Case C-869/19

Request for a preliminary ruling

Date lodged:

28 November 2019

Referring court:

Tribunal Supremo (Supreme Court, Spain)

Date of the decision to refer:

27 November 2019

Applicant:

L

Respondent:

Banco de Caja España de Inversiones, Salamanca y Soria, S.A.U.

[…] [identification of the proceedings and the referring court]

SUPREME COURT

Civil Division

[…] [identification of the members of the referring court]

Madrid, 27 November 2019.

[…] [identification of the judge-rapporteur]

BACKGROUND FACTS

SOLE FACT.- *Main proceedings in which the question referred for a preliminary ruling arises* **[OR 2]**

1.- Ms L has lodged an appeal in cassation against judgment 19/2017 of 13 January 2017 given by the Sección Primera de la Audiencia Provincial de Valladolid (First Section, Provincial Court, Valladolid) […].

2.- […] [C]onsideration was given to whether it was appropriate to make a request to the Court of Justice of the European Union for a preliminary ruling. It was therefore decided to hear the views of the parties on whether such a request should be made.

3.- The applicant consumer argued that the question should be referred for a preliminary ruling, while the defendant financial institution opposed a reference, on the grounds that 'EU law cannot force a national court to cease to apply internal rules of procedure', such as rules that require judgments to be congruent with the petitions of the parties.

4.- The parties to the main proceedings are Ms L, as the applicant, […] and Banco de Caja España de Inversiones, Salamanca y Soria, S.A.U., as the defendant […].

LEGAL BASIS

ONE.- *Summary of the background*

1.- On 22 March 2006, the financial institution Banco de Caja España de Inversiones, Salamanca y Soria, S.A.U. ('Banco Ceiss') granted Ms L ('the applicant' or 'the consumer') a loan of EUR 120 000, secured by a mortgage, to purchase her family home. The borrower was to repay the loan over 30 years in 360 monthly payments. The agreement comprised general terms and conditions drawn up by Banco Ceiss.

2.- The interest rate on the loan was 3.350% per annum for the first year. At the end of that period a variable interest rate applied, which was **[OR 3]** 0.52% above the twelve-month Euribor rate. However, the agreement contained a clause stipulating that the interest rate on the loan would never fall below 3% per annum (the 'floor clause'). When there was a significant fall in the Euribor rate in 2009, that clause prevented the loan rate from falling below 3% per annum.

3.- In January 2016 the consumer lodged a claim against the bank in which she asked for the 'floor clause' to be declared void on the grounds that it was unfair due to a lack of transparency, because the bank had not given her sufficient information about the existence of the clause and its significance for the economic effect of the agreement.

4.- In addition to seeking to have the 'floor clause' declared void, the borrower sought to have the bank repay all the amounts that had been overpaid under the clause. In the alternative, she requested that, if the bank was not ordered to repay the total amount, it should be required to repay the amounts received since 9 May 2013.

5.- Banco Ceiss opposed the claim in a written submission filed on 4 March 2016. It argued that the 'floor clause' was not unfair, because the borrower had been informed of its inclusion in the agreement.

6.- The Court of First Instance gave judgment on 6 June 2016. It ruled that the 'floor clause' was unfair due to a lack of transparency. But it only ordered Banco Ceiss to repay the borrower the sums received under the clause since 9 May 2013, plus interest, as it applied the case-law established by the Sala Primera del Tribunal Supremo (Civil Division of the Supreme Court) in judgment 241/2013 of 9 May 2013. It also ordered Banco Ceiss to pay costs.

7.- On 14 July 2016 Banco Ceiss filed an appeal against the judgment at first instance. In its appeal it challenged the order for costs against it, on the grounds that the claim had not been upheld in full, but only in part. The borrower opposed the appeal in a written submission filed on 20 July 2016. **[OR 4]**

8.- Before the Provincial Court gave judgment in the appeal, on 21 December 2016 the Court of Justice of the European Union gave judgment in joined cases C-154/15, C-307/15 and C-308/15 (EU:C:2016:980). In the operative part of that judgment the Court of Justice held that Article 6(1) of Directive 93/13/EEC precludes national case-law that temporally limits the restitutory effects connected with a finding of unfairness by a court to amounts overpaid under such a clause after the delivery of the decision in which the finding of unfairness is made. The national case-law referred to by the Court of Justice is that established in judgment 241/2013 of 9 May 2013 of the Civil Division of the Supreme Court.

9.- The Provincial Court subsequently gave judgment in the appeal on 13 January 2017. It upheld the appeal, on the grounds that the claim had been upheld only in part, and it set aside the order for costs made against Banco Ceiss in the judgment by the Court of First Instance.

10.- In its judgment, the Provincial Court made no mention of the judgment of the Court of Justice of 21 December 2016 and did not alter the ruling in the judgment at first instance on the restitutory effects of the nullity of the unfair 'floor clause', because that was not the subject of the appeal.

11.- The borrower has filed an appeal in cassation with the Supreme Court against the judgment of the Provincial Court. In the appeal, she argues that, in not applying the case-law established in the judgment of the Court of Justice of 21 December 2016 and not making an order of its own motion for repayment of all sums paid under the 'floor clause', the judgment is in breach of, among other provisions, Article 1303 of the Spanish Código Civil (Civil Code) (which regulates the restitutory effects connected with the nullity of obligations and contracts) read together with Article 6(1) of Directive 93/13/EEC (which establishes that unfair terms are not binding on consumers). **[OR 5]**

12.- The respondent bank opposes the appeal. It has argued that what the consumer is seeking is in breach of the *principio de congruencia* (principle that there should be correlation between the claims put forward in the action and the rulings contained in the operative part), because the consumer did not lodge an appeal against the judgment at first instance in order to challenge the temporal

restriction on the restitutory effects of the nullity of the clause, and therefore it was not open to the Provincial Court to order that the repayment to be made following the ruling that the clause was unfair should extend to all sums paid.

TWO.- *EU law*

1.- The provision of EU law which gives rise to questions of interpretation over the consequences of the finding that the 'floor clause' is unfair is Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, which provides 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.'

2.- In the operative part of its judgment of 21 December 2016 in joined cases C-154/15, C-307/15 and C-308/15 (EU:C:2016:980), the Court of Justice of the European Union ruled as follows:

'Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as precluding national case-law that temporally limits the restitutory effects connected with a finding of unfairness by a court, in accordance with Article 3(1) of that directive, in respect of a clause contained in a contract concluded between a consumer and a seller or supplier, to amounts overpaid under such a clause after the delivery of the decision in which the finding of unfairness is made.'

THREE.- *National law relevant to the main proceedings*

1.- Article 1303 of the Spanish Civil Code establishes a duty of repayment where an obligation is declared void, stipulating that: **[OR 6]**

'When an obligation has been declared void, the contracting parties must restore to one another those things that formed the subject matter of the contract, together with the profits derived therefrom, and the price together with interest, without prejudice to the following articles.'

2.- Supreme Court judgment 241/2013 of 9 May 2013 (ECLI:ES:TS:2013:1916) ruled that the 'floor clauses' contained in the general terms and conditions of certain contracts between consumers and the defendant banks in a class action were void due to a lack of transparency. However, it placed a temporal limit on the restitutory effects of the voiding of the clauses, in that it ruled that those effects did not apply to payments made before the date of publication of the judgment. Several subsequent judgments have endorsed that case-law.

3.- The judgment of the Court of Justice of 21 December 2016 ruled that the temporal limitation on the restitutory effects established in that case-law was contrary to Article 6(1) of Directive 93/13/EEC. As from its judgment 123/2017 of 24 February 2017, the Civil Division of the Supreme Court has altered its case-law and adjusted it to reflect the case-law in the judgment of the Court of Justice.

4.- When the Court of Justice of the European Union delivered that judgment, the Spanish courts were dealing with tens of thousands of cases concerning the nullity of unfair terms, most of which concerned 'floor clauses'. Some cases were still being heard at first instance, while others were at the appeal or cassation stage. In many of these proceedings, the application made by consumers, either in the principal claim or in the alternative, for repayment of amounts overpaid was limited to payments made after 9 May 2013. These applications reflected the case-law established in judgment 241/2013 of 9 May 2013 of the Civil Division of the Supreme Court, as the Court of Justice had yet to deliver its judgment of 21 December 2016.

5.- That is the situation in the claim brought by the consumer in these proceedings, who applied for temporally limited repayment in the alternative to repayment in full. The consumer did not appeal the judgment at first instance that dismissed her principal claim and upheld only her claim **[OR 7]** in the alternative, at a time when the Court of Justice had yet to deliver its judgment of 21 December 2016 and the court's judgment accorded with national case-law. Only the defendant bank appealed, seeking to overturn the award for costs against it.

6.- In other cases, consumers had lodged claims for repayment of all amounts overpaid but did not appeal against judgments that declared the clause void but placed a temporal limit on repayments of sums paid under the clause, due to the existence of the national case-law established by judgment 241/2013 of the Civil Division of the Supreme Court of 9 May 2013, which limited repayments to sums paid after that date, with the result that only the defendant bank appealed.

7.- In proceedings where this has been the position, the question has often arisen as to whether consumers can alter their claim to reflect the judgment of the Court of Justice of 21 December 2016 and seek repayment of all amounts overpaid once they have already lodged their claim or accepted a judgment at first instance which limited the restitutory effect of the 'floor clause'.

8.- The question has also arisen as to whether — even if the consumer did not appeal against a judgment that placed a temporal limit on the restitutory effects connected with a finding of unfairness, because the aforementioned judgment of the Court of Justice had yet to be delivered, and it was only the financial institution that appealed — a court hearing an appeal after that Court of Justice judgment should make an order, even of its own motion, for repayment of all amounts overpaid, in accordance with the case-law established by the judgment of the Court of Justice of 21 December 2016.

9.- Spanish civil proceedings are governed by the principles of delimitation of the subject-matter of an action by the parties, time-barring of procedural steps, prohibition of *mutatio libelli* or modification of the claim, correlation between the claims put forward in the action and the rulings contained in the operative part (*principio de congruencia*) and, in the case of appeals, the principle of prohibition of *reformatio in peius*, which is closely linked to the *principio de congruencia*.

10.- Article 216 of the Ley de Enjuiciamiento Civil (Code of Civil Procedure) provides that: **[OR 8]**

'Principle of party disposition.

'Civil courts before which cases are brought shall dispose of them on the basis of the facts, evidence and claims put forward by the parties, save where otherwise provided by law in specific cases.'

11.- Article 218(1) of the Code of Civil Procedure provides that:

'Completeness and congruence of judgments. Reasoning.

'1. Legal decisions must be clear and precise and must be commensurate with the requests and other claims of the parties, made in a timely manner in the course of the proceedings. Those decisions must contain the requisite declarations, find in favour of or against the defendant and settle all points in dispute which form the subject matter of the litigation.

[…] The court, without departing from the cause of action by accepting elements of fact or points of law other than those which the parties intended to raise, must give its decision in accordance with the rules applicable to the case, even though they may not have been correctly cited or pleaded by the parties to the procedure.'

12.- Article 465(5) of the Code of Civil Procedure, which addresses appeals, provides that:

'Orders or judgments issued in appeals must rule solely on the points and matters raised in the appeal and, where applicable, in the written statements of opposition or challenge referred to in Article 461. Decisions may not be to the detriment of the appellant, unless the detriment is the result of upholding a challenge to the decision in question brought by the original respondent.'

13.- Article 412(1) of the Code of Civil Procedure states that:

'Once the subject matter of the proceedings has been established in the application, in the defence, and, as the case may be, in the counterclaim, the parties may not vary it at a later date.'

14.- The Spanish Constitutional Court has held that some of these principles, such as the prohibition of *reformatio in peius* and, in some regards, the *principio*

de congruencia, are rooted in the constitution, in the right to effective judicial protection recognised in Article 24 of the Spanish Constitution (which has its equivalent in Article 47 on the Charter of Fundamental Rights of the European Union). If courts were able, of their own motion, to alter the decision that has been challenged by the appellant, to the appellant's detriment, this would act as a deterrent to exercising the right to the appeals lawfully **[OR 9]** established by law, which would be incompatible with the effective judicial protection which the courts are required to provide.

15.- These procedural principles led the Provincial Court to rule solely on the issue raised by Banco Ceiss in its appeal. While no reasons are expressly given on this point, it is clear that the Provincial Court did not order the sums received by the financial institution under the 'floor clause' to be repaid in full because the consumer did not appeal against the judgment at first instance that ordered repayment of only the sums paid after 9 May 2013.

16.- In her appeal in cassation, the consumer challenges that decision, arguing that, once the judgement of the Court of Justice of 21 December 2016 had been published, the Provincial Court should have applied the case-law in that judgment and should, of its own motion, have ordered all amounts paid under the 'floor clause' to be repaid, including amounts paid before 9 May 2013.

17.- In that case, as in many other cases pending in the Spanish courts, there is a tension between the principle that unfair 'floor clauses' are not binding on consumers — which means that temporal limits should not be placed on the repayment of amounts overpaid — and the procedural principles of delimitation of the subject-matter of an action by the parties, time-barring, correlation between the claims put forward in the action and the rulings contained in the operative part and prohibition of *reformatio in peius*.

FOUR.- *Doubts of interpretation giving rise to the first question*

1.- The Supreme Court is referring this question to the Court of Justice of the European Union because it has doubts over the compatibility of the principles of delimitation of the subject-matter of an action by the parties, time-barring and prohibition of *reformatio in peius* laid down in Article 216 and Articles 218(1) and 465(5) of the Code of Civil Procedure with Article 6(1) of Directive 93/13/EEC.

2.- The Court of Justice has held that the prohibition of *reformatio in peius* is based on the principles of respect for the rights of the defence, legal certainty and protection of legitimate expectations (judgment of 25 November 2008, C-455/06, paragraph 47, EU:C:2008:650). **[OR 10]**

3.- The Court of Justice has also held that consumer protection is not absolute, and that, under the principle of the institutional and procedural autonomy of the Member States, the procedural rules governing actions to safeguard an individual's rights under EU law are determined by national law. But this

procedural autonomy cannot put obstacles in the way of the effectiveness of EU law. Nor may claims founded on rights conferred by EU law receive less favourable treatment than similar claims founded on domestic law.

4.- As regards unfair terms, the judgment of the Court of Justice of 21 December 2016 (joined cases C-154/15, C-307/15 and C-308/15) held that certain restrictions on the effectiveness of the principle that unfair terms are not binding on consumers were reasonable, such as restrictions arising from *res judicata* (paragraph 68 of the judgment) or laying down reasonable time limits for bringing proceedings (paragraph 69 of the judgment).

5.- In recent judgments the Court of Justice has drawn attention to the importance, both in the legal order of the European Union and in national legal systems, of the principle of *res judicata*, because in order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection can no longer be called into question (judgment of 24 October 2018, C-234/17, EU:C:2018:853). Consequently, EU law does not require a national court to disapply domestic rules of procedure conferring finality on a judgment, even if to do so would make it possible to remedy a domestic situation which is incompatible with EU law (judgment of 29 July 2019, C-620/17, EU:C:2019:630).

6.- Under Spanish law, in an appeal it is possible for the various rulings contained in a judgment to be challenged separately (Article **[OR 11]** 458(2) of the Code of Civil Procedure). If a ruling is not challenged by any of the parties, the appellate court cannot set it aside or alter it. This rule is in some respects similar to *res judicata* in terms of its underlying reasons and its purpose.

7.- In that tension between procedural principles founded on the requirements of legal certainty, the sound administration of justice and respect for due process, linked to the right to effective judicial protection, on the one hand, and the principle of the effectiveness of EU law on the other, questions arise over the limits which the procedural rules established by the principles of delimitation of the subject-matter of an action by the parties, time-barring and prohibition of *reformatio in peius* place on the effectiveness of the principle that unfair terms are not binding on consumers. According to the ruling of the Court of Justice in the judgment of 21 December 2016, the latter principle is incompatible with the establishment of temporal limits on repayment in full of amounts overpaid by the consumer under an unfair term; but the principle is not absolute and is subject to limits linked to the sound administration of justice, such as *res judicata* or laying down reasonable time limits for bringing proceedings.

8.- In terms of the appeal that gives rise to the question referred, those doubts specifically concern whether, once the Court of Justice had delivered its judgment of 21 December 2016, a court hearing proceedings in which only the defendant bank has appealed, and the consumer has not appealed against the judgment,

should order repayment of all amounts received by the bank under the unfair term, thereby placing the appellant in a worse position.

OPERATIVE PART

[OR 12] THE COURT ORDERS: In the light of the above, the Civil Division of the Supreme Court orders that the following question be referred to the Court of Justice of the European Union for a preliminary ruling:

Does Article 6(1) of Directive 93/13/EEC preclude the application of the procedural principles of delimitation of the subject-matter of an action by the parties, correlation between the claims put forward in the action and the rulings contained in the operative part and prohibition of *reformatio in peius* that prevent the court seised of the appeal lodged by the bank against a judgment that placed a temporal limit on repayment of the amounts overpaid by the consumer under a 'floor clause' subsequently declared void from ordering repayment in full of the said overpayments, thereby placing the appellant in a worse position, because the consumer has not appealed against the said limit?

[…]

[…] [closing formulas and signature]