Case C-324/23 [Myszak] [1]

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

25 May 2023

Referring court:

Sąd Okręgowy w Warszawie (Poland)

Date of the decision to refer:

26 October 2022

Applicants:

OF

EI

RI

Defendant:

Getin Noble Bank S.A.

Subject matter of the main proceedings

The applicants, who are consumers, concluded a mortgage loan agreement indexed to Swiss francs (CHF) with the defendant bank, and to date have not paid all the agreed instalments. They requested a declaration that that agreement contains unfair terms, a declaration that the agreement is invalid, and an order that the bank repay the instalments paid.

Special resolution was declared in relation to the defendant bank, and the applicants therefore requested that claims be secured by suspending further instalments of the loan, which could no longer be recovered on account of the restructuring and expected insolvency of the defendant bank.

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

Subject matter and legal basis of the request

Compatibility with Articles 6(1) and 7(1) of Council Directive 93/13/EEC and Article 70(1) and (4) of Directive 2014/59/EU of the European Parliament and of the Council of national legislation under which it is not permissible, in relation to a bank declared to be under special resolution, to grant a consumer's application for an interim measure (securing of the action) to suspend, during the course of the court proceedings, the obligation to pay the loan instalments under a loan agreement which is likely to be declared invalid by a court as a result of the removal of unfair contractual terms from it, on the sole ground that that bank has been put under special resolution

Question referred for a preliminary ruling

Must Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, in the light of the principles of effectiveness and proportionality, and also Articles 34(1)(b) and (g) and 70(1) and (4) of Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms, be interpreted as precluding national legislation under which, in relation to a bank against which special resolution has been initiated, it is not permissible to grant a consumer's application for an interim measure (securing of the action) suspending, during the course of the court proceedings, the obligation to pay the capital and interest instalments under the loan agreement, which is likely to be declared invalid by a court as a result of the removal of unfair contractual terms from it, on the sole ground that that bank has been put under special resolution?

Provisions of European Union law and case-law of the Court of Justice cited

Treaty on the Functioning of the European Union: Article 169(1).

Charter of Fundamental Rights of the European Union: Article 38.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts: fourth, twenty-first and twenty-fourth recitals, and Articles 6(1) and 7(1).

Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council: recitals 50 and 130, and Articles 34, and 70.

Judgments of the Court of Justice of:

21 December 2016, *Francisco Gutierrez Naranjo*, C-154/15, C-307/15 and C-308/15, ECLI:EU:C:2016:980,

14 June 2012, *Banco Español de Credito SA*, C-618/10, ECLI:EU:C:2012:349,

19 June 1990, *Factortame*, C-213/89, EU:C:1990:257,

11 January 2001, *Siples*, C-226/99, EU:C:2001:14,

13 March 2007, *Unibet*, C-432/05, ECLI:EU:C:2007:163,

10 September 2014, *Kušionova*, C-34/13, EU:C:2014:2189,

14 March 2013, *Aziz*, C-415/11, EU:C:2013:164,

26 June 2019, *Kuhar*, C-407/18, EU:C:1990:257,

5 May 2022, *Banco Santander SA* v *J.A.C.*, C-410/20, ECLI:EU:C:2022:351.

Order of 26 October 2016, *Ismael Fernandez Oliva*, Joined Cases C-568/14 to C-570/14, EU:C:2016:828.

Opinion of Advocate General Kokott delivered on 19 November 2020, *Banco de Portugal, Fondo de Resolución, Novo Banco SA* v *VR*, C-504/19, ECLI:EU:C:2020:943.

Provisions of national law cited

Article 385[1] of the Ustawa z 23 kwietnia 1964 roku Kodeks cywilny (Law of 23 April 1964 establishing the Civil Code), 'the Civil Code':

1. 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 or her interests (unlawful contractual terms). This provision shall not apply to terms setting out the parties' principal obligations, including price or remuneration, provided that they are worded clearly.

2. If a term of that contract is not binding on the consumer pursuant to paragraph 1, the other terms of the contract shall otherwise continue to be binding on the parties.

3. The terms of a contract which have not been individually negotiated are those contractual terms over whose content the consumer has had no actual influence. They include, in particular, contractual terms taken from a standard contract proposed to that consumer by his or her co-contracting party.

4. Whosoever alleges that a term has been individually negotiated shall have the burden of proving that allegation.'

Article 405 of the Civil Code:

'Any person who, without legal basis, has obtained a pecuniary benefit at the expense of another person shall be required to return that benefit in kind and, where that is not possible, to make good the value thereof.'

Article 410 of the Civil Code:

'1. The provisions of the preceding articles shall apply in particular to undue performance.

2. A performance shall be undue if the person who rendered it was not under an obligation to render it or was not under an obligation to render it to the person to whom it was rendered, if the basis for the performance has ceased to exist, if the objective of the performance has not been achieved or if the legal act requiring that same performance was invalid and has not become valid since the performance was rendered.'

Article 189 of Ustawa z 17 listopada 1964 roku Kodeks postępowania cywilnego (Law of 17 November 1964 establishing the Code of Civil Procedure), 'the Code of Civil Procedure'.

Article 730^1 of the Code of Civil Procedure:

1. Any party to the proceedings may request preventive measures provided that it demonstrates the prima facie existence of its claim and of an interest in seeking those measures.

2. The interest in seeking the grant of preventive measures exists where the failure to grant those measures would prevent or seriously impede the enforcement of the forthcoming judgment in the case concerned or would otherwise prevent or seriously impede the achievement of the purpose of the proceedings in that case.

2^1 […]. Sufficient prima facie evidence of an interest in seeking the grant of preventive measures shall be deemed to exist where the person seeking such measures is an applicant pursuing a payment due in connection with a commercial transaction within the meaning of the Law of 8 March 2013 on counteracting excessive delays in commercial transactions, provided that the value of that transaction does not exceed seventy-five thousand zlotys, and the amount claimed has not been paid and at least three months have elapsed from the date of expiry of the time limit for the payment thereof.

3. When ruling on a request for preventive measures, the court must take into account the interests of the parties to the proceedings so as to guarantee the

beneficiary adequate legal protection and not oblige the debtor more than necessary.'

Article 731 of the Code of Civil Procedure,

Article 755 of the Code of Civil Procedure

1. Where a request for the grant of preventive measures does not relate to pecuniary claims, the court shall order the protective measures it considers appropriate in the circumstances of the case, without excluding the grant of protective measures provided for in respect of pecuniary claims. In particular, the court may:

(1) fix the rights and obligations of the parties or participants in the enforcement proceedings concerned for the duration thereof;

(2) prohibit the disposal of the assets or rights concerned by those proceedings;

(3) suspend those proceedings or any other proceedings for the enforcement of the decision concerned; ... .'

Article 146 of the Ustawa z 28 lutego 2003 r. Prawo upadłościowe (Law of 28 February 2003 on insolvency)

Article 135 of the Ustawa z 10 czerwca 2016 r. o Bankowym Funduszu Gwarancyjnym, systemie gwarantowania depozytów oraz przymusowej restrukturyzacji (Law of 10 June 2016 on the Bank Guarantee Fund, the deposit guarantee scheme and special resolution), 'Law on the Bank Guarantee Fund', in particular paragraph 4:

'4. During the period of special resolution, it is not permissible to initiate enforcement proceedings and proceedings to secure claims against the entity undergoing restructuring.'

Succinct presentation of the facts and procedure in the main proceedings

1 In 2007, OF, together with his parents RI and EI, concluded a CHF-indexed mortgage loan agreement with the defendant Getin Noble Bank SA in Warsaw for an amount of PLN 185 375.71 (approximately EUR 40 000) for a period of 360 months. Under Paragraph 9(2) of the mortgage loan agreement, the amount of the loan on the date of disbursement was to be converted into CHF at the purchase rate set out in the bank's table. Under Paragraph 10(3) of the agreement, loan instalments (calculated in CHF) were to be converted into PLN at the sale rate set out in the bank's table on the due date.

2 The loan was intended to cover part of the purchase price of immovable property and the costs related to taking out the loan. The loan agreement provided that the principal would be converted into Swiss francs (CHF) at the purchase rate set by

the bank, whilst the instalments – calculated in francs – would be paid at the sale rate also set by the bank. The applicants were provided with information on the impact of variations in the interest and exchange rates in the form of a table containing a comparison of the amount of the loan instalments assuming a 20% increase in the amount of the loan and in the event of a 9.21% increase in the exchange rate (which corresponded to the difference between the highest and lowest exchange rate over the last year).

3 On 9 September 2022, the Bank Guarantee Fund, acting pursuant to the Law on the Bank Guarantee Fund, adopted a decision to initiate special resolution in relation to the defendant bank using a bridge bank set up. Pursuant to the decision, a new entity named VELO Bank S.A. was established, to which almost all rights and obligations of the defendant Getin Noble Bank S.A. were transferred, with the exception, however, of in-rem rights arising from de facto, de jure or unlawful acts relating to credit and loan agreements denominated in Swiss francs (CHF) or indexed to the exchange rate of Swiss franc (CHF), and claims arising from those in-rem rights, including those covered by civil and administrative proceedings, irrespective of the date on which they were raised. This means that the bank's assets consist mainly of claims arising from loan agreements which, like the applicants' agreement, contain unfair contractual terms and may also be challenged retrospectively. That decision is the subject of a question referred for a preliminary ruling by another court in Case C-118/23.

4 It appears from media statements of the Bank Guarantee Fund that an application for insolvency of the defendant bank and its winding up will be submitted within a year.

The essential arguments of the parties in the main proceedings

5 The applicants (borrowers) brought an action before this court and are now seeking a declaration that the agreement in question is invalid and the award of PLN 48 352.97 and CHF 27 171.82 (which at current exchange rates corresponds to approximately 95% of the capital drawn down), plus statutory default interest and legal costs. The applicants stated that the loan agreement contained unlawful contractual terms concerning the indexation of the loan amount to a foreign currency. The amount claimed represents the sum of the payments made by the applicants, constituting an undue performance received by the defendant. In the alternative, the applicants requested the possibility of continuing the agreement, once the unfair terms had been removed from it.

6 The defendant bank sought dismissal of the action and the award of legal costs. The defendant raised formal objections and denied that the terms of the contract were unlawful. It submitted documents to confirm the lawfulness of those terms. It also argued that the bank had a claim for repayment of the entire capital drawn down and for remuneration for the use of that capital.

7 Following commencement of the restructuring, the applicants requested that the claim for a declaration of invalidity be secured by fixing the rights and obligations of the parties to the proceedings for the duration of the thereof by:

i. suspending the obligation to pay the loan instalments in the amounts and on the dates specified in the agreement for the period from the lodging of the action until the final conclusion of the proceedings,

ii. prohibiting the defendant from issuing a notice of termination,

iii. prohibiting the defendant from publishing information with the Biuro Informacji Gospodarczej (Economic Information Office) about the failure by the applicants to make payments on the loan in the period from the grant of the security until the conclusion of the proceedings.

Succinct presentation of the reasoning in the request for a preliminary ruling

8 The referring court has already referred a question for a preliminary ruling in a similar case concerning the general possibility of securing claims by suspending the performance of a loan agreement, and the arguments raised therein remain valid (C-287/22). In particular, in the view of the referring court it is permissible to grant security by suspending the obligation to pay loan instalments. The fundamental difference in the facts of this case lies in the declaration of special restoration in relation to the defendant bank, which has fundamental consequences for the permissibility of instituting proceedings to secure claims and continuing proceedings which have already commenced.

9 The Court of Justice has, on a number of occasions, made general statements on the need for national courts to be able to adopt interim measures for the full effectiveness of court decisions concerning the protection of rights granted by EU law (see judgment of 19 June 1990, *Factortame*, C-213/89, EU:C:1990:257, paragraph 21; judgment of 11 January 2001, *Siples*, C-226/99, EU:C:2001:14, paragraph 19; and judgment of 13 March 2007, *Unibet*, C-432/05, paragraph 67).

10 The referring court [starts] from the premiss that the inclusion in the agreement of unlawful contractual terms placing an exchange rate risk on the consumer and containing a reference to exchange rates set by the bank means that the overall agreement cannot continue to be valid after those unfair terms have been removed from it, which amounts to the invalidity thereof under national law (Article 385^1 of the Civil Code). Consequently, each party to an agreement which has been declared invalid will have a claim against the other party for repayment of the sums paid (Article 410 of the Civil Code), and those claims may also be settled by offsetting.

11 Article 385^1 of the Civil Code implements Directive 93/13 in Polish law. Therefore, that provision should be interpreted in a way that ensures the maximum effective attainment of the objectives of that directive. As the Court of Justice has

already pointed out, 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. The obligation for the national court to exclude an unfair contract term imposing the payment of amounts that prove not to be due entails, in principle, a corresponding restitutory effect in respect of those same amounts (see judgment of 21 December 2016, *Francisco Gutierrez Naranjo*, C-154/15, C-307/15 and C-308/15, ECLI:EU:C:2016:980, paragraphs 61 and 62).

12 Where the removal of unlawful contractual terms involves a declaration of invalidity of the loan agreement, the restitutory effect consists in a claim arising against the bank for the repayment of sums paid under the loan agreement. The consumer thus becomes a creditor of the bank and may exercise his or her claim by way of enforcement (after obtaining a court judgment) or by way of offsetting against the bank's claim for repayment of the capital drawn down. The declaration of special resolution rules out the possibility of enforcement against the bank and therefore the only effective means of producing the restitutory effect becomes offsetting. If, however, the consumer has paid the bank an amount greater than the capital drawn down, he or she is deprived of that possibility as regards the overpaid amount.

13 In the view of the referring court, the duration of the loan agreement and the specific nature of the situation following a declaration of invalidity of such an agreement raise doubts as to the relationship between Directive 93/13 and Directive 2014/59. Directive 2014/59 does not lay down special rights for consumers and therefore it is necessary to consider that in a situation of special resolution it is permissible to limit the rights of consumers as creditors of the bank. The principle of Directive 2014/59 is not to make the position of creditors less favourable than it is in ordinary insolvency proceedings and to treat creditors of the same category in the same way. Therefore, depriving the consumer of an effective possibility of claiming repayment of sums paid in excess of the amount of the capital drawn down – although disadvantageous to the consumer – appears to meet the objectives of Directive 2014/59 since in that respect consumers are treated in the same way as other creditors.

14 However, the amount of the bank's liabilities to other creditors is limited by the date on which special restoration is declared. After that date, the amount of claims against the bank (for example, arising from bonds that have been written down) will not increase and therefore the negative effects of the restructuring (losses) related to the reduced possibility of satisfaction, or even to the writing down of the liability, will no longer increase. On the other hand, a consumer who pays sums to the bank after the announcement of the restoration pursuant to an agreement containing unfair terms increases the amount of his or her losses as he or she will no longer be able to recover the sums paid. The possibility of offsetting is limited

to the amount of the bank's claim and will be limited by additional formal requirements in the expected insolvency proceedings. The consumer will therefore find him or herself in a less favourable situation than other creditors.

15 In the view of the referring court, an interpretation of the abovementioned provisions of Directive 93/13 and Directive 2014/59, which would make it impossible to suspend performance of a loan agreement in relation to a consumer by means of an appropriate court order, would be contrary to the principle of effectiveness. The consumer would then not only be deprived of the possibility of actually freeing him or herself from an agreement containing unfair terms, but would be obliged to perform such a contract with no possibility of any subsequent restitutory effect. There would then be no deterrent effect of Directive 93/13 as agreements containing unfair terms would continue to be performed, generating the expected revenue for the trader. In such a situation, the declaration of restoration by a State authority acting under EU law would result in consumers giving up exercise of their rights, which are protected in particular under, inter alia, Article 38 of the Charter of Fundamental Rights.

16 On the other hand, the relevant provisions of national law are interpreted by the courts in such a way as to exclude the possibility of instituting proceedings to secure claims against a bank under special restoration. Such an interpretation completely disregards the provisions of Directive 93/13 and deprives the consumer of his or rights under that directive. Consequently, the courts refuse to secure consumers' claims.

17 In the view of the referring court, those provisions of national law constitute incorrect implementation of Article 70(1) and (4) of Directive 2014/59/EU since that provision imposes an obligation on Member States to ensure that the resolution authority (the Bank Guarantee Fund in the present case) only has the power to restrict secured creditors of an institution under resolution from enforcing security interests in relation to any assets of that institution and only from publication of a notice of the restriction in the Member State of the resolution authority of the institution under resolution.

18 On the other hand, the Article 135(1) and (4) of the Law on the Bank Guarantee Fund completely disregards the conditions laid down in Article 70(1) and (4) of Directive 2014/59. In essence, therefore, there has been an extensive transposition of Directive 2014/59 into the national legal order as a result of which the institution of any proceedings to secure claims against an entity under resolution has been prohibited in advance, which also infringes the rights of consumers under Directive 93/13.

19 Subject to the Court of Justice's future judgment in Case C-287/22, the referring court is of the view that granting security by suspending the obligation to pay loan instalments under the agreement under consideration in the main proceedings would also be permissible in insolvency proceedings. The security concerns a non-pecuniary claim for a declaration that the agreement is invalid and such a

claim has no direct pecuniary consequences for the insolvent person. Such security does not constitute security over the insolvent person's assets within the meaning of Article 146(3) of the Law on insolvency. The property consequences for the insolvent person arise from pecuniary claims for the recovery of sums paid but not due as a restitutory effect arising from the application of Directive 93/13 and the implementing provisions, for example Article 385[1](1) of the Civil Code. Therefore, security of the second claim is not permissible.

20 Since securing a claim as in the main proceedings would be permissible in insolvency proceedings, an interpretation of Article 135(1) and (4) of the Law on insolvency, which does not permit security of such a claim to be granted, would disadvantage a creditor who is a consumer in relation to insolvency proceedings. Thus, adopting such an interpretation would be contrary to Article 34(1)(g) of Directive 2014/59.

21 In the view of the referring court, Articles 6(1) and 7(1) of Directive 93/13, in the light of the principle of effectiveness, require, even where special resolution has been declared, that, where proceedings have been instituted by a consumer against a trader (a bank) seeking a declaration that the terms of a loan agreement are unfair and, consequently, the agreement is invalid, and seeking repayment of sums paid by the consumer under the invalid agreement (restitution), the national court may suspend the performance of such a loan agreement. Such security does not constitute more favourable treatment in comparison with other creditors since it does not concern claims for repayment of sums already paid to the bank.

22 However, account must be taken of the fact that the defendant bank has a claim for the repayment of the capital drawn down which is the main asset where special resolution has been declared. Suspending payments before the amount of the bank's claim has been reached would appear to run counter to the purpose of that resolution since it restricts or slows down the process of recovering funds which also serve to satisfy other creditors. Furthermore, it cannot yet be precluded that, in addition to the claim for repayment of the capital drawn down, the bank may have other claims, as referred to in the preliminary questions in Cases C-520/21 and C-756/22.

23 In the light of the foregoing, the referring court proposes that the question thus referred should be answered to the effect that, in the light of the principles of effectiveness and proportionality, the provisions set out therein must be interpreted as precluding national legislation and case-law which prevent an application to secure claims by suspending the performance of a loan agreement such as that at issue in the main proceedings, despite the bank having been put under special resolution, from being granted where the consumer has already paid the sums owed to the bank, which it is for the national court to establish.