

Case law

Case Details

National ID: Recourse 2016/08

Member State: Cyprus

Common Name: link

Decision type: Administrative decision, first degree

Decision date: 09/09/2016

Court: Competition and Consumer Protection Service

Subject:

Plaintiff: Competition and Consumer Protection Service

Defendant: Pafilia Property Developers Ltd

Keywords: average consumer, black list, consumer, immovable property, jurisdiction, misleading advertising, precontractual information, transactional decision, unfair commercial practices

Directive Articles

Unfair Commercial Practices Directive, [Chapter 1, Article 2, \(a\)](#) Unfair Commercial Practices Directive, [Chapter 1, Article 2, \(d\)](#) Unfair Commercial Practices Directive, [Chapter 1, Article 3, 2.](#) Unfair Commercial Practices Directive, [Chapter 2, Article 5, 5.](#) Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 6, 1.](#) Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 6, 1., \(a\)](#) Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 6, 1., \(b\)](#) Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 6, 1., \(c\)](#) Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 6, 1., \(d\)](#) Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 6, 1., \(e\)](#) Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 6, 1., \(f\)](#) Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 6, 1., \(g\)](#) Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 6, 2.](#) Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 6, 2., \(a\)](#) Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 6, 2., \(b\)](#) Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 6, 2., \(b\), \(i\)](#) Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 6, 2., \(b\), \(ii\)](#) Unfair Commercial Practices Directive, [Chapter 2, Section 1, Article 7, 1.](#) Unfair Commercial Practices Directive, [Annex I, 9.](#) Unfair Commercial Practices Directive, [Annex I, 10.](#)

Headnote

- (1) The existence of a way to avoid or resolve problems created by a commercial practice does not absolve the seller of his responsibility for such commercial practice, but is only a mitigating factor to be taken into account.
- (2) A practice which may be characterized as 'customary practice' does not absolve its user from any responsibility and in no case it is automatically considered legal and/or fair.
- (3) The fact that a natural person buys an immovable property for investment purposes should not affect his status as a consumer, as long as this is done outside the person's professional activities.
- (4) The commercial practices contained in the Annex are deemed automatically unfair and no assessment is required so as to ensure that the consumer was misled.
- (5) The economic situation of the property (ie. the existence of mortgages/charges) is material information which the average consumer needs in order to make an informed decision.
- (6) Pre-contractual information about contractual terms is a commercial practice.
- (7) The fact that consumers can sell-on immovable property to third persons without the title of ownership, does not absolve the seller of his responsibility in failing to transfer the title of ownership as promised.
- (8) Promoting a false 'sense of security' to consumers from countries whose legal system is similar to the seller's country's legal system, by relying on both such legal systems being based on English or EU law, is an unfair commercial practice.

Facts

The complaint was submitted to the Competition and Consumer Protection Service (the "Service") on the 31st December 2013. The complaint focuses on a commercial practice which the defendant was using before and/or during and/or after the conclusion of a contract between the parties, signed on the 20th December 2007, which relates to the sale of immovable property, specifically a flat (the "Contract"). The consumers complained that the defendant concealed from them substantial information which, if they knew, they would not have proceeded with the conclusion of a transaction with the defendant and/or they would not proceed with signing the Contract. The consumers claimed, inter alia, that the defendant drove them to buy a specific immovable property in the Republic of Cyprus by determining its monetary price in the Contract they signed. Specifically, the consumers reported, inter alia, that:

- they were misled because they were not informed of the existence of pre-existing charges over the property by the defendant and that, if they had been informed, they would not proceed with the purchase.
- they were misled by advertising material which was given to them by the defendant for promotion of the said property, because in that material it was stated that the law in Cyprus is based on English Law.
- they were not informed that, if the defendant does not pay off any charge over the property, they will not receive title of ownership, because in their home country, if the buyer pays off all the monetary amounts owed, then the title of ownership is transferred to his name, irrespective of whether the defendant has monetary debts over the mortgaged property.

The Service's examination focused on (a) the selling of the immovable property without first having received a building permit, (b) the non-information about the mortgage of the property and (c) the advertising material of the defendant titled "Passion For Cyprus Property - The Ultimate Guide to buying property in Cyprus".

The defendant, in its defense, argued that:

- all commercial practices used during the negotiation process were before the coming into effect of the Unfair Commercial Practices From Business to Consumers Law 103(I)/2007;
- the consumers knew what they were buying since they had received legal advice and obtained a loan from the same bank to which the property was

mortgaged;

- the consumers were Irish nationals so the reference to English Law in the advertising material could not have influenced them;
- the defendant made no unfair profit through the commercial practice which is 9 years old and was customary at the time;
- the consumers are merely trying to avoid their contractual obligations towards the defendant and the bank due to the change of their financial or personal situation.

Legal issue

(1) The possibility of a 'way out' and/or 'solution' term, is only taken into account to the point that they are consistent with the commercial practice under examination and possibly as mitigating factors. From the moment the complaint and/or examination specifies certain practices which are deemed unfair and/or unlawful, it is not possible to consider that there is no unfair practice and or illegality just because there may have been some form of resolution of the conflict.

(2) The present matter is related to the matter above. There have been multiple references by the defendant to matters of 'customary practice', i.e. that some practices were customary practices of developers companies. Furthermore, it was mentioned that agreement of this nature and with similar terms were used by various companies at the time in question, without there being any indication by any public authority of the Republic of Cyprus for violation of the Directive 2005/29/EC (implemented into the national Unfair Commercial Practices From Business to Consumers Law 103(I)/2007). In the present case it is not examined whether the practice was customary or not. The examination relates to the unfair misleading practice that the Company may have used and that is not related to the matter of customary practice. The possibility of 'way out' and/or 'solution' through some customary practices is taken into account only to the point that it is consistent with the practice under examination, that is, whether and to what extent the practice is unfair or not.

(3) The status of "consumer" may be combined with investment purposes of an owner of immovable property. In any case, natural persons are presumed to be acting outside the field of their business activities, unless there is obvious evidence to the contrary.

(4) In accordance to Chapter 2, article 5(5) of Directive 2005/29/EC (implemented into national law by article 4§4 of the Unfair Commercial Practices From Business to Consumers Law 103(I)/2007), in Annex I, there is a list displaying the commercial practices considered unfair under any circumstances. The commercial practices contained in the Annex I are deemed automatically unfair and there is no need for assessment so as to ensure the existence of deception or misleading nature. Particularly, Annex I (9) of Directive 2005/29/EC (implemented into national law by ANNEX I A, §9 of the Unfair Commercial Practices From Business to Consumers Law 103(I)/2007) states: "Stating or otherwise creating the impression that a product can be sold legally, when it cannot". The Service found a violation of paragraph 9 of Annex I to Directive 2005/29/EC (implemented into national law by ANNEX I A, §9 of the Unfair Commercial Practices From Business to Consumers Law 103(I)/2007), having evaluated the findings of its research and taking into account that the Company proceeded with signing the contract without having first obtained a building permit for the construction of the said property even though it had planning permission.

(5) Even if for the sake of argument the practice of selling immovable property before the issuing of a building permit was accepted, then the practice of the defendant not to include in the Contract a term which contains the said information as a notice it means that the defendant omits substantial information that the average consumer needs, in accordance with the present context, to make an informed transactional decision, something which is an unfair practice. Evidence of the necessity of the said information is that in case that for any reason the defendant's application for building permit was rejected by the Public Authorities, not only would the ownership titles never be issued, but the District Administration would be given the right to issue a demolition permit. Therefore the case law and/or parameters contradict the defendant's position that they legally proceeded with the selling from the moment that in accordance with the Streets and Buildings Regulation Law (Chapter 96), there is no prohibition on selling immovable properties before the issuing of a building permit.

(6) The information in relation to contractual terms and their consequences is of substantial importance to the consumer and it needs to take place before the conclusion of the contract. Specifically where based on that information the consumer decides whether he wishes to be bound by the terms that the professional has pre-formulated.

(7) The extent of the obligations of the traders which must be included in the contract is a necessary condition provided by Directive 2005/29/EC (implemented into the national Unfair Commercial Practices From Business to Consumers Law 103(I)/2007). Therefore, the obligations of the traders may not be overlooked and/or ignored due to the submission of the contract with the District Land Office for purposes of specific performance, which took place at a later stage, or due to the referral of the defendant to term 16 of the Contract which states that "the complainant's rights are not affected by the non-issuance of a separate title in their name". Even if the consumers may sell on the property to a third person without the issuance of a title in their name it is immaterial for the purposes of the trader's legal obligations.

(8) The average consumer from Ireland, the United Kingdom, and from any other country whose legal system is based on the English legal system, may be mislead and consider that the legal principles and/or legal parameters of the Republic of Cyprus are identical to those of this home country. Taking into account the claims in the advertising material, namely that the law in Cyprus is based on English Law and that Cyprus is a member of the European Union, without making any legal explanation and/or clarification and/or placing a memorandum setting out the legal and procedural differences or even a note about the existence of such differences, the said claims may mislead the average interested consumer, even if the information is objectively true. In the present case, it appears that the consumers, residents of Ireland whose legal system is based on that of the United Kingdom, were mislead from the said advertising material having considered that the legal principles of Cyprus law, especially in relation to the ownership of immovable property are identical to those of the United Kingdom. The security brought about by such an understanding combined with the fact that both countries are members of the European Union, drove those consumers to take a transactional decision which they would not or may not have taken if they did not feel the safety of a legal system that is familiar to them. It appears that this practice of the defendant, to promote a false 'sense of security' to consumers, from Ireland, the United Kingdom, and any other country whose legal system is based on the English legal system and is a member of the European Union, goes to the root of this complaint.

Decision

(1) Does the existence of a way to avoid or resolve problems created by a commercial practice absolve the seller of his responsibility for such commercial practice?

(2) Does a practice which may be characterized as 'customary practice' absolve its user from any responsibility?

(3) Does the fact that a natural person buys an immovable property for investment purposes affect his status as a consumer?

(4) Are the commercial practices contained in the Annex deemed automatically unfair and is any assessment required so as to ensure that the consumer was

mislead?

(5) Is the economic situation of the property (ie. the existence of mortgages/charges) material information which the average consumer needs in order to make an informed decision?

(6) Is pre-contractual information about contractual terms a commercial practice?

(7) Does the fact that consumers can sell-on immovable property to third persons without the title of ownership, absolve the seller of his responsibility in failing to transfer the title of ownership as promised?

(8) Is promoting a false 'sense of security' to consumers from countries whose legal system is similar to the seller's country's legal system, by relying on both such legal systems being based on English or EU law, an unfair commercial practice?

URL: [http://www.mcit.gov.cy/mcit/cyco/cyconsumer.nsf/All/D4DF8689253DFC83C225803A00322736/\\$file/%CE%91%CF%80%CF%8C%CF%86%CE%B1%CF%83%CE%B7%2008-2016-%20Pafilia%20Property%20Developers%20Ltd.pdf?OpenElement](http://www.mcit.gov.cy/mcit/cyco/cyconsumer.nsf/All/D4DF8689253DFC83C225803A00322736/$file/%CE%91%CF%80%CF%8C%CF%86%CE%B1%CF%83%CE%B7%2008-2016-%20Pafilia%20Property%20Developers%20Ltd.pdf?OpenElement)

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Result

An administrative fine of a hundred thousand euro (€100.000,00) was imposed on the defendant.