

Munich Regional Court I

File no.: 5 HK O 15710/20



IN THE NAME OF THE PEOPLE

In the case

Dr jur. Jaffé Michael as insolvency administrator over the assets of Wirecard AG,
Franz-Joseph-Straße 8, 80801 Munich
- Claimant -

Legal representative:

[REDACTED]
[REDACTED]

1) [REDACTED]
- Intervening party -

2) [REDACTED]
- Intervening party -

3) [REDACTED]
- Intervening party -

Legal representative 1:

Lawyer [REDACTED]
[REDACTED]

Legal representative 2:

Lawyer [REDACTED]

Legal representative 3:

Lawyer [REDACTED]

v.

Wirecard AG, represented by [REDACTED]

[REDACTED]

- Respondent -

Legal representative:

Lawyers [REDACTED]

[REDACTED]

Legal representative:

Lawyers [REDACTED]

[REDACTED]

[REDACTED]

Dr Braun Markus, Augsburg-Gablingen Prison, Am Fliegerhorst 1, 86456 Gablingen

- Intervenor -

Legal representative:

Law firm [REDACTED]

In the matter of nullity

The District Court of Munich I, 5th Chamber for Commercial Matters - by Dr Krenek, Presiding Judge at the Regional Court, Ms Batdorf, Commercial Judge, and Mr Zoch, Commercial Judge, on the basis of the oral proceedings held on 16 December 2021, hereby rules as follows

Final judgement:

- I. It is hereby determined that the Respondent's financial statements for the year ended 31 December 2017 are null and void.

- II. It is hereby determined that the Respondent's financial statements for the year ended 31 December 2018 are null and void.

- III. It is hereby determined that the resolution on the appropriation of profits adopted under item 2 of the agenda at the Annual General Meeting of the Respondent on 21 June 2018 is null and void.
- IV. It is hereby determined that the resolution on the appropriation of profits adopted under item 2 of the agenda at the Annual General Meeting of the Respondent on 18 June 2019 is null and void.
- V. The Respondent and the intervenor who intervened on the Respondent's side shall bear the costs of the proceedings, including the costs of the intervening parties 1) to 3) who intervened on the side of the Claimant, in equal shares.
- VI. The judgment is provisionally enforceable against security in the amount of 105% of the respective amount to be enforced.
- VII. The value in dispute is set at €1,000,000 in relation to the intervening party 1) and the Respondent and the intervenor who joined the legal dispute on the side of the Respondent, in other respects at €1,500,000.

Facts:

The parties, by means of declaratory actions, dispute the nullity of two annual financial statements of the Respondent as well as of two resolutions on the appropriation of profits passed by the Respondent's general meeting.

I.

1. The Claimant was dismissed by order of the Munich Local Court - Insolvency Court - dated 25/08/2020, Case No.: 1542 IN 1308/20 (Annex K 1) as insolvency administrator over the assets of the Respondent, formerly listed in the DAX 30, an internationally active payment service provider with various business divisions. This also included the so-called third party acquiring business (hereinafter referred to as: TPA business). In regions where the Respondent itself did not have the necessary licences, it used partner companies (TPA partners) to carry out payment transactions in connection with credit card transactions, whereby these TPA partners were supposed to have the necessary licences. The Respondent was then supposed to refer its customers - i.e. traders - to the TPA partners, who were then to take over the payment processing for these customers. The settlement fees were agreed by the TPA partners, although they should actually have been due to the Respondent. The TPA partners were then supposed to receive a commission, which in turn was to be paid into trust accounts by the respective TPA partner and not distributed to the Respondent. The Respondent's significant TPA partners were Alam Solutions Provider FZ-LLC, based in the United Arab Emirates, Pay Easy Solutions Inc., based in the Philippines, and Senjo Payments Asia Pte Ltd (hereinafter: Senjo) based in Singapore. The trust accounts were initially held by Singapore-based trustee Citadelle Corporate Service Pte. Ltd. (hereinafter also referred to as: Citadelle) and managed at a bank in Singapore before being acquired in November 2019 by M.K. Tolentino Law Firm.

Citadelle had held the following accounts with the Oversea-Chinese Banking Corporate (hereinafter: OCBC) since 2015, the Singapore dollar-denominated account 65084162001, the US dollar-denominated account 65002306301 and the two euro-denominated accounts 503177768201 and 601097975201.

As at 31 December 2017, the account balances were as follows: on account 5031 7776 8201 it was €2,799.07, on account 6010 9797 5201 it was €2,679.56, on account 6508 4162 0001 it was SGD 2,384,680.40, on account 6500 0230 6301 it was USD 31,949.34 - a total, therefore, of around €1.5 million. As at 31 December 2018, the accounts 5031 7776 8201 and 6010 9797 5201 showed unchanged credit balances, account 6508 4162 0001 had a credit balance of SGD 2,956,932.49 and the account 6500 0230 6301 had a credit balance of USD 30,125.29 - a total of around €2 million. The Claimant had received balance confirmations from Citadelle as at 31 December 2017 concerning the existence of €327.5 million in account 6508 4162 001 in favour of Wirecard UK & Ireland Ltd, €141.4 million in account 6010 9797 502 and €194 million in account 6010 9797 5203, in each case for Card System Middle East FZ LLC (hereinafter: Card System) as well as €30 million in account 7838 4162 0001 and €20 million in account 8004 1929 8016 each for the Respondent.

As at 31 December 2018, the Claimant had received balance confirmations from Citadelle of €20 million for Wirecard International Sales Holding GmbH and of €30 million for the Respondent, without a breakdown by account, of €305.5 million for account 6508 4162 0001, for account 6010 9797 5202 of €317.2 million, for account 6010 9797 5203 of €248.6 million and for account 6914 0615 1139 for Wirecard Technologies GmbH of €105 million. These balance confirmations totalled €712.9 million as at 31 December 2017 and €1,026.3 million as at 31 December 2018.

Senjo deposited a total of SGD 49,378.30 into the account at OCBC 6508 4162 0001 between September 2016 and April 2020, where, in part, reference was made to Citadelle invoices as the purpose.

Due to allegations made in the media, which also concerned an alleged increase in turnover through fictitious client relationships, especially with TPA partners in Asia, and in particular fictitious fiduciary deposits totalling €1.9 billion, the auditing firm KPMG carried out a special review on behalf of the Supervisory Board

of the Respondent. In the audit report of 27 April 2020 (Annex K 5), the auditors of KPMG came to the conclusion that the payments allegedly made into trust accounts in the investigation period from 2016 to 2018 in the amount of approximately €1 billion could not be proven. No statement could be made on either its existence or its non-existence.

With regard to the further details of this special audit report, reference is made in full to Annex K 5.

2. The Respondent's financial statements as at 31 December 2017 (Annex K 10) were adopted by the Respondent's Management Board and Supervisory Board on 25 April 2018. As at 31 December 2017, the Management Board comprised the intervenor as Chief Executive Officer and Chief Technology Officer, Mr [REDACTED] as Chief Financial Officer and Mr [REDACTED] as Chief Sales Officer; Mr [REDACTED] left the Management Board on 31 December 2017. He was succeeded by [REDACTED]; in addition, Ms [REDACTED] joined the Management Board of the Respondent as Product Director. The members of the Supervisory Board were Mr [REDACTED], Mr [REDACTED], Mr [REDACTED] and Ms [REDACTED]. In these financial statements as at 31 December 2017, total assets amounted to €1,897,717,567.39, of which investments in subsidiaries amounting to approximately €986.5 million, intercompany receivables of €823.8 million and trust accounts amounting to €84.7 million were shown on the assets side. The profit and loss account showed a balance sheet profit of €142,545,355.99.

On 24 April 2019, the Management Board and the Supervisory Board of the Respondent adopted the annual accounts as at 31 December 2018, whereby the composition of the Management Board had not changed, while the Supervisory Board now included Dr [REDACTED] and Ms [REDACTED], together with Mr [REDACTED], Mr [REDACTED] and Mr [REDACTED] and Ms [REDACTED]. The balance sheet total of these financial statements was €2,344,437,576.48, of which shares in affiliated companies accounted for approximately €1,288.5 million, receivables from affiliated companies for approximately €919.7 million and trust accounts for an unchanged €84.7 million. The profit and loss account showed a balance sheet profit of €167,833,280.20 for the 2018 financial year.

Both annual financial statements were confirmed without qualification by [REDACTED] [REDACTED] Wirtschaftsprüfungsgesellschaft as the auditor responsible for the annual financial statements. For the annual financial statements as well as the consolidated financial statements as at 31 December 2019, [REDACTED] submitted audit opinions in a letter dated 29 June 2020.

The Respondent's general meetings of 21 June 2018 and 18 June 2019 both adopted resolutions under agenda item 2 on the appropriation of the balance sheet profit for 2017 and 2018, according to which a dividend of €0.18 per no-par value share entitled to dividend, i.e. a total amount of €22,241,805.48, was to be distributed from the balance sheet profit for the 2017 financial year and an amount of €120,303,550.51 was to be carried forward to new account. For the 2018 financial year, €0.20 per no-par value share entitled to dividend, i.e. a total of €24,713,117.20, was to be distributed as a dividend and an amount of €143,120,163.00 was to be carried forward to new account.

II.

In support of its claim, the Claimant essentially argues that the nullity of both sets of financial statements results from the lack of existence of the trust assets and the TPA receivables already as at 31 December 2017 and 31 December 2018. This was shown by the content of OCBC's confirmations of the accounts held with them, which could not have been fiduciary accounts, but rather expense accounts of Mr [REDACTED] - the director of Citadelle - as shown, for example, by the payment for fuel. In the case of payment flows to accounts of Centurion On-line Payment International Corp (hereinafter: Centurion) and Conepay International Inc (hereinafter: Conepay), they could not be payments from the TPA business because the payment frequency with only a small number of payers with irregular deposits was highly atypical for merchant payments and it was also not usual for the merchant to receive the full payment and then pay the payment processing fee directly to the TPA partner. There was no transfer of the TPA business from the Respondent to Centurion. There were no other accounts at OCBC

as can be seen from the letters of the law firm Allen & Gledhill dated 28 October 2021 and 3 November 2021 (Annexes K 71 and K 72). The balance confirmations from Citadelle, the trustee, as at 31 December 2017 and 31 December 2018 were falsified, according to an email from Citadelle to [REDACTED], which stated that Citadelle had never confirmed such balances and did not hold such balances. It stated that two further balance confirmations dated 2 December 2016 and 29 January 2017 (Annex K 22) had been prepared personally by Mr [REDACTED] - a former managing director of subsidiaries of the Respondent - for the purposes of deception. A reconciliation with OCBC's foreign currency deposits also proved the lack of fiduciary deposits, as the total foreign currency deposits only accounted for about half of the alleged fiduciary deposits on both reporting dates. It also said there was no discernible outflow of more than €1 billion on OCBC's balance sheet before 31 December 2019. The lack of existence of the TPA business was also shown by the failure of the TPA partners or the alleged traders to contact the Respondent. In the case of the reality of the business relationship, such contact would have been expected. The Respondent lacked an organisational structure for the handling of the TPA business, which contributed more than 50% to the group's turnover. For the tasks allegedly taken over by the sales department, there was only an inadequate sales team consisting of a few people. The deficient bookkeeping is proven by the findings of the German Financial Reporting Enforcement Panel (Deutsche Prüfstelle für Rechnungslegung, DPR) in its letter to the Respondent dated 9 July 2020 (Annex K 25). There was no indication that the trust assets still existed as at 31 December 2017. The lack of existence of the TPA business and thus also of the trust assets, in view of the associated overvaluation of the investment values, the trust assets and the intercompany receivables from the companies involved in the TPA business in the amount of €743.6 million in 2017 and €972.6 million in the annual financial statements as at 31 December 2018, led to the nullity of the annual financial statements. In addition, there was a violation of creditor-protecting provisions in view of the serious deficiencies in the accounting, which also led to nullity.

The nullity of the annual financial statements would then also necessarily entail the nullity of the accompanying resolutions on the appropriation of profits.

The Claimant therefore requests the Court to order as follows:

- I. It is hereby determined that the Respondent's financial statements for the year ended 31 December 2017 are null and void.
- II. It is hereby determined that the Respondent's financial statements for the year ended 31 December 2018 are null and void.
- III. It is hereby determined that the resolution on the appropriation of profits adopted under item 2 of the agenda at the Annual General Meeting of the credit balance on 21 June 2018 is null and void.
- IV. It is hereby determined that the resolution on the appropriation of profits adopted under item 2 of the agenda at the Annual General Meeting of the credit balance on 18 June 2019 is null and void.

III.

In contrast, the Respondent requests as follows:

Dismissal of the case.

In support of its application, the Respondent essentially relies on the fact that the application only compiles various indications from the year 2020 from which the lack of existence of the trust assets is inferred, although no conclusion can be drawn from them as to the situation at the relevant times. According to the Respondent, a statement made by the new trustee, Tolentino, to two Philippine banks did not provide sufficient evidence of the lack of existence of the trust assets of the long-time trustee, Citadelle, at OCBC. In addition, there was the possibility of misappropriation of the existing trust funds - for example in connection with the change of trustee towards the end of

2019. However, this did not result in the nullity of the annual financial statements for the financial years 2017 and 2018. KPMG's assessment did not allow any conclusion to be drawn about the lack of existence of the trust assets. The Respondent claims that the auditor ██████████ had not obtained any reliable findings in this regard either, but instead referred to several pieces of evidence that speak against the non-existence, such as the reconciliation of quarterly accounts of the three TPA partners with the confirmations obtained from the trustee Citadelle for the bank accounts managed by it and the receipt of payments from Citadelle in 2017 and 2018 for €36 million and €50 million respectively in accounts of other companies of the Respondent, the inspection by the auditors of ██████████ of the bank account statements of OCBC, which holds the trust account, during a meeting with Mr ██████████ on 26 March 2019, and the confirmation of the legal existence and proper incorporation of the trustee obtained from ██████████ in connection with the consolidated financial statements for the year 2018. Also, during a meeting between the auditors of ██████████ and the auditor AVN of the TPA partner Pay Easy, the auditor confirmed that it had received auditor's confirmation certificates for the deposit of funds into the corresponding trust account. No grounds for nullity due to insufficient auditing could be affirmed, because this would require the failure to carry out the statutory audit or insufficient audit procedures per se, which could not be assumed in this case. The Claimant did not substantiate any violations of fundamental provisions affecting the mandatory significance of the statutory audit under public law.

IV.

1. By order of 3 December 2020 (page 25 of the file), the court appointed Dr Andres Höder, lawyer, as guardian ad litem for the Supervisory Board and by resolution of 7 January 2021 (pages 39/40 of the file), corrected by resolution of 1 February 2021 (pages 59/61 of the file) appointed Dr ██████████, lawyer, as guardian ad litem for the Respondent's Management Board.

2. The intervening parties (1) to (3) joined the legal dispute on the side of the Respondent in written pleadings from their legal representatives dated 28 January 2021 (pages 51/57 of the file) and 26 January 2021 (pages 49/50 and 47/48 of the file). The intervening party 1) agreed in full with the Claimant's application for a declaration that the annual financial statements were null and void, as did the intervening parties 2) and 3).

3. The Respondent has declared notices of dispute with an invitation to intervene in the dispute on the Respondent's side as follows:
 - By written statement dated 23 February 2021 (pages 73/77 of the file) of [REDACTED] [REDACTED] Wirtschaftsprüfungsgesellschaft mbH (hereinafter: [REDACTED])
 - In written submissions dated 25 February 2021 to Ms [REDACTED] (pages 86/89 of the file), to Mr [REDACTED] (pages 90/93 of the file), to Mr [REDACTED] (pages 94/97 of the file), to Dr Markus Braun (pages 98/101 of the file), to Mr [REDACTED] (pages 81/84 of the file), to Mr [REDACTED] (pages 102/105 of the file), to Ms [REDACTED] (pages 106/109 of the file), to Dr [REDACTED] (pages 110/113 of the file), to Ms [REDACTED] (pages 114/117 of the file), to Mr [REDACTED] (pages 118/121 of the file) and to Mr [REDACTED] (pages 122/125 of the file)

The court served the notices to intervene on each of the intervening parties, and public service was ordered in respect of Mr [REDACTED] by order of 24 March 2021 (pages 125a/125b of the file).

The joined party [REDACTED] gave notice of the dispute to the following in the written pleadings of her legal representatives dated 23 July 2021 (pages 251/255 and 256/260 of the file) and 20 August 2021 (pages 335/339 of the file), [REDACTED]. By written pleadings of her legal representative dated 28 July 2011 (pages 265/269 of the file) and 16 August 2021 (pages 288/292 of the file), the joined party in the dispute, Dr [REDACTED], served notice of the dispute on [REDACTED] and Mr. [REDACTED]. Ms [REDACTED], in a written statement by her legal representative dated 17 September 2021 (pages 379/383 of the file) gave notice of the dispute to Mrs [REDACTED], Dr Markus Braun, Mr [REDACTED] and Mr [REDACTED]

- . The joined party, [REDACTED], gave notice of the dispute to [REDACTED] in a written statement by his legal representative dated 21 September 2021 (pages 384/390 of the file). By written statement of 17 November 2021 (pages 576/581, 582/588 and 589/595 of the file), the joined party [REDACTED] gave notice of the dispute to [REDACTED], [REDACTED], Dr Markus Braun, [REDACTED], [REDACTED] and [REDACTED]. The joined party, [REDACTED], in further written submissions by his legal representative dated 7 December 2021 (pages 641/646 and 647/653 of the file) gave notice of the dispute to [REDACTED] and Ms [REDACTED], Dr Markus Braun, Mr [REDACTED] and Mr [REDACTED]. The notices of dispute were served on the other parties to the dispute, whereby the notices of dispute were publicly served on Mr [REDACTED] on the basis of resolutions dated 16 August 2021 (pages 298/299 of the file), 23 September 2021 (pages 475/477 of the file), 22 November 2021 (pages 621/622 and 8 December 2021 (pages 690/691 of the file).
4. The joined party, Dr Markus Braun, was the only one of the joined parties to join the legal dispute on the side of the Respondent in a written statement by his legal representatives dated 2 August 2021 (pages 270/272 of the file). He joined the Respondent's motion to dismiss. In support of his claim, he essentially argues that the Claimant has not met its burden of proof to show that the annual financial statements as at 31 December 2017 and 31 December 2018 are null and void; and that it cannot rely on any relief from the burden of proof. He maintains that this does not result from the accusation of faulty bookkeeping; furthermore, there is an information gap in favour of the Claimant. He argues that the non-existence of the fiduciary deposits does not result from Warth & Klein's expert opinion on the extent of OCBC's foreign currency deposits in its annual financial statements. The statement by Mr [REDACTED] from the Respondent's compliance department could not be used as evidence as a simple party submission. Moreover, the findings made there could not have any indicative effect. In view of the possibility of the TPA partners' involvement in the disappearance of the trust funds by the puppet master [REDACTED] and ongoing investigations in Singapore and the Philippines, the assumption of contact with the Claimant as insolvency administrator had to be regarded as naïve.

Braun also argues that the closeness and conspicuous connections between the trustee, TPA partners and other companies were derived by the Claimant as well as Mr [REDACTED] from press articles which were not suitable for this purpose. The bank statements of Centurion showed that in 2017 and 2018 alone, payments of trader proceeds from the TPA business amounted to €160 million. The investigation files of the public prosecutor's office did not allow any conclusion to be drawn on the non-existence of the TPA business, nor did the findings of the parliamentary investigation committee on this complex. The allegedly falsified balance confirmations with other cut-off dates of 22 November 2016, 30 November 2016 and 31 December 2016 did not allow any conclusions to be drawn as to the lack of authenticity of the balance confirmations on the relevant cut-off dates for the two annual financial statements. [REDACTED] comprehensive audit procedures also speak against the hypothesis of the lack of existence of the trust assets and the TPA business. A misappropriation of income from the TPA business after 31 December 2018 by a group around board member [REDACTED] should be considered much more plausible.

There is no evidence from the submitted OCBC account statements that the trust assets did not exist. The inference from the non-existence of the trust assets to the non-existence of the TPA business was circular. Likewise, there are a large number of documents such as dealer lists, minutes of meetings with TPA partners, account statements of Centurion and Conepay. Payments into the accounts of TPA partners Pay Easy of €310 million, Al Alan of €166 million, Centurion of €424 million and Conepay of €13 million are a clear indication of the existence of the TPA businesses.

5. The joined parties - Ms [REDACTED] and Mr [REDACTED] - who had intervened in the dispute on behalf of the Respondent in a written statement by their legal representatives dated 20 August 2021 (pages 325/326 of the file) withdrew their interventions in a written statement dated 17 November 2021 (pages 620a of the file).

V.

In order to supplement the facts, reference is made to the exchanged pleadings including annexes as well as the minutes of the oral proceedings of 16 December 2021 (pages 722/727 of the file).

Reasons for the decision:**I.**

The actions seeking a declaration that the Respondent's financial statements as at 31 December 2017 and 31 December 2018 are null and void are admissible and well founded.

1. The action is admissible as an action for a declaration of nullity in each case pursuant to sections 256 (7) sentence 1, 249 (1) sentence 1 AktG (Aktiengesetz [German Stock Corporation Act]), whereby in particular the Claimant's standing as insolvency administrator must be affirmed. This is due to the legal position of the insolvency administrator, who is responsible for ensuring the legality of the corporation's actions. The action for annulment under section 256 (7) AktG serves first and foremost as a legal check on accurate annual financial statements, not as a means of asserting personal advantages. Within the scope of his duties, the insolvency administrator also assumes the legal control which is fundamentally incumbent on the Management Board. The insolvency administrator's duties include preserving and properly managing the assets belonging to the insolvency estate. Therefore, this duty must be based on the model of the proper and conscientious insolvency administrator, which is based on the requirements of due diligence under commercial and corporate law, as they result above all from sections 347 (1) HGB (Handelsgesetzbuch [German Commercial Code]), 93 (1) sentence 1 AktG, 43 (1) GmbHG (Gesetz betreffend die Gesellschaften mit beschränkter Haftung [Act on Limited Liability Companies]) and 34 (1) sentence 1 GenG (Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften [Act concerning commercial and

industrial cooperatives]). Consequently, the insolvency administrator is also obliged to comply with the legal obligations and requirements of the legal system as a corporate body, insofar as there is a connection to the insolvency estate. Since the legal position of the insolvency administrator includes the task of representing the interests of the insolvent company vis-à-vis all creditors and debtors, he must be authorised to bring an action for annulment to the extent that the defectiveness of the annual financial statements affects the insolvency estate. In the present case, the objected defects of the annual financial statements have adverse effects on the insolvency estate; the discontinuation of the annual financial statements as a result of the nullity must be described as favourable for the estate (cf. BGHZ 225, 198, 204 ff. = ZIP 2020, 1064, 1065 = WM 2020, 1256, 1257 f.; AG 2020, 540 f. = ZIP 2020, 1118 f. = WM 2020, 1263, 1264 f. = NZI 2020, 739, 740 f.; Vatter in: BeckOGK AktG, as at: 01/02/2022, section 245 margin no. 53; Jansen in: BeckOGK AktG, loc.cit., section 256 margin no. 83; Koch, AktG., 16th ed., section 256 margin no. 31; Schulz in: Bürgers/Körber/Lieder AktG, 5th Ed., section 256 margin no. 20; Bezenberger in: Commentary on the German Stock Corporation Act, 5th ed., section 256 margin no. 227 a; Waclawik in: Hölter/Weber, AktG, 4th ed., section 256 margin no. 38). Due to an overvaluation, it could not be ruled out that excessive tax liabilities were reported for the Respondent for the 2017 and 2018 financial years, which, in the event of nullity, could lead to claims for repayment in connection with overpaid trade and corporate income tax claims or to the elimination of direct tax liabilities in compliance with the provisions of the German Fiscal Code. Likewise, it cannot be ruled out that the Claimant could be entitled to claim restitution with regard to the dividends paid under section 62 (1) AktG. In view of this, the court does not have to decide whether the more far-reaching view in some of the literature (cf. Heidel in: Heidel, Aktienrecht und Kapitalmarktrecht, 5th ed. ed., section 256 margin no. 41; Schwab in: Schmidt/Lutter, AktG, 4th ed. ed., section 256 margin no. 40), which tends to affirm a general right of action of the insolvency administrator for the action for a declaration of nullity based on section 256 (7) AktG, should have to be followed.

2. The action is well-founded because the annual financial statements of the Respondent are null and void on the basis of section 256 AktG, without it being relevant to the decision whether the trust accounts into which payments from the TPA transactions were received actually did not exist or whether the corresponding funds were misappropriated or were available in other

accounts of the Respondent. Therefore, no hearing of the evidence is required.

a. Based on the Claimant's submission, the nullity results from a violation of section 256 (5) sentence 1 no. 1 AktG. According to this, annual financial statements are null and void if items are overvalued due to a violation of valuation regulations. This is the case if asset items are stated at a higher value than permissible under sections 253 to 256 a HGB. The non-existence of the TPA transactions as well as the trust balances claimed by the Claimant has an impact at the level of the Respondent on the capitalised cash and cash equivalents, the carrying amounts of the investments as well as the receivables from the affected direct and indirect subsidiaries, after substantial parts of the affected trust accounts and receivables for the Respondent as well as direct subsidiaries Wirecard Technologies GmbH Deutschland and Card Systems Middle East FZ-LLC as well as the indirect subsidiary Wirecard UK & Ireland Ltd. were posted.

(1) If the recognised credit balances in the trust accounts are at least largely non-existent, this leads to a significant overvaluation of the assets in the annual financial statements of the Respondent as at 31 December 2017 and 31 December 2018, after escrow accounts for the Respondent of €84.7 million in the balance sheet as at 31 December 2017, at Wirecard Sale International Holding GmbH of €20 million, at Card Systems of €340.4 million, at Wirecard UK & Ireland Ltd. of €327.5 million and at Wirecard E-Money Philippines of €1.7 million, in addition to TPA receivables from Wirecard Technologies GmbH of €209.3 million, from Card Systems of €39.5 million, from Wirecard UK & Ireland Ltd. of €7.6 million and from Wirecard (Gibraltar) Ltd. of €6.6 million were posted. As at 31 December 2018, the trust accounts, as reported in the balance sheet, amounted to €84.7 million for the Respondent, €105 million for Wirecard Technologies GmbH, €20 million for Wirecard Sales International Holding GmbH, for Card Systems to €570.8 million and for Wirecard UK & Ireland Ltd. to €305.5 million. The TPA receivables in the financial statements were reported at €265.6 million from Wirecard Technologies GmbH, €208.3 million from Card Systems, €2.8 million

from Wirecard UK & Ireland Ltd., €9.9 million from Wirecard Singapore Pte. Ltd., €0.1 million from Wirecard Bank AG and €6.6 million from Wirecard (Gibraltar) Ltd.

- (2) Without having to decide this conclusively, the court assumes that there are massive reasons for the correctness of the Claimant's argument that these trust assets never existed or at least did not exist to any significant extent. This is shown by the excerpts from OCBC submitted by the Claimant. The accounts at this bank had a total of approximately €1.5 million and €2.1 million, respectively. According to OCBC's certification as at 31 December 2017, the accounts 6010 9797 5202 and 6010 9797 5203, in which, according to Citadelle's confirmation, there should be €141.4 million and €194 million respectively for Card Systems, did not exist, nor did the accounts 7838 4162 0001 and 8004 1929 8016 for the Respondent with balances of €30 million and €20 million. The account 6508 4162 0001 for Wirecard UK & Ireland Ltd. showed a balance of SGD 2,956,932.49, whereas according to the balance confirmation it should have shown €305.5 million - i.e. more than 100 times that amount. There were no balance confirmations for the three accounts 5031 7776 8201, 6010 9797 5201, 6500 0230 6301 with amounts of €2,799.07, €2,679.56 and USD 30,125.39. The two accounts for Card Systems as well as 6914 0615 1139 for Wirecard Technologies, for which there are balance confirmations of €317.2 million, €245.6 million and €105 million did not exist as at 31 December 2018, according to information provided by OCBC.

There will be no serious doubt as to the correctness of OCBC's findings which were communicated to the Claimant by their lawyers on 28 October 2021. OCBC had been ordered by the High Court of the Republic of Singapore to produce account statements of the trust accounts in question since 2015, correspondence with Citadelle or ██████████, account opening documents and account statements of the known accounts since 2015, as well as all documents relating to any unknown accounts held by the trustee Citadelle. When an internationally active credit institution such as OCBC is ordered by a court to provide

comprehensive information, it cannot be assumed without further concrete evidence that this request will not be complied with correctly and that inaccurate information could be provided. For a bank in international competition, a contrary approach could well be associated with a loss of reputation and potentially also lead to measures by the banking supervisory authority of the Republic of Singapore. The intervenor was also unable to provide any concrete evidence that the information on the individual accounts was incorrect.

The fact that the trust accounts for the TPA business were actually held at OCBC is also supported by the submissions of the intervenor as well as other former board members of the Respondent in civil proceedings against them. Both [REDACTED] and the former CFO [REDACTED] confirmed in written submissions to the Munich Regional Court I in the proceedings conducted there, 3 O 5875/20, that OCBC acted as trustee bank, later BDO and BPI, whereby Mr [REDACTED] had further clarified this to the effect that Citadelle acted as trustee until the end of 2019 and that the trust accounts were also held at OCBC until 31 December 2018. The submission also of the intervenor in these civil proceedings speaks very substantially in favour of the fact that the trust accounts were indeed held at OCBC. It is true that a party is not prevented from changing its submissions in the course of the proceedings, in particular to clarify, supplement or correct them, for which purpose, for example, the development of the proceedings may give rise if what was previously presented in passing is clarified. However, if a party has changed its arguments in the course of the trial, this may become important in the context of the assessment of evidence. The same may apply to the assessment of a party's contentious submissions in a legal dispute if the party has submitted different submissions in a previous action (see BGH, GRUR 2016, 705, 708 = WRP 2016, 869, 872; Greger in: Zöller, ZPO, 34th ed., section 286 margin no. 14). Such a situation must be assumed here. Here, the intervenor adapted its presentation to

a new procedural situation in which it points out that the trust assets did not necessarily have to be held at OCBC.

Citadelle's balance confirmations do not match the balance of the accounts held at OCBC, insofar as these accounts at OCBC are also mentioned in the balance confirmations. This also indicates that the trust assets did not actually exist.

To the extent that the intervenor refers to payments received in the amount of €964 million from TPA partners in the period from 2015 to 2020 on the domestic accounts of the Respondent, it must be assumed that these payments have nothing to do with the payments allegedly received on trust assets. In addition, the Claimant has submitted, without contradiction, that as at 31 December 2017 and 31 December 2018, there were only credit balances of €11.75 million and €9.18 million respectively in these accounts. In view of the total amount of the trust balances at the centre, corresponding to the balance confirmations of €712.9 million and €1,026.3 million respectively, these balances would in any case not be suitable to call into question the nullity of the two annual financial statements.

- b. Even based on the submission of the intervenor in particular, it must be assumed that the annual financial statements as at 31 December 2017 and 31 December 2018 are null and void.
 - (1) This applies in particular if Mr [REDACTED] - possibly in collaboration with third parties - had embezzled the funds before the adoption of the respective annual financial statements by the Management Board and the Supervisory Board and the funds were no longer in the accounts of the Respondent. In this situation, the credit balances would no longer be recorded in accounts attributable to the Respondent, which is why the assets would be overvalued in the same way as in the situation described above, in which the trust balances are said not to have existed or only to have existed to a minor extent.

(2) However, even if the intervenor's submission is taken as the basis for the legal assessment that the trust assets were in accounts other than those of OCBC, it must be assumed that the annual financial statements as at 31 December 2017 and 31 December 2018 are null and void. In this situation, nullity results from section 256 (1)(1) AktG, according to which adopted annual financial statements are null and void if their content violates regulations that are exclusively or predominantly given for the protection of the company's creditors. In the present case, even according to the intervenor's submission, there is a violation of the principles of proper accounting within the meaning of sections 238 (1) sentence 1, 264 (2) sentence 1 AktG, which have the quality of law due to their inclusion in sections 238 (1) sentence 1, 264 (2) sentence 1 HGB and which serve in particular to protect creditors (cf. BGHZ 124, 111, 117 = NJW 1994, 520, 521 = AG 1994, 124, 125 = ZIP 1993, 1862, 1864 = DNotZ 1994, 619, 621; Koch in: Munich Commentary on the German Stock Corporation Act, 5th ed., section 256 margin no. 12; Bezzenger in: Major Commentary on the German Stock Corporation Act, loc. Cit., section 256 margin no. 48; Schwab in: Schmidt/Lutter AktG, loc.cit., section 256 margin no. 7 ; Jansen in: BeckOGK AktG, loc.cit., section 256 margin no. 23; Heidel in: Heidel, Aktienrecht und Kapitalmarktrecht, loc. cit. 11; E. Vetter in: Henssler/Strohn, Gesellschaftsrecht, 5th ed., section 256 margin no. 6). In accordance with the principles of proper accounting, the annual financial statements of a corporation must give a true and fair view of the net assets, financial position and results of operations of the corporation in accordance with section 264 (2) sentence 1 HGB. This cannot be assumed; the principles of proper accounting were violated, even if the intervenor's submission on the existence of the trust property in other accounts is used as a yardstick. According to section 238 (2) HGB, the accounting must be such that it can provide an expert third party with an overview of the business transactions and the situation of the company within a reasonable period of time. It should show the commercial transactions and the situation of the assets in accordance with the principles of proper accounting. In this context, bookkeeping means the ongoing, systematic and monetary

documentation of business transactions (cf. Ballwieser in: Munich commentary on the German Commercial Code 4th ed., section 238 margin no. 16), which is why the TPA transactions are then also documented in it and must accordingly also be clearly identifiable. Only then can the central principles of completeness, clarity and timeliness of the records and the principles of system and result documentation be derived, which are to be observed as principles of proper accounting in the sense of accounting technique (cf. Ballwieser in: Munich commentary on the German Commercial Code, loc. cit. 30). This was violated in the present case. Otherwise, the payments resulting from the genuine or alleged TPA transactions would have had to be found in the company's accounts. If the trust assets are booked to other accounts of the company, they should actually have been found by the insolvency administrator and the competent employees engaged by him. Since this did not happen, it must be assumed that there was a violation of section 238 (2) sentence 1 HGB.

It cannot be argued against this that section 256 (5) sentence 1 no. 1 AktG is a *lex specialis* in comparison to section 256 (1)(1) AktG, which is why nullity cannot result from a violation of the provisions protecting creditors. This principle, which is in any case not undisputed, can only apply if the direction is the same, i.e. the overvaluation of the assets simultaneously constitutes a violation of the principles of proper accounting (according to Bezenberger in: Major Commentary on the German Stock Corporation Act, loc. cit., section 256 margin no. 4), which is not to be affirmed here. However, the intervenor's argumentation is based precisely on the assumption that there cannot be an overvaluation of assets because the funds exist. In this case, however, the violation is fundamentally different from section 256 (5) sentence 1 no. 1 AktG, which is why the question of the relationship between the two grounds for nullity cannot arise in the present case.

- c. The valuation deficiency within the meaning of section 256 (5) sentence 1 no. 1 AktG must, like the violation of the principles of proper accounting

as a provision protecting creditors within the meaning of section 256 (1) no. 1 AktG.

- (1) The overvaluation of a balance sheet item within the meaning of section 256 (5) sentence 1 no. 1 AktG leads to the nullity of the annual financial statements if an accounting entry that is contrary to the principles of proper accounting is not insignificant in terms of its scope.

The requirement of this unwritten element follows from the legal concept of section 256 (4) AktG, which in this respect preserves a general legal principle for the consequences of errors in the preparation of the annual financial statements. A slight overvaluation does not affect the protective purpose of the norm (cf. BGHZ 83, 341, 347 = NJW 1983, 42, 44 = ZIP 1982, 1077, 1080; NZG 2021, 1603, 1608 = AG 2022, 159, 163 = WM 2021, 1692, 1697; OLG Hamm AG 1992, 233, 234; OLG Brandenburg GmbH 1997, 796, 797; LG Frankfurt am Main DB 2001, 1483; LG München I DB 2007, 2306, 2307 = BB 2007, 2510, 2511 = Der Konzern 2007, 537, 538; Jansen in: BeckOGK AktG, loc.cit., section 256 margin no. 67; A. Arnold in: Cologne Commentary on the German Stock Corporation Act, 3rd ed., section 256 margin no. 71; Schulz in: Bürgers/Körper/Lieder, AktG, loc. cit., section 256 margin no. 17; E. Vetter in: Henssler/Strohn, Gesellschaftsrecht, loc.cit., section 256 margin no. 20). The expert report submitted by the Claimant shows the need to write down the Respondent's assets in the annual accounts as at 31 December 2017 by €743.6 million or approximately 39% of the balance sheet total and in the annual accounts as at 31 December 2018 by €972.7 million or 41% of the balance sheet total. In the case of such an overvaluation, there can be no doubt as to materiality. The Respondent did not substantiate its contradiction of these findings, but merely referred to the fact that the intervening party ██████████ had pointed out to the guardians ad litem that the party's expert opinion was flawed, for example, in that it transferred the assets that might not be present in the subsidiaries to the Respondent's book values of the shareholdings without taking into account possible counter-effects, and that it assumed that the Respondent had trust assets, although the trust assets were said to have existed in favour

of subsidiaries. However, the incorrect accounting at subsidiaries has an effect on the book values of the holdings, which were then clearly overstated on the assets side of the Respondent's annual financial statements. Furthermore, the Respondent has not been able to show what could result in possible counterclaims of the Respondent that would have had to be accounted for.

(2) The same considerations apply if the intervenor's submission is to be taken as a basis.

(a) In the case of misappropriation prior to the adoption of the respective annual financial statements, the explanations made above apply in the same way, because an overvaluation of assets within the meaning of section 256 (5) sentence 1 no. 1 AktG must also then be assumed.

(b) If, on the other hand, there is a violation of the principles of proper accounting, materiality must also be affirmed. It can be left unresolved whether this requirement is in agreement with part of the literature (cf. Heidel in: Heidel, Aktienrecht und Kapitalmarktrecht, loc. cit. 12) can be dispensed with or whether - which there are better reasons to support - section 256 (4) AktG expresses a general principle that applies to all defects of content specified in section 256 AktG (see Jansen in: BeckOGK AktG, loc.cit., section 256 margin no. 26; Koch in: Munich Commentary on the German Stock Corporation Act, loc. Cit., section 256 margin no. 15; Schwab in: Schmidt/Lutter , AktG, loc.cit., section 256 margin no. 7; Bezzenberger in: Major Commentary on the German Stock Corporation Act, loc. cit., section 256 margin no. 52; A. Arnold in: Cologne Commentary on the German Stock Corporation Act, loc. Cit., section 256 margin no. 24). The effects of the violation of the principles of proper accounting are so serious here that nullity must be assumed because the incorrect entry leads to the above-mentioned need for devaluation.

In view of the above, it was necessary to declare the financial statements as at 31 December 2017 and 31 December 2018 null and void without having to conduct any evidentiary proceedings. The offers of proof on the existence of the trust accounts are not relevant to the decision for the reasons mentioned above. The Claimant's pleading of 23 March 2022, which was not omitted, was not used in the decision to the detriment of the Respondent and its intervenor. Therefore, reopening the oral proceedings pursuant to section 156 ZPO was not necessary for this reason either.

II.

The action seeking a declaration that the resolutions of the Respondent's general meeting of 21 June 2018 and 18 June 2019 on the appropriation of the balance sheet profit are null and void is admissible and well founded.

1. With regard to the admissibility of the action, the same considerations apply as those set out above under I.1. Reference is made to this in order to avoid repetition.
2. The merits of the action, which in turn is to be directed against the Respondent, result from section 253 (1) sentence 1 AktG. Since the two annual financial statements on which the resolution on the appropriation of profits is based are null and void, the resolutions on the appropriation of the balance sheet profit are also null and void pursuant to section 253 (1) sentence 1 AktG.

III.

1. The decision on costs is based on sections 91 (1), 100 (1), and 101 (2) ZPO. Since the intervention in an action for a declaration of nullity is a contentious ancillary intervention and this also applies to the intervenor on the side of the Respondent, the Respondent and the intervenor must bear the costs of the proceedings

equally as losers in the dispute. As a result of the withdrawal of the intervening party on the part of the Respondent by the intervening parties [REDACTED] and [REDACTED], an obligation to bear the costs cannot be assumed, because for this the point in time of the decision must be taken into account and the intervening party must still be admitted as such at that moment. In the present case, however, this is no longer the case in view of the potential to withdraw possible at any time and the associated withdrawal (see Goldbeck in: Kern/Diehm, ZPO, 2nd ed., section 101 margin no. 4). This is the only possible outcome if, in accordance with general principles of civil procedure, the time of the last oral hearing is decisive because the two intervening parties had already declared their withdrawal of the intervention.

2. The decision on provisional enforceability results from section 709 sentences 1 and 2 ZPO.

3. The amount in dispute was to be determined on the basis of the provisions of sections 247 (1) AktG, 5 ZPO. In view of the requested declaration of nullity of the annual financial statements of a company formerly listed on the DAX 30, the amount in dispute was to be set at €500,000 for each annual financial statement and at €250,000 for each resolution on the appropriation of profits. Even though the claims for repayment of dividends and taxes paid on the basis of the above may be higher, the court sees no need to set a higher amount in dispute than that which is regularly determined.

Signed

Dr Krenek
Presiding Judge at
the District Court

Batdorf
Commercial
judge

Zoch
Commercial
judge
Commercial judge
Zoch is unable to sign
due to illness.
Dr Krenek
Presiding Judge at the
District Court

Promulgated 05/05/2022

Signed
Taş, Court Official,
Clerk of the court