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First 'dieselgate' judgment in Spain to void a car sale, in respect of a Skoda Yeti Greenline. No order to pay damages

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1. Judgment no. 180/2017 of the Manacor Court of First Instance No. 4 of 5 January 2018

The claimant brings an action to void a contract for the sale and purchase of a Skoda Yeti Greenline vehicle for vitiated consent and, in the alternative (i.e., failing the foregoing), an action to rescind said contract for failure of consideration, against the seller and the manufacturer. As ancillary relief, the claimant seeks in both cases compensation for the depreciation of the vehicle valued at 7,834.11 euros. In addition to bringing the aforementioned actions and regardless of whether they succeed or not, 5,933.47 euros are claimed for pain and suffering (i.e., non-material damage), plus another 1,494.17 euros for interest and expenses paid as a result of the financing contract for the purchase of the vehicle.

The claimant submits that the purchased vehicle has an EA189 diesel engine where the engine software fraudulently configured it in such a way that NOx emissions on the test benches would comply with the limits laid down in Regulation (EC) No 715/2007 – "Euro 5 and Euro 6 Regulation", although after, under actual driving conditions, these limits would be exceeded to the detriment of the environment. These facts were judicially noticed.

The action to void for mistake is based on art. 1266 of the Civil Code (CC), which provides that "[i]n order for a mistake to invalidate consent, it must go to the substance of that which was the subject matter of the contract or to those conditions thereof that would have mainly given cause to conclude the contract".

The sale and purchase contract did not include any information on the vehicle's level of NOx emissions. The list of technical characteristics of the various Skoda Yeti models included the data on C02 emissions but not NOx. However, the vehicle model purchased was part of the 'Greenline' range, which was expressly advertised as a response to the "great concern for the environment" (advertising leaflet submitted as documentary evidence). The workshop manager, as a witness, stated that the model had specific tires and covers aimed at low consumption, and that few units were sold. This shortage of sales leads the Judge to conclude that Skoda Yeti Greenline's low level of pollutant emissions was the main reason for the acquisition of the vehicle by a large majority of users; and that the remaining vehicle characteristics (price, performance, equipment) were not sufficiently attractive to other potential buyers who were not driven by ecological criteria.

This circumstance of special environmental "concern", "awareness", of the buyer meant for the Judge in this particular case, unlike others that were previously not upheld, that either the action to void or the action to rescind the contract should succeed, identifying both as suitable for consideration. In connection with the action to void, because of the presence of an excusable mistake on the part of the buyer concerning one of the conditions which mainly gave rise to the choice of the Skoda Yeti Greenline vehicle; in connection with the action to rescind, because the vehicle's non-conformity to the conditions of respect for the environment taken into singular account in the acquisition of the vehicle determines objective buyer dissatisfaction, and with such the application of the *aliud pro alio* ('delivery of the wrong good') doctrine (Judgments of the Supreme Court of 25-2-2010, 17-2-2010, 9-7-2007, 27-2-2004 and 31-7-2002).

The Judge was of the opinion that the possibility of correcting the incident by reconfiguring the software at approved body shops had no relevance for the purposes of the actions to void and to rescind.

The action to rescind presupposes the validity and completion of the contract notwithstanding the failure of consideration. Upholding the action to rescind entails the duty of the parties to mutually return what has been received and the injured party's entitlement to damages and payment of interest (arts. 1123 and 1124 CC).

The action to void, on the other hand, implies here a contract voidable for vitiated consent, consent that constitutes an essential element of the contract (art. 1261 CC). Art. 1303 CC provides that "[s]ubject to determination of voidability of an obligation, the contracting parties must reciprocally return to each other that which was the subject matter of the contract, along with any proceeds therefrom, and the price plus interest, except as provided in the following articles". The wording of the article seems to exclude the possibility that the claimant may claim additional compensation. However, the Judge holds that article 1306 CC, specifically sub-article (2), does recognize a substantial legal effect: "Where the turpitude does not constitute a minor or serious offence, the following rules will be observed: [...] (2) Where it attaches to a single contracting party, such party may not recover what he has given under the contract,

nor request performance of what he was promised. The other party, to whom the turpitude does not attach, may claim back what he has given, without any obligation to perform what he has promised."

In light of the foregoing, the Judge concludes that in the case of the action to rescind, the buyer would be obliged to compensate for the "possession value of the vehicle" during the five years following the date of the sale as a return of proceeds, though he could also claim compensation for damage or loss suffered. In the case of the action to void, the Judge concludes that the buyer cannot claim damages, although he can invoke art. 1306(2) CC that prevents the mala fide party from recovering "what he has given under the contract" and object, by virtue of this, to any compensation for the possession value of the vehicle.

In order to analyse the above two options, the Judge recalls that the Provincial Court of the Balearic Islands (Third Chamber), in Judgment no. 107/2017 of 11 April 2017, appraised the non-material damage suffered by the buyer of a vehicle affected by the irregularity of the EA189 diesel engine at 500 euros. This amount, added to the amount of interest paid as a result of the financing contract, represents a total amount of 1,994.17 euros, which represents 10.29% of the vehicle price. For the calculation of the vehicle's possession value, if the applicable depreciation percentage applicable to the calculation of average sales prices for tax purposes is taken as a guiding criterion (at the date of filing of the claim, Ministerial Order HAP/2763/2015 of 17 December, BOE of 21-12-2015), this would represent 44% of the price paid, exceeding notably any damages payable.

For that reason, and considering the best outcome for the claimant's interests subject to the *non ultra petita* rule under art. 218 of the Civil Procedure Act (LEC), the judge finally determined that the contract be voided rather than rescinded, ordering the seller and the manufacturer to refund the price paid (19,378.11 euros) plus statutory interest from the date of conclusion of the contract (five years back) and ordering the buyer to return the vehicle. The seller and manufacturer were found not liable to damages.

Once the judgment becomes final and conclusive, the purchaser's "good faith", understood as ignorance of the incident that affected the level of emissions of the vehicle for the purposes of art. 1306 CC, ceases. Therefore, in the event of any delay in returning the vehicle, the co-defendant parties may claim compensation for the possession value of the vehicle generated after the date on which the judgment became final and conclusive.

2. Some considerations

The judgment does not assess what happens to the financing contract and the costs associated with it once the sale and purchase contract has been voided. Since the sale and purchase contract - the main contract - was voided, the ancillary contract - the financing contract - should automatically become void, so that the return of the product together with any proceeds and

price and interest would be necessary. The supervening voidness of contracts financing the purchase of 'dieselgate' vehicles – observed for the first time as a consequence of the judgment under review – has legal consequences and involves potential contingencies for lending institutions.

Some of the points of law set out in the judgment might be questionable. Firstly, as established by the Supreme Court's judgment of 4 May 2017 (STS 1652/2017), statutory interest on the price must be calculated, for the purposes of arts. 1295 and 1303 CC, from the moment payment of the price was received. The judgment under review refers to the payment of statutory interest from the moment of "conclusion of the contract" with delivery of the vehicle and transfer of ownership. Although in this particular case – and in those involving a sale to an end consumer – the time of payment and delivery of the vehicle are likely to coincide, there may be cases where they do not.

Secondly, the application of arts. 1305 and 1306 CC to this type of case seems forced. The aforementioned articles include circumstances of voidability of an illegal contract (illegal *causa* or purpose), distinguishing the former article those cases where the grounds of voidability constitute a minor or serious offence, and the latter those that do not. In the particular case that is the subject matter of the judgment under review, the purpose of the contract is not illegal, regardless of misrepresentation. On the contrary, it could be argued that the "possession value of the vehicle" does not fall within the concept of "proceeds" in art. 1303 CC – in the same way that it would not in the case of rescission under art. 1295 CC – so that with the return of the good the provisions of the aforementioned articles would be complied with by the claimant, without having to compensate for the "possession value of the vehicle".

We contend, therefore, that the legal consequences of the voiding of the contract or its rescission are or should be substantially the same: return of the good and its proceeds by the buyer and return of the price with interest by the seller. With regard to damages, we believe that they could also be granted in both cases based on the positive contractual interest of the buyer, i.e. legitimate expectations regarding the conclusion and fulfilment of the contract, which should not be limited by the type of action (to void or to rescind) brought, even though it is usual practice to bring both actions simultaneously. However, in the case of the action to rescind, following the amendment introduced by the Civil Procedure Act 1/2000 Amendment Act 42/2015 of 5 October, the limitation period is five years, from the time when the failure of consideration becomes apparent (that is, as of the existence of the software in question being reported). On the contrary, an action to void has a limitation period of four years from the consummation of the contract, i.e. from the date of delivery and transfer of ownership. This is an aspect that must be taken into account for procedural strategy purposes.

The importance of the judgment under review lies in the fact that it opens a new avenue of case law, recognising for the first time a case of special "environmental awareness" that invalidates consent and renders a contract void. This has significant implications for the manufacturer

and its concessionaires, which will have to repay the price with interest and take delivery of a vehicle whose present value is negligible, and for the financing of the purchase and the lending institution. At first instance, it is likely that both actions will be identified as suitable for consideration. Counsel for the manufacturer and the concessionaires must contest the existence of the circumstances that legally justify voidance or rescission. With regard to the action to void, the issue will focus on whether the level of NOx was a decisive factor in shaping the buyer's intention and, in the case of the action to rescind, on whether, once the software tampering became known, the purpose of the contract for the buyer is frustrated. In this regard, particular probative importance will be attached, inter alia, to advertising brochures stressing environmental characteristics of the vehicle and the average type of buyer of the range – as in the 'Greenline' case analysed in the judgment.

Although it is still too early to know what the predominant avenue of case law will be and we believe that cases will be limited in view of the special characteristics of the buyer, in those where special "environmental awareness" is proved, actions to void or rescind are likely to succeed.