

IN DEFENCE OF THE IMAGE OF LAWYERS AND PROPERTY INVESTORS ON THE COSTA DEL SOL

“Truth is corrupted by silence as much as by a lie”.

This is one of the most famous quotations from the Roman orator, Marcus Tullius Cicero.

In other words, corruption will continue to exist until we all participate in its eradication and stop turning a blind eye to it.

The property market on the Costa del Sol seems to be showing clear signs of recovery. This means that we should avoid the mistakes or even abuses that were committed years ago during the good times.

Focusing on the field of law, there are two main kinds of behaviour that we want to strongly denounce and that should be permanently eradicated from our profession. The first is the payment of —illegal— commissions for obtaining clients. And the second is the habit of some lawyers of failing to utilize, by “oversight” or “negligence”, the funds received from their clients for a specific purpose. This purpose is often to pay the income tax that is due when non-residents decide to sell their property.

ILLEGAL COMMISSIONS

The first activity refers to agreements between law firms and third parties, in particular with real estate agents. Such agreements may state that the third party (or agency) will recommend the law firm to some of its clients —mostly foreigners—, who are purchasers of property. In return the third party (or agency) will receive an agreed percentage of the fees charged by the law firm (we have found that this percentage can be as high as 20% or 25%) or any other economic compensation. Once this agreement is signed, the agencies start to recommend to their foreign buyers the legal services provided by the lawyers who have offered them the “extra commission”. They pay no heed to the greater or lesser knowledge or professional skill on the part of the lawyer. More seriously, they ignore the possible conflict of interest that this may lead to, which might —and, in fact, usually does— end up causing damage to the client.

Naturally, the main interest of the real estate agency is to sell property; while the only interest of the lawyer should be to advise his client honestly and independently. The lawyer has to advise of any irregularity or anomaly, even if that may mean having to recommend that the client should not continue with the transaction. There is an undoubted conflict of interest.

One cannot imagine that a lawyer, who has signed one of these “co-operation agreements” with an agency, would recommend that his client should not buy the property that the agency offers. He would be risking his relationship with one of his main sources of obtaining new clients. How would a real estate agency send its clients to a lawyer, if it knew that the

lawyer might recommend the client to withdraw from the transaction if he found any irregularity? How could any lawyer, bound by such an agreement with a real estate agency, provide his services with complete independence?

The behaviour described is against the ethical standards which are binding for all lawyers. It is also a case of unfair competition that could be punished by law. But, leaving aside those aspects and focusing exclusively on what affects the property investor, these “agreements” carry a risk that the lawyer’s main interest is to satisfy the demands of the real estate agency that

were intended to pay the income tax that is due from non-residents (IRNR).

Foreigners may decide to sell the property that they have acquired in Spain and return to their home country. However, they have an obligation to pay non-resident income tax (IRNR) on their property. It does not matter whether the property is owned by them directly or is in the name of a Spanish or foreign company. Regardless of the method through which the property was purchased, the owners are liable for a tax on the gain from the sale. The deadline for declaring and paying this tax is one month from the

and, on the other hand, the foreigner may be liable for prosecution for non-payment of tax.

The Tax Office is, indeed, unlikely to know whether the property was sold or not —especially when the sale of property is done through the transfer of the company which owns that property—; and, even if it does, the Spanish authorities probably will not know the foreigner’s address in his home country. This means that it is not possible for them to notify the foreigner of any investigation or verification. After four years (which is the prescription period in these cases) the

to demand it, the money will remain indefinitely —or permanently— in his account.

Believe it or not, there is a judicial ruling which covers the “issue of forgotten money” (we are talking about a situation in which almost one million euros were “forgotten”). This ruling states that the act of “forgetting” was a mere breach of contract and not a crime of misappropriation, on the basis that the forgetful lawyers had met their responsibilities, once their behavior had been discovered, by paying the money they had defrauded plus interest and a fine from the tax authorities.

This kind of ruling is not only a very serious mistake from the legal point of view; it also encourages this type of behavior because, taking into account the great difficulty in discovering it as we mentioned earlier, some heartless people might think that it is worth “forgetting” to pay this money unless they are found out. In all the cases which are not discovered (which will, predictably, be the majority) the financial benefits could be enormous.

In conclusion, we cannot continue to allow such illegal practices (or any other) to harm the good name of our legal profession. There are many lawyers on the Costa del Sol who perform their work honestly, and many real estate agents are professionals who reject the unfair agreements we referred to earlier.

If the professional bodies do not put an end to these irregularities, associations will be formed by lawyers who are not willing to tolerate this “game of marked cards” or endure the bad image that such behaviour projects onto us all. These associations will obtain the necessary support from the relevant organizations or Tribunals in order to ensure that the market for legal services on the Costa del Sol is free, fair and honest. The foreign investor must receive independent service from his lawyer without any “self-interested and dangerous recommendations”. The lawyer must always respect his professional rules of conduct. He must fulfill the demands of his clients and ensure that the client’s funds are properly dispensed.

Let us stop turning a blind eye!!

provides him with a significant part of his professional income, instead of providing an honest and independent service to his client.

MISUSE OF PROVISIONS OF FUNDS (With special reference to the non-resident income tax)

Now we would like to examine the second, more serious issue. This is the misuse of funds which the lawyer has received from his clients, who have placed their trust in him. This issue is especially significant when the funds

date of the sale.

Those foreigners often provide funds to a third person (usually their lawyers or any other trustworthy person) to cover the capital gains tax (IRNR) that will be due. They then return home with the satisfaction of having completed —presumably— their obligations. However, it may happen that the lawyer (or that “trustworthy” third person) “forgot” to make the payment and kept the money in his account. The subsequent situation is extremely serious. On one hand, such an omission may be difficult to detect;

following truly scandalous situations arise:

- The Tax Office cannot demand any payment of tax since the prescription has to be made “ex-officio”.

- The foreign owner believes that he has faithfully complied with his tax obligations to the Spanish Government, by leaving funds with a third person with instructions to pay the tax.

- The third person, who has breached his mandate and “forgotten” to pay the tax, becomes the real beneficiary of that money. Since no one is going

