Free Credit for All?

Court cases sometimes arouse great emotions. For several years now, emotions have been running high in Poland with regard to cases concerning mortgage loans denominated in or indexed to the Swiss franc (CHF) to consumers seeking to purchase a flat or a house. Following the rulings of the Court of Justice of the European Union, the Polish courts assumed that "after finding that certain terms of a loan agreement indexed to a foreign currency and subject to an interest rate directly linked to the interbank rate of the currency concerned are unfair, from taking the view, in accordance with its domestic law, that that contract cannot continue in existence without those terms because the effect of their removal would be to alter the nature of the main subject matter of the contract".[1] The settlement between the bank and the consumer after a loan has been declared void has raised further questions. Among them is the question of whether banks can claim back from a former borrower for the use of money received from the bank to which they had no legal title because the contract was declared void. Emotions have been fired these days by the Advocate General's opinion in Szcześniak v. Bank M. S.A. According to this opinion, the bank is not entitled to restitution by way of the benefit obtained by the consumer from the use of the bank's money without legal title, because, "should a bank suffer any disadvantage following the annulment of a mortgage loan agreement containing unfair terms, it should not be compensated for that disadvantage since it arose as the exclusive result of its own unlawful conduct".[2] Already the day after this opinion was announced, the Chairman of the Polish Financial Supervision Authority stated that "granting consumers a multi-year, 'free credit' - will have dramatic consequences from the point of view of the stability and security of the financial market".[3] Underlying this game of emotions and economic concerns is the historical argument used by the Advocate General. Crucial to the Advocate General's reasoning was his reliance on "the generally accepted legal principle *nemo auditur pro-*

1 Judgement of 3rd October 2019, Dziubak, C-260/18.

2 Opinion of the Advocate General, Szcześniak, C-520/21.

3 https://www.knf.gov.pl/komunikacja/komunikaty?articleId=81171&p_id=18 (18.02.2023).

priam turpitudinem allegans, a party cannot derive any economic advantage from a situation it has created by its own unlawful conduct".[4] To the discussion of the Advocate General's opinion, one can add the question of whether the origin and history of the medieval maxim used by him supports the conclusions reached in his opinion. I believe that the historical extension of the legal argument shows a simplification in the Advocate General's understanding of the maxim. Editorial is not the right place to present the history of the maxim I was concerned with.[5] However, by taking this issue of *Forum Prawnicze* in which there are several texts referring to legal experience, I want to draw attention to the usefulness of thinking about the law in this way. Emotions about mortgage loans denominated in or indexed to the Swiss franc make the maxim *nemo audiatur propriam turpitudinem suam* used by the Advocate General a good example. From a historical and comparative perspective, I see simplifications in this application of the maxim. Firstly, it is worth recalling that it was introduced in the 14th century by Bartollus de Saxoferrato as a justification for the narrowly applied exclusion in Roman law of the restitution of unjust enrichment to one who acted with a wicked purpose.[6] Secondly, in unjust enrichment litigation in the pre-codification period, the maxim was linked to the question of whether the claimant was making good use of their right.[7] Thirdly, the departure from the Roman approach to unjust enrichment in codified French law has made the maxim a criterion applied flexibly by the courts, sometimes justifying, for reasons of good morals, the exclusion of the return of what was delivered under a void contract.[8] The flexible approach to the maxim was not changed by the modernisation of the French Civil Code in 2016. Historical experience argues in favour of a rather restrained, flexible application of the maxim *nemo audiatur propriam turpitudinem suam* in cases where it is shown that restitution of unjust enrichment would be contrary to good faith. The traditional understanding of good faith referred to three values: to live honourably, not to harm any other person, and to render to each his own.[9] According to this way of thinking, restitution of unjust enrichment would be contrary to good faith, once it is shown that the principle to live honourably clearly takes precedence over the principles not to harm any other person and to render to each his own. The General Advocate's maxim-based reasoning does not consider and, consequently, does not convincingly resolve this conflict of values. Moving to this level of discussion on 'free credit' for consumers would also broaden the field of evaluation of the arguments of the chairman of the Polish Financial Supervision Authority, who opposes the opinion of the General Advocate and refers to the values protected by the financial market regulator. It is worth talking about what values the law should protect and how they should be protected. The articles published in this issue proffer new examples of how a broader historical and comparative view of the law helps one to see and understand it.

I invite you to read this issue of the Law Forum in English. In announcing the organisational changes of the "Forum Prawnicze" in 2023, I offer my sincere thanks for the ten years in which I have led the journal.

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4 The opinion of Advocate General, Szcześniak, C-520/21.

5 W. Dajczak, *L'arricchimento ottenuto mediante una prestazione per uno scopo contrario alla legge o ai buoni costumi. Una prospettiva storico-comparatistica*, in: S. Patti, L. Vacca (eds.), *Studi in memoria Berthold Kupisch e di Paolo Maria Vecchi*, Napoli [Jovene Editore] 2019, 85–105; W. Dajczak, Świadczenie niegodziwe – trudne dziedzictwo rzymskiej inspiracji, "Studia Iuridica", 72 (2017), 113 – 131.

6 Bartolus de Saxoferrato, *Commentaria*, 1516, (reprint, Roma, 1996), Vol. II, 42

7 H. Zoesius, *Commentarius ad Digestorum seu Pandectorum Iuris Civilis*, Lovanni 1656, s. 288; M. Wesenbeck, *Commentarii in Pandectas Juris Civilis et Codiem Justinianeum olim dicta Paratitla*, Amstelodami 1665, 244; J. Brunnemannm, *Commentarius in Pandectas*, Vol. I, Lugduni 1714, 433.

8 H. Honsell, *Die Rückabwicklung sittenwidriger oder verbotener Geschäfte*, München [C. H. Beck] 1974, 130; F. Terré, Ph. Simler, Y. Lequette, *Droit civil. Les obligations*, Paris [Dalloz] 2002, 421–422 and 1003.

9 D.1,1,10,1.