

PURCHASING A PROPERTY FROM A DEVELOPER

Buying property in Spain from a developer is somewhat easier and safer than buying from a private seller. Developers are restricted by several laws to what, when and how the offer of their product is put across to the prospective purchaser. Likewise, and given the fact that these entities sometimes demand from the purchaser prior to completion, the government under Franco's ruling enacted a law whereby all downpayments made before the property was completed have to be secured either by bank guarantees or insurance policies. This assurance that the buyer will retrieve his invested capital from the developer should the project stall or fail is not available for resales unless it is specifically provided for. The subject of how these laws apply to the offer made by the developer, the contents of the contract and the remedies of the purchaser is an interesting one, and therefore merits a deeper analysis.

Following a normal schedule of events, a purchaser, after taking the decision of what and where to buy, is normally requested to put down a small deposit ranging from 2.000 to 5.000 Sterling Pounds. Automatically, several protection of consumers acts are applicable to what you have signed and will very much determine the legal position of the parties, regardless of whether you have waived the mandatory protection granted by the law. According to the Supreme Court in Spain, a reservation deposit document, deposit slip, offer and deposit receipt, have to be construed as either being a true purchase-sale agreement or a promise to buy or sell.

Normally, a promise to either buy or sell both parties agree that upon the realisation of certain future events any of the parties will be entitled to compel the other to sign a proper purchase sale contract. Basically, it sets out the lines of the future purchase-sale contract which the parties do not want to commit themselves to. This might be the case where the developer has not obtained the building license or is pending authorisation by regional authorities. Likewise, the buyer might be in the process of raising funding or realising a credit due imminently. Once these events occur, the parties are in are bound to enter into a contractual agreement, i.e. purchase-sale contract. Vendor and buyer can compel the other party to sign a proper purchase-sale contract.

It can also be the case that the developer words the promise to buy/sell document to his interest, by for example making the validity of the contract subject to either the granting of a building licence or a certain time limit, whichever happens first, in which case the deposit is refunded without penalty. The Supreme Court draws a very fine line between these two contracts, regarding a promise to buy or sell as a true purchase-sale agreement where the price and the object of the transaction are clearly set out. The difference is important, since a potential buyer might want to buy that property he chose and arrange accordingly his affairs regardless of any future events or vicissitudes.

Every contract is different, as well as the true intentions of the parties, but fortunately developers stand on a very difficult position since Consumers laws are very restrictive regarding contractual terms on promises to buy or sell, and indeed any contract used by developers. In fact, the undersigned is sure that at least 80% of all contracts signed between developers and private purchasers are void clauses that are automatically null and void and others

which are so confusing that can only benefit the purchaser. The same high court also defines the true nature of these contract regardless of the title given to that contract, since more often than not project developers have poor legal advice and name these contracts with a varied number of erroneous titles.

In summary, a promise to buy and sell, reservation deposit contract, reservation fee, pre-contract, etc. is to be construed as being a true purchase-sale agreement, totally enforceable in a Court of law where such document describes the property and its price, and according to the latest jurisprudence, even where the document, although not including price and property, enables these two elements to be fixed in a future document. The remedies of a purchaser in case of default by the developer are a suit to compel the latter to grant public deed of purchase sale before a notary public and or claim damages.

Protection granted by the consumers laws in respect of purchase of property from a developer

We can divide the requirements to be met by a standard purchase/sale contract in the following:

- General requirements as per the Consumer's protection Act 1984. (Ley 26/1984 de 19 de Julio General para la defensa de los Consumidores y Usuarios), and General requirements as per the General Contractual Conditions Act 1998. (Ley 7/1998, de 13 de Abril, sobre Condiciones Generales de la Contratación).
- Specific requirements as per Royal Decree 515/1989, of 21 April.
- Miscellaneous requirements as per other laws.

1. General requirements

The Consumers Protection Act 1984, extended by General Contractual Conditions Act 1998, is an ample piece of legislation enacted following a mandate of the Spanish Constitution to guarantee and protect the rights of consumers.

To ease the reading of the Act, we highlight the most important protections granted. Any clauses, conditions and stipulation will have to meet the following requirements:

- Clarity, simplicity and concretion, allowing these to be directly understood, without reference to legal texts that are not provided simultaneously or before signing the contract.
- Good faith and fair balance between the clauses, which excludes:
 - o Clauses which enable one of the parties to rescind unilaterally the contract, except those recognized to the purchaser in the sales made by post, door to door or by sample.
 - o Abusive clauses, understanding these as being unproportionally harmful for the consumer, or placing the consumer in the contract in a position of imbalance with regards to the rights and obligations of the parties, to the detriment of the consumer.
 - o Abusive conditions of financing.

- o Total waiver of responsibility with regards to the consumer, specially those referring to the aim and utility of the product.
- o Inversion of the burden of proof to the detriment of the consumer.
- o Refusal by the provider of products and services to render typical services of the product or service.
- o Imposition of waiver of rights and defences of the consumer under this Act.
- o In the first sale of properties, those clauses which impose on the consumer the obligation to bear the legal costs which by their nature should be borne by the provider of products and services. (Declaration of New Works, Horizontal Division and costs of existing mortgage loans, such as opening and cancellation costs).

For the purposes of this Act, conditions, clauses and stipulation object of the protection are deemed to be such where they are drafted unilaterally by a company or group of companies and are imposed on the consumer, who cannot avoid being subject to them. (This clause is later extended to include also specific clauses privately negotiated by the parties and inserted in the contract).

Also, the Act stipulates that any uncertainty or doubt in any of the conditions, clauses and stipulations will be interpreted to the detriment of the drafter of them.

Finally, any condition, clause and stipulation which contradicts the above requirements is considered to be null and void and will be deemed as never inserted in the contract. In case the suppression of any condition, clause or stipulation renders the contract imbalanced overall to the detriment of the consumer, the contract will be null and void.

These two Acts provide an umbrella protection, but there is still a Royal Decree which is specific to buying real estate.

2. Specific requirements

There a number of specific requirements which are of mandatory insertion in the purchase-sale contract of a developer:

- 1 Name, domicile and where applicable, registration details of the developer company in the Mercantile Registry.
- 2 Plan of location of the property and plan of the unit itself, together with a detailed description of the electricity, water, gas and heating/air-conditioning systems, and fire prevention devices installed in the unit.
- 3 Extensions of the property, and reference to the building where the unit is located, the common areas and accessory services.
- 4 Reference to the materials used in the construction of the unit, including heat and sound proof systems, and materials of the building where the unit is located, common areas and accessory services.
- 5 Instructions of the use and maintenance of the general installations which require special knowledge handling and also instructions relating to action to be taken in case of emergency.

- 6 Details of registration of the building in the Land registry or mention to the non registration of it, where applicable.
- 7 Price of the property and accessory services and form of payment.

Another set of requirements includes:

- Copy of the authorisation and building licenses necessary for commencing the works, certification from the relevant authorities regarding town-planning, with special reference to permit to the division and compensation operations of the plot where the property is being built.
- Statutes and by-laws of the Community of proprietors, where applicable, and information regarding community services and supplies. Where the Community is operating, an up-to-date statement of accounts.
- Information regarding taxes levied on the property paid or to be paid.

Special importance is given here to **clauses where the developer imposes on the consumer costs which by their nature should be borne by the vendor/developer**, for example Declaration of New Works, Horizontal Division and costs of existing mortgage loan, such as opening and cancellation costs.

If you are assuming the mortgage existing on the property, the contract should mention that if you change your mind and decide not to subrogate the mortgage, thus paying in full on completion, the costs of cancellation will be entirely borne by the vendor/developer. Also, and although the existing legislation does not envisage these costs, check that the Notary Public costs which arise when you complete are to be paid according to the provisions of the Spanish Civil Code (80% of costs borne by vendor) and that the PLUSVALIA Tax is also paid by the vendor, since according to the law it is their cost.

This clause is very rarely contended by purchasers given they are in their majority unaware of this protection granted by consumer laws.

3. Miscellaneous requirements/Guarantee of monies paid prior to completion

Although in the last place, the safety of any and all payment made to the developer prior to completion is perhaps the most important issue to bear in mind when purchasing a property from a developer.

Developing is perhaps one of the most exposed activities to risk. Most of the developers take monies from purchasers to finance the stages of construction of their properties. However, a particular developer might have sold most of the units of one of their projects and none of another. They lack of advanced payments from purchasers and yet cannot stall the construction of the unsold development. Eventually, monies of purchasers destined to finance the first development are re-routed to the second development, since creditors for the second development are impatient. In the worst case-scenario, sales drop overall (if they have ever taken off on the second development), monies stop flowing and creditors begin to take legal action. Privileged creditors (workers from the

construction company) will queue up for salaries. The bank who gave the loan to the developer to buy the land forecloses on the mortgage for payment default and the hard earned monies of the purchaser who paid thinking they were used for building their holiday home vanish. This is not unrealistic at all. It has happened and it could well happen again.

To address this risk Franco's government implemented, quite rightly, the 57/1968 Act to guarantee advanced payments paid over to building developers. These guarantees may be in the form of bank guarantees or insurance policies, which the developers should have ready on or before the moment of handing over monies.

A standard contract should include the following:

- The obligation of the developer to refund any all payments paid in advance, plus 6% annual interest, in case the developer does not commence the works of the proposed property on schedule as per the contract signed with the consumer, does not complete the construction of the proposed property on time, or the licence allowing occupation of the property is not granted.
- Reference to the type of guarantee and indication of the guarantor (bank or insurance company).
- Reference to the bank where advanced payments are to be paid in, and account number.
- On signing of the contract (coincident with payment of funds), the developer will be obliged to hand over the relevant guarantee documentation: insurance policy or bank guarantee.

Should the events which allow the refund of the monies occur, the consumer has a double choice: demand refund for the monies added with an annual 6% interest increase, or grant the developer an extension to fulfill their commitments as per the contract. Documentary evidence of any of the occurrence of any of the events abovementioned together with the original guarantee documentation enables the consumer to execute the guarantee or insurance policy.

Most developers use the form of bank guarantees which they hand over against receipt of funds. However, some developers are incurring in the unlawful practice of charging the consumer with the costs of the guarantee. This is against the law and should be highlighted when approaching a developer. Denunciation of such practices will encourage other consumers to follow suit and eventually swift action will be taken by the relevant authorities.

Finally, where the advanced payments are demanded upon realisation of the required events, refusal to refund the consumer amounts to criminal misappropriation (Supreme Court). Apart from these provisions, general provision contained in the Spanish Civil Code are likewise applicable to the transaction insofar as they do not contradict the more favourable provisions contained in the consumer legislation.