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Ibercaja Banco SAU v. José Cortés González C-613/15

Article by David Bowden

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CJEU rules 19% interest on consumer mortgage unfair

The Court of Justice of the European Union (CJEU) has ruled that a clause in a consumer mortgage contract that permitted the lender to increase the interest rate payable to 19% in the event of default or non-payment was an unfair contract term. The case has been remitted back to the lower court in Madrid so it can apply to CJEU ruling on the unfair contract terms directive (UCTD) in contested possession proceedings.

Ibercaja Banco SAU v. José Cortés González
Case C-613/15 17 March 2016
Court of Justice of the European Union, 10th Chamber
Judges Biltgen (President), Borg Barthet, Levits and Maria Berger
Advocate-General Szpunar

What did the mortgage contract say?

The mortgage that Mr & Mrs González had with their lender was on the lender's standard terms of business. The following clauses are of particular relevance:

- Clause 6 – headed '**Interest**' - provided that in the case of late payment the lender shall charge the borrowers a rate of interest of 19% per year,
- Clause 6bis – headed '**Early Termination**' – provided that the lender could declare the early termination of the whole loan in the event that the borrowers failed to repay any of the interest or capital borrowed.

What were the facts in this case?

On 5 March 2007 Mr & Mrs González took out a first money purchase mortgage with a lender, Ibercaja Banco. They got into difficulties in paying the loan. On 14 April 2010 the lender brought proceedings to enforce payment and for possession of the property. The figures demanded in filed court papers comprised:

- €190,743.30 loan capital,
- €38,000 interest, and
- €20,000 costs and expenses.

What happened when the case came before the judge in Madrid?

The claim for possession was defended and the borrowers disputed the amount due. The case came on for hearing before a judge in Alcobendas, Madrid. He decided to stay the proceedings and to refer 3 preliminary questions to the CJEU.

What were the terms of reference to the CJEU?

The court in Madrid referred these 3 questions to the CJEU. These were:

- Do Articles 3(1), 4(1), 6(1) and 7(1) of the Unfair Contract Terms Directive (**93/13/EEC**) preclude a provision of national law (such as Article 114 of the Law on Mortgages) under which the national court when assessing the unfairness of a term fixing default interest may examine **only** whether the agreed interest rate exceeds three times the statutory interest rate and may take account of no other circumstances?
- Do Articles 3(1), 4(1), 6(1) and 7(1) of Unfair Contract Terms Directive preclude a provision of national law (which allows a claim to be made for accelerated repayment of the total amount of the loan on the grounds of failure to pay 3 monthly instalments) without account being taken of other factors such as:
 - the duration of the loan,
 - the amount of the loan, or
 - any other relevant matters

and which also makes the possibility of avoiding the effects of such accelerated repayment dependent on the will of the creditor except in cases in which the mortgage is secured on the mortgagor's permanent residence?

- Is the 4th transitional provision of Law 1/1203 contrary to the line of decided cases following *Cofidis* **C-473/00**?

Are there any special provisions in the Spanish Law?

There are a couple of provisions in the Spanish Mortgage law ('*Ley Hipotecaria*'), the Spanish Law of Civil Procedure ('*Ley de Enjuiciamiento Civil*' or '*LEC*') and the General Consumer Protection Law that are relevant:

- Unfair terms shall be null & void and will not be enforced.
- When a court encounters an unfair contract term in a contract it will rule that such a term is unfair but it will endeavour to construe the rest of the contract without those unfair contract terms
- Where a mortgage is at least 3 months in arrears, the lender can claim all the capital and interest outstanding.
- In enforcement procedures there was a limited right to challenge the unfairness of interest claimed
- Interest due on late payment secured by a mortgage on a home may not be charged at a rate of more than three times the rate of interest the lender charges on the capital borrowed. Late payment interest may not be capitalized.

What does the Unfair Contract Terms Directive (UTCD) say?

Article 3 of the UTCD provides:

'1. 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.'

'2. A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract. Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.'

'3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.'

Article 4 of the UTCD provides:

'1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.'

'2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.'

Article 6.1 goes on to say '*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.'*

And finally Article 7.1 says: '*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.'*

What did the CJEU rule on unfair contract terms?

The CJEU said it should appreciate the consequences that such a clause may have within the framework of the law applicable to the contract and this involves an examination of the applicable national legal system.

Taken together articles 3.1 and 4.1 of the UTCD do not limit the assessment by a national court of the unfair nature of a clause in a mortgage contract that sets the late payment interest rate

and a clause of which determines the conditions of the early repayment loan. This assessment as to whether a contract term is unfair or not cannot merely be restricted to the limited criteria set out in article 114 of the Spanish mortgage law or article 693 of the LEC.

With regard to the consequences which follow in the event that a judge find contractual clauses unfair, article 6.1 of the UTCD expressly places an obligation on member states to find that such clauses 'shall not bind the consumer'.

The CJEU said in previous case that it had already interpreted these UTCD's provisions to mean that it is up to national courts (who appreciate the unfairness of contractual terms) to infer all the consequences which, under national law, are derived from it, in order to avoid that these clauses bind a consumer. The CJEU stresses that the UTCD sets out mandatory provisions which are intended to set a genuine balance to the contract and bring equality to the rights and obligations of both parties

Accordingly the CJEU ruled that Articles 3.1 and 4.1 of the UTCD do not allow a member state to restrict the consideration of a judge where he refers to a finding of an unfair character of clauses in a mortgage contract concluded between a consumer and a business.

The CJEU also ruled that Articles 6.1 and 7.1 also requires that a national law will not prevent a judge from interpreting such a term as being 'unfair' where such a term falls within the ambit of Article 3.1 of the UTCD.

What will happen next with this case?

The CJEU has sent the case back to the lower court in Madrid. It will then have to apply the CJEU's ruling on the UTCD to the case and deal with any outstanding findings of facts.

Are there any other challenges in this sphere pending?

It is never entirely certain what cases are pending before courts of other EU member states that may end up getting referred to the CJEU for a ruling.

On 29th January 2015, Mr Justice Teare handed down his reserved judgement in the Commercial Court. This ruling was given in a case called *Property 118 Action Group v. West Bromwich Mortgage Company Limited* [2015] EWHC 135 (Comm). In that case, the lender had decided to **increase** the rate of interest payable under its standard mortgage contract. It decided to increase rates by 2% a year. This increase was applied at a time when bank base rates in the UK had been 0.5% for over 7 years. The lender decided to apply that increase to borrowers who had 3 or more 'buy to let' mortgages with it.

It should be noted that the borrowers in *PAG118* are unlikely to be regarded as 'consumers' under the UTCD because it defines consumers as '*any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession*'. As buy to let landlords will generally be running a business they will not fall within this provision. However some may end up falling within its scope when they are either building up or winding down their portfolios or where they (or a member of their family) end up living in a property as their main home which was originally financed by a buy to let mortgage.

Teare J ruled that the lender was not prevented from increasing its rates in this way and dismissed the challenge from a group of buy to let investors who formed the PAG118. However, an application for permission to appeal that ruling was granted.

On 27th April 2016, the Court of Appeal is now going to hear this appeal. It has been listed for a 1 day hearing before the Sir Brian Leveson (the President of the Queen's Bench Division), Lady Justice Sharp and Lord Justice Hamblen. It is likely that judgment will be reserved and we will expect it to appear before the summer recess at the end of July 2016. Before he became an appeal court judge, Mr Justice Hamblen had to rule on a challenge by Mr Khan to standard form business contracts issued by Deutsche Bank. He dismissed [2013] EWHC 482 (Comm) all these challenges including those under the UTCD, the Unfair Contract Terms Act 1977 and the 'unfair relationship' one under section 140A of the Consumer Credit Act 1974. The Court of Appeal refused permission to appeal that decision at an oral hearing - [2013] EWCA Civ 1149.

15th April 2016