

On 23 December 2015 the Civil Division of the Supreme Court gave judgment finding the clause to be abusive under which a credit institution, when entering into a mortgage agreement with a private individual, made the borrower liable to pay all the costs, taxes and charges deriving from the loan. Specifically, the Supreme Court held that: "Clauses which make the consumer liable for all the costs deriving from the formalisation of the contract consequent to action by notary and registrar and the payment of the fees which correspond to the bank are void." And the ruling added: "It is undoubtedly the lender who has the chief interest in documenting and registering the mortgage deed..."

According to the Supreme Court, it was a provision that caused the consumer a significant imbalance which he would not have reasonably accepted in the framework of individualised negotiations and, thus, was classed as abusive under the General Law on Consumer Protection. The plenary Supreme Court thereby upheld the decision of the Madrid Provincial Appeal Court which obliged the bank to repay the costs of setting up the mortgage, the court having declared that part of the contract to be void.

That reasoning has been adopted in subsequent judgments, such as the decision of the First Instance Court No. 6 of Granollers (Barcelona) which last January annulled the floor clause of a mortgage contracted with a bank for being abusive. It also ordered the bank to return to the borrower the amount paid for notary costs and duties deriving from the loan, as the court considered that those costs had to be borne equitably by both parties, that is, payment of the notary costs and fees of the Property Registry should have been agreed "equitably between the parties, given that the lender is the most interested in having the documents recorded in a public deed."

In the same regard, on 5 January 2017 the Provincial Appeal Court of Zaragoza ordered a bank to repay to the lender the costs corresponding to the formalisation of the mortgage. As in the decisions mentioned above, the judgment held that: "From an abstract point of view, reciprocity in the costs is required as both parties benefit from action by the notary or registrar, at least on an initial approach to the contractual rule inserted in a mortgage loan with standard clauses."

Notwithstanding the above, there is another line of case law flagged by the Supreme Court judgment (Contentious-Administrative Division) of 15 September 2015, which states that the party liable to pay Stamp Duty on a mortgage is the borrower not the lender, and therefore it is the borrower who must bear those costs.

In any event, and generally speaking, in the judgments analysed above, it was considered to be unfair for all the costs to fall to the borrower/mortgagor, although there are doubts whether it is advisable that the bank takes responsibility for all of them. The costs that are the subject matter of these claims include the costs associated with recording the loan agreement in a public deed, its registration in the Property Registry and the payment of Stamp Duty. In other words, the fee charged by the notary, the costs of the agency entrusted with the administrative paperwork and the tax payment, which are usually 2%-3% of the loan amount.

It should also be noted that although most current legal reasoning holds that clauses that are unilaterally imposed by the bank are void if they oblige the client to bear all the costs, the bank is not obliged to return all the monies paid under that clause if it is not proven that the clause was not the subject of prior negotiation. In other words, in order for all the notary and registry costs incurred by the borrower to be refunded to him or her, it must be proven that the clause concerned is abusive and void in the sense that there was no negotiation between the parties under which the parties agreed that the borrower would pay those amounts.

Bearing the above cases in mind and wishing to avoid further disputes and claims, many banks have included in the "standard" terms of their loan agreements the provision that the bank will pay certain notary and registry costs which were previously paid by customers or borrowers in accordance with the general terms imposed. Therefore a close eye should be kept on each particular case. However, it can be said that this matter will have a significant impact given that claims for floor clauses have been the order of the day since the last decision of the European Court of Justice in 2016.

In conclusion, these judgments are of some significance as they could open a way for people who have mortgages with banks to recover the monies paid as notary and registry costs which the bank obliged them to pay when they signed the mortgage agreement, irrespective of whether the agreement include a floor clause or not, or if it has already been paid off or cancelled. As a matter of fact, a campaign by the Consumers and Users Organisation (OCU) to recover these costs has already brought together thousands of cases and, according to the Organisation, six million mortgages could be affected, which would leave a rather large hole for the banks.