Case C-582/23 [Wiszkier] [i]

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

20 September 2023

Referring court:

Sąd Rejonowy dla Łodzi-Śródmieścia w Łodzi (Poland)

Date of the decision to refer:

2 August 2023

Applicant:

R. S.

Other parties:

C. spółka akcyjna in W.

Syndik masy upadłości (Bankruptcy administrator) for M. S. and R. S.

Syndik masy upadłości (Insolvency administrator**)** for G. spółka akcyjna w upadłości [joint-stock company in liquidation] in W.

J. J.

M. G.

Subject matter of the main proceedings

Establishment of a creditor repayment plan in bankruptcy proceedings concerning an individual.

[i] This case has been given a fictitious name which does not correspond to the real names of any of the parties to the proceedings.

Subject matter and legal basis of the request

The possibility to rely on unfair terms in consumer contracts in the context of bankruptcy proceedings; Directive 93/13; Article 267 TFEU

Questions referred for a preliminary ruling

1. Must Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as precluding rules of national law which provide that the bankruptcy court is bound by the list of claims approved by the judge-commissioner in bankruptcy proceedings, thereby preventing the bankruptcy court which gives the final ruling in the proceedings from assessing whether contractual terms are unfair?

2. Must Articles 6(1) and 7(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts be interpreted as precluding rules of national law which prohibit the ordering of interim measures in bankruptcy proceedings and which are therefore liable to deter consumers from availing themselves of the protection afforded them by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts?

Provisions of European Union law cited

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts: Articles 6(1) and 7(1)

Provisions of national law cited

1. Ustawa z dnia 28 lutego 2003 r. – Prawo upadłościowe (Law of 28 February 2003 on Bankruptcy and Insolvency, *Dziennik Ustaw* (Journal of Laws) of 2019, item 498, as amended)

2. Ustawa z dnia 17 listopada 1964 r. – kodeks postępowania cywilnego (Law of 17 November 1964 – Code of Civil Procedure, *Dziennik Ustaw* (Journal of Laws) of 2021, item 1805, as amended): Articles 730 and 730^1 (proceedings to secure claims)

3. Ustawa z dnia 26 czerwca 1974 r. – kodeks pracy (Law of 26 June 1974 – Labour Code, *Dziennik Ustaw* (Journal of Laws) of 2022, item 1510, as amended):

Article 87(3). Deductions may be made within the following limits:

(1) in the case of maintenance payments – up to three-fifths of the remuneration;

(2) in the case of other fees or the deduction of advance payments – up to half of the remuneration.

Succinct presentation of the facts and procedure in the main proceedings

By decision dated 15 October 2019, the Sąd Rejonowy dla Łodzi-Śródmieścia w Łodzi (District Court for Łódź-Śródmieście in Łódź, Poland) instituted bankruptcy proceedings against R. S., an individual not engaged in business.

The bankruptcy estate included, inter alia, a 50% ownership interest in immovable property. That ownership interest was sold for Polish złote (PLN) 350 000. A mortgage had been established on the property to secure repayment of a loan plus interest and other costs and fees amounting to PLN 832 696.77 to creditor G., which is a joint-stock company. Under the distribution plans, creditor G. received PLN 360 671.91 in the present bankruptcy proceedings.

In the bankruptcy proceedings concerning R. S., a list of claims was drawn up, which was approved by order of the judge-commissioner of 26 April 2021. The list included claims with a total value of PLN 1 247 127.93, with creditor G. claiming PLN 975 362. The bankrupt acknowledged all the claims. No objection was raised by the bankrupt or by any creditor regarding the list of claims.

The debt owed to G. arose in connection with the purchase of property. On 30 March 2007, the bankrupt R. S., together with his wife M. S. and with L. K. and A. K., entered into a mortgage loan agreement with the creditor; the loan, indexed to the Swiss franc (CHF), amounted to PLN 489 821.63, with a term of 360 months. Under the indexed loan agreement, the borrowers agreed to repay CHF 211 952.23 to the creditor.

In the court's opinion, the agreement in question contains unfair contractual terms which may render it invalid. This would mean that the debt to G. does not exceed PLN 489 821.63, and since bankruptcy proceedings are also pending against L. K. and A. K., and the creditor obtained a certain sum from the sale of a 50% ownership interest in the property in separate bankruptcy proceedings, the debt would amount to PLN 0, which requires additional findings of fact.

The court before which this case is pending should, using as a guide the list of claims established in the bankruptcy proceedings, draw up a plan for the bankrupt R. S. to repay his creditors in accordance with his earning capacity and the amount of the unsatisfied claims. R. S. requests that his debts be discharged without the drawing up of a repayment plan or, alternatively, that a repayment plan be drawn up in the amount of PLN 500 for a period of 6 months. Creditor G. requests that a repayment plan be drawn up, amounting to a minimum of PLN 2 000 per month for 36 months. The other creditors take no position. The insolvency administrator requests that a repayment plan be drawn up, amounting to PLN 2 500 per month for 36 months.

The bankrupt R. S. remains employed. He receives approximately PLN 3 500 per month in remuneration paid into his bank account, while the remaining part of his remuneration, also amounting to approximately PLN 3 500, is remitted to the bankruptcy estate in order to pay off his creditors, including G.

G. was declared bankrupt on 20 July 2023, and the proceedings are continuing with the participation of the bankruptcy administrator.

Succinct presentation of the reasoning in the request for a preliminary ruling

1 Bankruptcy proceedings conducted against consumers essentially have two objectives – to satisfy the bankrupt's creditors and to enable the bankrupt to have his or her debt discharged. Those proceedings are managed by a judge-commissioner – a judicial authority that performs all actions with the exception of those reserved for the bankruptcy court. In the course of consumer bankruptcy proceedings, the bankrupt's assets are liquidated, a list of claims is established, assets are distributed to creditors, and the proceedings conclude with the drawing-up of a creditor repayment plan for up to 36 months.

2 The list of claims includes the creditors participating in the proceedings and the amounts of their claims. As a rule, the list is not subject to substantive review by the judge-commissioner. The insolvency administrator lists the claims, and the bankrupt has the right to file a statement as to whether he or she acknowledges those claims or not. After drawing up the list, the judge-commissioner announces it, and the bankrupt and creditors have the right to challenge the list by filing an objection. Such objections may be filed only within two weeks from the date of the announcement. After that date, the parties to the proceedings can no longer challenge the list. If no objections have been filed, the judge-commissioner approves the list, which is binding during the proceedings unless amended in the appropriate manner.

3 It is common ground that neither the insolvency administrator nor the judge-commissioner reviewed the agreement concluded with creditor G. with respect to unfair contractual terms. The judge-commissioner did not introduce any changes to the list of his own motion either.

4 The bankrupt filed a statement acknowledging the claims in full, which may suggest that he was not seeking protection related to the company's use of unfair contractual terms. However, in a letter submitted to the court after the hearing had closed, the bankrupt's authorised agent pointed out that the agreement with G. might be invalid due to the use of unfair contractual terms, and the repayment amounts might be reduced as a result.

5 There is no mention in the bankruptcy case file that the bankrupt was informed that the terms of the agreement with G. might be unfair or that the bankrupt knowingly declared that he did not wish to avail himself of the protection afforded

by Directive 93/13. Until 3 November 2022, the bankrupt was also not represented by a lawyer in the proceedings.

6 The applicable national laws do not permit a bankruptcy court, when drawing up a creditor repayment plan, to review independently whether contractual terms are unfair. Where a bankruptcy court has doubts as to the unfairness of contractual provisions, it may postpone examination of the case and refer the matter to the judge-commissioner in order to enable the latter to consider whether to amend the list of claims of his own motion. This causes an unreasonable delay in the examination of the case, since, during the hearing convened to establish the repayment plan, the court usually already has at its disposal all the information necessary to determine whether contractual terms are unfair. Furthermore, all actions related to the liquidation and distribution of assets, and to the list of claims, have already been completed. Amending the list of claims is a formal procedure: it requires a statement of reasons to be drawn up, the amendments to be delivered to the parties, and an announcement to be made. Moreover, the judge-commissioner is not bound by the position of the bankruptcy court and may determine that there are no grounds for amending the list of his own motion.

7 Taking into account the unfairness of contractual terms, the bankruptcy court ruling on the bankrupt's repayment plan could set a lower repayment amount or not draw up a plan at all if it turns out that the assets already collected are sufficient to satisfy all claims. That will require further findings of fact, which will depend on whether the referring court has the possibility to grant the bankrupt legal protection.

8 During the bankruptcy proceedings, the bankrupt did not have the opportunity to bring an action independently in order to protect his rights under Directive 93/13 as his assets were (and continue to be) managed by the bankruptcy administrator.

9 The bankrupt did have the opportunity to challenge the list of claims. However, filing an objection involves a proportional fee to be paid from the bankrupt's own funds (50% of his remuneration is garnished by the insolvency administrator and remitted to the bankruptcy estate). An objection is also a formal document that must include all pleas and evidence relied on. Furthermore, on the date on which the list was drawn up during the bankruptcy proceedings, the bankrupt may also have been unaware that the terms of the agreement with G. were unfair.

10 As the Court of Justice stressed in its judgment of 5 March 1996 in Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur* and *Factortame*, EU law must, when conferring rights upon individuals, also provide means for their effective exercise. As a rule, EU law does not regulate procedural issues related to the assertion of claims based on EU law, which it leaves to the Member States (the principle of procedural autonomy), and that freedom is circumscribed by the principles of equivalence and effectiveness.

11 When examining the case at hand with respect to the drawing-up of a repayment plan, the court came to the conclusion that the applicable national legislation might make it excessively difficult, or even impossible, for a bankrupt consumer to avail himself or herself of the protection afforded by Directive 93/13. Bankruptcy law, however, does not permit the court before which the case concerning the drawing-up of a repayment plan is pending to review whether the agreement contains unfair terms.

12 The Court of Justice has repeatedly stressed that *ex officio* examination of unfair contractual terms is a duty incumbent on the national courts, and excessive workload or other practical difficulties do not release the courts from that obligation (for instance, order of 26 November 2020, *DSK Bank EAD*, C-807/19).

13 In bankruptcy proceedings, however, it is difficult to determine which authority involved in the proceedings is responsible for carrying out that examination, and therefore in practice it is not carried out at all. The judge-commissioner merely examines the claims in formal terms and then forwards them to the insolvency administrator, who conducts a substantive assessment and draws up a list of claims. The judge-commissioner has no legal possibility to amend the list before it is approved, unless an authorised party files an objection. In the case at hand, no objections were filed, and thus the judge-commissioner approved the list of claims.

14 During the proceedings before the judge-commissioner, the bankrupt did not rely on the unfair nature of the terms of the agreement concluded with creditor G., and therefore the judge-commissioner was not obliged under national law to verify the claim included on the list. The objection referred to above was only raised by the bankrupt's authorised agent before the referring court, whose task is to rule on drawing up a creditor repayment plan or discharging the bankrupt's debts, which will end the bankruptcy proceedings.

15 It should also be noted that, according to the bankrupt's testimony, after the garnishments from his remuneration, which are remitted to the bankruptcy estate, he is left with PLN 3 500, which is insufficient to meet his needs and those of his family. The laws applicable to the bankruptcy proceedings pending in the present case do not permit the court or the judge-commissioner to amend the amount of that garnishment in any manner.

16 Of course, the assets collected during the bankruptcy proceedings are to be used to satisfy all creditors, not just G.; however, given the amount of assets in the bankruptcy estate and the amount of other claims, it may turn out in the not-too-distant future that the assets collected are sufficient to satisfy those claims (except for the disputed claim). Under national law, the bankrupt's remuneration forms part of the bankruptcy estate, and only at the end of the bankruptcy proceedings will any surplus be disbursed to the bankrupt.

17 In its judgment of 15 June 2023, *Getin Noble Bank*, C-287/22, the Court of Justice has already ruled that Article 6(1) and Article 7(1) of Directive 93/13 must be interpreted as precluding national case-law according to which a national court may dismiss an application for the grant of interim measures lodged by a consumer seeking the suspension, pending a final decision on the invalidity of the loan agreement concluded by that consumer on the ground that that loan agreement contains unfair terms, of the payment of the monthly instalments due under that loan agreement, where the grant of those interim measures is necessary to ensure the full effectiveness of that decision.

18 In bankruptcy proceedings, however, no provision is made for interim measures to be ordered by the court either upon a motion from a party or of its own motion.

19 It is true that the bankrupt may request that part of his remuneration be excluded from the bankruptcy estate; however, that would require a creditors' meeting to be convened and a resolution to be passed by a two-thirds majority of the creditors. As a result, the bankrupt has no way of obtaining protection without G.'s approval, which means that that remedy is completely ineffective.

20 In its judgment of 19 June 1990, *Factortame I*, C-213/89, the Court of Justice stressed that, under EU law, effective interim measures must be available to protect rights which derive from EU law.

21 Obviously, ordering interim measures in bankruptcy proceedings would require the court to weigh the interests not only of the bankrupt, but also of the other creditors involved in the proceedings. In the court's view, since bankruptcy proceedings by their nature involve universal enforcement of the debtor's assets, this precludes the use of interim measures to reduce the repayments made by the bankrupt.

22 However, a rule that excludes the use of interim measures may discourage a bankrupt from claiming protection under Directive 93/13, or even persuade the bankrupt to declare that he or she does not wish to avail himself or herself of that protection, thereby undermining the purpose of the directive, which is to ensure that contracts with consumers do not contain unfair terms.