

Anonymised version

Translation

C-35/22 – 1

Case C-35/22

Request for a preliminary ruling

Date lodged:

17 January 2022

Referring court:

Audiencia Provincial de Málaga (Spain)

Date of the decision to refer:

14 December 2021

Appellant:

Cajasur Banco, S. A.

Respondents:

JO

IM

SECCION N.º 6 DE LA AUDIENCIA PROVINCIAL DE

MÁLAGA

(SECTION No 6 OF THE PROVINCIAL COURT, MÁLAGA)

[...]

[...] [Identification of the referring court and of the parties and their representatives]

I. FACTUAL BACKGROUND

FIRST: By judgment of 2 March 2020, the *Juzgado de Primera Instancia 18 bis de Málaga* (Court of First Instance 18a, Málaga), in proceedings [...], ruled as follows:

'In the light of the foregoing, I UPHOLD the ACTION brought by MS IM AND MR JO [...] FOR A DECLARATION AS TO THE INVALIDITY OF GENERAL CONDITIONS OF CONTRACT AND RECOVERY OF SUMS OWED against the institution CAJASUR BANCO, S. A., SOCIEDAD UNIPERSONAL (SINGLE-MEMBER COMPANY) [...] and, in consequence, make the following order:

- *I DECLARE the 'costs clause' contained in the MORTGAGE LOAN Instrument between the parties —more specifically, the fifth clause with respect to costs attendant upon the mortgage — VOID,*
- *I ORDER the defendant to PAY to the applicant the SUM of EUR 488.69 by way of [compensation of] notarial fees (50% of the sum originally claimed), agency fees (50% of the sum originally claimed) and all registration fees with the exception of stamp duty, in the manner described, plus statutory interest under Article 1896 of the Código Civil (Spanish Civil Code), that is to say from the date of the payments made, and without prejudice to the provisions contained in Article 576 of the Ley de Enjuiciamiento Civil (Spanish Code of Civil Procedure).*
- *I ORDER the defendant to REMOVE the contractual stipulation described above.*
- *I DECLARE that the contract shall otherwise continue in being.*
- *I ORDER the defendant to pay the COSTS'.*

SECOND: An appeal lodged against that judgment was scheduled for deliberation, voting and adjudication on 8 February 2022.

THIRD: That appeal is directed exclusively against the order made in the judgment as to the imposition of costs on the defendant in accordance with Article 395 of the LEC-1/2000 [(Code of Civil Procedure)].

FOURTH: The parties had previously been given notice to express their views on the advisability of making a reference for a preliminary ruling to the Court of Justice of the European Union in the light of the recent case-law of the Tribunal Supremo (Spanish Supreme Court) as expressed, inter alia, in the judgment of the Supreme Court, Civil Chamber, First Section, of 8 June 2021 (ROJ (Official Case-Law Repository): STS 2295/2021), judgment of the Supreme Court of 22 September 2021— ROJ:STS 3421/2021 and judgment the Supreme Court of 22 September 2021 – ROJ:STS 3413/2021.

FIFTH: [...] [The referring court decides to make the present reference for a preliminary ruling]

II. LEGAL GROUNDS

First: Definition of the subject matter of the appeal.

- 1 These proceedings are based on the declared invalidity on grounds of unfairness of a clause (costs clause) contained in the instrument creating a loan secured by mortgage that was concluded between the parties, the fact of one of those parties (the borrower) being a consumer rendering applicable Directive 93/13/EEC and the Spanish legislation on the protection and defence of consumers in the form of [Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias (Royal Legislative Decree 1/2007 of 16 November 2007 approving the recast text of the General Law for the Defence of Consumers and Users and other supplementary laws)] and [Ley 7/1998, de 13 de abril, sobre condiciones generales de la contratación (Law 7/1998 of 13 April 1998 on General Conditions of Contract)].
- 2 After the consumer[s] had taken legal action, the defendant acquiesced to the claim, albeit on the basis of specific sums which were later accepted [by the applicants], that is to say, on the basis of acquiescence to unfairness but not entirely to the sums falling to be paid as a result of that unfairness. The judgment sets out that acquiescence and the sums to which the defendant is said to have acquiesced.
- 3 The judgment nonetheless ordered the defendant to pay the costs on the ground that, notwithstanding the acquiescence, the action had been essentially upheld.
- 4 Article 395 of the Code of Civil Procedure, which governs [civil] proceedings in Spain, provides as follows:

‘Article 395. Order as to costs in the event of acquiescence.

1. A defendant acquiescing to the action before contesting it shall not be required to pay the costs unless the court finds, on a duly reasoned basis, that he has acted in bad faith.

Bad faith shall in any event be deemed to be present if, prior to any legal action, the defendant has received a due and substantiated demand for payment, mediation proceedings have been initiated or a request for conciliation has been made to him.

2. If acquiescence takes place after the statement of defence has been lodged, paragraph 1 of the preceding article shall apply.’

Second: Recent case-law of the Tribunal Supremo (Supreme Court) in Spain.

- 5 As regards acquiescence in specific matters relating to general conditions of contract, the Spanish Supreme Court ruled recently in the following judgments: judgment of the Supreme Court, Civil Chamber, First Section, of 8 June 2021 (ROJ: STS 2295/2021), judgment of the Supreme Court of 22 September 2021 – ROJ:STS 3421/2021 and judgment of the Supreme Court of 22 September 2021 – ROJ: STS 3413/2021.
- 6 The first of those judgments, of 8 June 2021, relates to the imposition of costs in a case where there had been a prior demand for payment issued to the defendant (Article 395(1) of the Civil Code) and refers to the Supreme Court's own judgment 131/2021 of 9 March 2021. In interpreting circumstances in which a prior demand for payment had been issued to the financial institution but legal action was taken before the time limit for payment laid down in the demand had expired and the financial institution subsequently acquiesced to the action, the Supreme Court held that Article 395 of the Code of Civil Procedure was to be interpreted as meaning that the defendant did not act in bad faith and was not therefore required to pay the costs.
- 7 The second judgment, of 22 September 2021, sets out the case-law applicable to the circumstances provided for in Article 395 in the same way as the other judgments under consideration:

‘As this court stated in its judgment 131/2021 of 9 March 2021, one of the purposes of the provision reproduced is to promote out-of-court dispute settlement. This encourages potential applicants to seek to settle disputes without recourse to the courts, inasmuch as, in the case where an applicant has attempted to settle a dispute out of court before taking legal action but has not obtained a satisfactory response to his claim, the party with whom the applicant has the dispute will, if he acquiesces to the action, be deemed to have acted in bad faith and will be ordered to pay the costs. Conversely, an applicant who takes legal action without having attempted to secure an out-of-court settlement beforehand by issuing a “due and substantiated demand for payment”, initiating mediation proceedings or making a request for conciliation runs the risk of having to pay his own costs if the defendant acquiesces to the action before contesting it, since, in order to promote acquiescence (which expedites dispute settlement and relieves the justice system of the need to devote resources to disputes that do not require them), the law exempts a defendant who acquiesces without acting in bad faith from the requirement to pay costs. In this way, the potential defendant too is encouraged to settle the dispute out of court, since, if he does not comply with the out-of-court demand for payment issued to him by the future applicant and the latter is compelled to bring an action before the courts, the defendant will, if he then acquiesces to the action, be ordered to pay the costs on the ground that he acted in bad faith. 4.- Article 395 of the Code of Civil Procedure, applicable for temporal reasons, is not contrary to EU law, even when applied in disputes concerning unfair terms. The principle of consumer protection, one aspect of

which is the effective protection against unfair terms provided for in Directive 93/13/EEC, must be reconciled with other principles of EU law, such as ensuring the sound administration of justice, essential to the effectiveness of the principle of the rule of law that is one of the pillars of the EU legal order. 5.- One aspect of the principle of the sound administration of justice is to ensure that the ever limited resources available to the courts are used to dispose of those cases which inevitably require a judicial settlement because an out-of-court settlement cannot be found. In this way, cases which can be settled out of court will not take up time and resources that must be devoted to other cases in which the intervention of the judiciary is essential. 6.- This, moreover, operates to the benefit of the consumer too, since litigation is a slow and expensive way of settling the disputes in which consumers become involved, and one that is not without its risks (missing of deadlines, limitation of proceedings, etc.). 7.- These are the reasons behind the EU's firm commitment to promoting out-of-court dispute settlement, including for consumer disputes, that is reflected in provisions such as Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes, or Directive 2013/11/EU of the European Parliament and of the Council, also of 21 May 2013, on alternative dispute resolution for consumer disputes'.

- 8 It is this judgment which clearly explains that an applicant who takes legal action without first having attempted to secure an out-of-court settlement by issuing a 'due and substantiated demand for payment', initiating mediation proceedings or making a request for conciliation runs the risk of having to pay his own costs if the defendant acquiesces to the action before contesting it. In other words, the imposition of costs in proceedings will be determined as follows in the event of acquiescence: 1. If a demand for payment was issued to the bank and the latter failed to respond, the bank might have to pay the costs of the recovery proceedings if legal action is taken against it. 2. If a demand for payment was issued to the bank but it was not given enough time to respond, it will not have to pay the costs of the subsequent recovery proceedings. 3. If a demand for payment was not issued to the bank and the applicant proceeds directly to taking legal action, the bank will not have to pay the costs of the recovery proceedings if it acquiesces.
- 9 The third judgment cited consolidates the regime described above.

Third: Assessment of the Chamber and questions to be referred.

- 10 It would seem to follow from all of the foregoing that it is the settled case-law of the Spanish Supreme Court that the imposition of costs on the defendant (a financial institution) in cases concerning general conditions of contract is to be determined on the basis of the existence or otherwise of an attempt to recover the amount owed from that institution before legal action is taken. Thus, if there has been a prior attempt to recover the sums owed but the financial institution has not settled the claim, and the applicant subsequently takes legal action, the financial institution will have to pay the costs even if it acquiesces. If, however, there has

been no prior attempt to recover the amount owed and, following the institution of legal proceedings, the financial institution acquiesces to the action, it will not have not pay the costs because it did not act in bad faith.

- 11 The foregoing might adversely affect, in the first place, the right to effective judicial protection (Article 47 of the Charter of Fundamental Rights of the European Union 2000/C-364/01) in making the right to claim and obtain compensation thereof conditional upon compulsory prior out-of-court action. Thus, in order to be able to obtain full compensation, the consumer must of necessity take prior out-of-court action, and cannot proceed directly to legal action, since, in the event of acquiescence, the costs will not be refunded to him, notwithstanding that the case involves unfair non-binding terms. The CJEU has stated (Case C-243/08, *Pannon GSM*, paragraph 28) that the non-binding nature of a contract term cannot depend on whether or when a consumer raised the matter of the unfairness of a particular contract term or challenged its validity, as it confirmed when finding that ‘... Article 6(1) of the Directive must be interpreted as meaning that an unfair contract term is not binding on the consumer, and it is not necessary, in that regard, for that consumer to have successfully contested the validity of such a term beforehand’.
- 12 Likewise, the interpretation given might adversely affect the consumer’s right to full compensation, since it compels him to issue a demand for payment prior to taking legal action as a condition of such redress (Article 6(1) of Directive 93/13/EEC). The aforementioned judgment of the Spanish Supreme Court of 8 June 2021 states: ‘The requirement that the consumer must first have issued an out-of-court demand for payment under conditions and within a timeframe such as to enable the party to whom the demand is addressed to give a satisfactory response, in order not to have to bear his own costs in the event that the defendant should acquiesce to the action, does not constitute a disproportionate obstacle to the effectiveness of Directive 93/13/EEC. In particular, that requirement does not stop the consumer from being able to remove himself from the binding effect of the unfair term without having to bear the costs of his lawyer and legal representative, since it does not make it impossible in practice or excessively difficult to exercise the rights which the Directive confers on consumers, this being a requirement that is easy to comply with’.
- 13 Having a bearing on the foregoing is the fact that a clause similar to that under consideration was declared void by judgment of the Supreme Court of 23 December 2015, and, although the Supreme Court’s definition of the consequences of such invalidity has evolved over the course of its case-law since then, that case-law has at least in part become settled for a number of years now (to the extent, for example, that the bank must assume all of the registration costs and half of the notarial fees). That being so, the approach taken by lenders is not to reimburse consumers in the event of a term known to be void but to wait for them to take legal action (and, as a result, to pay their lawyers’ and legal representatives’ fees) before acquiescing, thereby avoiding the requirement to pay the costs of the proceedings, in the absence of a prior demand for payment. This

too would run counter to the principle of full compensation laid down in the judgment of the CJEU of 21 December 2016: ‘It follows from the foregoing considerations that Article 6(1) of Directive 93/13 must be interpreted as meaning that a contractual term held to be unfair must be regarded, in principle, as never having existed, so that it cannot have any effect on the consumer. Therefore, the determination by a court that such a term is unfair must, in principle, have the consequence of restoring the consumer to the legal and factual situation that he would have been in if that term had not existed’.

- 14 It should be noted that, in accordance with the relevant provision of domestic law, Article 395 of the aforementioned Code of Civil Procedure, bad faith is to be deemed to be present if, before legal action is taken, a due and substantiated demand for payment has been issued to the defendant; this does not mean, however, that bad faith may arise as a result of other stances on the part of the defendant, such as being aware of the unfairness of a term but refraining from taking proactive steps to eliminate its consequences and satisfy the consumer’s claim until such time as the consumer takes legal action against the defendant, in the knowledge that, in the absence of an out-of-court demand for payment, it will not be compelled to pay the costs of the proceedings, or even waiting to receive the out-of-court demand for payment before restoring the position to that prevailing before the unfairness caused by a term known to be void.

- 15 [...]

[...] [Verbatim transcription of the questions referred for a preliminary ruling as set out below]

THIS COURT HEREBY DECIDES TO MAKE A REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION FOR A PRELIMINARY RULING on the following questions:

1. Is it contrary to the right to effective judicial protection and Article 47 of the Charter of Fundamental Rights of the European Union to require that, before instituting legal proceedings, the consumer must first have issued an out-of-court demand for payment in order for the declaration as to the invalidity of a particular general condition of contract on grounds of unfairness to give rise to all of the compensatory effects (including the costs of the legal proceedings) associated with such invalidity, pursuant to Article 6(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts?

2. Is it compatible with the right to full compensation and the effectiveness of European Union law and Article 6(1) of the aforementioned directive to make the imposition of costs (including legal fees) subject to a condition based on the existence of a prior out-of-court demand for payment issued by the consumer to the financial institution with a view to the removal of that term?

[...]

[...] [Stay of the national proceedings and final procedural formulae]

WORKING DOCUMENT