

ANALYSIS



Banking and Finance

Consequences of the contractual link between individual bank loans taken out by commonhold unit-holders and restoration work agreed between the commonhold association and a third party

The judgment is groundbreaking in two respects: first, in holding that unit-holders are parties to a contract between the commonhold association and a third party; and second, in holding that this contract is linked to the loan agreements concluded by a bank with said unit-holders.

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1. Supreme Court Judgment no. 919/2026

Supreme Court Judgment no. 919/2016 of 16 June puts an end to the claim filed by twenty-four members of a commonhold association against Pinturas S.A. and Banco de Santander, in which they sought a judgment ordering the defendants, jointly and severally, to pay each claimant a specific amount of money.

The case stems from a building contract entered into between the commonhold association and Pinturas, which required the latter to restore the building's facades. *The contract provides that unit-holders who so choose may finance their contribution through a loan from Banco de Santander's finance arm.* Clause 3 of the building contract establishes a deferred payment system with Banco de Santander's finance arm, under which "each unit-holder is solely and exclusively responsible for the portion of the work on the building that he or she is required to pay according to his or her percentage as stated in the deed" of ownership. It further states that "each unit-holder shall arrange, according to their needs and on an individual basis, the payment of the portion they are responsible for paying based on their percentage", with the option to choose from various financing methods.

Some unit-holders paid their share of the price in cash. Others chose to finance their contribution by applying for a loan from Banco de Santander. The claimants belong to this second group and have fulfilled on time all payment obligations arising from the loan agreement. *As soon as the loan agreements were executed, the contractor received from the bank the amount of the loans granted to the unit-holders.* However,

the contractor abandoned the project shortly after work had begun, thereby breaching the contractual commitments reached with the commonhold association. After the unit-holders took the necessary steps to recover the money paid, they filed a lawsuit against the contractor and the bank, requesting that they be ordered jointly and severally to refund the repayment instalments.

This request is based on clause eleven of the loan agreement, which states the following:

Given that this loan is granted to finance the acquisition of the specific service indicated at the beginning of this document, and is therefore considered a linked credit for the purposes of the Consumer Credit Agreements Act 16/2011, the borrower may exercise against the bank the same rights it holds against the provider of the financed service, provided that all of the following requirements are met:

- that the subject matter of the financed contract has not been delivered in whole or in part, or does not conform to the terms agreed upon in said contract, and
- the borrower has made a claim, either in or out of court, by any legally recognized means, against the provider of

the service and has not obtained the satisfaction to which they are entitled.

If the borrower exercises their right of withdrawal with respect to the financed contract, they shall no longer be bound by this loan, without any penalty.

The claim was not upheld at first instance, on the grounds that the claimants lacked standing to sue. This ruling was affirmed by the Provincial Court. However, the Supreme Court allowed the ‘cassation’ appeal on the grounds that the lower court’s and appellate court’s finding of lack of standing was not in accordance with the law. For that reason, it remanded the case to the Provincial Court in order to render a new judgment on the merits”.

The bulk of the Supreme Court’s judgment concerns the issue of standing derived from the building contract. The Supreme Court, citing various sound reasons, concludes that such standing exists. We find the Supreme Court’s ruling to be clearly correct and will not elaborate further on the reasoning. What interests us is the Supreme Court’s statement —made, of course, *obiter dictum*, since the case has been remanded to the Provincial Court for a decision on the merits — regarding the link between the building contract and the loan agreements, which, in and of itself, *should not be relevant for or against the issue of standing against the contractor*. According to the Supreme Court, the loan is subject to the Consumer Credit Agreements Act 16/2011 (LCCC), because the exclusion provided for in Article 3(b) thereof

does not apply. The judgment states as follows:

Nor can the respondent’s argument regarding the application of the exclusion provided for in Article 3(b) LCCC be accepted, since the loans at issue were not granted to acquire or retain property rights over land or buildings — whether already constructed or to be constructed —but rather to finance the execution of previously contracted facade restoration work. The purpose of the financing was not the acquisition of a property or the establishment or retention of property rights over it, but rather the performance of a clearly identified restoration project (“home repair,” in the terms used by the loan agreement). Therefore, the exclusion invoked by the respondent is not applicable.

2. What is the link?

The building contract is real estate in nature (facade restoration), and the loan is granted for this purpose. It would therefore be appropriate to refer to the Consumer Real Estate Credit Agreements Act 5/2019 to determine the applicable provisions. The case might fall under Article 2(1)(b), namely, “loans intended to acquire or retain property rights over land or buildings — whether already constructed or to be constructed — provided that the borrower, surety or guarantor is a con-

sumer”. It would be a stretch to argue that the co-owners are applying for a loan to “retain property rights”. Moreover, since the unit-holders are neither sureties nor guarantors, they could only fit into this provision as borrowers — which they obviously are, as stated above. But the most unproductive aspect of this proposal is that nothing follows from the fact that the agreements and contract are linked, because the statute contains no rules applicable to contractual linkage. This would require resorting to the general law of contractual linkage — which, in fact, does not exist either — even though case law has, on occasion, derived specific consequences regarding cross-termination and limitation periods.

If we set aside the question of whether this might be a loan to retain ownership rights (rather than to preserve real property through renovation), the linkage refers us to the current (“personal”) Consumer Credit Agreements Act 16/2011. This is confirmed by the not yet properly transposed rule set out in Article 46 of the Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property.

In this context, the following conclusions arise:

- First: the *invalidity* of the (consumer) building contract also entails the invalidity of the credit (Art. 26(2)); however, the building contract is not invalid from the outset, and, to render it invalid subsequently, the building contract would have had to be “terminated”, which

has not occurred, nor — as we shall see — can it occur in the present case.

- Second: for the link rule we will discuss below to apply, the contract and the agreements must “constitute a commercial unit from an objective standpoint”, a concept now detailed in Article 3(20)(b) of the (non-transposed) Directive (EU) 2023/2225 of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers. And, according to this provision, the link certainly exists (“a commercial unit shall be deemed to exist where, in the event that the credit is financed by a third party, *the lender relies on the involvement of the supplier of goods or the provider of services in the marketing, preparation, or conclusion of the credit agreement, or where specific goods or the provision of a specific service are expressly indicated in the credit agreement*”). Moreover, the credit agreement in question itself mentioned the linked nature and the application of Article 29 of the law.
- Third: the link creates a sort of cross-exception in the sense that the consumer may assert against the lender “the same rights” to which they are entitled against the underlying service provider, provided that “they have not obtained [from the contractor] the satisfaction to which they are entitled” (Art. 29(3) of Act 16/2011). In other words, a sort of benefit of excussion is required, which in our case has not occurred, but which the Provincial Court must assess on appeal.

Note that the prior consideration of the standing of the claimant co-owners in the building contract was — although the

it is neither possible nor fair for them to exercise these rights entirely against the bank as well. Strictly speaking, the only

meaningful course of action they can pursue is a “termination” of the loan, with release from the obligation to pay principal and interest. But the terminated contract will obligate the unit-holders to return the amount received and the statutory interest, even though these co-owners do not have the principal in their possession

because the bank paid the contractor directly, who is certainly not in a position to repay it.

Prior consideration of the standing of the claimants in the building contract was essential for drawing link consequences

Supreme Court does not emphasize this — essential for drawing link consequences. This is because Article 29 of Act 16/2011 presupposes one and the same debtor or counterparty as regards both the underlying service and the credit agreement. Otherwise, the case could not have met the factual requirements of the aforementioned provision, because the claimant co-owners and borrowers were not even sureties of the principal debt, which would have allowed them, by that fact alone, to invoke the application of Article 29.

3. Applications to the present case

§1. What rights did the association (the unit-holders) have against the debtor in default under the underlying building contract? It makes no sense to assert an action for specific performance. They can, however, bring an independent action for damages (a form of improper termination) whereby each unit-holder who signed a loan agreement may claim the amount of the loan disbursed and lost (due to the contractor’s insolvency), plus interest owed to the bank, plus late payment interest, plus losses arising from the progressive deterioration of the facade, and so on. However,

§2. However, in order to “terminate” with the bank, they would need to be in a position to terminate with the contractor. But they cannot, because the building contract (not the loan agreement) is a joint and indivisible contract, and its termination requires the approval of the commonhold association — which will not occur because a number of co-owners lack incentive to do so, having not participated in the third-party financing. In fact, they also could not render (each) credit agreement ineffective because this action is not the same as the one being asserted against the contractor.

§3. They cannot assert a defence of non-performance against the bank. First, because they no longer have that defence against the contractor. Second, because it would leave the unit-holders and the bank in a state of perpetual suspension of their rights and duties.

§4. The only remaining option would be to surreptitiously bring an action for

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damages against the contractor — which would function as an improper termination — and a claim of recourse against the bank, also based on improper termination.

§5. Directive 2023/2225 (not transposed) “breaks” the necessary unity between the action against the contractor and the action against the bank. The debtor would have “the right to bring an action” against

the lender, “provided that it has brought an action” against the underlying debtor (Art. 27(2)). But this does not work in our case either, because what would truly be in the interest of the group of debtor unit-holders is to

cross-settle the two claims, such *that the bank would have to settle the rights and obligations arising from the loan exclusively with the contractor.*

§6. The fate of this sort of benefit of excussion to which we have referred would remain unresolved. Consider the structure of the possible object of the claim, and it will become clear that a consolidation of proceedings does not lie.