

## A Court in Barcelona Declares That the Clause of Unlimited Personal Liability of a Mortgagor Is Void

### Judgment of Mercantile Court No. 10 of Barcelona (7 December 2016).

In its judgment of 7 December 2016, Mercantile Court No. 10 of Barcelona upheld, in full, the claim issued by the holders of a mortgage arranged with a banking institution in June 2006, which included a mortgage clause pursuant to which the loan had not been extinguished even though the bank had foreclosed the mortgage guarantee. The court held that the case involved an abusive clause because the bank had not properly informed its customers.

Specifically, the first of the voided clauses, referring to the unlimited liability of the borrower, included the following wording: "...without prejudice to the joint and unlimited personal liability of the borrower in guarantee of the principal obligation of the repayment of the loan that is entered into in this deed." For the present purposes, it should be stated that Spain's legal system includes a principle of unlimited financial liability under article 1911 of the Civil Code, which establishes that "the debtor shall meet the obligations with all his properties, present or future." At the same time, article 105 of the Mortgage Act provides that "the mortgage may be constituted in guarantee of all classes of obligation and shall not alter the unlimited personal liability of the debtor set down in art. 1911 CC." That is to say, when the mortgaged property does not cover all the debt contracted with the bank, the debt continues to subsist and the creditor may go against any other asset belonging to the debtor, with the exception of properties that are untouchable.

Notwithstanding that, the ruling held that the clause establishing unlimited personal liability of the debtor was void, also holding that the additional guarantee of the jointly liable guarantor was void. The said clauses were deemed to be abusive for not having passed the required test of transparency, given that it had not been proven that the bank had explained the conditions of the mortgage and the implications of the relevant clauses to the claimants "in a way that is understandable".

In this context, it is important to recall that unlimited liability clauses in mortgage loans are common in Spain, where the majority of mortgages provide for the personal several and unlimited liability of the holders as guarantee. In practice, it means that debtors may be obliged to pay any outstanding amounts even though the mortgage has been foreclosed and the property is in the hands of the bank.

In that regard, and in that particular case, the judge held that it could be inferred from the documentary evidence that such clauses were "standard terms", not negotiated and incorporated into many contracts "in order to standardise the content of the mortgage loans entered into with the bank."

In the court's opinion, many such clauses deserve to be classified as 'abusive', given that they do not pass the transparency test required in consumer contracts as the information contained in them is not sufficiently clear and consumers, when signing the contract, are not aware of the economic consequences on them personally and on their assets of those guarantees.

In that respect, the court specified that intervention of a notary at the signing of a contract was insufficient for it to be considered that the requirements of the transparency test and absence of abuse had been met. Furthermore, the court emphasised that even though the clause may have been clear when it was read, it did not follow that the consumer had understood its consequences.

The senior judge also based his decision on article 3 of Council Directive 93/13/EC (5 April 1993 on abusive clauses in contracts formed with consumers, which states: "A contractual term which has not been negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance... to the detriment of the consumer." In that regard, the senior judge stated that the bank had not acted in good faith because the disputed clauses resulted in a significant and unjustified imbalance of contractual obligations to the consumer's detriment. For that reason, the clauses had to be deemed abusive.

As mentioned above, for the same reasons the court held that the additional guarantee included in the mortgage agreement, under which the guarantors answered jointly with the borrowers and expressly accepted primary, personal and joint liability, was void. The court based its decision on the provisions of article 51 of the Spanish Constitution, which states that the public authorities shall effectively protect the financial interests of consumers and users.

The court went on to say that the clauses included in banking contracts, and mortgage agreements in particular, "cannot be masked among overwhelmingly exhaustive information which, in short, makes them difficult to identify and casts shadows over what, when considered in isolation, would be clear."

It awaits to be seen how this matter progresses in the appellate courts, as this decision may set an important precedent and open a route to legal payment in lieu, in such a way that mortgagors could settle their debts by handing over the property, provided it were shown that the bank had acted abusively towards its clients by not observing the minimum requirements of transparency and clarity required in this type of contract, which imposes non-negotiated clauses on consumers that involve waivers of rights, as in this case.