JUDGMENT OF THE COURT (Second Chamber)

25 October 2005 *

In Case C-229/04,

REFERENCE for a preliminary ruling under Article 234 EC, from the Hanseatisches Oberlandesgericht in Bremen (Germany), made by decision of 27 May 2004, received at the Court on 2 June 2004, in the proceedings

Crailsheimer Volksbank eG

v

Klaus Conrads,

Frank Schulzke and Petra Schulzke-Lösche,

Joachim Nitschke,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, C. Gulmann (Rapporteur), R. Silva de Lapuerta and P. Kūris, Judges,

* Language of the case: German.

Advocate General: P. Léger,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 March 2005,

after considering the observations submitted on behalf of:

— Crailsheimer Volksbank eG, by M. Siegmann and N. Polt, Rechtsanwälte,

— Mr Conrads, Mr Schulzke and Mrs Schulzke-Lösche and Mr Nitschke, by E. Ahr and K.-O. Knops, Rechtsanwälte,

— the German Government, by A. Dittrich and C.-D. Quassowski, acting as Agents,

— the French Government, by R. Loosli-Surrans, acting as Agent,

— the Commission of the European Communities, by A. Aresu, H. Kreppel and S. Gruenheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 June 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31, 'the Directive'), in particular Articles 1, 2 and 5(2) thereof.

2 The reference was made in proceedings brought by Crailsheimer Volksbank eG ('the Bank') against K. Conrads, F. Schulzke, P. Schulzke-Losche and J. Nitschke ('the borrowers') concerning the cancellation, under the applicable national law on doorstep selling, of the credit agreements concluded between the borrowers and the Bank to finance the purchase of immovable property.

Legal context

The Community legislation

3 The Directive is intended to provide consumers in the Member States with a minimum of protection in the area of doorstep selling, in order to protect them from

the risks arising on the conclusion of a contract away from the business premises of the trader. The fourth and fifth recitals in the preamble to the Directive read:

'... the special feature of contracts concluded away from the business premises of the trader is that as a rule it is the trader who initiates the contract negotiations, for which the consumer is unprepared or which he does not expect; ... the consumer is often unable to compare the quality and price of the offer with other offers; ...

... the consumer should be given a right of cancellation over a period of at least seven days in order to enable him to assess the obligations arising under the contract'.

4 Article 1(1) of the Directive provides:

'This Directive shall apply to contracts under which a trader supplies goods or services to a consumer and which are concluded:

...

— during a visit by a trader:

(i) to the consumer's home or to that of another consumer;

...

where the visit does not take place at the express request of the consumer.'

5 Article 2 of the Directive provides:

'For the purposes of this Directive:

...

"trader" means a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a trader.'

6 Article 3(2)(a) of the Directive provides:

'This Directive shall not apply to:

(a) contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property.

...'

7 Article 4 of the Directive provides:

'In the case of transactions within the scope of Article 1, traders shall be required to give consumers written notice of their right of cancellation within the period laid down in Article 5, together with the name and address of a person against whom that right may be exercised.

Such notice shall be dated and shall state particulars enabling the contract to be identified. It shall be given to the consumer:

(a) in the case of Article 1(1), at the time of conclusion of the contract;

...

Member States shall ensure that their national legislation lays down appropriate consumer protection measures in cases where the information referred to in this Article is not supplied.'

8 Article 5 of the Directive provides:

'The consumer shall have the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from receipt by the consumer of the notice referred to in Article 4, in accordance with the procedure laid down by national law.

...

2. The giving of the notice shall have the effect of releasing the consumer from any obligations under the cancelled contract.'

9 Article 7 of the Directive provides:

'If the consumer exercises his right of renunciation, the legal effects of such renunciation shall be governed by national laws, particularly regarding the reimbursement of payments for goods or services provided and the return of goods received.'

10 Article 8 of the Directive provides:

'This Directive shall not prevent Member States from adopting or maintaining more favourable provisions to protect consumers in the field which it covers.'

The case-law of the Court

11 In its judgment in Case C-481/99 *Heininger* [2001] ECR I-9945, the Court interpreted three aspects of the Directive.

12 First, it held that the Directive applied to secured credit agreements, that is to say, credit agreements for financing the purchase of immovable property. In paragraph 32 of that judgment, it held that, whilst an agreement of the type in question is linked to a right relating to immovable property, in that the loan must be secured by a charge on immovable property, that feature is not sufficient for the agreement to be regarded as concerning a right relating to immovable property for the purposes of Article 3(2)(a) of the Directive.

13 It concluded that a consumer who has entered into a secured credit agreement in a doorstep-selling situation has a right of cancellation under Article 5 of the Directive. It pointed out, in paragraph 35 of that judgment, that the effects of a cancellation of that agreement in accordance with the Directive on the contract for the purchase of the immovable property and on the provision of security in the form of a charge on it fall to be governed by national law.

14 Finally, the Court observed that the minimum period of seven days allowed for cancellation must be calculated from the time the consumer receives the notice concerning his right of cancellation from the trader. In paragraph 48 of the judgment in *Heininger* it held that the doorstep-selling directive precludes the national legislature from imposing a time-limit of one year from the conclusion of the contract within which the right of cancellation provided for in Article 5 of that Directive may be exercised, where the consumer has not received the information specified in Article 4.

The national legislation

15 The Directive was transposed into German law by the Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften (Law on the cancellation of doorstep transactions and analogous transactions) of 16 January 1986 (BGBl. 1986 I, p. 122, the 'HWiG').

16 In the version applicable at the material time, Paragraph 1(1) of the HWiG provides:

'Where the customer was induced to make a declaration of intention to conclude a contract for a service for valuable consideration:

1. by oral negotiations at his place of work or in a private home,

...

that declaration of intention takes effect only if the customer does not give written notice revoking it within a period of one week.'

17 Paragraph 3 of the HWiG provides:

'(1) In the event of cancellation, each contracting party shall return to the other whatever it has received. Damage to or loss of the object or any other matter preventing the return of the object shall not preclude cancellation. If the customer is liable for the damage, loss or other matter preventing return, he shall pay the difference in value or the value of the object to the other contracting party.

(2) Where the customer has not been informed pursuant to Article 2 and has not otherwise been made aware of his right of cancellation, he shall be held liable for the damage, loss or other matter preventing return only if he has not exercised the care he usually exercises with his own possessions.

(3) For the right to use or apply goods and for the other services supplied up to the date of cancellation, the value of such right or services must be paid; loss of value as a result of normal use of goods or other services shall be disregarded.

(4) The customer may demand compensation from the other party for necessary expenditure on the goods.'

18 The German Civil Code (Bürgerliches Gesetzbuch) provides in Paragraph 123, which concerns avoidance for deceit or threats:

'1. A person may avoid a declaration of will that has been induced by deceit or by an unlawful threat.

2. If the deceit is perpetrated by a third person, a declaration that had to be made to another person may be avoided only if the latter person knew or ought to have known of the deceit. ...'

The disputes in the main proceedings

19 In the early 1990s a property development company built an apartment complex in the Stuttgart area intended for letting primarily to businessmen. The property complex was to be run as a hotel by an operating company acting as lessee.

20 The apartments were sold on a joint ownership basis to individuals, including the borrowers, as an investment entailing tax advantages. The property development company used a sales company under its supervision which set up a 'timetable' for the various steps necessary to arrange the purchase and its financing. The sales company, in turn, used independent intermediaries, including the broker, Mr W. ('the broker'), who negotiated the purchases at issue in the main proceedings. In most cases the purchase of the apartments was financed by a bank (the DSL-Bank) which undertook part of the expenditure with preferential security, while the Bank, which had already provided the finance for the property development company to construct the complex, financed the remainder of the expenditure with a lower-ranking charge as security.

21 In the three cases in the main proceedings, the broker's method was to make appointments, in some cases several appointments, with the borrowers at their home in order to show them calculation models and compile personal information

and data concerning their solvency in order to draw up an application for financing. The broker would return several weeks later to have the loan agreements, which had been drawn up in the meantime by the Bank, signed. In parallel, the property purchase contracts or a power of attorney authorising the conclusion of such a contract were authenticated by a notary.

22 The building was completed in February 1993. Five months later the operating company discontinued the rental payments and became insolvent at the beginning of 1994. The property development company paid the agreed rent until the end of 1993 and became insolvent in 1995. The anticipated rate of occupation was never achieved.

23 Subsequently, the revenue derived from the investment proved insufficient. On account of the restrictions in the declaration of apportionment the residential units could not be utilised separately in practice, as individual use or individual letting was prohibited.

24 The borrowers also discontinued their payments to the Bank.

25 Following the termination of the loan agreements by the borrowers, the Bank brought proceedings against each of the borrowers for payment of what was owed to it with interest.

26 In the case of Mr Conrads, the Landgericht (Regional Court) Bremen upheld the Bank's application by judgment of 4 December 2001.

27 On appeal by that borrower against that judgment, the Hanseatisches Oberlandesgericht (Hanseatic Higher Regional Court) in Bremen ordered enquiries to establish whether the loan agreement was concluded in a doorstep-selling situation. It was established that the broker approached that borrower on his own initiative and reached agreement with him on his participation in the tax saving scheme of the property development company in a doorstep-selling situation. By judgment of 16 January 2003, the Hanseatisches Oberlandesgericht in Bremen set aside the judgment of the Landgericht Bremen and dismissed the original application.

28 The Hanseatisches Oberlandesgericht in Bremen stated as grounds for that dismissal, first, that the Bank was liable by reason of the false information supplied on the monitoring of the use of the funds and other matters, second, that the right to repayment of the loan had to be assessed in the light of the objections made about the builder and, third, that the cancellation of the loan agreement under the HWiG was valid.

29 On that point, the referring court declared that the circumstances were those of a doorstep-selling situation. As to where responsibility for that situation lay, it cited and applied the principles set out on that subject by the 11th Chamber of the Bundesgerichtshof (Federal Court of Justice). It is on that basis that the Hanseatisches Oberlandesgericht in Bremen held the Bank responsible for the doorstep-selling situation of which it held the Bank was unaware as a result of its negligence, pointing out that the very short time-limit allowed by the timetable should have led it to ask for more information about the circumstances of the negotiation of the contracts. As the purchase and the financing formed a single economic unit, the referring court refused to uphold the application for repayment made by the Bank under Paragraph 3 of the HWiG.

30 On appeal on a point of law by the Bank, the Bundesgerichtshof set aside the judgment of the Hanseatisches Oberlandesgericht in Bremen by judgment of 27 January 2004 and referred the case back to that court for it to rule on the matter again.

31 In the case of Mr Schulzke and Mrs Schulzke-Lösche, the Landgericht Bemen upheld the application of the Bank by judgment of 27 November 2001.

32 On appeal by those borrowers the Hanseatisches Oberlandesgericht in Bremen heard the testimony of a witness. It was revealed that the loan agreement was also concluded following a visit by the broker to the borrowers' home. Proceedings were stayed in the light of the appeal on a point of law in the case of Mr Conrads.

33 As regards the application for repayment of the loan brought by the Bank against Mr Nitschke, it was dismissed by the Landgericht Bremen. The Bank appealed against that decision to the Hanseatisches Oberlandesgericht in Bremen.

The questions referred for a preliminary ruling

34 As a preliminary point, the Hanseatisches Oberlandesgericht in Bremen explains that, since the judgment in *Heininger*, there has been disagreement, in Germany, between the 11th Chamber of the Bundesgerichtshof and a number of courts of first and second instance regarding the legal effects of that judgment.

35 According to the referring court, the conditions for the right of cancellation provided for by Paragraph 1 of the HWiG are themselves controversial. It states in that regard that, according to the settled case-law of the Bundesgerichtshof, the right of cancellation does not turn solely on the existence of a doorstep-selling situation but also on responsibility for it. This case-law is linked to the official explanatory memorandum attached to the HWiG, which specifically recommends the

interpretation of Paragraph 1 of that law on the basis of the legal principles laid down in Paragraph 123(2) of the BGB, that is to say that a contracting party must be held responsible for the deceptive conduct of a third party only where it was or ought to have been aware of the conduct of that third party. According to the Bundesgerichtshof, a person who is taken unawares in a doorstep-selling situation and is caused to make a declaration of intent must not be in a better position than a person who is the victim of deceit. The Hanseatisches Oberlandesgericht in Bremen takes the view, rather, that the Directive contains nothing to suggest that the right of cancellation should be restricted in that way, as it makes that right dependent only on the existence of a doorstep-selling situation. The first question therefore concerns the conditions under which a lender must be considered responsible for a doorstep-selling situation.

36 The Hanseatisches Oberlandesgericht in Bremen also raises the question whether, in a doorstep-selling situation, cancellation necessarily entails an obligation to repay the loan. Its second to fourth questions thus concern the legal effects of cancellation.

37 In that regard, the referring court states that the Bundesgerichtshof takes the view that, in circumstances such as those of the main proceedings, the borrower must repay the loan even where it has been paid to a third party, such as the property development company in this case. That court adds that the Bundesgerichtshof interprets Paragraph 3(1)(1) of the HWiG as meaning that following cancellation of the loan the borrower has to pay back the loan immediately in a one-off sum and not in the instalments provided for in the agreement.

38 The Hanseatisches Oberlandesgericht in Bremen refers to the reference for a preliminary ruling by the Landgericht Bochum in Case C-350/03 *Schulte* [2005] ECR I-9215 leading to the judgment also delivered today, in which the Court was also asked to rule on the legal effects of the cancellation of a secured credit agreement in a doorstep-selling situation.

39 As regards the second question, which, like the third question of the Landgericht Bochum in the above case, concerns the obligation to repay, the referring court maintains that, to guarantee the effectiveness of the Directive, and Article 5(2) thereof in particular, the borrower does not have to repay the loan where he is persuaded in a doorstep-selling situation not only to conclude the loan agreement but also to allow the loan proceeds to be paid irreversibly to a third party without any further right of disposal. No obligation to repay should arise from such an instruction given by a person taken unawares. As regards its third and fourth questions, the Hanseatisches Oberlandesgericht in Bremen states that they correspond to the fourth question of the Landgericht Bochum in *Schulte*, cited above.

40 In those circumstances, the Hanseatisches Oberlandesgericht in Bremen decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is it compatible with Article 1(1) of Directive 85/577/EEC for the rights of consumers, in particular their right of cancellation, to be made subject not only to the existence of a doorstep-selling situation as referred to in Article 1(1) of the directive but also to additional criteria for responsibility, such as a trader's deliberate use of a third party in the conclusion of the agreement or a trader's negligence in respect of the third party's conduct in connection with the doorstep selling?

2. Is it compatible with Article 5(2) of Directive 85/577/EEC for a mortgage borrower, who not only concluded the loan agreement in a doorstep-selling situation but also arranged, in that situation, for the loan to be paid into an account which, in practice, is no longer at his disposal, to have to pay back the loan to the lender if the agreement is cancelled?

3. Is it compatible with Article 5(2) of Directive 85/577/EEC for the mortgage borrower, if he is required to pay back the loan following cancellation, to have to do so not on the instalment repayment dates laid down in the agreement but immediately in a one-off sum?

4. Is it compatible with Article 5(2) of Directive 85/577/EEC for the mortgage borrower, if he is also required to pay back the loan following cancellation, to have to pay interest on it at the normal market rate?'

The questions

The first question

41 By this question the referring court essentially seeks to know whether Articles 1 and 2 of the Directive must be interpreted as meaning that, when a third party intervenes in the name of or on behalf of a trader in the negotiation or conclusion of a contract, the application of the Directive can be made subject not only to the condition that the contract has been concluded in a doorstep-selling situation defined in Article 1 of the Directive but also to the condition that the trader was or should have been aware that the contract was concluded in that situation.

42 In that regard, suffice it to observe that there is no basis in the wording of the Directive for inferring the existence of such an additional condition. Article 1 of the Directive provides that it applies to contracts concluded between a trader and a consumer in a doorstep-selling situation and, under Article 2 of the Directive, for the purposes thereof, 'trader' means any person who acts in the name or on behalf of a trader.

43 Moreover, to accept such an additional condition would be contrary to the objective of the Directive which is to protect the consumer from the element of surprise inherent in doorstep selling.

44 That interpretation is borne out by paragraph 43 of the judgment of 22 April 1999 in Case C-423/97 *Travel Vac* [1999] ECR I-2195, according to which, in order for the consumer to have the right of renunciation, it is sufficient for him to be in one of the situations described in Article 1 of the Directive and there is no need to require in addition that he was influenced or manipulated by the trader.

45 Therefore, the answer to the first question must be that Articles 1 and 2 of the Directive must be interpreted as meaning that when a third party intervenes in the name of or on behalf of a trader in the negotiation or conclusion of a contract, the application of the Directive cannot be made subject to the condition that the trader was or should have been aware that the contract was concluded in a doorstep-selling situation as referred to in Article 1 of the Directive.

The second, third and fourth questions

46 By these questions the referring court essentially seeks to know whether the Directive, and Article 5(2) thereof in particular, precludes a requirement that, in the event of cancellation, a mortgage borrower must pay back to the lender the amount of a loan where the loan agreement was concluded in a doorstep-selling situation and where the borrower had the loan paid into an account which, in practice, is no longer at his disposal, and, if not, whether it precludes a requirement that the borrower must repay the loan not on the instalment repayment dates laid down in the agreement but immediately in a one-off sum with interest at the market rate.

47 It must be observed that, as the Bank, the borrowers, the German and French Governments and the Commission pointed out and the referring court noted, the second, third and fourth questions essentially correspond to the third and fourth questions referred in the case leading to the judgment in *Schulte*.

48 In reply to those questions, the Court ruled in that judgment that the Directive does not preclude:

— a requirement that a consumer who has exercised his right to cancel under the Directive must pay back the loan proceeds to the lender, even though according to the scheme drawn up for the investment the loan serves solely to finance the purchase of the immovable property and is paid directly to the vendor thereof;

— a requirement that the amount of the loan must be paid back immediately;

— national legislation which provides for an obligation on the consumer, in the event of cancellation of a secured credit agreement, not only to repay the amounts received under the agreement but also to pay to the lender interest at the market rate.

However, in a situation where, if the Bank had complied with its obligation to inform the consumer of his right of cancellation, the consumer would have been able to avoid exposure to the risks inherent in investments such as those at issue in the main proceedings, Article 4 of the Directive requires Member States to ensure that their legislation protects consumers who have been unable to avoid exposure to such risks, by adopting suitable measures to allow them to avoid bearing the consequences of the materialisation of those risks.

49 Accordingly, the answers to the questions referred must be given in the same terms as those given in the judgment in *Schulte*, that is to say that the Directive, and Article 5(2) thereof in particular, does not preclude:

— a requirement that a consumer who has exercised his right to cancel under the Directive must pay back the loan proceeds to the lender, even though according to the scheme drawn up for the investment the loan serves solely to finance the purchase of the immovable property and is paid directly to the vendor thereof;

— a requirement that the amount of the loan must be paid back immediately;

— national legislation which provides for an obligation on the consumer, in the event of cancellation of a secured credit agreement, not only to repay the amounts received under the agreement but also to pay to the lender interest at the market rate;

However, in a situation where, if the Bank had complied with its obligation to inform the consumer of his right of cancellation, the consumer would have been able to avoid exposure to the risks inherent in investments such as those at issue in the main proceedings, Article 4 of the Directive requires Member States to ensure that their legislation protects consumers who have been unable to avoid exposure to such risks, by adopting suitable measures to allow them to avoid bearing the consequences of the materialisation of those risks.

Costs

50 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 (Second Chamber) hereby rules:

1. **Articles 1 and 2 of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises must be interpreted as meaning that when a third party intervenes in the name of or on behalf of a trader in the negotiation or conclusion of a contract, the application of the Directive cannot be made subject to the condition that the trader was or should have been aware that the contract was concluded in a doorstep-selling situation as referred to in Article 1 of the Directive.**

2. **Directive 85/577, and Article 5(2) thereof in particular, does not preclude:**

   — **a requirement that a consumer who has exercised his right to cancel under the Directive must pay back the loan proceeds to the lender, even though according to the scheme drawn up for the investment the loan**

serves solely to finance the purchase of the immovable property and is paid directly to the vendor thereof;

— **a requirement that the amount of the loan must be paid back immediately;**

— **national legislation which provides for an obligation on the consumer, in the event of cancellation of a secured credit agreement, not only to repay the amounts received under the agreement but also to pay to the lender interest at the market rate;**

However, in a situation where, if the Bank had complied with its obligation to inform the consumer of his right of cancellation, the consumer would have been able to avoid exposure to the risks inherent in investments such as those at issue in the main proceedings, Article 4 of the Directive requires Member States to ensure that their legislation protects consumers who have been unable to avoid exposure to such risks, by adopting suitable measures to allow them to avoid bearing the consequences of the materialisation of those risks.

[Signatures]