Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

30 April 2014*

(Request for a preliminary ruling — Directive 93/13/EEC — Thirteenth recital in the preamble — Article 1(2) — Consumer contracts — Mortgage loan agreement — Mortgage enforcement proceedings — National statutory and regulatory provisions — Contractual balance)

In Case C-280/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de Primera Instancia Nº4 de Palma de Mallorca (Spain), made by decision of 23 April 2013, received at the Court on 22 May 2013, in the proceedings

Barclays Bank SA

v

Sara Sánchez García,

Alejandro Chacón Barrera,

THE COURT (Sixth Chamber),

composed of A. Borg Barthet, President of the Chamber, E. Levits, and S. Rodin (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Barclays Bank SA, by J. Rodríguez Cárcamo and B. García Gómez, abogados,

— the Spanish Government, by S. Centeno Huerta, acting as Agent,

— the European Commission, by M. van Beek, É. Gippini Fournier and L. Banciella, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Spanish.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

2 The request has been made in proceedings between Barclays Bank SA ('Barclays') and Ms Sánchez García and Mr Chacón Barrera ('the debtors') concerning the recovery of unpaid debts arising from a mortgage loan agreement between those parties in the main proceedings.

Legal context

EU law

3 The ninth recital in the preamble to Directive 93/13 reads as follows:

'… acquirers of goods and services should be protected against the abuse of power by the seller or supplier …'.

4 The thirteenth and fourteenth recitals in the preamble to that directive state, as regards the national statutory or regulatory provisions:

'Whereas the statutory or regulatory provisions of the Member States which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms; whereas, therefore, it does not appear to be necessary to subject the terms which reflect mandatory statutory or regulatory provisions and the principles or provisions of international conventions to which the Member States or the Community are party; whereas in that respect the wording "mandatory statutory or regulatory provisions" in Article 1(2) also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established;

Whereas Member States must however ensure that unfair terms are not included, particularly because this Directive also applies to trades, business or professions of a public nature.'

5 Article 1 of that directive provides:

'1. The contractual terms which reflect mandatory statutory or regulatory provisions … shall not be subject to the provisions of this Directive.

2. The contractual terms which reflect mandatory statutory or regulatory provisions … shall not be subject to the provisions of this Directive.'

6 Article 3 of that directive is worded as follows:

'1. A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

…

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.'

7 Article 4(1) of Directive 93/13 reads as follows:

'Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.'

8 Article 6(1) of that directive is worded as follows:

'Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.'

9 Article 7(1) of that directive provides:

'Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.'

10 The annex to the directive contains a list of the terms referred to in Article 3(3) thereof. This letter reads as follows:

'1. Terms which have the object or effect of:

…

(e) requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;

…'

Spanish law

11 Article 1911 of the Civil Code (Código Civil) provides:

'The debtor shall be liable for settlement of his obligations using all his present and future assets.'

12 Article 105 of the Law on Mortgages (Ley Hipotecaria) codified by the Decree of 8 February 1946 (BOE No 58 of 27 February 1946, p. 1518), as amended most recently by Law 1/2013, provides:

'A mortgage may be created as security for all types of obligations and it shall not alter the unlimited personal liability of the debtor laid down in Article 1911 of the Civil Code.'

13 However, Article 140 of that law authorises the conclusion of agreements to the contrary limiting the debtor's liability. That article states:

'Without prejudice to Article 105, it may validly be agreed in the document creating the voluntary mortgage that the obligations secured shall be effective only with regard to the assets mortgaged.

In that case, the liability of the debtor and the action by the creditor shall be limited, by virtue of the mortgage loan, to the amount of the goods mortgaged, and shall not extend to the debtor's other assets.'

14 Under the heading 'Conclusion of enforcement proceedings', Article 570 of the Code of Civil Procedure (Ley de enjuiciamiento civil, 'the LEC') is drafted as follows:

'Enforcement proceedings shall be concluded only when the party seeking enforcement has received full and final settlement, which shall be determined by an order of the Clerk of the Court, against which a direct appeal for review may be brought.'

15 Under Article 579 of the LEC, entitled 'Monetary enforcement in cases of specifically mortgaged or pledged property':

'If, after the mortgaged or pledged property has been auctioned, the proceeds are insufficient to cover the debt, the party seeking enforcement may apply for enforcement in respect of the shortfall against the persons concerned and the enforcement proceedings shall continue in accordance with the ordinary rules applicable to all enforcement proceedings.'

16 Under the heading 'Auction with no bidders', Article 671 of the LEC, in the version resulting from Law 13/2009 of 3 November 2009 amending the legislation on court proceedings in order to introduce the new court offices (BOE No 266 of 4 November 2009, p. 92103), provides:

'If there are no bidders at the auction, the creditor may apply for the award of the property at a value equal to or greater than 50% of the sum at which it was valued or at a value equal to the amount which he is owed in respect of all items.

…'

17 Article 9 of Royal Decree 716/2009 of 24 April 2009 implementing certain aspects of Law 2/1981 of 25 March 1981 concerning regulation of the mortgage market and other provisions of the mortgage and financial systems (BOE No 107 of 2 May 2009, p. 38490) provided:

'Where, for market reasons or as a result of any other circumstance, the value of the mortgaged property falls below the initial valuation by more than 20% … the creditor institution, following a valuation carried out by an approved independent company, may require the debtor to extend the mortgage to other property sufficient to cover the difference between the value of the property and the loan or credit secured by it, in respect of which a demand may be made.

…

… If the debtor, within a period of two months of being required to effect the extension, has failed to do so and has also failed to repay the part of the loan or credit referred to in the previous paragraph, he shall be deemed to have opted for repayment of the whole of the loan or credit, which the creditor institution may demand forthwith.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 On 30 August 2005, the debtors concluded a loan contract with the Caja de Ahorros y Monte de Piedad de Baleares for EUR 91 560. In order to secure that loan they mortgaged the dwelling in which they lived. The parties included in the mortgage deed a specific term providing that, in the event of any

auction which might be held, the reference value of the dwelling would be EUR 149 242.80. According to Barclays, the parties to the contract also agreed to the unlimited personal liability of the debtors, without limiting that liability to the value of the mortgaged property.

19 By act of 24 July 2007, Barclays was substituted to the contractual position of the lender. Barclays and the debtors agreed by an act of the same date to an increase in the capital lent to EUR 153 049.08. The estimation of the value of the property mortgaged and the term relating to the liability of the debtors was not changed. As regards the points which were not expressly set out in the new act, the provisions of the original mortgage loan contract were to apply.

20 According to Barclays, the debtors having ceased to pay the monthly loan instalments on 24 October 2009, repayment of the loan was accelerated on 25 March 2010. On that date, the amounts due under that loan were EUR 150 011.52.

21 On 10 December 2010, Barclays brought an action before the Juzgado de Primera Instancia de Palma de Mallorca Nº4 (Court of first Instance, Palma de Mallorca) seeking the enforcement of its mortgage against the debtors, claiming a debt of EUR 148 142.83 in respect of the principal, EUR 1 689.95 for interest due and EUR 45 003 in respect of interest and costs. The Juzgado de Primera instancia Nº4 de Palma de Mallorca ordered the mortgaged property to be repossessed by decision of 15 December 2010.

22 On 25 May 2011, the property was auctioned, but no bidders were present. The property was awarded to Barclays, in accordance with the wording of Article 671 LEC, at a value of EUR 74 621.40, that is, 50% of the estimated value which the parties had entered in the mortgage deed.

23 On 18 October 2012, at Barclay's request, an order for enforcement was issued against the debtors. That order authorised the continuation of the enforcement proceedings for the outstanding sum of Barclay's debt of EUR 95 944.11, that is, EUR 75 390.12 for the remainder of the principal, EUR 10 960.50 for interest until 25 May 2011, plus EUR 9 593.49 for the costs of the mortgage enforcement proceedings and for an increase in the provisional sum of EUR 22 617.03 for interest and costs relating to the enforcement proceedings.

24 Within the statutory period prescribed for that purpose, the debtors lodged an objection to that order. They claim that, since the property estimated at EUR 182 700, according to the valuation certificate requested by Barclays drawn up on 18 May 2007, was awarded to Barclays for EUR 74 621.40, the debt must be deemed to have been cleared and repaid in full as regards the amount of Barclays' debt not covered by that amount. They also rely on abuse of rights and unjust enrichment by Barclays.

25 Barclays challenged the grounds of that objection, arguing that the amount owing to it had not been settled in full and that the Tribunal Supremo (Supreme Court) had already held, in cases similar to that which is the subject of the main proceedings, that there had been no abuse of rights or unjust enrichment.

26 In those circumstances, the Juzgado de Primera Instancia Nº4 de Palma de Mallorca decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must [Directive 93/13] and the principles of EU law on consumer protection and a balance in the parties' contractual rights and obligations be interpreted as meaning that they preclude Spanish legislation on mortgages which, although it provides that the mortgagee may request an increase of the security where the valuation of a mortgaged property decreases by 20%, does not provide, in the context of mortgage enforcement proceedings, that the consumer/debtor/party against whom enforcement is sought may request, following a valuation involving the parties concerned,

revision of the sum at which the property was valued, at least for the purposes stipulated in Article 671 of the LEC, where that valuation has increased by an equal or higher percentage during the period between the creation of the mortgage and the enforcement thereof?

2 Must [Directive 93/13] and the principles of EU law concerning consumer protection and a balance in the parties' contractual rights and obligations, be interpreted as meaning that they preclude the Spanish procedural rules on mortgage enforcement which provide that the creditor seeking enforcement may be awarded the mortgaged property at 50% (now 60%) of the sum at which the property was valued, which entails an unjustified penalty for the consumer/debtor/party against whom enforcement is sought equivalent to 50% (now 40%) of that valuation?

3 Must [Directive 93/13] and the principles of EU law concerning consumer protection and a balance in the parties' contractual rights and obligations, be interpreted as meaning that there is abuse of rights and unjust enrichment where, after being awarded the mortgaged property at 50% (now 60%) of the sum at which the property was valued, the creditor/party seeking enforcement applies for enforcement in respect of the outstanding amount in order to make up the total amount of the debt, despite the fact that the sum at which the property awarded was valued and/or the actual value of the property awarded is higher than the total amount owed, even though such action is permitted under national procedural law?

4. Must [Directive 93/13] and the principles of EU law concerning consumer protection and a balance in the parties' contractual rights and obligations, be interpreted as meaning that, upon the award of the mortgaged property with a valuation and/or actual value which is higher than the total amount of the mortgage loan, Article 570 LEC is applicable and supplants Articles 579 and 671 LEC, and that, accordingly, the creditor seeking enforcement must be considered to have been repaid in full?'

27 The parties were invited by the referring court to make submissions on those questions. Barclays argued that Spanish law does not infringe EU law and sought the continuation of the enforcement proceedings. The party objecting the enforcement agreed to the reference for a preliminary ruling.

The questions referred for a preliminary ruling

28 By those four questions, which it is appropriate to examine together, the referring court asks essentially whether Directive 93/13 and the principles of EU law on consumer protection and a balance in the parties' contractual rights and obligations must be interpreted as meaning that they preclude the laws and regulations of a Member State, such as those at issue in the main proceedings, which, first, provide that in spite of the award of the mortgaged property with an estimated value which is greater than the total amount of the mortgage loan for an amount equal to 50% of that value to the mortgage lender when there is no third party bidder, that lender may continue with the enforcement proceedings for an amount corresponding to the outstanding amount of the debt and, second, allow the extension of the mortgage where the valuation of a mortgaged property decreases by 20%, without providing for an upward revision of that estimate in favour of the debtor.

29 According to Article 1(1) of Directive 93/13, its purpose is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.

30 It must also be recalled that, under Article 1(2) of that directive '[t]he contractual terms which reflect mandatory statutory or regulatory provisions and the provisions … shall not be subject to the provisions of this Directive.'

31 Furthermore, in accordance with the thirteenth recital in the preamble to that directive, Article 1(2) of Directive 93/13 'also covers rules which, according to the law, shall apply between the contracting parties provided that no other arrangements have been established'.

32 In that connection, it is settled case-law that the system of protection introduced by the directive is based on the idea that the consumer is in a weak position *vis-à-vis* the seller or supplier, as regards both his bargaining power and his level of knowledge (Case C-415/11 *Aziz* EU:C:2013:164, paragraph 44).

33 As regards that weaker position, Article 6(1) of the directive provides that unfair terms are not binding on the consumer. As is apparent from the case-law, that is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (*Aziz*, EU:C:2013:164, paragraph 45).

34 In that context, the Court has already stated on several occasions that the national court is required to assess of its own motion whether a contractual term falling within the scope of Directive 93/13 is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task (*Aziz* EU:C:2013:164, paragraph 46 and the case-law cited).

35 Furthermore, the Court has held, in paragraph 64 of *Aziz* EU:C:2013:164, that that directive must be interpreted as precluding legislation of a Member State that does not permit the court hearing an application for a payment order to determine of its own motion, in limine litis or at any other time, even when it has available to it the matters of law and fact necessary to that end, whether a default interest clause in a contract concluded between a seller or supplier and a consumer is unfair, facing objection by the consumer (Case C-618/10 *Banco Español de Crédito* EU:C:2012:349, paragraph 57).

36 In addition, the Court held, in paragraph 64 of *Aziz*, that that directive must be interpreted as meaning that it precludes the legislation of a Member State which, while not providing in mortgage enforcement proceedings for grounds of objection based on the unfairness of a contractual term on which the right to seek enforcement is based, does not permit the court before which declaratory proceedings have been brought, which does have jurisdiction to assess the unfairness of such a term, to grant interim relief, including, in particular, the staying of those enforcement proceedings, where the grant of such relief is necessary to guarantee the full effectiveness of its final decision.

37 In that regard, there being no harmonisation of the national mechanisms for enforcement, the rules for giving effect to the grounds of objection allowed in mortgage enforcement proceedings and the powers conferred on the court hearing the enforcement proceedings to analyse the lawfulness of the terms of contracts concluded with consumers are a matter for the national legal order of the Member States, in accordance with the principle of the procedural autonomy of the latter, on condition, however, that they are no less favourable than those governing similar domestic actions (principle of equivalence) and do not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by EU law (principle of effectiveness) (see, by analogy, *Aziz*, paragraph 50).

38 However, the case in the main proceedings is distinguished from those which gave rise to the judgments in *Banco Español de Crédito* EU:C:2012:349 and *Aziz* EU:C:2013:164 in which the disputes before the referring courts were directly concerned with the contractual terms and the questions raised related to the limitation of the powers of the national courts to determine whether those terms were unfair.

39 In the case in the main proceedings, the national court does not invoke any contractual term that could be classified as unfair. The four questions concern the compatibility of the national laws and regulation with Directive 93/13. None of the national provisions at issue in the main proceedings is

contractual in nature. Furthermore, unlike the cases which gave rise to the judgments in *Banco Español de Crédito* EU:C:2012:349 and *Aziz* EU:C:2013:164, none of those provisions relates to the extent of the powers of the national courts to determine whether a contractual term is unfair.

40 The national provisions which are the subject of the reference for a preliminary ruling are laws or regulations and are not set out in the contract at issue in the main proceedings. Such provisions do not fall within the scope of that directive which aims to prohibit unfair terms in contracts concluded with consumers.

41 Unlike the case which gave rise to the judgment in Case C-92/11 *RWE Vertrieb* EU:C:2013:180, paragraph 25, in which, according to paragraphs 29 to 38 of that judgment, the parties agreed to extend the scope of rules laid down by the national legislature, the national statutory and regulatory provisions to which those questions relate are applicable without any modification of the area covered or of the extent of that coverage by means of a contractual term. Therefore, it may legitimately be supposed that the national legislature struck a balance between all the rights and obligations of the parties to certain contracts (see, to that effect *RWE Vertrieb* EU:C:2013:180, paragraph 28). The EU legislature has explicitly decided to presume the balance as is clear from the wording of the twentieth recital in the preamble and Article 1(2)of Directive 93/13.

42 Furthermore, the national statutory and regulatory provisions at issue in the main proceedings apply between the contracting parties where no other arrangement has been agreed. Therefore, in accordance with the thirteenth recital in the preamble to Directive 93/13, they are covered by Article 1(2) of that directive, according to which they are 'not [to] be subject to the provisions of this Directive'. Therefore, that directive is not applicable in any event.

43 As regards the principles of EU law relating to consumer protection and a balance in the parties' contractual rights and obligations, it must be held that Directive 93/13 is intended to ensure that they are observed by removing from consumer contracts unfair terms as a manifestation of the imbalance between the contracting parties.

44 As already stated, the national statutory and regulatory provisions at issue in the main proceedings do not fall within the scope of Directive 93/13 since no unfair contractual term has been relied on. Also, given the existence of a *lex specialis*, such as Directive 93/13, which excludes a case such as that at issue in the main proceedings from its scope, the underlying general principles are also inapplicable.

45 Having regard to all of those considerations, the answer to the questions referred by the national court is that Directive 93/13 and the principles of EU law relating to consumer protection and a balance in the parties' rights and obligations must be interpreted as meaning that statutory and regulatory provisions of a Member State, such as those at issue in the main proceedings, are excluded from their scope, when there is no contractual term altering the effect or ambit of those provisions.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts and the principles of EU law relating to consumer protection and a balance in the parties' rights and obligations must be interpreted as meaning that statutory and regulatory provisions of a Member State, such as those at issue in the main proceedings, are excluded from their scope, when there is no contractual term altering the effect or ambit of those provisions.

[Signatures]