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ECLI:EU:C:2017:945

Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

7 December 2017 (*)

(Reference for a preliminary ruling — Directive 93/13/EEC — Consumer contracts — Unfair terms — Powers of the national court — Effectiveness of the protection afforded to consumers — Mortgage loan agreement — Extrajudicial enforcement procedure — Simplified declaratory court procedure for recognition of the real rights of the successful bidder)

In Case C-598/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Juzgado de Primera Instancia de Jerez de la Frontera (Court of first instance, Jerez de la Frontera, Spain), made by decision of 9 November 2015, received at the Court on 16 November 2015, in the proceedings

Banco SantanderSA

v

Cristobalina Sánchez López,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, E. Levits (Rapporteur), A. Borg Barthet, M. Berger and F. Biltgen, Judges,

Advocate General: N. Wahl,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 26 April 2017,

after considering the observations submitted on behalf of:

- Banco Santander SA, by J.M. Rodríguez Cárcamo and A.M. Rodríguez Conde, abogados,
- the Spanish Government, by M.J. García-Valdecasas Dorrego, acting as Agent,

– the European Commission, by J. Baquero Cruz, N. Ruiz García and D. Roussanov, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 June 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 3, 6 and 7 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

2 The request has been made in proceedings between Banco Santander SA and Ms Cristobalina Sánchez López concerning the procedure for recognising Banco Santander’s real rights resulting from its acquisition of Ms Sánchez López’s dwelling in an auction.

Legal context

Directive 93/13

3 Article 1(2) of Directive 93/13 reads as follows:

‘The contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the [European Union] are party, particularly in the transport area, shall not be subject to the provisions of this Directive.’

4 Under Article 3(1) of that directive:

‘A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.’

5 Article 6(1) of the directive:

‘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.’

6 Article 7(1) of the directive provides:

‘Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.’

Spanish law

7 Article 250(1) of Ley 1/2000 de l’Enjuiciamiento civil (Law 1/2000 on civil procedure, BOE No 7 of 8 January 2000, p. 575, ‘the Code of Civil Procedure’) provides:

‘The court shall rule under the simplified procedure, regardless of the amount, on the following claims:

...

7° claims, brought by the holders of real rights entered in the land register, for the enforcement of those rights against those who challenge or interfere in their exercise without any registered title justifying the challenge or interference.

...’

8 According to Article 444(2) of the Code of Civil Procedure, where the applicant so requests, the defendant must pay a deposit fixed by the court before he can challenge a claim brought under the procedure referred to in Article 250(1)(7) of that code. Furthermore, the grounds of challenge which the defendant is entitled to raise are limited to those set out in Article 444(2) of the code. Reliance on an unfair term in the mortgage agreement on which the procedure for extrajudicial sale of the encumbered property is based does not appear on that list.

9 Under Article 440(2) of the Code of Civil Procedure, if the defendant does not appear in court, or if he appears without paying the deposit set by the court, the court is required, after hearing the defendant, to make an order for ‘possession’ of the immovable property and ejection of the occupant.

10 The exercise of rights resulting from the registration of a mortgage is governed, inter alia, by Article 41 of the Decreto por el que se aprueba la nueva redacción oficial de la Ley Hipotecaria (Decree approving the new official version of the Law on mortgages) of 8 February 1946 (BOE No 58 of 27 February 1946, p. 1518, ‘the Law on mortgages’). That provision, in force at the time of the case in the main proceedings, laid down that:

‘Real actions founded on registered rights may be brought under the simplified procedure set out in [the Code of Civil Procedure] against persons who, without registered title, challenge those rights or interfere in their exercise. ...’

11 Article 129(1) of the Law on mortgages, in force at the time of the case in the main proceedings, read as follows:

‘Mortgage enforcement proceedings may be brought:

(a) directly in respect of the mortgaged property, the exercise of which is subject to the provisions ... [of the Code of Civil Procedure] ...

(b) or by way of extrajudicial sale of the mortgaged property in accordance with Article 1858 of the Civil Code, provided that a power of sale was agreed in the mortgage instrument and only in the event of default on the principal or the interest of the secured sum.’

12 The rules on extrajudicial sales laid down in Article 129 of the Law on mortgages were amended by Article 3(3) of Ley 1/2013 de medidas para reforzar la protección a los deudores hipotecarios, reestructuración de deuda y alquiler social (Law 1/2013 on measures for the better protection of mortgage debtors, debt restructuring and social housing) of 14 May 2013 (BOE No 116 of 15 May 2013, p. 36373). The amendments apply to extrajudicial sales of mortgaged property where the process was begun after the entry into force of Law No 1/2013, regardless of the

date of execution of the mortgage instrument. Following such amendments, as far as concerns extrajudicial sales begun before the entry into force of Law 1/2013 and sales where the mortgaged property has not been auctioned, the notary is to suspend enforcement where, within a strict time limit of one month running from the day after the entry into force of Law 1/2013, one of the parties shows that he has brought an action before a competent court, in accordance with Article 129 of the Law on mortgages, alleging that one of the terms of the mortgage loan agreement on which the extrajudicial sale is based, or a term determining the amount payable, is unfair.

13 Article 234 et seq. of the Decreto de 14 de febrero de 1947 por el que se aprueba el Reglamento Hipotecario (Mortgage Regulation, BOE No 106 of 16 April 1947, p. 2238) specify the stages of the procedure for extrajudicial sale referred to in Article 129 of the Law on mortgages. Those provisions of the Mortgage Regulation were not amended following the amendment of Article 129 of the Law on mortgages by Law No 1/2013.

14 Under Article 234 of the Mortgage Regulation:

‘1. The extrajudicial enforcement of mortgages provided for in Article 129 of the [Law on mortgages] is subject to the requirement that the mortgage instrument stipulates that the parties consent to the use of that procedure and contains the following information:

- (1) the value of the immovable property, as estimated by the interested parties, for use as the auction value ...
- (2) the mortgagor’s address for service of claims and notices ...
- (3) the person who, at the relevant time, is to execute the instrument of sale of the immovable property on behalf of the mortgagor. The creditor itself may be nominated for this purpose.

2. The term under which the parties to the loan agreement and to the mortgage agree to the use of the extrajudicial enforcement procedure must appear separately from the other terms of the instrument.’

15 Article 236-l of the Mortgage Regulation provides:

‘1. Once the highest bid or award has been verified and, where applicable, the price recorded, the notary shall enter the instrument on the annual list of documents authenticated by him, and the highest bidder or person to whom the award is made, on the one hand, and the owner of the dwelling, on the other, shall record their agreement in the form of an authentic instrument.

...

3. An authentic instrument is a sufficient basis for registration [in the land register] in favour of the highest bidder or party to whom the award is made ...’

16 Article 236-m of the Mortgage Regulation provides:

‘The party to whom the award is made may seek a possession order in respect of the acquired property from the court of first instance of the place where that property is situated.’

17 Article 236-ñ of the Mortgage Regulation provides that the notary is to suspend the procedure only where the documents establish that criminal proceedings have been commenced regarding a

potentially fraudulent registration of the mortgage instrument in question or where the land register indicates that a previous application for annulment of a mortgage has been lodged. In those circumstances, the notary is to suspend the extrajudicial enforcement of the mortgage until, as applicable, the conclusion of the criminal proceedings or of the registration procedure. The extrajudicial enforcement of the mortgage is to resume, on application by the creditor concerned, if the instrument is not found to be a forgery or if the annulment of the mortgage is not registered.

18 Article 236-o of the Mortgage Regulation reads as follows:

‘As regards other objections capable of being raised by the debtor, third party in possession, or other interested parties, the provisions of the last five paragraphs of Article 132 of the [Law on mortgages] must be complied with where that article applies.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 On 21 December 2004, Ms Sánchez López entered into a loan agreement with Banco Español de Crédito SA, which became Banco Santander, for the purchase of a dwelling, the loan being secured by way of mortgage.

20 Clause 11 of that contract, headed ‘extrajudicial procedure’, stipulated:

‘In the event of enforcement through the extrajudicial procedure to which Article 129 of the [Law on mortgages] and Articles 234 et seq. of the [Mortgage Regulation] refer, the contracting parties, in addition to agreeing expressly to submit to that procedure, state: 1.- The value on the basis of which the mortgaged dwellings shall be assessed in order to determine the starting price in the auction shall be the same as that stated in point (1)(2) of the previous clause; 2.- The address stated by the parties to the loan agreement and constituting the mortgage for future service of demands and notice is the same as that stated for that purpose in the previous clause; 3.- The mortgagor authorises the bank to execute, on her behalf, through its statutory or legal representatives, the instrument of sale of the mortgaged property.’

21 On application by Banco Santander, the extrajudicial enforcement procedure was commenced, on 24 March 2011, before a notary, and completed, on 15 December 2011, by the award of the mortgaged property to the mortgagee for 59.7% of the value at which it had been assessed for the purposes of mortgage enforcement. Ms Sánchez López continued to owe the sum of EUR 13 482.97.

22 On 23 February 2012, the notary drew up the instrument of sale of the dwelling to Banco Santander, without the involvement of Ms Sánchez López, represented for that purpose by Banco Santander itself, in accordance with clause 11 of the mortgage loan agreement.

23 On the basis of the entry into the land register pursuant to the instrument of sale of 23 February 2012, on 23 September 2014, Banco Santander brought a claim under Article 250(1)(7) of the Code of Civil Procedure before the referring court, the Juzgado de Primera Instancia de Jerez de la Frontera (Court of first instance, Jerez de la Frontera, Spain), seeking an order for ‘possession’ of the dwelling in question to Banco Santander and the ejection of Ms Sánchez López from that dwelling.

24 In addition, Banco Santander asked the referring court to set EUR 10 000 as the amount which Ms Sánchez López would have to pay into court to challenge its claim.

25 In those proceedings, Ms Sánchez López did not appear before the referring court.

26 The referring court harbours doubts as to the compatibility of the provisions of national law governing the extrajudicial mortgage enforcement procedure and the procedure for ‘possession’ with Directive 93/13, in the light of the fact that a court before which a claim has been brought in respect of the procedure under Article 250(1)(7) of the Code of Civil Procedure cannot rule, of its own motion or on application by one of the parties, that a term of the loan agreement underlying a mortgage which has been enforced is unfair.

27 In those circumstances, the Juzgado de Primera Instancia de Jerez de la Frontera (Court of First Instance, Jerez de la Frontera) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is it contrary to [Article 3(1) and (2) to Article 6(1) and Article 7(1) of Directive 93/13] and the objectives of that directive for national legislation which establishes a procedure like that of Article 250(1)(7) [of the Code of Civil Procedure], requiring the national court to give a ruling ordering the dwelling subject to enforcement to be handed over to the person who acquired it in extrajudicial enforcement proceedings, in which, under the current regime contained in Article 129 of the Law on Mortgages ... and Articles 234 to 236-o of the [Mortgage Regulation] ..., there could be no review *ex officio* of unfair terms and the debtor could not raise an effective objection on those grounds, either in the extrajudicial enforcement procedure or in separate legal proceedings?

(2) Is it contrary to the abovementioned provisions of Directive [93/13] and the objectives thereof for legislation, such as [that following from the amendments to the Law on mortgages by Law No 1/2013], to allow the notary to suspend extrajudicial enforcement proceedings already commenced when Law No 1/2013 entered into force only if the consumer establishes that he has lodged a claim concerning the unfairness of a clause in the mortgage loan agreement on which the extrajudicial sale is based, or which determines the amount payable on foreclosure, provided that the separate claim has been lodged by the consumer within a period of one month from publication of Law No 1/2013, without the consumer having been notified in person of that period, and in any case before the notary has made the award?

(3) Are the abovementioned provisions of Directive [93/13], the objective it pursues and the obligation it imposes on national courts to examine of their own motion the existence of unfair terms in consumer contracts without the consumer having to request it to be interpreted as allowing the national court, in proceedings such as that established in Article 250(1)(7) [of the Code of Civil Procedure] or in the “extrajudicial sale” procedure governed by Article 129 [of the Law on mortgages], to disapply national law when the latter does not permit that judicial review of the court’s own motion, in view of the clarity of the provisions of Directive [93/13] and of the [Court’s settled case-law] concerning the obligation of national courts to review of their own motion the existence of unfair terms in cases relating to consumer contracts?

(4) Is it contrary to the abovementioned provisions and the objectives of Directive [93/13] for national legislation, such as Article 129 [of the Law on Mortgages], in the wording of Law No 1/2013, merely to confer on a notary, as sole effective remedy for protecting the consumer rights enshrined in Directive [93/13], and in respect of extrajudicial enforcement procedures with consumers, the power to warn of the existence of unfair terms; or to give the consumer against whom extrajudicial enforcement is sought an opportunity of lodging a claim in separate legal proceedings before the notary has awarded the property subject to enforcement?

(5) Is it contrary to the abovementioned provisions and the objectives of Directive [93/13] for national legislation, such as Article 129 [of the Law on mortgages], in the wording provided by Law No 1/2013, and Articles 234 to 236 [of the Mortgage Regulation] to establish an extrajudicial procedure for the enforcement of mortgage loan agreements concluded with consumers by sellers or suppliers in which there is no opportunity whatsoever for review *ex officio* of unfair terms?’

Consideration of the questions referred

The second, fourth and fifth questions

28 By its second, fourth and fifth questions, which it is appropriate to consider together, the referring court asks whether Article 129 of the Law on mortgages, as amended by Law No 1/2013, and its implementing provisions, are compatible with Directive 93/13.

29 In that regard, according to the order for reference, the extrajudicial mortgage enforcement procedure preceding the proceedings at issue in the main proceedings was commenced on 24 March 2011 and concluded on 23 February 2012.

30 Under Law No 1/2013, the amendments which it enacted apply to extrajudicial sales of mortgaged property for which the process was commenced after its entry into force, namely on 15 May 2013.

31 Accordingly, in so far as the provisions of national law mentioned in the second, fourth and fifth questions are not applicable, *ratione temporis*, to the case in the main proceedings and the order for reference does not indicate on what basis they are relevant to the outcome of the case, those questions must be held to be inadmissible.

The first and third questions

32 By its first and third questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as precluding national legislation such as that at issue in the main proceedings, under which, at the end of the procedure laid down for such purposes, the national court is required to grant vacant possession of immovable property to its transferee, even though neither the extrajudicial mortgage enforcement procedure agreed by the initial owner, nor the procedure governing the claim brought before that national court by that transferee, allow the initial owner of that property, as a consumer, to rely on an unfair term in the mortgage loan agreement which has been enforced extra-judicially and, where relevant, whether the national court is required to disapply that national legislation.

33 First, Banco Santander and the Spanish Government cannot plead the inapplicability of Directive 93/13 by relying on Article 1(2) thereof. In the present case, the referring court is not faced with the issue of whether a term in a mortgage loan agreement before that court is unfair, within the meaning of Article 3 of that directive, but it has doubts as to the impact which the simplified extrajudicial enforcement procedure set out in Article 129 of the Law on mortgages, to which that term of the contract refers, and the procedure for ‘possession’ laid down in Article 41 of the Law on mortgages and in Article 250 of the Code of Civil Procedure, have on the effectiveness of the protection conferred on consumers under Directive 93/13, in the light of the fact that the consumer has no real possibility, in that procedure, of successfully claiming that a term in the contract in question is unfair.

34 Second, it must be noted that, in accordance with Article 6(1) of Directive 93/13, unfair terms used in contracts concluded with sellers or suppliers cannot be binding on consumers.

35 In addition, under Article 7(1) of that directive, Member States are to ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

36 The system of protection introduced by Directive 93/13 is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This situation leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms (judgments of 10 September 2014, *Kušionová*, C-34/13, EU:C:2014:2189, paragraph 48, and of 1 October 2015, *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637, paragraph 39).

37 Thus, failing effective review of the potential unfairness of the terms of a contract from which the right to enforcement arises, observance of the rights conferred under Directive 93/13 cannot be guaranteed (see, to that effect, judgments of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 59, and of 18 February 2016, *FinanmadridEFC*, C-49/14, EU:C:2016:98, paragraph 46).

38 As regards, in particular, a procedure conducted by a notary for the enforcement of a mortgage, it should be noted that adequate and effective means to stop the use of unfair terms in consumer contracts must include provisions enabling consumers to be guaranteed effective judicial protection by making it possible for them to contest the contract at issue in legal proceedings, including in the enforcement phase, and under reasonable procedural conditions, so that the exercise of their rights is not subject to conditions, in particular time limits or costs, which make it excessively difficult or in practice impossible to exercise the rights guaranteed by Directive 93/13 (judgment of 1 October 2015, *ERSTE Bank Hungary*, C-32/14, EU:C:2015:637, paragraph 59).

39 In the present case, it is necessary to highlight the elements of the procedure at issue before the referring court and the particularities of the case in the main proceedings, as they appear from the order for reference.

40 Thus, the subject matter of the case in the main proceedings relates to the protection of real rights of ownership acquired by Banco Santander following a sale by auction.

41 In that context, the referring court seems, however, to consider that the procedure laid down in Article 41 of the Law on mortgages and in Article 250 of the Code of Civil Procedure is the prolongation of the extrajudicial mortgage enforcement procedure agreed by Ms Sánchez López in favour of Banco Santander, so that, as regards the applicability of Directive 93/13, that link allows the fact to be overlooked that the mortgage has been enforced, that the immovable property has been sold and that the real rights over that property have been transferred.

42 It is, however, clear from the information before the Court that, in accordance with the national legislation, the purpose of the action brought before the referring court is to safeguard the protection of real rights entered in the land register, irrespective of the means by which they were acquired.

43 Therefore, such a procedure operates after the transfer of ownership of immovable property and is initiated by the new owner of such property, in accordance with his registration as such in the land register, as against any person who challenges those rights or interferes with their exercise.

44 Consequently, first, the case in the main proceedings does not concern the procedure for compulsory enforcement of the mortgage guarantee under the loan agreement between Ms Sánchez López and Banco Santander, but the protection of real rights derived from title lawfully acquired by Banco Santander following a sale by auction.

45 Furthermore, although, in the present case, the owner of the immovable property at issue in the main proceedings is the mortgagee, namely Banco Santander, the fact remains that, following an extrajudicial mortgage enforcement procedure such as that preceding the proceedings at issue before the referring court, any interested third party may become the owner of that property and, as a result, have an interest in bringing proceedings for ‘possession’. In such circumstances, to allow the debtor who has granted a mortgage over that property to set up defences founded on the mortgage loan agreement against the transferee of that property, an agreement to which that transferee may nevertheless be a third party, would be liable to affect legal certainty in pre-existing proprietary relationships.

46 Second, although it has been held, in particular as regards enforcement proceedings for mortgages, that, failing effective review of the potential unfairness of contractual terms in the instrument on the basis of which the property is seized, observance of the rights conferred under Directive 93/13 cannot be guaranteed (see, to that effect, judgments of 14 March 2013, *Aziz*, C-415/11, EU:C:2013:164, paragraph 59, and of 18 February 2016, *Finanmadrid EFC*, C-49/14, EU:C:2016:98, paragraph 46), it must be emphasised that the instrument on which the action brought before the referring court is based is, in the present case, the instrument of ownership as entered in the land register and not the mortgage loan agreement, the security for which has been enforced extra-judicially.

47 In those circumstances, the provisions of Directive 93/13 cannot be relied on in order to prevent the recognition and protection of the owner’s real rights over that property.

48 In any event, in the first place, although the objective of Directive 93/13 is to ensure the protection it confers on consumers is guaranteed, to the point of requiring a national court, of its own motion, to review the unfairness of a contractual term falling within the scope of that directive, it should nevertheless be borne in mind that the provisions of the directive cannot be relied on where there is no corroborating evidence of an unfair term in a loan agreement secured by a mortgage which has been the subject of extrajudicial enforcement.

49 In the second place, as stated by the Advocate General in point 70 of his Opinion and subject to verification by the referring court, it appears that Ms Sánchez López had the opportunity, at the time of the extrajudicial procedure for transfer of the property, to challenge or seek a suspension of the procedure on the ground that the mortgage loan agreement contained an unfair term, and apply for interim measures so as to suspend the sale of the immovable property of which she was the owner. It is within the course of the mortgage enforcement procedure that the court seised could, if necessary of its own motion, have carried out a review of the potential unfairness of terms stipulated in the mortgage loan agreement.

50 It follows from all of those considerations that Article 6(1) and Article 7(1) of Directive 93/13 do not apply to proceedings such as those at issue in the main proceedings, brought by the successful bidder in an auction of immovable property, following extrajudicial enforcement of a mortgage granted over that property by a consumer to a creditor acting in the course of trade, such proceedings having been brought for the purpose of protecting real rights lawfully acquired by the successful bidder, provided that, first, the proceedings are independent of the legal relationship between that creditor and the consumer and, second, the mortgage has been enforced, the

immovable property sold, the real rights over that property transferred, and the consumer has not availed himself of the legal remedies provided in that context.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 6(1) and Article 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer do not apply to proceedings such as those at issue in the main proceedings, brought by the successful bidder in an auction of immovable property, following extrajudicial enforcement of a mortgage granted over that property by a consumer to a creditor acting in the course of trade, such proceedings having been brought for the purpose of protecting real rights lawfully acquired by the successful bidder, provided that, first, the proceedings are independent of the legal relationship between that creditor and the consumer and, second, the mortgage has been enforced, the immovable property sold, the real rights over that property transferred, and the consumer has not availed himself of the legal remedies provided in that context.

[Signatures]

* Language of the case: Spanish.