

Case C-347/23 [Zabitoń]ⁱ

Request for a preliminary ruling

Date lodged:

2 June 2023

Referring court:

Sąd Okręgowy w Warszawie (Poland)

Date of decision to refer:

8 May 2023

Applicants:

LB

JL

Defendant:

Getin Noble Bank S.A.

ORDER

...
The Sąd Okręgowy w Warszawie XXVIII Wydział Cywilny (Regional Court, Warsaw, Eighteenth Civil Division) ...

...

following consideration ... at the hearing

of the action brought by **LB and JL**

against **Getin Noble Bank S.A., established in Warsaw**

concerning a payment

ⁱ This case has been given a fictitious name which does not correspond to the real name of any of the parties to the proceedings.

makes the following order:

1. the following question is referred to the Court of Justice of the European Union, pursuant to Article 267 of the Treaty on the Functioning of the European Union:

Must Article 2(b) and (c) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as meaning that a natural person who concludes a mortgage loan agreement in order to raise funds to purchase a single property to be rented for remuneration (buy-to-let) is to be regarded as a ‘consumer’ within the meaning of that directive?

2. Proceedings are stayed pursuant to Article 177(1)(3¹) of the Code of Civil Procedure pending an answer to the question set out above.

...

GROUNDS ...

...

1 **[Details of the referring court]**

2 ...

3 **[Details of parties to the main proceedings and their representatives].**

4 ...

5 ...

6 **Subject matter of the dispute in the main proceedings and the relevant facts of the case**

7 By an application lodged on 27 December 2019 ... the applicants requested that the defendant be ordered to pay them the amount of PLN 764 938.17. The applicants claimed that they had concluded with the defendant bank a CHF-indexed mortgage loan agreement which contains unlawful terms, rendering the agreement invalid. Consequently, the applicants claim that the defendant bank should reimburse the equivalent of all loan instalments paid in the performance of that agreement.

8 In its defence, the defendant contended that the action should be dismissed, stating that the loan agreement concluded by the parties is not invalid and does not contain unlawful terms.

9 ... [T]he referring court established that the applicants, who ... reside in London, decided in 2008 to buy a residential property in Poland. The applicants did not intend to reside in that property. In order to carry out that plan, they used the

services of JP, a Polish property manager ... [, who] became the applicants' agent and represented them in the conclusion of the loan agreement, the purchase of the property, the rental of the property, and serving the tenants.

- 10 On 3 April 2008, the applicants submitted to Noble Bank S.A. in Warsaw (the bank of which the defendant is the legal successor) an application for a loan ... in CHF for a period of 360 months in order to acquire ... a property in Warsaw ... The application stated that the applicants are purchasing the property in order to rent it out for remuneration ('buy-to-let'). In addition, the applicants stated that they are married in a community of property and reside in London, and that the male applicant has completed secondary education and is a police officer and the female applicant has completed higher education and is a school principal.
- 11 Together with the loan application, the applicants signed a declaration in which they confirmed that they had familiarised themselves with the concept of currency risk (meaning that loan repayment instalments can change both downwards and upwards depending on fluctuations in the exchange rate of the currency in which the loan was taken out) and also with the model simulations of loan instalments ... and a historical chart of the CHF/PLN exchange rate for the period from 9 November 2004 to 2 July 2006.
- 12 On 20 June 2008, the applicants ... concluded a mortgage loan agreement ... indexed to CHF. ... [T]he bank granted the borrower a loan in the amount of PLN 710 407.07 indexed to the CHF exchange rate under the conditions set out in the loan agreement and the general conditions (Paragraph 2(1)). The loan was to be used to purchase of immovable property on the primary market ... (Paragraph 2(2)). The term of the loan was 360 months (Paragraph 2(3)). The loan was disbursed in PLN with simultaneous conversion on the day of disbursement into the currency stated in the loan agreement at the foreign exchange purchase rate in force at the bank on the day of disbursement (Paragraph 3(8)). Repayment of all obligations under the agreement was effected in zlotys to the loan account (Paragraph 4(2)). The method and date for fixing the exchange rate (on the basis of which repayment instalments and the current debt balance are calculated) and the conditions for updating the repayment schedule were set out in the general conditions (Paragraph 4(4)). The interest rate on the loan was variable and, as at the date the agreement was drawn up, amounted to 6.66% per annum, consisting of the sum of the applicable 3M LIBOR reference rate for CHF and the bank's fixed margin, which amounted to 3.95% (Paragraph 5(1)). The general conditions for loan agreements of Noble Bank S.A. in Warsaw ... formed an integral part of the loan agreement (Paragraph 13).
- 13 The general conditions for loan agreements of Noble Bank S.A. in Warsaw ... provided that the disbursement of a loan (or tranche thereof) denominated vis-à-vis a foreign currency was to be effected in PLN with simultaneous conversion of the disbursed amount on the date of disbursement into the currency stated in the loan agreement at the purchase [rate] of the currency concerned, as established by the bank in the current table of exchange rates (Paragraph 11(7)) and in the case of

a loan denominated in a foreign currency the loan repayment schedule is expressed in the currency of the loan, and the amount of a repayment instalment is calculated according to the foreign exchange selling rate in force at the bank, based on current exchange rate table in force at the bank as of the repayment date (Paragraph 12(7)) ...

- 14 The contents of neither the loan agreement nor the general conditions were negotiated. Following the conclusion of the loan agreement, the bank disbursed the loan ... The property was rented out for remuneration and the rental income was mainly used to repay the loan instalments. The entire time the applicants resided in London, where ... they carried on no commercial activity. The applicants did not reside in the property in Warsaw ... and the servicing of the property, the tenants and the loan was handled by JP on their behalf. On 21 December 2009, the parties concluded an annex to the loan agreement, allowing the applicants to repay the loan instalments directly in CHF, but despite this, all the amounts due under the agreement were paid in PLN (a total of PLN 764 938.17 in the period from 7 July 2008 to 10 May 2019). The applicants repaid all the amounts due under loan agreement on 18 October 2019, after which they sold the property at B. street in Warsaw.
- 15 **Relevant provisions of law**
- 16 **Provisions of Polish law**
- 17 **Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Law of 23 April 1964 establishing the Civil Code (Dz.U. No 16, item 93, as amended); ‘Civil Code’**
- 18 A ‘consumer’ is any natural person who concludes, with a seller or supplier, a legal transaction which has no direct link to that person’s business or professional activity (Article 22¹).
- 19 A ‘seller or supplier’ is a natural person, a legal person and an organisational unit as referred to in Article 331(1) carrying on in its own name a commercial or professional activity (Article 43¹).
- 20 The terms of a contract concluded with a consumer which have not been individually negotiated shall not be binding on the consumer if his or her rights and obligations are set forth in a way that is contrary to good practice and grossly infringes his interests (unlawful terms). This shall not apply to terms setting out the principal obligations to be performed by the parties, including price or remuneration, so long as they are worded clearly (Article 385¹(1)).
- 21 If a contractual term is not binding on the consumer pursuant to paragraph 1, the contract shall otherwise continue to be binding on the parties (Article 385¹(2)).
- 22 The compliance of contractual terms with good practice shall be assessed according to the state of affairs at the time of conclusion of the contract, taking into account its content, the circumstances in which it was concluded and also

other contracts connected with the contract which contains the provisions being assessed (Article 385²).

23 Provisions of European Union law

24 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29 – Special edition in Polish, Chapter 15, Volume 2, p. 288); ‘Directive 93/13’

25 For the purposes of this Directive: (a) ‘unfair terms’ means the contractual terms defined in Article 3; (b) ‘consumer’ means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession; (c) ‘seller or supplier’ means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned (Article 2).

26 Reasoning in the request for a preliminary ruling

27 The need to refer the present question has arisen in connection with the requirement to interpret European Union law in order to classify correctly (as a consumer or a seller or supplier) a borrower who buys a property with a view to renting it out. That issue is of key importance to the resolution of this case since it determines whether or not the provisions of Directive 93/13 will apply in this case. If the applicants are found to be consumers, it may be concluded that the terms of the mortgage loan agreement providing for indexation to the CHF exchange rate (Paragraph 2(1) of the agreement) and the fixing of the CHF/PLN exchange rate on the basis of a unilateral decision of the bank (Paragraph 3(8) of the agreement and Paragraphs 11(7) and 12(7) of the general conditions) are unfair. Those terms were not individually negotiated and at the same time define the main subject matter of the contract, were not drafted in plain, intelligible language, and are contrary to the requirement of good faith, causing a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the applicants. That assessment arises from the fact that, as a result of the conclusion of the loan agreement, the applicants were exposed to an unlimited exchange rate risk, without simultaneously being informed of the potential effects of an unfavourable change in the CHF/PLN exchange rate. Although the applicants were presented with a historical chart of the CHF/PLN rate and a simulation of the change in instalments in the event of an increase in that rate, in both cases the presented exchange rate fluctuations were insignificant. Moreover, both CHF and PLN were foreign currencies for the applicants as they earned in GBP, and none of the simulations and charts presented by the bank contained any reference to that currency. In addition, the terms of the loan agreement and the general conditions allowed the bank to set the level of the CHF/PLN exchange rate and it was therefore able to affect directly the amount of the payments made by the applicants. Declaring those terms of the loan agreement unfair and thus not binding on the applicants means that the loan agreement could not be in force and

was therefore invalid, and consequently all the loan instalments paid by the applicants constituted an undue performance which should be reimbursed to the applicants, as requested in the in the application. Thus, declaring the applicants to be consumers constitutes grounds for granting the action, whereas finding that they were not consumers when concluding the agreement will mean that the provisions of Directive 93/13, and consequently also the provisions of Polish law on unlawful terms, will not apply in this case, and therefore the action should be dismissed.

28 It is by reference to the capacity of the contracting parties, according to whether or not they are acting for purposes relating to their trade, business or profession, that Directive 93/13 defines the contracts to which it applies.¹ As regards the concept of ‘consumer’, within the meaning of Article 2(b) of Directive 93/13, it is objective in nature and is distinct from the concrete knowledge the person in question may have, or from the information that person actually has.² The concept of ‘consumer’ must be assessed by reference to a functional criterion, consisting in an assessment of whether the contractual relation at issue has arisen in the course of activities outside a trade, business or profession.³ The situation in which a natural person uses the apartment constituting his or her personal home for professional purposes also, such as in the context of salaried teleworking or in the exercise of a liberal profession, cannot be excluded from the scope of the concept of ‘consumer’.⁴ The concept of ‘seller or supplier’, within the meaning of

¹ See:

- judgment of the Court of Justice of 27 October 2022, *S.V. (Immeuble en copropriété)*, [C-485/21], paragraph 24,
- judgment of the Court of Justice of 21 March 2019, *Pouvin and Dijoux*, C-590/17, paragraph 23,
- judgment of the Court of Justice of 17 May 2018, *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen*, C-147/16, paragraph 53.

² See:

- judgment of the Court of Justice of 21 March 2019, *Pouvin and Dijoux*, C-590/17, paragraph 24,
- judgment of the Court of Justice of 3 September 2015, *Costea*, C-110/14, paragraph 21,

³ See:

- judgment of the Court of Justice of 27 October 2022, *S.V. (Immeuble en copropriété)*, [C-485/21], paragraph 25,
- order of the Court of Justice of 14 September 2016, *Dumitraş*, C-534/15, paragraph 32,
- order of the Court of Justice of 19 November 2015, C-74/15, paragraph 27,

⁴ See:

- judgment of the Court of Justice of 27 October 2022, *S.V. (Immeuble en copropriété)*, [C-485/21], paragraph 32,

Article 2(c) of Directive 93/13, is a functional concept, requiring determination of whether the specific contractual relationship is amongst the activities that a person provides in the course of his trade.⁵ As with the concept of ‘consumer’, within the meaning of Article 2(b) of Directive 93/13, that of ‘seller or supplier’, within the meaning of Article 2(c) of that directive is objective in nature and does not depend on whether the professional decides to act in the context of its main activity or a secondary and ancillary one.⁶

- 29 It is apparent from the findings of fact in the present case that the applicants took out a loan with a bank in order to raise funds to purchase a property which was [to be] rented out. The applicants resided in London throughout, ... they did not reside and did not intend to reside at that property as they had no connection at all with Warsaw. All the formalities relating to the loan and the purchase and the renting out and the subsequent sale of the property were handled on the applicants’ behalf by a property manager employed by them. Renting the property out was the applicants’ objective from the outset, as evidenced in particular by the loan application, in which the applicants stated that they intended to use the funds from the loan to purchase a rental property from a developer (‘buy-to-let’). Thus, the applicants’ objective was not to meet their own housing needs, but to [grow] their assets. Acquiring funds for the purchase of a rental property therefore constituted a kind of investment. At the same time, however, the applicants were not engaged professionally in commercial activity, but were employed under employment contracts, and the rental income was intended to be an additional source of income for them. The applicants did not rent out any properties other than the dwelling located in Warsaw ...
- 30 The referring court is uncertain whether, in the situation described, there are grounds for finding that the borrowers can be regarded as a ‘seller or supplier’ within the meaning of Article 2(c) of Directive 93/13. The issue here is the assessment whether seeking to derive income from the ‘private’ rental of property constitutes acting for purposes relating to someone’s business, trade or profession. It is clear that a natural person who takes out a loan in order to acquire several or multiple rental properties is acting for purposes relating to his or her business since an activity on such a large scale requires organisation characteristic of businesses. However, an appropriate organisation of activity is also required to acquire a single rental property (in the present case, the applicants employed a

⁵ See:

- judgment of the Court of Justice of 21 March 2019, *Pouvin and Dijoux*, C-590/17, paragraph 36,

- judgment of the Court of Justice of 17 May 2018, *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen*, C-147/16, paragraph 55,

⁶ See:

- judgment of the Court of Justice of 21 March 2019, *Pouvin and Dijoux*, C-590/17, paragraph 41.

professional property manager to deal with all the formalities related to the loan agreement and the purchase and rental of the property, and the servicing of the tenants). In addition, renting out immovable property for a consideration, both on a large and small scale, shares the feature of making profit, which is the main objective of engaging in business.

- 31 On the other hand, there are, however, strong arguments in support of the position that the acquisition of a loan for the purpose of purchasing a single rental property constitutes acting for purposes which are outside someone's trade, business or profession and that, consequently, such a borrower must be regarded as a consumer within the meaning of Article 2(b) of Directive 93/13. Although the purchase property of a property for rent requires a certain amount of organisation, given the small scale of such an activity it may be assumed that it is not characteristic of engaging in business since even micro-enterprises engage in large-scale activities. In addition, while renting out property implies, by its very nature, realising income, with a single property that income is not significant and remains considerably lower than that of the vast majority of businesses operating on the market.
- 32 On the basis of the facts of this case, it also appears to be relevant that, at the time of the conclusion of the loan agreement, both applicants were employed under employment contracts, were not professionally engaged in property management, and had no training in that field. Consequently, renting out the property did not have an important professional purpose for them, nor was it intended to be their main source of income. For them, the rental income was intended to be a form of investment, that is to say a way of growing their savings as an alternative to buying shares, bonds or fund units, or setting up [deposits] or savings accounts in banks. There is no doubt that the latter means of investing savings are not related to business, which would appear to warrant a similar assessment to be made as regards small-scale property rental too. Lastly, declaring borrowers in a situation such as the present to be consumers would appear better to achieve the objective of Directive 93/13 of protecting consumers against unfair terms in contracts, particularly given that investment in rental property is a popular way for consumers to grow their savings which, in addition, has a social benefit in that it makes it possible to meet the housing needs of people who do not have property of their own and are unable to buy it themselves.

33 Question referred for a preliminary ruling

34 [repetition of the question referred] ...

35 In the light of the circumstances set out above, the referring court proposes that the above question be answered in the affirmative.

36 Staying of main proceedings

37 ...