FEDERAL COURT OF JUSTICE

IN THE NAME OF THE PEOPLE

JUDGMENT

IX ZR 121/22

Promulgated on:
30 March 2023
Kluckow
Judicial clerk as
clerk of the court

In the case

Reference work:	yes
BGHZ:	no
BGHR:	yes

InsO Sections 129 et seqq.; AktG Section 62 (1) sentence 2
The protection of the *bona fide* dividend recipient under company law does not exclude contestation in insolvency proceedings.

InsO section 134 (1), section 140
A dividend payment to the shareholder is not gratuitous because the underlying resolution on the appropriation of profits loses its effect as a result of the (subsequent) replacement of the annual financial statements.

BGH, judgment of 30 March 2023 - IX - ZR 121/22, - OLG Frankfurt am Main
LG Frankfurt am Main

ECLI:DE:BGH:2023:300323UIXZR121.22.0

In the oral hearing on 30 March 2023, the 9th Civil Senate of the Federal Court of Justice (Bundesgerichtshof), composed of the Presiding Judge Prof. Dr Schoppmeyer, Judge Lohmann, Judge Dr Schultz, Judge Dr Selbmann and Judge Weinland,

ruled as follows:

On the appeal of the Respondent, the judgment of the 4th Civil Senate of the Higher Regional Court of Frankfurt am Main of 25 May 2022, corrected by order of 4 August 2022, was annulled with regard to costs and the Respondent was ordered to return dividend payments for the financial years 2009 and 2010. On the extent of the annulment, the case is referred back to the court of appeal for a new hearing and decision, including on the costs of the appeal proceedings. Any further appeal is rejected.

By law

Facts:

1. The Claimant is the administrator in the insolvency proceedings opened on 1 April 2014 regarding the assets of F. KGaA (hereinafter: Debtor). The Respondent is a limited shareholder of the Debtor. The Claimant asserts a claim against the Respondent for the return of dividend payments for the financial years 2009 to 2012 on the basis of a contestation of a gift under section 134 InsO.

2. The Debtor's annual financial statements for the years in dispute, which were prepared and approved prior to insolvency, showed profits. Resolutions on the appropriation of profits were passed. Based on the resolutions on the appropriation of profits, the Respondent received the contested dividend payments.

3. The Claimant brought actions for a declaration that the annual financial statements and the resolutions on the appropriation of profits were null and void. For the years 2009 and 2010, only the nullity of the resolutions on the appropriation of profits was established. The action for a declaration of nullity of the annual accounts for the years 2009 and 2010 was held to be inadmissible by the (local) court of appeal because the Claimant had replaced the annual accounts in the meantime. The court justified its finding that the resolutions on the appropriation of profits were null and void by stating that they had been deprived of their basis by the replacement of the annual financial statements. The fact that the resolutions on the appropriation of profits could have been void from the beginning remained unresolved. For the years 2011 and 2012, the original nullity of the annual financial statements and resolutions on the appropriation of profits was established.

4. The (local) district court dismissed the action. On the Claimant's appeal, the Higher Regional Court upheld the action except for part of the interest claimed. In its appeal, which was admitted by the court of appeal, the Respondent seeks to have the action dismissed in its entirety.

Reasons for the decision:

5. The appeal is partially successful. It leads to the reversal of the judgment under appeal and to the remittal of the case to the court of appeal as the Respondent was ordered to return dividend payments for the financial years 2009 and 2010. The appeal is unfounded with regard to the dividend payments for the years 2011 and 2012.

I.

6. The court of appeal held that the dividend payments for all four years were voidable under section 134 InsO. It held that the payments were gratuitous because the legal requirements had not been met. The relevant resolutions on the appropriation of profits were null and void. This had been legally established with *erga omnes* effect (section 248 AktG) by the judgments issued in response to the actions for a declaration of nullity brought by the Claimant. The declaration of nullity had retroactively made the dividend claim void, so the Respondent had received the dividends without any legal basis. Whether the annual accounts themselves were also null and void, which had only been established for the years 2011 and 2012, was held to be irrelevant. The resolution on the appropriation of profits is the only way that the shareholder's membership right to a share in the profits is transformed into a claim for payment against the public limited company.

7. No other assets had come into the Debtor's assets as a result of the unlawful dividend payments. There was no claim arising from section 62 (1) and section 278 (3) AktG because it was undisputed that the Respondent had no knowledge of the invalidity of the annual financial statements and resolutions on the appropriation of profits on which the dividend payments were based and there was no evidence of grossly

negligent ignorance. Therefore, the Respondent was not obliged to repay pursuant to section 62 (1) sentence 2 AktG and such repayment claim did not fall within the Debtor's assets. Claims of unjustified enrichment according to sections 812 et seqq. BGB do not apply either. In any case, the protective provision of section 62 (1) sentence 2 AktG should be applied accordingly to any claims of unjustified enrichment.

8. A challenge under section 134 InsO is not blocked by section 62 (1) sentence 2 AktG. The fact that section 62 (1) sentence 2 AktG, in contrast with section 31 (2) GmbHG, does not include a reservation of recovery from the *bona fide* recipient is not a viable argument, because section 31 (2) GmbHG does not refer to the insolvency situation, but applies in advance. The purpose of section 62 (1) sentence 2 AktG also does not require any privileges under insolvency law beyond the protection granted by section 143 (2) InsO. In addition, it should be noted that shareholders as equity investors with their financial interests must take a lower priority to the interests of creditors in insolvency, which arises from section 199 InsO.

9. The Respondent did not present any circumstances that could lead to a loss of assets (section 143 (2) InsO in conjunction with section 818 (3) BGB).

II.

10. This only partially stands up to legal scrutiny.

11. 1. Payments by the Debtor to the Respondent need to be assessed. In a two-person relationship, benefits are gratuitous if the debtor gives up

an asset in favour of another person without accruing or expecting to accrue any corresponding asset value (cf. BGH, judgment of 27 June 2019 - IX ZR 167/18, BGHZ 222, 283 margin no. 83 with further references; established case law).

12. a) The legal relationships at the time of the legal act to be determined pursuant to section 140 InsO are decisive. The gratuitousness should be assessed according to the time at which the respective performance of the debtor was made (BGH, judgment of 6 December 2018 - IX ZR 143/17, BGHZ 220, 280 marginal no. 12 with further references). Therefore, the legal situation when the legal effects of the dividend payments occurred is relevant (section 140 (1) InsO). In general, subsequent changes do not result in a performance that was for consideration at the time of the legal act being subsequently - retroactively - regarded as gratuitous (BGH, judgment of 6 December 2018, loc. cit. margin no. 12 et seq.; of 10 June 2021- IX ZR 157/20, ZIP 2021, 1977 margin no. 7). Thus, performance by the debtor remains for consideration even if the compensatory payment is subsequently not made (see BGH, judgment of 27 June 2019, loc. cit. margin no. 62 with further references).

13. b) If the debtor's performance does not constitute an obligation transaction, the gratuitousness should be assessed according to the underlying transaction (BGH, judgment of 20 April 2017 - IX ZR 252/16, BGHZ 214, 350 margin no. 15; of 27 June 2019, loc.cit. margin no. 84; of 11 November 2021- IX ZR 237/20, ZInsO 2022, 104 margin no. 53). Accordingly, performance by the debtor is gratuitous if either assuming the validity of the underlying transaction - the debtor should not receive any compensatory performance after the underlying transaction, or if, in the event of the invalidity of the underlying transaction for consideration, the debtor is not entitled to a claim for repayment of the performance rendered without legal grounds already at the time of its performance (see BGH, judgment of 20 April 2017, loc. cit. margin no. 15 et seq.).

14. aa) With regard to the underlying transaction, in a two-person relationship the extent to which the performing debtor is to receive a consideration corresponding to the asset given up or not must be taken into account (see BGH, judgment of 20 April 2017, loc. cit. margin no. 11 with further references). The fulfilment of an independent, legally binding liability resulting from a consideration in return for payment constitutes a performance for consideration. The decisive factor is that the debt incurred is itself to be regarded as for consideration because the debtor has received or is expected to receive a corresponding consideration accruing to their assets (cf. BGH, judgment of 27 June 2019, loc. cit.).

15. bb) If there is no valid underlying transaction for consideration, the gratuitousness required under section 134 (1) InsO does not follow automatically. According to the case law of the Federal Court of Justice, services rendered without legal cause may be for consideration if the debtor is entitled to a claim for repayment in respect of their service (see BGH, judgment of 20 April 2017 - IX ZR 252/16, BGHZ 214, 350 margin no. 14). A claim for restitution can arise from sections 812 et seqq. BGB (cf. BGH, judgment of 20 April 2017, loc. cit. margin no. 13 et seqq.; of 7 September 2017 - IX ZR 224/16, ZIP 2017, 854 margin no. 18; of 1 October 2020 - IX ZR 247/19, NZI 2021, 30 margin no. 10). However, the law on which the legal relationship is based may also provide for restitution in accordance with sections 346 et seqq. BGB (e.g. section 326(4) BGB, see BGH, decision of 26 January 2023 - IX ZR 17/22, ZIP 2023, 598 margin no. 11).

16. The question of whether a transaction is gratuitous or for consideration is determined here decisively according to the legal relationship and the general law on which it is based. It indicates whether a claim for recovery has reached the debtor's assets or not. It can therefore lead to the assumption of gratuitousness if a performance is rendered with knowledge of the non-debt (section 814 BGB) or under the

conditions of section 817 sentence 2 BGB (cf. BGH, judgment of 27 June 2019 - IX ZR 167/18, BGHZ 222, 283 loc. cit. margin no. 95; of 1 October 2020, loc.cit. margin no. 10 et seq.). In contrast, at a later time, after the relevant time under section 140 InsO (section 818 (3) BGB), the loss of assets that occurs is of no significance.

17. cc) The senate's case law on the assessment of whether a transaction is gratuitous or for consideration within the meaning of section 134 (1) InsO in the case of an existing claim for repayment is criticised (Bitter, KTS 2022, 423 et seq., idem, ZIP 2023, 169 et seqq.). The aim of the criticism is to always assume gratuitousness within the meaning of section 134 (1) InsO in the case of performance without legal grounds, i.e. irrespective of an existing claim for repayment (cf. Bitter, KTS 2022, 423, 476; idem, ZIP 2023, 169, 175). This is justified by alleged contradictions between general civil law and company law values on the one hand and values under insolvency avoidance law on the other. This applies in particular to the privileged treatment of the dividend recipient in bad faith under insolvency avoidance law, who cannot be an opponent of a challenge of a gift under section 134 (1) InsO because of the existing restitution claim under section 62 AktG (Bitter, KTS 2022, 423, 475 et seq.; idem, ZIP 2023, 169, 171).

18. This criticism is unjustified. Under the conditions of sections 129 et seqq. InsO, an otherwise in all respects proper acquisition of rights is set aside and the holder of the right is obliged to perform restitution under section 143 InsO. The legal position of the recipient of a performance without legal basis, against whom the claim for enrichment is excluded due to section 814 or 817 sentence 2 BGB, remains behind an acquisition of rights that is proper in every respect. The reason for retention only arises on the basis of special evaluations under the law of enrichment. There is no reason to give privilege to the recipient of a gratuitous benefit without legal basis under the insolvency avoidance law against a person who has duly acquired their right in all respects. Nothing else applies to the

recipient of unlawful dividend payments. The criticism of the senate's case law is clearly not concerned with the interests of the person who is protected by the general civil law or company law values. The alleged contradictions in value are not to be resolved, but rather covered up by the fact that every performance without legal basis is at the same time gratuitous within the meaning of section 134 InsO (Bitter, KTS 2022, 423, 476; idem, ZIP 2023, 169, 175). There is no reason for this.

19. 2. According to these standards, the decision of the court of appeal for the dividend payments of the years 2011 and 2012 stands up to legal review. For the dividend payments of the years 2009 and 2010, it proves to be erroneous in law.

20. a) The dividend payments for the years 2011 and 2012 constitute gratuitous payments by the Debtor within the meaning of section 134 (1) InsO.

21. aa) Assuming the validity of the underlying transaction, the Debtor's performance in the case in dispute is not gratuitous. Dividend payments on the basis of an effective resolution on the appropriation of profits are non-gratuitous if and to the extent that they constitute consideration for the contribution made (see BGH, judgment of 20 April 2017 - IX ZR 189/16, ZIP 2017, 1284 margin no. 9; of 5 July 2018- IX ZR 139/17, ZIP 2018, 1746 margin no. 14; of 22 July 2021- IX ZR 26/20, ZIP 2021, 1768 margin no. 11).

22. bb) The payments made by the Debtor for the years 2011 and 2012 are, however, gratuitous because at the time of the dividend payments there was already no valid legal reason for the payment made by the Debtor, and the Debtor is not entitled to a claim for repayment of the payments.

23. (1) For the financial years 2011 and 2012, the Respondent had no dividend entitlement and thus no fulfilment of an independent liability was created as a result of a non-gratuitous consideration.

24. (a) The prerequisite for the limited partner's dividend claim is a duly adopted resolution on the appropriation of profits (section 278 (3), section 174 AktG). There is therefore no entitlement to a dividend if the resolution on the appropriation of profits is void due to its own defect or due to the nullity of the annual financial statements on which the resolution on the balance sheet profit is based (MünchKomm-AktG/Bayer, 5th ed., section 58 margin no. 105; BeckOGK- AktG/Cahn/v. Spannenberg, 2023,section 58 margin no. 100; Schmidt/Lutter/Fleischer, AktG, 4th ed., section 62 margin no. 22; Grigoleit/Rachlitz, AktG, 2nd ed., section 62 margin no. 4).

25. (b) In response to the actions for a declaration of nullity brought by the Claimant, it was legally established for the financial years 2011 and 2012 that both the annual financial statements and the resolutions on the appropriation of profits were invalid from the outset. The decisions have the force of law of section 248 AktG (in conjunction with section 249 (1) sentence 1, Section 278 (3) AktG). Thus, it is also legally established in the relationship between the Claimant and the (present) Respondent that already at the time of the Debtor's performance to be determined pursuant to section 140 (1) InsO, there were no resolutions on the appropriation of profits which could have established an obligation of the Debtor to make the dividend payments for the financial years 2011 and 2012. Therefore, it does not follow that the corresponding payments were made for consideration because there were independent liabilities of the Debtor that were created as a result of a non-gratuitous consideration.

26. (2) For the dividends paid in 2011 and 2012 from the outset without legal ground, no other countervalue has reached the Debtor's assets.

27. (a) A claim under section 62 (1) AktG fails due to section 62 (1) sentence 2 AktG. The Respondent had no knowledge of the invalidity of the annual financial statements and the resolutions on the appropriation of profits. The findings of the court of appeal do not contain any indications that could lead to the conclusion of negligent ignorance. Insofar as the court of appeal - erroneously in law - used grossly negligent ignorance as a standard, this did not have any effect. Neither the appeal nor the response to the appeal show any factual argument that could justify negligent ignorance on the part of the Respondent. Instead, the appeal assumes that the Respondent acted in good faith within the meaning of section 62 (1) sentence 2 AktG.

28. (b) A possible claim for enrichment under sections 812 et seqq. BGB is superseded by the more specific provision under stock corporation law (BGH, judgment of 5 April 2016 - II ZR 268/14, NZG 2016, 1182 margin no. 11 with further references; Koch, AktG, 17th ed., section 62 margin no. 2; Mayer/Albrecht from Kolke in Hölters/Weber, AktG, 4th ed., section 62 margin no. 3; Schmidt/Lutter/Fleischer, AktG, 4th ed., section 62 margin no. 20; cf. also Münch- Komm-AktG/Bayer, 5th ed., section 62 margin no. 8). Therefore, it is irrelevant whether the dividend payments were made with knowledge of the non-debt within the meaning of section 814 BGB (cf. Habersack, ZIP 2022, 1621, 1626; doubtfully Thole, ZRI 2023, 49, 55 et seq.).

29. b) However, the previous findings of the court of appeal do not justify the assumption that the dividend payments for the financial years 2009 and 2010 are also contestable pursuant to section 134 (1) InsO. It is not established that the Respondent had no claim for payment of the dividend at the time of the Debtor's performance (section 140 InsO).

30. aa) The court of appeal holds that the Respondent was not entitled to the dividends for the financial years 2009 and 2010 because the invalidity of the corresponding resolutions on the appropriation of profits had been determined with the *res judicata* effect of section 248 AktG in response to the actions for a declaration of invalidity brought by the Claimant. However, the declaration of nullity of the resolutions on the appropriation of profits for the years 2009 and 2010 was based on the fact that their basis had been removed by the (later) replacement of the annual financial statements by the Claimant. Whether the resolutions on the appropriation of profits were null and void from the outset remains unresolved. The court of appeal did not make its own findings on the original invalidity of the resolutions on the appropriation of profits.

31. bb) If the resolutions on the appropriation of profits for the years 2009 and 2010 were originally effective, the dividend payments may have been paid in return for the provision of the corresponding risk capital. The subsequent replacement of the annual financial statements by the Claimant could not automatically eliminate the Respondent's claim for payment (see BGH, judgment of 21 April 2020 - II ZR 412/17, BGHZ 225, 198 margin no. 35; of 21 April 2020- II ZR 56/18, NZI 2020, 739 margin no. 31 et seqq.). Under insolvency law, only the point in time of section 140 InsO is relevant (see BGH, judgment of 6 December 2018 - IX ZR 143/17, BGHZ 220, 280 margin no. 12 et seq.; of 10 June 2021- IX ZR 157/20, ZIP 2021, 1977 margin no. 7). Neither can voidability be established by a retroactive voidability of the claim for payment of profits, nor is voidability

precluded conversely by the fact that the original ineffectiveness of the resolution on the appropriation of profits can no longer be asserted due to the lapse of time.

32. 3. Section 62 (1) sentence 2 AktG does not constitute contestability pursuant to the restricting legal provisions of sections 129 et seqq. InsO. This also applies to contesting a gift under section 134 (1) InsO at issue here.

33. a) The question of whether the protection of the recipient in good faith intended by section 62 (1) sentence 2 AktG can exclude voidability under sections 129 et seqq. InsO is disputed in the literature and has not been clarified by the highest courts.

34. aa) Insofar as contestability under section 134 (1) InsO is denied, this is justified on the basis of the legal system. Section 62 (2) sentence 2 AktG expressly deals with the insolvency situation. However, the legislator has not provided for an exception to the protection of good faith in section 62 (1) sentence 2 AktG for insolvency either, unlike in section 31 (2) GmbHG. This speaks in favour of the legislature's intention to extend the protection of section 62 (1) sentence 2 AktG also to contestability pursuant to section 134 (1) InsO (see BeckOGK-AktG/Cahn, 2023, section 62 margin no. 27; Henssler/Strohn/Paefgen, Gesellschaftsrecht, 5th ed., section 62 AktG margin no. 9). The intention of the legislator, as inferred from the legal system, is also said to have emerged in the course of deliberations on a historical predecessor provision of section 62 AktG - Art. 218 ADHGB (Foerster, WM 2022, 23,59, 2360). The legislator did not question the value decision made in this way when later structuring bankruptcy and insolvency law (Foerster, loc. cit. p. 2360 et seq.). The protection of good faith understood in this way is in line with the tasks and objectives of the capital market. Privileging the *bona fide* receipt of dividends strengthens investor confidence in the integrity and stability of

the capital market. The obligation to repay dividends received in good faith after years, on the other hand, is a sign of a lack of stability (Foerster, loc.cit. p. 2362).

35. bb) The payment of dividends is predominantly considered to be contestable. The effects of the protection afforded by section 62 (1) sentence 2 AktG are accordingly limited to the claim for restitution under company law under section 62 (1) AktG (see Uhlenbruck/Borries/Hirte, InsO, 15th ed., section 129 margin no. 52, section 134 margin no. 119 et seqq.; Mylich, AG 2011, 765, 768 et seq.; Habersack, ZIP 2022, 1621 et seqq.; Thole, ZRI 2023, 49 et seqq.; in conclusion also Bitter, KTS 2022, 423, 476 Fn. 324; idem. ZIP 2023, 169, 172; cf. also MünchKomm-InsO/Kayser/Freudenberg, 4th ed., section 134 margin no. 24a, 39; Haas, ZIP 2006, 1373, 1377).

36. cc) Previously, the Federal Supreme Court has only ruled that (at least) no general legal concept follows from section 62 (1) sentence 2 AktG, section 172 (5) HGB, section 31 (2) GmbHG to the effect that contestation under section 134 (1) InsO (against holders of profit participation rights) is excluded outside the scope of application of one of the above provisions (see BGH, judgment of 2 December 2021 - IX ZR 111/20, ZInsO 2022, 309 margin no. 30). This does not imply any statement about the scope of the provisions in their respective areas of application. In particular, it has not been decided that the *bona fide* dividend recipient cannot be an opponent in a contestation under section 134 (1) InsO.

37. b) The protection of section 62 (1) sentence 2 AktG does not preclude a challenge under sections 129 et seqq. InsO. This also applies to a challenge under section 134 (1) InsO. There are no sufficient indications for a corresponding value decision of the legislature.

38. aa) Section 62 (1) sentence 2 AktG is part of a system of regulation of restitution claims under company law. By returning unauthorised contributions to the company's assets, the claim serves the principle of capital preservation, which is central to the law of the stock corporation (MünchKomm-AktG/Bayer, 5th ed., section 62 margin no. 1; Grigoleit/Rachlitz, AktG, 2nd ed., section 62 margin no. 1; Koch, AktG, 17th ed., section 62 margin no. 1). This is a specific claim under company law, which is distinguished from other claims in the sense of capital preservation, which in principle allows for the recovery of unlawfully received benefits (cf. BGH, judgment of 12 March 2013 - II ZR 179/12, BGHZ 196, 312 margin no. 15 et seq.; Heidel/Drinhausen, AktG, 5th ed., section 62 margin no. 1). The overall structure of the standard must be seen against the background of the intended protection of capital preservation. This does not only apply to section 62 (1) sentence 2 AktG, which places the protection of the bona fide dividend recipient above the preservation of capital. The limitation provisions in section 62 (3) AktG are also subject to such a balancing process. Ultimately, this also applies to the provisions of section 62 (2) AktG concerning the legal succession by the company's creditors.

39. The insolvency avoidance law of sections 129 et seqq. InsO represents the insolvency law regulatory system for ensuring the greatest possible satisfaction of creditors. The purpose of the law on avoidance in insolvency is to restore the existence of the debtor's assets liable to the creditors by reversing asset transfers that were made to the detriment of the creditors, in particular during the period of the crisis before the opening of proceedings (BT-Drucks. 12/2443, p. 156). A justifiable reason is required to reverse the effects of legal acts that are detrimental to the creditor and the associated infringement of the legal position of the party seeking avoidance. Whether such a reason exists is answered by section 129 et seqq. InsO. In the case of gratuitous payments by the debtor,

section 134 (1) InsO limits the legal validity of the acquisition, whereas section 143 (2) InsO protects the good faith of the acquirer on the side of the legal consequences.

40. bb) The undue payment of dividends to a shareholder is thus subject to various claims for repayment. Upon receipt and irrespective of the insolvency of the company, section 62 AktG applies. In addition, sections 129 et seqq. InsO apply in the event of the opening of insolvency proceedings. There is no sufficient reason to assume that the legislature could have intended a restriction of the right of avoidance in insolvency through section 62 (1) sentence 2 InsO. It considered the restitution of dividends received in good faith to be dispensable against the background of the principle of capital maintenance. It cannot be assumed that the legislature could have intended this even taking into account the purposes of the law on avoidance in insolvency, which in particular regulates the protection of good faith independently.

41. The minutes referred to by the opposing opinion (Foerster, WM 2022, 2359, 2360) on the discussion of the version of Art. 218 ADHGB (Minutes of the Commission for the Consultation of a General German Trade Law Book, Minutes I to XLV and XCIX to CLXXVI, p. 335 et seq. and 1044) date from the time before the Bankruptcy Code came into force. The proposed amendments to Art. 218 ADHGB, which did not become law, were aimed at allowing the recovery of overpaid dividends under lower requirements. There are no indications in the materials that any protection against the risk of a challenge was intended. Insofar as it has been stated in the justification of the proposed amendment, among other things, that the shareholders are sufficiently protected in the event of bankruptcy due to the “difficulty of pursuing legal action” for factual reasons, this relates solely to the enforcement of a shareholder’s claim for repayment. Even if the majority had rejected this argument, it has no

consequences on the avoidance claims - which at that time were only regulated in particular rights and in different ways (cf. on the contestability of free dispositions of the debtor, for example, section 102 no. 2 Preuß. KO). No intention can be inferred from the minutes to exclude the challenge of dividend payments, which depends on the prerequisites of a claim for avoidance in the individual case. The later statutory regulations do not contain such a value decision either.

42. Neither are there any systematic legal reasons that might indicate with sufficient certainty a corresponding intention of the legislature. It is correct that the protection of good faith in section 62 (1) sentence 2 AktG goes further than the protection of section 31 (2) GmbHG, which is subject to the satisfaction of the company's creditors. However, this can be easily limited to the claim for restitution under company law, which continues to exist over the assets of the company, not only in the material insolvency but also after the opening of insolvency proceedings. Finally, it is also true that trust in the capital market is worth protecting. The design of the protection is a matter for the legislature. The latter relegates participations in risk capital in corporate insolvency to the subordinate status of section 199 sentence 2 InsO, apparently without, in its view, causing any lasting disruption to confidence in the capital market.

43. c) A challenge of dividend payments does not render section 62 (1) sentence 2 AktG irrelevant. On the one hand, liability under section 62 (1) AktG is in several respects stricter than the right to appeal resulting from section 134 (1) InsO (see also Habersack, ZIP 2022, 1621, 1625). Liability under section 62 (1) AktG does not recognise an objection of loss of assets (cf. MünchKomm-AktG/ Bayer, 5th ed., section 62 margin no. 8; BeckOGK-AktG/Cahn, 2023, section 62 margin no. 5; Henssler/Strohn/Paefgen, Gesellschaftsrecht, 5th ed., section 62 AktG margin no. 1), whereas the claim for avoidance is in principle limited to the

(continued) existing enrichment (section 143 (2) InsO). In terms of time, only the ten-year limitation period under section 62(3) AktG limits liability under company law, whereas the claim for restitution under section 134(1) InsO under insolvency avoidance law is subject to a contestation period of four years prior to the application for commencement of insolvency proceedings and a three-year limitation period (section 146(1) InsO, sections 195, 199 BGB).

44. Secondly, there are different eligibility requirements. Section 62 AktG covers every case of a dividend payment on the basis of a resolution on the appropriation of profits that is null and void or has only been declared null and void in avoidance proceedings (see MünchKomm-AktG/Bayer, 5th ed., section 62 margin no. 66 with further references). In particular, a successful challenge of a resolution on the appropriation of profits can also be based on grounds other than initial nullity (see Koch, AktG, 17th ed., section 62 margin no. 7). In contrast, a challenge pursuant to section 134 (1) InsO can only be considered if no effective decision on the appropriation of profits already existed at the time of the debtor's performance to be determined pursuant to section 140 InsO. However, mere contestability of the resolution on the appropriation of profits is not sufficient - despite the fact that in the case of a successful contestation nullity occurs from the beginning (section 241 no. 5 AktG).

45. The practical effect of these differences is that the shareholder in bad faith is worse off than the shareholder in good faith. This also applies in cases in which a *bona fide* shareholder is entitled to a challenge pursuant to section 134 (1) InsO. Against this background, there is no reason to limit the scope of the avoidance provisions which serve to improve the satisfaction of creditors with regard to the provisions of company law.

46. 4. The appeal unsuccessfully asserts that a right of contestability fails due to section 143 (2) InsO. The court of appeal was right to assume that there was no loss of assets within the meaning of section 143 (2) sentence 1 InsO. The Claimant contested the Respondent's assertion that it had “reinvested the interest and dividends received in securities of the I. Group in a quasi-accumulative manner”. The appeal does not show that the Respondent has submitted evidence to this effect. The view of the Respondent that it lost assets in any case to the extent of the taxes paid is not correct against the background of the factual submissions to which the appeal refers. There is no evidence of a definitive additional tax burden (see BGH, judgment of 22 April 2010 - IX ZR 163/09, NZI 2010, 605 margin no. 14 with further references).

III.

47. Accordingly, the judgment must be set aside and the case remanded to the court of appeal insofar as the Claimant seeks repayment of the dividends for the financial years 2009 and 2010 (section 562 (1), section 563 (1) ZPO). The senate cannot make its own decision on the merits of the case because the matter is not ready for a final decision (section 563 (3) ZPO). Further appeal is unfounded.

Schoppmeyer Lohmann Schultz

Selbmann Weinland

Lower courts:
LG Frankfurt am Main, decision of 04/12/2019 - 2-17 O 225/18 -
OLG Frankfurt am Main, decision of 25/05/2022 - 4 U 310/19 -