

## The Liability of the Bank Institution for Breach of Its Duty of Control With Respect to Funds Deposited

### Ruling 249/2017 of the Madrid Provincial Court, Section 19, 22 June 2017, Appeal 297/2017

Article 1.2 of Spanish Act 57/1968, on quantities advanced in the construction and sale of dwellings, establishes that the individuals and legal entities that promote the construction of dwellings for use as housing or family residence and that seek to obtain deliveries of cash from the buyers prior to or during the construction, should "receive the quantities advanced by the purchasers by means of a Bank or Savings & Loan Institution, in which they shall be deposited in a special account, separately from any other type of funds belonging to the developer and which may only be used for the services deriving from the construction of the dwellings. To open these accounts or deposits, the Bank or Savings & Loan Association, under its liability, will require the guarantee to which the preceding condition refers".

The present case is based on the discrepancy existing between the parties to the process relative to the provisions of the above article, resolved by the Provincial Court as follows.

In the first instance, the claimant brought its claim against Banco Santander, Ibercaja Banco, S.A. and Caja Castilla La Mancha alleging a breach of the duty of these bank and savings and loan associations to effectively oversee the interests of the members of the cooperative and verify that the payments made in favour of the cooperative were being deposited in special accounts for which a guarantee had been established. Following the appropriate hearing, the judge of First Instance pronounced a ruling establishing the liability of Ibercaja Banco, S.A. and Caja Castilla La Mancha, for failure to guarantee the quantities advanced by insurance or surety and, therefore, the breach of the provisions in the aforementioned Article 1.2 of Spanish Act 57/1968.

In view of the resolution ordered by the judge of First Instance, Ibercaja appealed alleging, on the one side, an error in the assessment of the evidence, stating that it had complied with its duty to oversee the funds and, on the other, the discrepancy over the determination of interest.

However, in the current ruling, the Madrid Provincial Court understood that no error whatsoever had been incurred. Thus, the Provincial Court mentioned the rulings of the Supreme Court (Judgements n. 733/2015, 142/2016, 174/2016, 226/2016 and the Supreme Court Order of 19 November 2013) stating that, in the credit or savings and loan institutions in which the advanced funds are deposited for the construction of dwellings, if a "special account" is not opened, requiring the "corresponding guarantee", these institutions and savings and loan associations will be liable before the buyers for the entirety of any quantities advanced or deposited in the account or accounts that the developer may have opened.

In addition, in its reasoning the Provincial Court emphasises what was stated by the Supreme Court in its ruling of 21 December 2015, that explained the content and the scope of the liability of bank institutions when funds have been deposited by buyers of dwellings of future construction. The ruling of the Supreme Court indicated that **credit institutions have a special duty of control over the developer to which a loan is granted so that any deposits made by buyers are allocated to the special account that the developer should open with the establishment of a guarantee (that the institution must require)**. In other words, the Supreme Court affirmed that in no case was the liability of the bank waived by attributing the breach of the rule to the developer, because the credit or savings and loan institution cannot maintain a passive or secondary role, and their function is instead that of primary guarantor and to ensure the destination of the money deposited.

As a result, the Madrid Provincial Court has considered that, whereas the credit institutions involved failed to prove that the institutions to which the transfers were made fulfilled the same purpose (developer deposit) and "for having consented over time to deposits on account of the construction without having required the establishment of the corresponding guarantee", they should be held liable toward the claimant.

With this ruling, therefore, the Madrid Provincial Court reiterates the obligation of control by the banks, upholding the action for liability exercised by the buyer of a dwelling, insofar as the bank institutions involved in this case consented to deposits on account of the construction without requiring the establishment of the corresponding guarantee.

In conclusion, the Provincial Court stated that **the bank institution in which the deposit were cancelled following the transfer of its funds to accounts opened in other institutions is not exempt from liability**, and indicated that this is **a direct responsibility of the bank institutions, that should maintain the buyers of dwellings informed of the transfer of funds as well as of the preservation of any legal guarantees.**

Consequently, the Provincial Court ruled in favour of the claimant and dismissed the appeal with the understanding that the appellant petitioner breached its obligation of control and infringed the provisions of Spanish Act 57/1968.