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SUPREME COURT

Civil Division

PLENARY SESSION

President Hon. Francisco Marín Castán

JUDGEMENT

Judgement No: 323/2015

Judgement date: 30/06/2015

APPEAL AND PROCEDURAL INFRINGEMENT

***Appeal No.*:** 2780/2013

***Ruling / Agreement*:** Judgement Dismissed

***Voting and Ruling*:** 20/05/2015

***Presiding Judge*:** Hon. Rafael Sarazá Jimena

***Provenance*:** AUD. PROVINCIAL SECCION N. 19

***Court secretary*: Hon. José María Llorente García**

***Brief by*:** LSR

Multicurrency mortgage. Judgement of plenary session

Non application of the Revised Text of the General Law for the Protection of Consumers and Users to professionals and entrepreneurs. Information defects and procedural error. Enforcement of MiFID. Its incompliance does not determine the invalidity of the contract for violation of mandatory rules but can determine invalidity for procedural error. Significance that the borrower, although a retail client, has profile of expert.

***APPEAL AND PROCEDURAL INFRINGEMENT No*.: 2780/2013**

***Presiding Judge:* Hon. Rafael Sarazá Jimena**

***Voting and Ruling*: 20/05/2015**

Court secretary: Hon. José María Llorente García

SUPREME COURT

Civil Division

PLENARY SESSION

***JUDGEMENT NO:* 323/2015**

HON.

Francisco Marín Castán

José Antonio Seijas Quintana

Antonio Salas Carceller

Ignacio Sancho Gargallo

Francisco Javier Orduña Moreno

Rafael Sarazá Jimena

Sebastián Sastre Papiol

Eduardo Baena Ruiz

Xavier O' Callaghan Muñoz

In the City of Madrid, 30 June 2015

The First Chamber of the Supreme Court, meeting in plenary session, comprising the judges indicated above, has examined the extraordinary appeal for procedural infringement and the appeal brought by Mr. Jacobo and Ms. Zaira, represented in this Court by the Attorney José Ramón Cervigón Ruckauer, against the judgement delivered on 17 July 2013 by Section Nineteen of the Provincial Court of Madrid in appeal no. 273/2013 arising from the proceedings of ordinary action no. 304/2012 of the Court of First Instance no. 97 of Madrid. The respondent was KUTXABANK, SA, represented in this Court by the Attorney Ana Prieto Lara-Barahona.

FACTS

Processing in the first instance

FIRST.- The attorney José Ramón Cervigón Ruckauer, on behalf of Mr. Jacobo, filed a request for ordinary proceedings against KUTXABANK, SA, requesting:

"[...], that, considering this application and the accompanying documents, with corresponding copies, be admitted and that ordinary Court action for declaratory judgement filed in EXERCISE OF THE ACTION OF ANNULMENT OF MULTICURRENCY CLAUSES, *and subsidiary of* CANCELLATION OF MULTICURRENCY CLAUSES, *of the mortgage documents and mortgage novation, both granted before the Notary of Madrid Celso Méndez Ureña, with sequence numbers 736/2008 and 5932/2009, and in both cases by exercise of* RESTITUTION OF AMOUNTS IMPROPERLY COLLECTED, *where appropriate, after their procedures, and of the foregoing statement issued serving*:

A) *To approve the annulment of the aforementioned multicurrency clauses.*

B) *To agree that for purposes of the restitution the amount due is € 704,691.45; result of subtracting the paid capital (€ 44,829.58) and the exchange commission (€ 8,129.27) that*

should never have been necessary; if the debt has increased it is due to the defendant which shall not be rewarded for the economic and moral damage it has caused to the claimant.

C) *To these amounts it shall be necessary to add the unjustified interest, so in accordance with the rule that it be submitted by whoever can most easily obtain it, diagrams of initial and current amortization are presented to determine the difference.*

D) *To ascertain the debt in Euros.*

E) *To reference the exchange with EURIBOR.*

F) *To declare clauses Six bis g), k), n) and Fifteen abusive.*

G) *To order the defendant to pay the costs.*

"FIRST ADDENDUM I STATE: That in the case that Your Honour considers that the contract is not null as of right, but only voidable, I URGE THE COURT: Make judgement that serves to.

A) *Agree the annulment of the multicurrency clauses object of this procedure.*

B) *Agree that for purposes of restitution the amount due is that given for the above reasons*

C) *To these amounts it shall be necessary to add the unjustified interest, so in accordance with the rule that it be submitted by whoever can most easily obtain it, diagrams of initial and current amortization are presented to determine the difference.*

D) *To ascertain the debt in Euros.*

E) *To reference the exchange with EURIBOR.*

F) *To declare clauses Six bis g), k), n) and Fifteen abusive.*

G) *To order the defendant to pay the costs [...]".*

SECOND.- The demand was filed on 6 March 2012 and passed to the Court of First Instance no. 97 of Madrid, registered under no. 304/2012. Once admitted, the defendant was cited.

THIRD.- Attorney Ana Prieto Lara-Barahona, representing KUTXABANK, by application lodged on 11 April 2012 requested "*the combining of decrees of Ordinary Judgement with number 325/2012 by the Court of First Instance no. 96 of Madrid and its precautionary measures to the present decrees; and after the legal proceedings, declare the combining requested with hearing of the counterparty, ordering in the same decree to send official communication to the Court of First Instance number 96 of Madrid, which knows the decrees whose combining is requested, with written testimony and history that determine and are sufficient to make known the cause for*

which the combining is sought, as well as the arguments formulated to the contrary, requiring the combining and requesting the referral of the decrees. All this with imposition of costs against the counterparty if opposed."

FOURTH.- By application lodged on 23 April 2012, the Attorney Ana Prieto Lara-Barahona, representing Kutxabank, answered the demand requesting: "*judgement in which the claims of the plaintiffs should be dismissed, except the claim to declare clauses Six bis g), k), n) and Fifteen of the contract abusive to which we partially agree, without special condemnation of the costs against my client and asking for costs against the plaintiff for his recklessness and bad faith.*"

FIFTH.- 15 June 2012, the Court of First Instance no. 96, in compliance of an appeal, submitted testimony to the demand filed by the Attorney José Ramón Cervigón Ruckauer, on behalf of Ms. Zaira against KUTXABANK, SA, requesting:

"*"[...], that, considering this application and the accompanying documents, with corresponding copies, be admitted and that ordinary Court action for declaratory judgement filed in* EXERCISE OF THE ACTION OF ANNULMENT OF MULTICURRENCY CLAUSES, *and subsidiary of* CANCELLATION OF MULTICURRENCY CLAUSES, *of the mortgage documents and mortgage novation, both granted before the Notary of Madrid Celso Méndez Ureña, with sequence numbers 736/2008 and 5932/2009, and in both cases by exercise of* RESTITUTION OF AMOUNTS IMPROPERLY COLLECTED, *where appropriate, after their procedures, and of the foregoing statement issued serving*:

A) To approve the annulment of the content on pages 12 and 13 of the document; clause Two.- B) MULTICURRENCY, the phrase on page 16 which contains "or of the last modification of the currency, in the case where this option has been utilised."; letter B) of clause THREE-BIS: VARIABLE INTEREST RATE, which begins B) In foreign currencies: Applies. . .", given that all these reference the multicurrency operation.

B) To agree that the amount due is that of € 704,691.45 as a result of subtracting paid-in capital (€ 44,829.58) and the exchange commission (€ 8,129.27) that should never have been necessary from the sum of € 757,450.30 that was really loaned as documented; if the debt has increased it is due to the defendant which shall not be rewarded for the economic and moral damage it has caused to the claimant.

C) To these amounts it shall be necessary to add the unjustified interest, so in accordance with the rule that it be submitted by whoever can most easily obtain it, diagrams of initial and current amortization are presented to determine the difference between what was really paid and what should have been paid; or the amount set by its judgement or execution.

D) To set the debt in Euros.

E) That the interest rate reference in clause THIRTEEN-BIS is the EURIBOR.

F) To declare clauses Six bis g), k), n) and Fifteen abusive.

"FIRST ADDENDUM I STATE: That in the case that Your Honour considers that the contract is not null as of right, but only voidable, I URGE THE COURT: Make judgement that serves to.

A) To approve the annulment of the content on pages 12 and 13 of the document; clause Two.- B) MULTICURRENCY, the phrase on page 16 which contains "or of the last modification of the currency, in the case where this option has been utilised."; letter B) of clause THREE-BIS: VARIABLE INTEREST RATE, which begins B) In foreign currencies: Applies. . .", given that all these reference the multicurrency operation.

B) *To agree that the amount due is that of € 704,691.45 as a result of subtracting paid-in capital (€ 44,829.58) and the exchange commission (€ 8,129.27) that should never have been necessary from the sum of € 757,450.30 that was really loaned as documented; if the debt has increased it is due to the defendant which shall not be rewarded for the economic and moral damage it has caused to the claimant.*

C) *To these amounts it shall be necessary to add the unjustified interest, so in accordance with the rule that it be submitted by whoever can most easily obtain it, diagrams of initial and current amortization are presented to determine the difference between what was really paid and what should have been paid; or the amount set by its judgement or execution*.

D) To set the debt in Euros.

E) That the interest rate reference in clause THIRTEEN-BIS is the EURIBOR.

F) To declare clauses Six bis g), k), m), n), p), t) and Fifteen abusive.

G) To order the defendant to pay the costs[...]."

SIXTH.- By Decree of 25 June 2012, the Court of First Instance no. 97 considered the request submitted by Attorney Ana Prieto Lara Barahona, representing KUTXABANK, SA, to combine this process with the process that was pending before the Court of First Instance no. 96 of Madrid, ordinary procedure 325/2012, filed at the request of Ms. Zaira against KUTXABANK, cumulatively continuing the process.

SEVENTH.- After combining the two processes before the Court of First Instance no. 97 and filing the relevant procedures, the Magistrate-Judge of the Court of First Instance no. 97 issued a ruling dated 4 February 2013 with the following operative part:

"*Ruling: That in my consideration the combined claims by Mr. Jacobo and Ms. Zaira, represented by Attorney José Ramón Cervigón Ruckauer, against Kutxabank, SA, represented*

by Attorney Ana Prieto Lara-Barahona, I am compelled and hereby agree to [emphasis in capitals removed]:

"1. The nullity relating to error as invalidating consent in relation to the documents of mortgage loan and mortgage loan novation, both granted before the Notary of Madrid, Mr. Celso Méndez Ureña, sequence numbers 736/2008 and 5932/2009, with the resulting mutual restitution between the parties of the services that would have been object of these, with statutory interest, in accordance with the guidelines set out in the sixth legal argument.

"2. No statement is made on the costs incurred in this instance."

Appeal proceedings

EIGHTH.- The decision of the first instance was appealed against by the representation of KUTXABANK, SA.

The resolution of this appeal corresponded to Section Nineteen of the Provincial Court of Madrid, which processed it under number 273/2013 and after filing the relevant procedures gave judgement on 17 July 2013, part of which provides:

"*We rule: to consider the appeal submitted by Kutxabank against the judgement of the Court of First Instance No. 97 of Madrid to revoke ordinary procedure 304/2012 filed by Mr. Jacobo and Ms. Zaira dismissing the demand except for the partial acquiescence. No conviction is made with relation to the costs of the appeal"* [emphasis in capitals removed].

Filing and processing of extraordinary appeal for procedural infringement and appeal

NINTH.- Attorney José Ramón Cervigón Ruckauer, representing Mr. Jacobo and Ms. Zaira, filed an extraordinary appeal for procedural infringement and appeal.

The grounds for the extraordinary appeal for procedural infringement were:

"*1) Reason for extraordinary appeal by Mr. Jacobo for procedural infringement: violation in the civil process of fundamental rights recognised in* Article 24 of the constitution."

"*2) Reason for extraordinary appeal by Ms. Zaira for procedural infringement violation in the civil process of fundamental rights recognised in* Article 24 of the constitution."

The grounds for the appeal were:

«*I) The sole motive for appeal of Mr. Jacobo and Ms. Zaira is for infringement of the rules governing the process and exceeding the amount of € 600,000* under Article 477 of the Civil Procedure Act (Spanish abbreviation LEC) *and is broken down into the following offences*:

"*a) First. - Infringement for non application of* Articles 3, 8, 60 and 80 of the RD. 1/2007, approving the Revised Text of the General Law for the Defence of Consumers and Users.

"*b) Second. - Infringement for non application of* Article 19 of Law 36/2003 of 11 November, *in conjunction with* Article 48.2 of the Law on Discipline and Intervention of Credit *Institutions and Articles 3, 5 and 7 of the Order of the Ministry of Economy and Finance of 5 May 1994*.

"*c) Third. - 1. 'Infringement for non application of Chapter II of Royal Decree 1/2007 of 16 November on protection of consumers and users, the Annex to Accounting Circular CBE 4/2004 of 22 December, to Credit Entities on Standards of financial, public and confidential information and financial status models*, Law 7/1998 of 13 April, on General Conditions of Contract, Articles 5, 7, 8 *and* 10.

"*d) Fourth 1. - "Infringement in judgement made of the Doctrine and Jurisprudence contrary to the Court on excusable error in contracts* (Articles 1261, 1262 and 1265 of the Civil Code)."

TENTH.- The proceedings were transferred by the Provincial Court to this Court, and the parties were summoned to appear before it. Once proceedings were received in this Court and the persons appearing before it were the same parties through representation of the solicitors named above, a decree dated 7 October 2014 was dictated, whose operative part was as follows:

"1) *ADMIT BOTH THE APPEAL AND THE EXTRAORDINARY APPEAL FOR PROCEDURAL INFRINGEMENT, filed by the procedural representation of Mr. Jacobo and Ms. Zaira against the* Judgement delivered on 17 July 2013 by the Provincial Court of Madrid (Section 19), appeal number 273/2013 *arising from the decrees of ordinary trial No. 304/2012 of the Judgement of the Court of First Instance No. 97 of Madrid*.

"2) *And to surrender formalised copies of the brief filing the appeal and the extraordinary appeal for procedural infringement, with attachments, to the appellant represented before this Court, in order to formalise their opposition within TWENTY DAYS, during which the Secretariat will receive the actions*".

ELEVEN.- Transfer was made to the appellant in order to formalise opposition to the admission of the appeal, brought by the representation of KUTXABANK, SA, via presentation of the corresponding brief.

TWELVE.- By ruling of 24 March 2015 the presiding judge was appointed for this process and agreed to resolve the appeals without a hearing, signalling a vote and decision on 20 May 2015, at 10:30 am, which has taken place.

The Presiding judge being Hon. **Rafael Sarazá Jimena**,

LEGAL ARGUMENTS

FIRST.- Background to the case

1. Mr. Jacobo and Ms. Zaira filed applications, subsequently combined, requesting the revocation or cancellation of the "Multicurrency" clauses in the mortgage loan, granted 29 February 2008 and novation of the mortgage loan, granted on 27 November 2009, entered into by the plaintiffs with the defendant company, "Kutxabank, SA" (hereinafter Kutxabank), to set the amount owed as 704,691.45 Euros, resulting from subtracting the paid capital and exchange commission, to set the debt in Euros, reference it against the Euribor, and to declare clauses six bis g, k and n, and fifteen abusive.

2. Kutxabank partially acquiesced to the demand, accepting the claim to declare clauses six bis g, k and n, and fifteen abusive, and objected to the application on the grounds that it considered that the applicants had the profile of experts, the wife being an executive and the husband, who took out the contract for himself and on behalf of his wife, administrator of several companies and expert lawyer in banking law and, in particular, multicurrency mortgages, understanding their operation to the point where he had requested two currency exchanges in the first months of the contract, and for which reason there had been no errors which vitiate the contractual agreement.

3. The Court of First Instance considered that the defective information provided by Kutxabank should be considered an error in the consent which vitiated the agreement, and therefore partly upheld the demand and agreed to the invalidity of the "multicurrency" mortgage for procedural error and the mutual restitution of benefits (in Euros) with legal interests, without imposition of the costs.

4. Kutxabank appealed the sentence. The Provincial Court allowed the appeal, quashed the original ruling and dismissed the claim.

The Court considered that the breach of administrative regulations concerning the duty of disclosure cannot by itself produce the nullity of the contract, but is significant in determining whether the client, depending on their financial preparedness, level of education and experience, was fully aware of the obligations and risks assumed and, ultimately, if this could result in a serious and fundamental misconception of the product contracted and its conditions. But, given the profile of the applicants (executive and lawyer specialising in banking law and multicurrency mortgages, administrator of several companies, who requested exchange of the loan currency on various occasions), it was considered that there was no excusable error which would vitiate consent. Therefore the judgement was reversed and the claim dismissed, except for the section partially acknowledged by Kutxabank.

5. The applicants brought an extraordinary appeal against that decision for procedural infringement, based on two grounds, and an appeal, based on four grounds.

Extraordinary appeal for procedural infringement

SECOND.- Formulation of the grounds for the extraordinary appeal for procedural infringement

1. The extraordinary appeal for procedural infringement includes two separate grounds relating to each of the plaintiffs, and that under the heading "*breach in the civil process of fundamental rights recognised in* Article 24 of the Constitution", includes the following heading: "*the extraordinary appeal for procedural infringement we now request is based on the existence of a clear error or arbitrariness in the assessment of the evidence that has been violated under* Article 469.1.4 LEC *as to be manifestly arbitrary or illogical, the assessment of the evidence fails the rationality test required under the constitutional doctrine to respect the right to an effective remedy enshrined in* Article 24 EC (SSTS 28 November 2008, RC No 1789/03 of 30 June 2009, RC No 1889/2006, of 6 November 2009, RIPC No. 1051/2005 *and as also indicated by the Agreement of this First Chamber of 30 December 2011)*".

2. The main reason behind this argument is that the judgement performs a deficient assessment of the evidence since, as the plaintiffs are classed as retail customers, that is, people without any financial culture, the ruling grants greater value to the professional profile of the plaintiffs or to their actions after signing the loan.

Furthermore, the Court's assessment of the expert report supplied by the plaintiffs and the interrogation of the witnesses is criticised.

Regarding that of Ms. Zaira, she is allegedly unaware of the multicurrency loan operation because these issues were dealt with by her husband.

THIRD.- Decision of the Court. Rejection of the grounds

1. In our system, the civil procedure follows the second hearing model, which is why none of the reasons that "numerus clausus" [in closed relationship] listed in Article 469 of the Code of Civil Procedure refers to the evaluation of evidence.

Therefore, the review intended in the assessment of witness statements and expert report has no place in the extraordinary appeal for procedural infringement. More so when these mostly refer to legal rather than factual assessment.

2. The importance that the Provincial Court has given to the professional profile of the applicants and their behaviour in the early life of the loan, and the importance it has given to their classification as retail customers are not issues pertaining to the evaluation of the evidence, but legal assessments of the proven facts which are the very essence of the substantive issue in dispute, whose challenge is logically inconsistent with Article 469.1.4 of the Code of Civil Procedure.

Appeal

FOURTH-. Formulation of the first ground of appeal

1. The appeal claim is founded on a single motive, which is divided into four sections. In reality, four reasons are formulated, and the appellants misinterpret the provision of Article 477.1 of the Code of Civil Procedure through which "*the appeal will be based, solely, on the violation of rules applicable to the resolution of process issues*", considering that where the law limits the scope of the appeal to the denunciation of the infringement of the rules applicable to the resolution of process issues (by which the infringement of the rules governing the process itself can only be denounced in the extraordinary appeal for procedural infringement if they fall into any of the assumptions of Article 469.1 of the Code of Civil Procedure), what prevails is that the appeal consists of a single motive, when what is appropriate is that each legal infringement is formulated independently in a separate motive, which is in effect what the plaintiffs did in each of the sections into which the motive is subdivided.

Therefore, the four sections will be analysed as independent grounds, without prejudice to grouping to jointly resolve them when the close relationship between them makes this desirable.

2. The first ground of appeal is headed as follows:

"*Infringement by derogation of* Articles 3, 8, 60 *and* 80 of the RD 1/2007 approving the Revised Text of the General Law for the Protection of Consumers and Users."

3. The appellants consider that this legal standard applies because the contracting party has the status of an individual. They therefore believe they are within the scope of protection of the Article 8 of the Revised Text of the General Law for the Protection of Consumers and Users (hereinafter TRLCU for its Spanish acronym), as transcribed. Article 80 of that statute is also transcribed. They claim what they consider to constitute breaches of those rules, for example,

"*the contract and its clauses do not conform to the Law of Consumers and Users",* that *"there was indeed error in the consent*" or that "*there were abusive clauses, which attributed rights to the bank that my client did not have.*"

They also invoke Royal Decree 629/1993 of the Securities Market Act, the Commercial Code (without specifying precepts), Articles 1101, 1103, 1104 and 1105 of the Civil Code and "*Articles 2, 25 and 26 General Law on Protection of Consumers*" without specifying how they are violated or even knowing what the last of those laws is.

Article 60 of the TRLCU is also transcribed, they invoke Article 6.3 of the Civil Code, linking it to Articles 8 and 10 bis of the General Law for the Protection of Consumers and Users, Article 5.4 of the Law on General Conditions of Contract and 1.a of the General Law for the Protection of Consumers and Users, for not having adjusted the taking out of the contract to Article 79 of the

Securities Market Act, considering that the violation of administrative regulations is liable to lead to the annulment of the transaction.

FIFTH.- Decision of the Court. Non application of the Revised Text of the General Law for the Protection of Consumers and Users to professionals and entrepreneurs. Lack of precision in the motive for appeal.

1. As stated in the judgement of the Provincial Court, the demand linked the request for the multicurrency mortgage loan to property development activities in which the plaintiff was involved. The consequence to be drawn from this is that the applicants did not hold, in this legal relationship, the legal status of consumers, given that they were not acting "*in a field unrelated to a business or professional activity*", as required by Article 3 of the TRLCU. It is not sufficient to be an individual, therefore, in order to be included in the scope of application of the Revised Text of the General Law for the Protection of Consumers and Users.

2. The above renders irrelevant the alleged infringement of the legal rules that are invoked in the header of the reason because the multicurrency loan signed by the applicants does not come under the legal regime of the Revised Text of the General Law for the Protection of Consumers and Users.

3. In addition to the foregoing, the reason suffers from a serious flaw of appellate technique. With relation to the legal provisions cited in the heading of the reason, how the violation occurs is not adequately specified. Suffice it to consider the terms "*the contract and its terms do not conform to the Law of Consumers and Users",* that *"there was indeed error in the consent"* or that *"there were abusive clauses, which attributed rights to the bank that my client did not have*", which are used, along with other similar, which do not properly state how the judgement under appeal has performed such legal infringements.

Also, throughout the development of the reason, there is indiscriminate citation of rules, sometimes laws for which there is no specification of the precept allegedly infringed, and a confused and vague allegation of various supposed legal violations.

We have stated on previous occasions that extraordinary appeals for procedural infringement and appeal are subject to certain formal requirements which are, among other requirements, the need to indicate clearly and precisely the rule that is considered violated, and that it is not permitted to combine unrelated arguments that lack reasonable clarity of exposition to allow the identification of the legal issue raised (in this sense, sentences 965/2011 of 28 December, 957/2011 of 11 January 2012, 185/2012 of 28 March, and 557/2012 of 1 October).

The appellants, in formulating the appeal, incur these defects. It is not pertinent, since it is not consistent with the nature of these appeals, that the Court proceeds to speculate how the numerous standards cited in this way may have been violated, nor to rework the appeal, ordering the fragmentary and disorderly allegations, and providing them with content.

SIX.- Formulation of the second to fourth grounds of appeal

1. The second motive begins with this synopsis: "*Infringement by derogation of* Article 19 of Law 36/2003 of 11 November, *in connection with* Article 48.2 of the Law on Discipline and Intervention of Credit Institutions *and Articles 3, 5 and 7 of the Order of the Ministry of Economy and Finance of 5 May 1994*".

2. In short, the motive is based on the fact that the regulation invoked requires that the characteristics of the contract are recorded in the binding offers, provided at least three days before the award of the contract, along with information on risk coverage systems, and therefore by not doing so, there was a lack of information that would have come out from the expert report presented, reproduced in the appeal, in both the written report and the oral replies of the expert during the appeal and of the witnesses. All of which would confirm that there is an error in the consent determining the nullity of the contract.

3. The third reason is headed as follows: "*Violation by derogation of Chapter II of Royal Decree 1/2007 of 18 November on protection of consumers and users, the Annex to the Accounting Circular CBE 4/2004 of 22 December to Credit Entities on Standards of financial, public and confidential information and financial status models*, Law 7/1998 of 13 April, on General Conditions of Contract, Articles 5, 7, 8 and 10".

4. The reason is based, synthetically, on the fact that the breach of these rules results in a fundamental defect of consent.

5. The fourth and final ground of appeal is headed as follows: "*Infringement in judgement made of the Doctrine and Jurisprudence contrary to the Chamber on excusable error in contracts* (Articles 1261, 1262 *and* 1265 of the Civil Code). "

6. The motive is supported by the argument that the jurisprudence of this Court "*will not even admit that the inexcusable error is not given when both parties are professionals. It is more proven than the professional status of the purchaser, in this case consumer and user of banking products, does not add inexcusability to the error, in other cases, not as in this case where we insist that one of the parties was a retail customer or ignorant.*" The appellants allege that "*even if for dialectical effects he was knowledgeable, not even in that case could it be judged that he could not be, given the characteristics of the product, be object of a totally excusable error which led to a mistake in the consent of such magnitude that the contract does not exist due to lack of valid consent...*".

Other numerous legal provisions are invoked such as Article 1301 of the Civil Code, which is considered applicable by reason of a contract ruined by the "*falsity of the motive*", Royal Decree 629/1993, the Securities Market Act, the Commercial Code (without specifying precepts), Articles 1101, 1103, 1104 and 1105 of the Civil Code and "Articles 2, 25 and 26 LGDC" (sic), Law 26/1984 on Protection of Consumers and Users, Article 7 of the Law on Unfair Competition, an Article 79.1 letters a, c, e and h of an unidentified law that appears to be the Securities

Market Act, Article 6.3 of the Civil Code and Articles 48, 80, 87, 91 and 118 of the "General Law of Consumers and Users".

SEVENTH.- **Decision of the Chamber. Informational defects and procedural error**

1. The grounds for appeal are formulated, as above, with serious technical appeal defects. It does not properly identify what substantive legal violations are being denounced. To the contrary, a vague argument is provided including legal and factual style arguments that cover disparate issues, but without complying with the requirements of precision and identification of specific legal infringements belonging to the appeal.

They also cite the violation of provisions of a regulatory nature or entire chapters of certain laws, without specifying the legal principles infringed, they cite precepts of laws whose references are unknown, and much less what law they correspond to, or cited directly without specifying the law referred to by the articles whose numbers are indicated, as well as referring to legal provisions that are generic, whose content is too large or too heterogeneous and inappropriate to establish a single legal violation.

Moreover, how the infringement of such laws occurs is not properly explained.

2. The only question that is treated with any amount of clarity is that of sustaining the existence of legal infringement in the contested judgement for not having considered contributory a procedural error of sufficient importance to establish the cancellation of the contract for existence of error in the consent despite having infringed the rules requiring the provision of adequate information to the contracting party.

Before directly addressing the aforementioned legal infringement, it is necessary to perform some preliminary considerations on the nature and characteristics of the transaction whose cancellation is intended, and on the rules governing the information that should be provided to potential customers by the entities that offer it.

3. What has come to be colloquially called "multicurrency mortgage" is a variable interest home equity loan, in which the borrower can choose the currency for delivery of capital and repayment instalments, from several possible options, and in which the benchmark on which the differential is applied to determine the interest rate applicable in each period is often different from the Euribor, specifically often the Libor (London Interbank Offered Rate, i.e. the interbank interest rate in the London market).

The appeal of this type of financial instrument lies in using the currency of a country where interest rates are lower than those of countries whose currency is the Euro as a reference, together with the possibility of changing the currency if that taken as a reference alters its relationship with the Euro at the expense of the borrower. The currencies in which these financial instruments are most often arranged are the Japanese yen and Swiss franc. As has

been said, the frequent change from one currency to another is expected, and even to the Euro, as occurred in the loan object of this appeal.

4. The risks of this financial instrument exceed those of variable rate mortgage loans requested in Euros. As well as the risk of changes in the interest rate there is also the risk of currency fluctuation. But, in addition, this risk of currency fluctuation does not mean only that the Euro amount of the periodic redemption fee, including principal and interest, may rise if the chosen currency appreciates against the Euro. The use of a currency such as the yen or the Swiss franc is not only a reference to fix the Euro amount of each repayment instalment, to the extent that if the currency depreciates, the Euro amount will be lower, and if it appreciates, it will be higher. The exchange currency chosen applies to, in addition to the Euro amount of the instalment, the establishment of the outstanding principal amount in Euros, such that the currency fluctuation signifies a constant recalculation of the borrowed capital. This implies that despite paying periodic amortisation instalments, including repayment of borrowed capital and payment of interest accrued since the previous amortisation, it could well be that after several years, if the currency has appreciated against the Euro, the borrower not only has to pay higher instalment amounts in Euros, but also owe the lender a greater capital sum in Euros than they received to arrange the loan.

This type of loan used to finance the acquisition of an asset that is mortgaged as security for the lender, provides an added difficulty for the customer in obtaining an exact idea of the correlation between the asset financed and the liability that finances it, given that the possible fluctuation in the value of the asset acquired is added to the fluctuation of the liability incurred to acquire it, not only due to the variability of interest linked to a non-customary reference index, the Libor, but by currency fluctuations, such that, in recent years, while the value of property acquired in Spain has suffered a sharp depreciation, the most used currencies in these "multicurrency mortgages" have appreciated, meaning lenders must pay higher instalment and in many cases now owe an amount in Euros greater than when they took out the mortgage loan, in absolute disproportion to the value of the property financed by taking out this type of loan.

5. At a date subsequent to entering into the contract object of the proceedings, Directive 2014/17/EU of the European Parliament and Council of 4 February 2014 was issued on credit agreements concluded with consumers for residential real estate, for which the transposition deadline has not yet passed, and is therefore not applicable to the judgement of this appeal.

As justification of said rule, recital four of the Directive refers to existing problems "*regarding the irresponsible granting of loans and contracts, as well as the potential margin of irresponsible behaviour among market participants*," such that "*some of the problems identified derive from foreign currency loans signed by consumers because of the advantageous interest rate offered, without information or adequate understanding of the exchange rate risk entailed*". In recital thirty, the Directive adds that "*because of the major risks associated with borrowing in foreign currency, it is necessary to introduce measures to ensure that consumers are aware of the risks they assume and that they have the ability to limit their exposure to foreign exchange risk during the term of the loan. The risk could be limited by giving the consumer the right to convert the*

currency of the credit agreement, or by other methods. Such procedures might, for example, include maximum limits or risk warnings, if these are sufficient to limit the currency exchange risk."

Articles 13.f and 23 contain specific provisions for loans in foreign currency that are subject to important limitations to reduce the currency exchange risk assumed by the borrowers, and strengthened obligations of information regarding the risks for entities marketing them.

The CJEU on 30 April 2014, ruled on Case C-26/13 dealing with such a multicurrency mortgage. However, in the case of a multicurrency mortgage granted to a consumer, the cited ruling of the CJEU applies and interprets Directive 93/13/EEC on provisions not negotiated in consumer contracts, which in our case is not applicable in that, as already stated, the plaintiffs did not hold the status of consumers in this legal relationship, so it is inappropriate to mention that judgement.

6. Determination of the norm applicable to this type of legal transaction in order to establish the duties of information incumbent on the lender is not something of common accord.

The Court considers that the "multicurrency mortgage" is, in terms of a loan, a financial instrument. It is also a derivative financial instrument in that the quantification of one party's obligation to the contract (the payment of the loan repayment instalments and the calculation of the outstanding capital) depends on the amount of some other distinct value, called the underlying asset, which in this case is a foreign currency. As a derivative financial instrument related to foreign exchange, it is included in the scope of the Securities Market Act in accordance with the provisions of Article 2.2 of the Act. It is also a complex financial instrument under the provisions of Article 79.bis 8 of the Securities Market Act, in relation to Article 2.2 of the Act.

The result of what is expressed, is that the lender is required to perform the duties of information imposed by the aforementioned Securities Market Act, as currently worded following the amendments introduced by Law no. 47/2007, of 19 December, implementing Directive 2004/39/EC of 21 April, MiFID (Markets in Financial Instruments Directive), developed by Royal Decree 217/2008 of 15 February, and specifically, Article 79.bis of the Securities Market Act and the Royal Decree.

7. It is not a barrier to the above that Article 79 quáter of the Securities Market Act establishes that Article 79.bis shall not apply when an investment service is offered as part of a financial product which is already subject to other provisions of Community legislation or common European standards for credit institutions and for consumer credit activity, concerning risk assessment of customers or information requirements.

Said Article 79 quáter of the Securities Market Act establishes Article 19.9 of the MiFID Directive, which provides that "*in the event that an investment service is offered as part of a financial product which is already subject to other provisions of Community legislation or*

common European standards for credit institutions and credit consumption relating to the assessment of risk of customers or the information requirements, this service shall not additionally be subject to the obligations set out in this Article."

The judgement of the Court of Justice of the European Union of 30 May 2013, Case C-604/11, Genil 48 SL, ruled that in order for the exception of Article 19.9 of the directive to apply it is necessary that the investment service has been subject to other legal provisions or guidelines for risk assessment of customers or the requirements in terms of information, constituting European Union legislation or common European standards. This case would only apply if the investment service formed an intrinsic part of a financial product at the time that this evaluation or these requirements were met with respect to that product. And it also states that the provisions of Union law and common European standards to which that provision of the MiFID refers, and that would determine the non subjection to the obligations under this Directive, must enable an assessment of customer risk or establish information requirements that themselves cover the investment service which is an intrinsic part of the financial product in question.

Consequently, in the absence of Community legislation or common European standards for credit institutions to establish information requirements for financial institutions in relation to the loans in which the determination of the amount of the amortization fee and calculation of the outstanding capital is at all times referenced against a foreign currency at the time the contract was entered into, allowing customers to appropriately assess the risk, this was governed by the MiFID for regulation of these ends.

8. As we ruled in the judgement of the First Chamber of the Supreme Court no. 840/2013, of 20 January 2014, and have reiterated in subsequent judgements, these information duties respond to a general principle: every client should be informed by the bank, before entering into the contract, of the risks involved in the speculative operation in question. This general principle is a consequence of the general duty to act in accordance with the requirements of good faith, which is contained in Article 7 of the Civil Code and the Law of Contracts of our economic and cultural environment, particularly in Article 1: 201 of the Principles of European Contract Law. This general duty to negotiate in good faith entails specifically assessing the knowledge and experience of the customer in financial matters, in order to specify what information must be provided in relation to the product concerned, and where appropriate issue a judgement of convenience or suitability, and having done this, provide the customer with information about the fundamentals of the transaction, which includes the specific risks involved in the financial instrument that they are looking to contract.

9. In the present case, the bank violated its obligations imposed by Article 79.bis of the Securities Market Act, in particular those relating to inform customers, in an understandable manner, of the nature and risks of the complex financial derivative instrument that they were contracting. The defendant has sustained throughout the dispute that it was not required to provide such information because the operation was excluded from the scope of application of the Securities Market Act, which, as we have seen, this Court does not accept.

10. The next question to be resolved is that relating to what should be the consequences of this violation. The judgement of this Court of 15 December, no. 716/2014, stated that the aforementioned judgement of the Court of Justice of the European Union of 30 May 2013, Case C-604/11, Genil 48 SL, in paragraph 57, ruled that "*while* Article 51 of Directive 2004/39 *provides for the imposition of administrative measures or sanctions against persons responsible for an infringement of the provisions adopted to implement said Directive, this does not specify that Member States must establish contractual consequences in the event that contracts are entered into that do not respect the obligations derived from the provisions of national law brought by* Article 9, paragraphs 4 *and* 5 of Directive 2004/39, *nor what those consequences might be*", and that, therefore, "*in the absence of rules on the matter in the Law of the Union, it falls upon the national legal system of each Member State to determine the contractual consequences of non-compliance with these obligations, respecting the principles of equivalence and effectiveness* [see Judgement of 19 July 2012, case Littlewoods Retail (C-591/10), paragraph 27]."

We stated in our ruling that, in accordance with this doctrine of the CJEU, the EU MiFID does not impose the penalty of nullity of the contract for breach of duties of information, which we had to consider whether, in accordance with our domestic law, would justify the annulment of the contract of acquisition of this complex financial product for the mere breach of duties of information imposed by Article 79.bis of the Securities Market Act, section of Article 6.3 of the Civil Code. We took into consideration that the legal standard that introduced the legal obligation of information of Article 79.bis of the Securities Exchange Act did not establish the nullity of the contract of acquisition of a financial product as a result of its incompliance, but another distinct effect of administrative order in case of violation. Law 47/2007, upon transposition of the MiFID Directive, established a specific penalty for breach of these duties of information under Article 79.bis, qualifying this behaviour as "very serious infringement" (Article 99.2.zbis LMV - Securities Market Act), allowing the opening of disciplinary proceedings by the National Securities Market Commission to impose appropriate administrative sanctions (Article 97 and following of the Securities Market Act).

Considering the above we do not deny that the breach of these legal duties of information could have an effect on the validity of the contract, to the extent that the lack of information may cause a procedural error in the terms we set out in Judgement 840/2013 of 20 January 2014, but we consider that the mere breach of these duties of information did not on its own imply the nullity of the contract.

11. Regarding this procedural error, this Court, in cases such as no. 840/2013 of 20 January, and 716/2014 of 15 December, has stated that the breach of duties of information, by itself, does not necessarily entail the judgement of procedural error, but there is no doubt that the legal provision of these duties, which relies on the asymmetry of information that usually occurs in the contracting of such financial products by retail customers, may affect the appreciation of the error.

The Court has also highlighted the importance of the duty to properly inform the retail customer, who in principle is assumed to lack adequate knowledge to understand complex products and for which, in general, there is an asymmetry in the information with respect to the company with which the contract is entered into. But it has considered unfounded the claim for annulment on the grounds of invalidating consent in the case of procurement of these products, usually for large amounts, where the contracting party, despite having the legal condition of retail customer, has the profile of an experienced customer and the information that has been supplied, while possibly insufficient for a non-expert customer, is sufficient for those who have experience and financial knowledge (case no. 207/2015 of 23 April). What is relevant in deciding whether there has been a procedural error is not whether the reporting obligations affecting the bank were met per se, but whether the customer had sufficient knowledge of this complex product and the specific risks associated therewith when taking out the contract.

The failure to perform the duties of information that the general and sector rules impose on the banking entity allow presumption that the customer lacks sufficient knowledge of the contracted product and associated risks, which would vitiate consent, but such presumption may be rebutted by proof that the client has the right skills to understand the nature of the product being contracted and the associated risks involved, in which case the relevant information asymmetry no longer applies that justifies the obligation of information imposed on the banking or financial institution and which would justify the excusable nature of customer error.

12. The judgement of the Provincial Court finds there is evidence that allows the petitioners to be granted the profile of expert clients. They are highly qualified professionals (the wife is an executive, the husband lawyer and business owner), and the spouse who, for himself and on behalf of his wife contracted the product, specialises in banking law and multicurrency mortgages in particular, which is precisely the contracted product he intends to annul for procedural error.

His first actions after signing the multicurrency loan show that he actually knew the characteristics and risks of the product: in the first months he twice requested a currency exchange (from yen to Swiss francs and vice versa, although the second change was not implemented as the commission for the foreign exchange was not paid), and in one of the emails sent to the sued financial institution, precisely when requesting a currency exchange, stated: "*in the current situation, and pending sending of the fee, the only method we have of significantly reducing the risk is through currency exchange. As you know we gained a little bit with the [Swiss] franc that we are going to lose now, with the yen we lost the opportunity in January at 114 but being along the lines of 129-132, the dollar increasing considerably, it is expected that the yen will be devalued because if not the Japanese economy will be out of control*".

13. For a bank customer to be classified as a retail customer, for the purposes of MiFID, signifies that they do not meet the stringent requirements of the Securities Exchange Act to be considered a professional client. In short, professional customers are financial institutions; certain authorities or public bodies of considerable importance; entrepreneurs who individually

fulfil at least two of the following conditions: 1. that the total asset items equals or exceeds 20 million Euros; 2. that the amount of their annual turnover is equal to or exceeds 40 million Euros; 3. that their own resources are equal to or greater than 2 million Euros; institutional investors who usually invest in securities or other financial instruments; and customers who request it in advance, and expressly waive their treatment as retail customers, provided they meet at least two of the following criteria: 1. that the customer has carried out a significant volume of transactions in the market, with an average rate of more than ten per quarter over the previous four quarters; 2. that the value of the cash and securities deposited exceeds 500,000 Euros; 3. that the client works, or has worked for at least one year, in a professional position in the financial sector that requires knowledge of the transactions or services envisaged.

Certainly, being a retail customer implies a presumption of lack of knowledge of complex financial instruments and, consequently, the existence of asymmetric information that justifies the existence of rigorous duties of information by investment firms. But this does not mean, as claimed by the appellants, that the customer is necessarily a "financial ignoramus", it can be that customers who do not meet the stringent requirements that the MiFID requires for consideration as a professional customer may possess, through their profession or experience, in depth knowledge of such complex financial instruments that allow them to understand the nature of the product they are contracting and its associated risks, even if they do not receive the information MiFID requires from these companies.

14. In the case under appeal, the judgement of the Provincial Court has decided, for the reasons stated, that the person who personally and on behalf of his spouse contracted the multicurrency mortgage possessed adequate skills to understand the nature of the contracted financial instrument and its associated risks.

The error that, being excusable, vitiates the consent, is that which is imposed on the nature and risks of the product. What does not vitiate consent, and is therefore not adequate to justify the annulment of the contract, is the behaviour of the person, who knowing the component of elevated randomness of the contract and the nature of its risks, believed he could obtain gains derived from these characteristics, but erred in the calculation and, contrary to what he foresaw, resulted in losses, not profits.

The foregoing leads to the conclusion that there was no error that vitiated consent that would allow the cancellation of the contract, since, if there was misrepresentation by the contracting party, which is highly unlikely in view of his professional qualifications and written communications he had with the sued bank, such an error would not be excusable in response to such professional qualification.

15. Ms. Zaira had a significant professional qualification as executive of a major company. It is true that this, by itself, does not mean she has enough knowledge to obtain a complete picture of the nature and risks of the product contracted, since this is a very specialised contract sector and, above all, a peculiar product that requires expertise that is not within the scope of any executive.

But having acted under representation of her husband, to whom she had given power of attorney to contract on her behalf the financial instrument in which he was an expert, it is his profile that is relevant in assessing the existence of procedural error. In judgement no. 207/2015 of 23 April, we state: "*When anyone willing to contract grants power of attorney to a third party to perform contract negotiation and arrange the provision to be contracted on their behalf, prosecution of the error has to be made with respect to such agent. If this agent has badly fulfilled their task and has been unable to explain to the principal the nature and characteristics of the contract, and in particular the object of this, it is a matter affecting the fulfilment of the mandate and responsibility of the agent for badly fulfilling their obligations to the principal.*"

The foregoing means that the appeal must be dismissed.

EIGHTH.- Costs and deposits

1. In accordance with the provisions of Article 398.1, concerning 394.1, both of the Code of Civil Procedure, the costs of the extraordinary appeal for procedural infringements and appeal should be imposed on the appellants.

2. The loss of deposits made pursuant to the 15th additional provision, paragraph 9 of the Organic Law of Judicial Power is also appropriate.

Accordingly, in the name of the King and under the authority of the Spanish people.

WE RULE

1. To dismiss the extraordinary appeal for procedural infringement and the appeal lodged by Mr. Jacobo and Ms. Zaira against the judgement dated 17 July 2013 issued by the Provincial Court of Madrid, Section Nineteen, in appeal No. 273/2013.

2. To impose upon the aforementioned appellants the costs of the extraordinary appeal for procedural infringements and appeal that we dismiss, as well as the loss of the deposits.

The mentioned court issues the relevant certificate, with return of the decrees and court record.

Thus we pronounce, order and sign our judgement, to be inserted in the Collection of Laws, passing the necessary copies to this effect.

PUBLICATION.- The above ruling was read and published by the Hon. **Rafael Sarazá Jimena**, Presiding judge in the process of the present decrees, Public Hearing being held by the First Chamber of the Supreme Court, on this day, which as secretary of this body, I certify.