Anonymised version

Case C-865/19

Request for a preliminary ruling

Date lodged:

27 November 2019

Referring court:

Tribunal d'instance de Rennes (France)

Date of the decision to refer:

21 November 2019

Applicant:

Caisse de Crédit Mutuel Le Mans Pontlieue

Defendant:

OG

[…] **ORDER of 21 November 2019**

[…]
BETWEEN:

***APPLICANT*:**
CAISSE DE CRÉDIT MUTUEL LE MANS PONTLIEUE […], LE MANS […] **[Or. 2]**

AND:

DEFENDANT:
OG
[…] ST GRÉGOIRE, […]

SUCCINCT PRESENTATION OF THE FACTS AND PROCEDURE, CLAIMS AND PLEAS IN LAW OF THE PARTIES

In accordance with an instrument certified by a notary and dated 7 August 2008, CAISSE DE CRÉDIT MUTUEL LE MANS PONTLIEUE agreed to grant to OG and PF, for the purpose of the acquisition of immovable property:

- a MODULIMMO loan for an amount of EUR 80 275, repayable in 300 monthly instalments, at a rate of 4.85%;

- an interest-free loan of EUR 13 200 repayable in 96 monthly instalments.

The interest-free loan was repaid in July 2016.

As the debtors failed to make a number of payments, CAISSE DE CRÉDIT MUTUEL LE MANS PONTLIEUE sent a registered letter with acknowledgement of receipt dated 26 April 2018 triggering the accelerated payment procedure and demanding repayment of the sum of EUR 78 080.

A formal notice of seizure and sale was served on them on 11 May 2018 at the notary's office.

By application of 11 June 2018, received by the tribunal d'instance de Rennes (District Court, Rennes, France) on 13 June 2018, CAISSE DE CRÉDIT MUTUEL LE MANS PONTLIEUE applied for an attachment of earnings order against OG with a view to recovering a debt of EUR 78 602.57.

The same application was made against PF.

A hearing for the case was initially scheduled for 11 October 2018, but was postponed to 20 December 2018 in order to allow the creditor to state its position on (i) a potential two-year limitation period, (ii) the applicable interest rate and (iii) the principal sum claimed.

The case was then postponed to 28 February 2019 to allow the creditor to provide explanations for a possible error in the percentage rate of charge stipulated in the loan agreement and the loan offer.

In a note of 24 December 2018, the court pointed out to the parties that the proportional percentage rate of charge for a loan of EUR 80 275 with a fee of EUR 583 which was repayable in 96 monthly instalments of EUR 384.90, followed by 204 monthly instalments of EUR 527.55, excluding compulsory insurance of EUR 22.76 per month, calculated in accordance with the method for calculating present-day values laid down in décret No 2002-98 (Decree No 2002-98) of 10 June 2002 and the annex thereto, a method which is applicable to all loans, was 5.364511%, which is 5.365% when rounded to three decimal places, and not 5.363% as stated in the loan offer.

[…] [formula for calculating the rate]

The court noted that the question whether, where the percentage rate of charge is 5.364511%, the rate of 5.363% imposed by the lender could be considered to be accurate most likely justified a reference to the **[Or.3]** Court of Justice of the European Union, since the rules governing how the percentage rate of charge (which became the annual percentage rate of charge ('the APRC') on 1 October 2016) is to be rounded fall within the ambit of Community law.

[…] [national procedure]

By written submissions, […] CAISSE DE CRÉDIT MUTUEL LE MANS PONTLIEUE, […] claims that the referring court should:

- dismiss all of OG and PF's claims, pleas and forms of order sought;

- find that its application for an attachment of earnings order against OG and PF is admissible and well-founded;

- find that its action for payment is not time-barred;

- declare that it has established that it has an enforceable instrument;

- find that it is not necessary to reduce the contractual interest rate;

- issue an attachment of earnings order against OG and PF for the purpose of recovering its debt which, when provisionally calculated on 11 June 2018, amounted to EUR 78 663.46;

[…]

CAISSE DE CRÉDIT MUTUEL LE MANS PONTLIEUE is opposed to the defendant's claim that a request for a preliminary ruling should be submitted. It maintains that the rule to be applied is clear, in particular in the light of the case-law of the Cour de cassation (Court of Cassation, France), which precludes the borrower from relying on an error in the calculation of the APRC where that error does not affect the first decimal place of that rate.

It also claims that OG and PF are time-barred from relying on the invalidity of the APRC due to the five-year limitation period, since the instrument was executed on 7 August 2008.

On the substance, it argues that the borrowers, who have given no reasons why they are challenging the loan offer, have suffered no loss.

Additionally, it submits that its calculations — based on an annual rate divided by 12, with the equal month rule being perfectly acceptable in accordance with legislation and case-law — are not vitiated by any error, as the calculation method which was applied by the court and adopted by the defendants is inapplicable.

It also claims that its action is not time-barred, is perfectly well-founded as regards the amount claimed and precludes it from granting a grace period. **[Or. 4]**

By written submissions, made also on behalf on PF […], OG, […] claims that the referring court should:

before ruling on the action,

- refer to the Court of Justice of the European Union a question for a preliminary ruling on the interpretation of Directive 98/7/EC of 16 February 1998 in accordance with French national law;

on the substance,

- declare that the interest terms of the loan at issue are null and void,

- principally, strip CAISSE DE CRÉDIT MUTUEL LE MANS PONTLIEUE of its right to interest and fees, and set the amount of its debt at EUR 33 179.98;

- in the alternative, substitute the statutory interest rate for the contractual interest rate, and order that the principal and interest at the statutory rate that are still payable be set off against the repayment of the difference between the amount of interest already paid at the contractual rate and the interest at the statutory rate, which is to apply retroactively;

- in any event, grant them the widest possible time periods and order that the sums payable are not to accrue interest during the period granted;

[…]

OG argues that the five-year limitation period began to run on the day on which they became aware of the fact allowing them to bring the action, that is to say when the court raised that issue of its own motion. She adds that, as the Court of Justice of the European Union has found previously, the reference to the APRC in an agreement is fundamentally important and claims that that rate is, by its nature, a decisive factor in a consumer's decision making.

GROUNDS OF THE DECISION

ON THE APRC ERROR

1. Limitation period applicable to the plea in law

Under article 122 of the code de procédure civile (Civil Procedure Code), any plea seeking a declaration that the other party's claim is inadmissible, without examination of the substance, on the basis that that other party does not have the

right to bring an action, such as pleas alleging a lack of standing, a lack of legal interest, the application of a limitation period or a strict time limit, or the force of res judicata, constitutes a plea of inadmissibility.

In the present case, since the credit agreement at issue was executed on 7 August 2008, the bank argues that the borrowers can no longer rely on the APRC error. **[Or. 5]**

In the first place, it should be noted that that issue was raised by the court, which cannot ever be treated in the same way as a party. Such a limitation period can apply only to a legal action and to a counterclaim submitted in response to that action. The limitation period therefore applies only to the parties to the dispute and not to the court. By raising a plea in law of its own motion, the court takes an initiative to ensure compliance with the law; the court is thus not acting as a party and is not making an application. That plea cannot, therefore, be declared 'inadmissible'.

Moreover, as regards the starting point of the alleged limitation period, the court is not in the same position as the borrower, who might have realised as soon as the agreement was signed, assuming that he or she was sufficiently informed of the intricacies of consumer law, that the relevant applicable provisions had been breached, and who would then have acted negligently by allowing the limitation period to run. Obviously, as the judge becomes familiar with the agreement only at the time of the proceedings, the starting point of an alleged limitation period could be fixed, at the earliest, only at the time when the case is entered in the court register.

In addition, the legislature has not made the court's ability to raise pleas of its own motion subject to any time limit. […] [background to legislation]

Lastly, in the light of the case-law of the Court of Justice of the European Union, the requirement that 'the imbalance which exists between the consumer and the seller or supplier [be corrected] by the court hearing such disputes only by positive action unconnected with the actual parties to the contract' (judgment of 21 April 2016, *Radlinger and Radlingerová*, C-377/14, EU:C:2016:283, paragraphs 66 and 67) must lead the court to raise of its own motion the irregularities that it notes, in particular the most serious ones (judgment of 9 November 2016, *Home Credit Slovakia*, C-42/15, EU:C:2016:842, paragraphs 70 and 71); its national law cannot prohibit it from doing so after the expiry of a certain time limit (judgment of 21 November 2002, *Cofidis*, C-473/00, EU:C:2002:705).

It is a notable illustration of a fair trial that, when it seems appropriate to the court to do so, it will make up for a party's weakness or ignorance.

With regard to the parties themselves, it should be noted that counterclaims and grounds of defence are brought in the same way against the parties to the proceedings. The claims of a debtor merely seeking dismissal of the applications

brought against him or her simply constitute a substantive ground of defence, within the meaning of Article 71 of the Code Civil Procedure, to which the limitation period does not apply.

The legal bases for forfeiture of the right to interest or for invalidity of the APRC are both covered by the body of rules applying to substantive grounds of defence, since they each constitute a plea seeking dismissal of the other party's claim, after examination of the substance, on the basis that it is unsubstantiated and that applies, at least in part, where no counterclaim has been submitted seeking repayment of an overpaid sum. **[Or. 6]**

Finally, it has not been established that OG and PF, as inexperienced borrowers, were personally capable of identifying errors in the calculation of the APRC, as well as the periodic rate, which do not result from a simple omission of certain fees, but from an overall calculation error.

It cannot therefore be properly maintained that the defendant's plea is time-barred.

On that basis, the plea of inadmissibility must be rejected.

2. The question referred for a preliminary ruling

Annex II to Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 87/102/EEC for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit lays down the mathematical formula to be used for calculating the APRC and states in the [English] version thereof (remark (d)):

'*The result of the calculation shall be expressed with an accuracy of at least one decimal place. When rounding to a particular decimal place the following rule shall apply: If the figure at the decimal place following this particular decimal place is greater than or equal to 5, the figure at this particular decimal place shall be increased by one.*'

That rule was set out in Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC and more recently in Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, in the following terms:

'*The result of the calculation shall be expressed with an accuracy of at least one decimal place. If the figure at the following decimal place is greater than or equal to 5, the figure at the preceding decimal place shall be increased by one.*'

Under national law, the mathematical formula derived from Community legislation is set out in the Annex to Article R 314-3 ex-R 313-1 III of the code de la consommation (Consumer Code), and the rounding rule is set out in point (d) of that annex (‘*The result of the calculation shall be expressed with an accuracy of at least one decimal place. When rounding to a particular decimal place the following rule shall apply: If the figure at the decimal place following this particular decimal place is greater than or equal to 5, the figure at this particular decimal place shall be increased by one*’). Until 30 September 2016, the rounding rule mentioned above formally applied only to consumer credit, but case-law extended it to credit agreements for immoveable property. Since 1 October 2016, décret 2016-884 (Decree 2016-884) of 29 June 2016 formalised that extension to credit agreements for immoveable property.

It is clear that the two sentences of remark d referred to above complement one another: the first sentence (‘*The result of the calculation shall be expressed with an accuracy of at least one decimal place*’) requires the result to extend to at least one decimal place. The term ‘decimal place’ refers to each of the figures to the right of the decimal point, rather than to a numerical value, and the term ‘accuracy’ (which is not accompanied by the adjective ‘mathematical’) is therefore, in the first sentence, a synonym for ‘precision’. **[Or. 7]**

The second sentence (‘*When rounding to a particular decimal place the following rule shall apply: If the figure at the following decimal place is greater than or equal to 5, the figure at this particular decimal place shall be increased by one*’) lays down a rounding rule applicable to the last decimal place stated (which may be the first, if the lender mentions only one): that figure must be adjusted according to the value of the figure following it.

That interpretation is shared by most draftsmen and also by the European Commission, which was responsible for the text […]. [reference to academic legal writing]

The Cour de cassation (Court of Cassation) does not share that interpretation. It maintains that in the first sentence of that article (‘*The result of the calculation shall be expressed with an accuracy of at least one decimal place*’), the term ‘accuracy’ refers to the mathematical correctness of the result (rather than to the number of decimal places) and that the decimal place referred to is to be interpreted as the numerical value of the first decimal place, namely 0.1. Therefore, it concludes that the rate stipulated in the credit agreement is still accurate if the difference between that rate and the actual rate is ‘less than the decimal place laid down in Article R 313-J (now R 314-3) of the code de la consommation (Consumer Code)’ (Civil Division 1 of 26 November 2014, No 13-23033 — Civil Division 1 of 9 April 2015, No 14-14216). The Cour de cassation (Court of Cassation) therefore simply ignores the second sentence of remark d and confuses precision and mathematical correctness in the first sentence. That interpretation may lead to distortions of competition, in particular in the area of loans for the purchase of immoveable property: taking the example from the

judgment of 9 April 2015 in Case No 14-14216, cited above, it is more attractive to declare a rate of 5.79% (or even 5.75%, as this will still be rounded to 5.8%) than the actual rate of 5.837% or 5.84%, even though the fees and monthly payments will in fact be the same. For a loan of EUR 500 000 over 30 years, the potential borrower will naturally be drawn to the institution proposing an (underestimated) percentage rate of charge of 5.75% rather than to an institution declaring an (accurate) percentage rate of charge of 5.84%, because that borrower will believe that he or she will make a significant saving (in this example it would be a saving of EUR 8 103.07 over the duration of the loan).

In the present case, the percentage rate of charge set out in the loan offer is 5.363%, whereas the actual rate is 5.364511%; as the difference between the two is less than 0.1, the interpretation of remark d favoured by the Cour de cassation (Court of Cassation) effectively permits the declared rate of 5.363%, despite the last decimal place indicated being incorrect. For a loan of EUR 80 275 over 300 months, the potential borrower will naturally be drawn to the institution proposing a percentage rate of charge of 5.363% rather than one declaring a percentage rate of charge of 5.365%, because that borrower will believe he or she will make a saving, whatever the amount may be.

In view of the practical importance of the interpretation of the rounding rule set out in remark d, and given that this is a Community law applicable to all consumer credit agreements, for both moveable and immoveable property, it is for the Court of Justice of the European Union to determine how this rule is to be interpreted.

However, the Cour de cassation (Court of Cassation) refuses to consult the Court of Justice of the European Union. […] **[Or. 8]** […] [reference to case-law]

In 2017, in similar cases, the tribunal d'instance de Limoges (District Court, Limoges, France) sent two questions to the Court of Justice of the European Union concerning the rounding rule […], but each time, once the request for a preliminary ruling had been made, the lenders withdrew from the proceedings and discontinued their actions, preferring to lose significant sums […] rather than allow the Court of Justice of the European Union to give judgment.

As a result, it is necessary that a new question be referred for a preliminary ruling.

ON THOSE GROUNDS

The tribunal d'instance (District Court), ruling by interlocutory order,

- **REJECTS** the plea of inadmissibility;

- **REFERS** the following question to the Court of Justice of the European Union for a preliminary ruling:

Where the annual percentage rate of charge for credit granted to a consumer is 5.364511%, does the rule laid down in Directives 98/7/EC of 16 February 1998,

2008/48/EC of 23 April 2008 and 2014/17/EU of 4 February 2014, according to which, in the [English] version, 'The result of the calculation shall be expressed with an accuracy of at least one decimal place. If the figure at the following decimal place is greater than or equal to 5, the figure at this particular decimal place shall be increased by one', allow it to be concluded that an agreement stating that the annual percentage rate of charge is 5.363% is accurate?

[…]