

REAL ESTATE AGENCIES: A LEGAL PERSPECTIVE

Introduction

Most of the buyers of real estate in Spain will make a first contact with an estate agent, or several estate agents, with lovely properties on their books which all seem to have a large number of other cash buyers queuing up for all of them. As a preliminary warning, property buyers need to be aware that Real Estate Agents in Spain are not strictly regulated as they may be in their own countries.

In fact, Spain has a somewhat chaotic regulation regarding these operators in that they are not all registered, and indeed, do not need to be. For a start, they are called agencies but are not agents according to the definition of an agent given by the Spanish Agency Act, nor by the EC Agency directive. Participants to the deal do not sign an agency contract and vendor and agency cannot be regarded as principal and agent, respectively. Spain under Franco first regulated the trade by creating the School of Real Estate Agents (Colegio de Agentes de la Propiedad Inmobiliaria) and subsequently passed the Decree 3.248-1969, which after a number of vicissitudes is again in force.

Registered Real Estate Agents began a crusade to outlaw those operators which were not qualified and registered and eventually lost. A ruling of the Provincial Audience of Alicante condemning an unregistered agent for illegal intrusion was quashed by the Spanish Constitutional Tribunal (STC 25.3.93) in a ruling that determined that rendering the typical services of an agent without being qualified did not amount to an illegal activity and therefore article 321 of the Criminal Act (Codigo Penal) was not applicable.

As a result of this ruling, Real Estate Agencies have begun operating on the main tourist resorts with little or control. Most of them are serious operators, many of them unlicensed, who will try to find the property the buyer is looking for and eventually earn a fair commission from the property owner for that introduction. A minority, however, are simply taking advantage of the excellences of the current economic boom and are not established in any particular location but are nomads. They are opportunity seekers. Once they receive a deposit amount to reserve the property, which on occasions is unproportionally high in respect to property price, they hold on it until the deal is completed. More often than not they use poorly drafted contracts, worded in a way that, perhaps unintentionally, produce an extreme confusion.

If buyer and seller never agree they try to keep an amount in concept of fees, a worrying attitude where the owner never accepted the conditions of the buyer's offer. Eventually only the Courts are able to settle the matter, at times through criminal proceedings - misappropriation-. But fortunately these operators are few and far between and eventually hearsay does away with them.

The selection below of some legal situations encountered by the buyer and seller are highlighted and will help the parties involved have a more clear picture when transacting as a result of the introduction of a Real Estate Agent in Spain. We have to reiterate that being licensed or unlicensed does not matter any more in the light of the regulatory changes.

Buyer pays a reservation sum to the agency with an express mandate to sell from the vendor

The owner of the property (mandator) confides to the Real Estate Agent (mandatory) the sale of his property at a given price and subject to any other agreed condition. In exchange, the owner undertakes to pay a compensation for their services, an emolument commonly known as commission. The particularity of this agreement is that a prospective purchaser is automatically bound by an offer made for a property, and the owner of the property is entitled to compel the purchaser to perform the deal. This offer is accepted is irrevocable for both parties and binds and entitles both parties to sue for damages and/or performance if any party reneges on the signed document.

It is not commonly used by Real Estate Agents, since a purchaser may not be aware that withdrawing from the purchase may not only entitle the owner to keep the deposit or offer reservation sum but to sue for performance. However, the signing of such document with the mentioned authority entitles the Real Estate Agent to its commission regardless of the purchase being effectively completed before a Notary Public, unless otherwise agreed between the Real Estate Agent and owner.

Buyer pays a reservation sum to the agency without an express mandate to sell from the vendor

This is the case where the Real Estate Agent's duty is to put together an offer by the purchaser for a property and the acceptance of that offer by the owner. This operation is widely used by Real Estate Agents and avoids many conflicts, being the real essence of the real estate intermediation business. In this situation, the buyer makes an offer for a property and subject to any condition which subsequently will have to be accepted by the owner in order to bind both parties. The offer made is of a revocable nature unless otherwise agreed. This means that a buyer who pays an amount of money to a Real Estate Agent in order to reserve a property can be unilaterally revoked by the buyer before the owner express or tacitly accepts the offer. The buyer is, in that lapse of time, entitled to retrieve the monies from the Real Estate Agent as a result of the revocation, amounting the Real Estate Agent's refusal to a possible criminal misappropriation.

Again, the accepted offer is construed as a binding agreement unless the wording of the document provides otherwise. Also, it is common for offer and reservation documents to stipulate that the acceptance will have to be done within a period of time, after which the offer is automatically revoked and ceases to have the binding effect if accepted by the owner.

Vendor accepts the offer and does not receive the deposit

Regardless of whether the Real Estate Agent is acting by virtue of an express mandate to sell or not, any and all deposits should be immediately transferred to the owner as opposed to keeping part as a security for the commission.

However, many Real Estate Agents, quite legitimately, agree expressly with the owner that an amount will be kept by them on account of the final commission. This possibility is reflected on the commission agreement (which can have many titles although the nature of it quite the same). Where this has not been agreed, refusal to have them transferred is likely to fall within the definition of criminal misappropriation.

Commissions earned by the Real Estate Agent

Real Estate Agent, unless otherwise agreed, have the right to earn their commission once the buyer's and the seller's aspirations are met on a document, that is, once offer and acceptance are put together, according to the Spanish Supreme Court, the obligation of the owner to satisfy the agreed commission arises.

Typically, many Real Estate Agent poorly advised regard a deal as lost and waive their right to the commission owing to ignorance. The Spanish Supreme Court has, on many occasions, regarded the real estate intermediation activity as one of means and not of result. Consequently, the right to a commission arises once the buyer and seller agree on the terms and conditions of the purchase-sale contract in any of its possible varieties. What happens afterwards is irrelevant for the Real Estate Agents. A deal has been made possible and the right to the commission should not be subject to further vicissitudes which are out of the control of the Real Estate Agent. As an example, it could happen that the right to withdraw on an 'arras contract', a type of purchase price contract, is exercised by any of the parties. Consequently, completion of the deal before a Notary Public never takes place. In this situation, the right to earn the established commission remains unaltered although the time of payment is brought forward: if the seller has not provided otherwise on the commission agreement, he will be liable for payment of the agreed commission.

Some Real Estate Agents establish a proviso whereby if the deal is not taken any further they acquire the right to retain the reservation sum lodged with them or a fraction of it.

Purchase price split in 'net price for the vendor' and added on commission

Occasionally, overzealous and misguided Real Estate Agents indulge in situations of excessive intervention in the relationship buyer-seller. One of these situations is when the Real Estate Agent is sure the vendor and the buyer will never meet since the lawyers representing each act on behalf their clients with a power of attorney, or have chosen the Real Estate Agent itself to represent them. An unscrupulous Real Estate Agent may take advantage of the situation and fix two prices: a purchase price for the buyer and a selling price for the vendor: it takes little to realise the possibilities which open up for earning really fat commissions.

Property owners who want to sell engage the services of a Real Estate Agent and establish a bond which is to be governed by the law, but also founded in personal confidence and trust. A Real Estate Agent who breaks that rule will most certainly commit many other wrongs. A Real Estate Agent, whether licensed or not, is committed to the principles of honour and integrity just as any other professional dealing in real estate, and until the happening of a contingency which puts an end to their relationship, should uphold those principles.

The inherent complications in any real estate transaction, whether buying, selling or making both possible, certainly justifies the intervention of a lawyer with expertise in the matter. Unexpected situations may arise in the course of any transaction which will need remedy. Perhaps it is too late after signatures have been stamped on documents or hands have been shaken. The choice of whether legal advice should be antecedently sought or subsequently adopted is, to all intents and purposes, undisputed according to experience: 95% of foreign private individuals buying and selling property engage the services of an independent lawyer. A remaining 5% are lawyers buying or selling for themselves.