

Supreme Court rules on scope of mortgage liability

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Introduction

Background

First and second-instance decisions

Supreme Court decision

Comment

Introduction

In Decision 250/2019 of 6 May 2019, the Supreme Court confirmed that mortgage liability for interest claimed from third parties is limited to five years in accordance with Article 114 of the Mortgage Act. In this respect, 'mortgage liability' refers to the maximum amount for which a property is liable in the event of foreclosure.

Article 114 of the Mortgage Act provides that a mortgage which secures an interest-accruing loan cannot secure, to the detriment of a third party, more than the interest accrued during the previous two years. However, it also states that a mortgage that secures interest for more than five years cannot be agreed under any circumstances.

According to the Supreme Court, this maximum mortgage coverage applies to all legal effects – regardless of whether these are favourable or adverse – and to agreements between:

- mortgagees and mortgagors; and
- mortgagors and third-party acquirers.

Background

On 2 February 1995 Unicaja granted a mortgage loan for €45,081, which was secured by a property registered with the Fuengirola Land Registry. The mortgage guaranteed part of the principal, as well as the agreed interest for four years, for a total of €44,628.93.

As payments on the loan were incomplete, Unicaja initiated enforcement proceedings against both the borrowers and the guarantors. As a consequence of these proceedings, an enforcement order was issued for €46,448.48, corresponding to the principal and €21,035.42 to cover interest and legal costs. Further, the mortgaged property was seized.

On 21 October 2002 Unicaja assigned the receivable to Mr Teodulfo and Ms Bibiana (the assignees) for €87,936.50. Subsequently, the assignees – as legal successors of Unicaja – requested that the seized property be sold at public auction. On 20 January 2005 the public auction took place. Costasuel, SL was awarded the property and took on all liens and encumbrances in this regard, including the mortgage.

On 15 March 2010 one of the assignees initiated mortgage enforcement proceedings against Costasuel, claiming the total amount of the debt at the time of the assignment (ie, €87,936.50 plus €42,683.83 in interest and expenses (the mortgage foreclosure)).

Costasuel subsequently filed a claim against the assignees, whereby it requested that:

- the mortgage foreclosure be declared null and void; and
- the mortgage on the property be cancelled.

Alternatively, Costasuel requested that the assignees be entitled to seek only the principal and the interest from the previous two years in accordance with Article 114 of the Mortgage Act.

First and second-instance decisions

The Fuengirola Court of First Instance dismissed Costasuel's main claim. However, it upheld Costasuel's alternative claim that the assignees could seek only the interest that had accrued over

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the previous two years in accordance with Article 114 of the Mortgage Act.

The assignees filed an appeal before the Malaga Court of Appeal, which was dismissed. The appeals court considered that third-party acquirers of a mortgaged property are not liable in relation to the covenants contained in the mortgage agreement regarding mortgage liability since they are not contracting parties. The appeals court concluded that the five-year limit provided for in Article 114 of the Mortgage Act applies only *inter partes* and not *erga omnes* (ie, against third parties).

The assignees filed a cassation appeal before the Supreme Court, in which they alleged that the two-year term that had been applied in both the first and second-instance decisions infringed Article 114 of the Mortgage Act. The basis for this argument was that a broader limit had initially been agreed (ie, four years) and that this agreement applied to both the parties that had entered into the mortgage agreement and third-party acquirers of the mortgaged property.

Supreme Court decision

The Supreme Court declared that according to Article 114 of the Mortgage Act, mortgage liability for interest which is detrimental to third parties is limited to five years. Moreover, it specified that Article 114 distinguishes between the interest agreed by the signatories (ordinary and delay interests) and mortgage liability. Mortgage liability establishes, in each specific case, the maximum for which a *bona fide* third party may be responsible in the event that it takes ownership of a property whose mortgage is enforced.

The Supreme Court upheld the assignees' appeal, indicating that because Costasuel had acquired the property through a public auction, it had taken on the liability arising from the previous mortgage, which guaranteed four years of interest within the scope granted by Article 114 of the Mortgage Act. Accordingly, the Supreme Court concluded that mortgage liability applies both *inter partes* and *erga omnes* as it contributes to the determination of the limit of a mortgage coverage extension.

Comment

Article 114 of the Mortgage Act establishes a five-year limit on mortgage liability with regard to interest that affects third parties. Thus, within this five-year limit, the Mortgage Act allows parties to reach an agreement that will affect third-party acquirers of a mortgaged property.

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