

Munich Higher Regional Court

File no.: 7 U 3337/22
5 HK O 15710/20 LG Court Munich I



In the case

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

Legal representative:

Law Firm [REDACTED]
[REDACTED]

Intervenor:

[REDACTED]

Legal representative:

Lawyer [REDACTED]

Intervenor:

[REDACTED]

Legal representative:

Lawyer [REDACTED]

Intervenor:

[REDACTED]

Legal representative:

Lawyer [REDACTED] v

Wirecard AG, represented by [REDACTED]
[REDACTED]

- Respondent, Respondent -

Legal representative:

Lawyers [REDACTED]
[REDACTED]

Legal representative:

Lawyers [REDACTED]
[REDACTED]

Intervenor & Appellant:

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

Legal representative:

Lawyers [REDACTED] on

the grounds of nullity

The Munich Higher Regional Court - 7th Civil Senate - by the presiding judge at the Neumair Higher Regional Court, the judge at the Kunnes Higher Regional Court and the judge at the Reichel Higher Regional Court on 12/06/2023 issued the following

Indicative Order

1. The Senate intends to dismiss the intervenor's appeal against the judgment of the Munich I Regional Court of 05/05/2022 (Case No.: 5 HK O 15710/20) by unanimous resolution in accordance with section 522 (2) ZPO (Zivilprozessordnung [Code of Civil Procedure]).
2. Any response should be submitted by 21/07/2023.

Grounds:

I.

The appeal has no prospect of success within the meaning of section 522 (2) ZPO. Neither is the legal dispute of fundamental importance nor does a decision of the Court of Appeal based on oral proceedings appear necessary for the further development of the law or to secure uniform case law. An oral hearing is not required.

The Regional Court's assessment is free from legal errors (sections 513 (1), 546 ZPO). After due consideration of the parties' submissions, the overall circumstances and the documents submitted, the Regional Court granted the application for a declaration that the Respondent's annual financial statements as at 31 December 2017 and 31 December 2018 and the resolutions on the appropriation of profits of 21 June 2018 and 18 June 2019 were null and void.

II.

The objections raised by the Respondent's intervenor against this are not convincing and do not help to establish the success of their action. The following position is taken on the individual appeals.

1. The Regional Court correctly assumed that the trust balances recorded by the Respondent or its subsidiaries (as liquid funds) on the balance sheet dates 31 December 2017 and 31 December 2018 were in any case not present in the accounts to which the balance confirmations of the trustee Citadelle refer on those dates. Although the Regional Court does not explicitly say this, it underlies its assumption that the trust assets either did not exist or were misappropriated before the balance sheet dates, or were in other accounts, because otherwise this assumption would make no sense.

a) The submitted balance confirmations of the trustee Citadelle relating to the balance sheet dates (cf. summarised in Annex K 74) refer to balances in accounts held at the Oversea-Chinese Banking Corporate in Singapore [hereinafter: OCBC]. Although the balance confirmations do not mention any account numbers, they could only be understood by all parties involved, in particular by those responsible for the balance sheets for the Respondent and by the auditors, as referring to accounts at OCBC. The Regional Court is therefore correct in assuming (LGU 18) that, according to the parties' understanding, the trust assets managed by Citadelle were located at OCBC.

Both one of the balance confirmations as at 31 December 2017 and the balance confirmation as at 31 December 2018 (both Annex K 74) mention an account with the account number 650841620001 (with an account balance of around €327 million as at 31 December 2017 and around €305 million as at 31 December 2018), in each case without stating the account-holding bank. This account number 650841620001 already appears in an earlier balance confirmation as at 31 December 2015 (Annex K 88), but in that case under the name of the credit institution, namely OCBC. With the knowledge of this earlier balance confirmation, the persons responsible for the balance sheet for the Respondent, including the auditors, had to assume that the account 650841620001 mentioned in the balance confirmations on the current balance sheet dates in accordance with Annex K 74 was (still) held at OCBC.

Furthermore, both the balance confirmations as at 31 December 2017 and the balance confirmation as at 31 December 2018 (both Annex K 74) mention two accounts with the account numbers 61097975202 and 61097975203, in each case without stating the account-holding banking institution. A previous balance confirmation as at 31 March 2016 (Annex K 44) mentions an account with the number 61097975201 at OCBC. The above-mentioned account numbers listed in the balance confirmations for the current reference dates therefore only differ in the final digit (2, 3) from the account at OCBC mentioned in Annex K 44 (final digit 1), which, on reasonable assessment, would suggest that these accounts in the relevant balance confirmations were also held at OCBC. With the knowledge of the balance confirmation pursuant to Annex K 44, the persons responsible for the balance sheet for the Respondent including the auditors had to assume this in any case.

Thus, the majority of the account numbers specified in the balance confirmations on the balance sheet dates in accordance with Annex K 74 can be clearly assigned to OCBC from the relevant point of view of the recipients of the confirmations, i.e. the persons responsible for the balance sheet. Against this background, the persons responsible for the balance sheet had to assume, in any case without further explanation, that

the other accounts mentioned in the balance confirmations as per Annex K 74 (783841620001 and 800419298016 as at 31 December 2017; 691406151139 as at 31 December 2018) were also held at

OCBC; these trust balances were then recognised on the basis of this assumption.

b) However, the accounts held by the trustee Citadelle at OCBC - as the Regional Court rightly assumed (LGU 17) - only contained values totalling around €1.5 million (as at the balance sheet date 31 December 2017) and around €2 million (as at the balance sheet date 31 December 2018) although according to the balance confirmations (K 74), the trust assets held there supposedly amounted to around €712 million (as at 31 December 2017) and around €975 million (as at 31 December 2018).

The Claimant brought a claim against OCBC in the High Court of Singapore for information about the accounts held there for the trustee Citadelle and/or its director [REDACTED] and submitted the results of the information as Annexes K 66 - K 69, K 71, K 72. On the basis of this information provided, the Regional Court was entitled to conclude that the trust balances listed in the balance confirmations as at the balance sheet dates did not exist in the accounts mentioned in the balance confirmations.

This concerns primarily the account number 650841620001 listed in the balance confirmations on both reporting dates, which according to the confirmations should have account balances of around €327 million (2017) and around €305 million (2018) on the reporting dates. The account statements from 30 August 2006 to 31 July 2020 are now available for this account (Annex K 66). First of all, these show that the account was not in euros, but in Singapore dollars. Furthermore, they show that the account never had balances in the amount of the trust funds allegedly deposited there and, in particular, only had balances of 2.3 million and 2.9 million Singapore dollars on the balance sheet dates. This only allows the conclusion that in any case no (significant) trust assets were held for the Respondent on this account.

For the other accounts mentioned in the balance confirmations at the balance sheet dates (account numbers 60109795202, 60109795203, 783841620001, 800419298016, 69140615119), OCBC did not provide any account statements in response to the disclosure order. In response to a related follow-up question by the Respondent's lawyers authorised for the proceedings in Singapore dated 29 October 2021 (in Annex K 72), the lawyers of OCBC (whose power of attorney to act on behalf of OCBC was not disputed at the hearing before the Regional Court) responded by letter dated 3 November 2021 that there were no further accounts for Citadelle at OCBC beyond the account statements submitted. As the Regional Court rightly points out (LGU 18), the Respondent and the Appellant could not provide any specific evidence for the incorrect information provided, especially since the information was provided by an internationally renowned major bank on the basis of a corresponding court order. Therefore, there was nothing to prevent the Regional Court from concluding, on the basis of this information, that the accounts mentioned at the beginning of this paragraph did not exist, and consequently that, in contradiction of the balance confirmations, it was not possible for the trust assets to be in these accounts.

Even if it were to be assumed (for which, however, there is no evidence) that the accounts mentioned above possibly did exist, the account 650841620001 would remain, the genesis of which is documented by account statements and on which the trust assets allegedly located there in the amount of approximately €327 million (31 December 2017) and approximately €305 million (31 December 2018) were not present on the balance sheet dates.

c) Thus, the submitted balance confirmations prove to be (although not necessarily fake/forged in the sense of "not originating from the trustee Citadelle", but) false in the sense of "incorrect in content": The accounts to which the balance confirmations referred

did not hold the confirmed credit balances.

2. From the above finding (= the trust assets were not in the accounts to which the balance confirmations refer on the balance sheet dates), the Regional Court concluded that the trust assets either did not exist or had been misappropriated before the balance sheet dates or (although they existed) were in other accounts. This conclusion is shared by the Senate.

At most, it requires a minor clarification. The misappropriation of the trust assets prior to the respective balance sheet dates, which the Regional Court considered possible, is only a subset of the non-existence of the assets on the balance sheet dates. Because if the Respondent had already had its access to existing credit balances withdrawn through criminal acts before the balance sheet dates, they were no longer available to the Respondent in balance sheet form on the balance sheet dates. This ultimately leaves only two possibilities: the trust assets did not exist/no longer exist (hereinafter: Variant (1)) or they existed in accounts other than those mentioned in the balance confirmations (hereinafter: Variant (2)).

The above is a logical conclusion from the findings presented under point 1. Drawing conclusions is an inherent part of the court's role. In this respect, it is irrelevant whether the parties share or have presented these conclusions.

The Senate also agrees with the Regional Court's assessment that it is unnecessary to take evidence on the question of which of the remaining alternatives applies if both lead to the same legal consequence, namely the nullity of the annual financial statements. This final point is correct, as will be shown below.

3. The Regional Court rightly assumed that in the event of the non-existence of the trust deposits (Variant (1) above) there was a material overvaluation of the assets in the disputed annual financial statements of the Respondent within the meaning of section 256 (5) no. 1 AktG (Aktengesetz [German Stock Corporation Act]).

Firstly, the Regional Court's starting point that there is a need for devaluation with regard to the balance sheet items "cash and cash equivalents" (concerning missing trust assets in favour of the Respondent) and "participations" (concerning missing trust assets in favour of subsidiaries; it is immediately obvious that a company is worth less if an essential asset item is missing) is correct.

Furthermore, the Regional Court correctly assumes that, according to the general legal idea expressed in section 256 (4) AktG, the overvaluation of balance sheet items only leads to the nullity of the annual financial statements if their scope is material, i.e. if there is a significant influence on the balance sheet total (cf. the evidence listed in LGU 22).

There was nothing to prevent the Regional Court from assuming such a significant overvaluation on the basis of its findings. In total, certified trust balances of around €712 million (2017) and around €975 million (2018) are missing with the balance confirmations according to K 74, which is around 37% of the 2017 balance sheet total of around €1,897 million and around 41% of the 2018 balance sheet total of around €2,344 million. In view of these large amounts, the Regional Court was able to determine a significant overvaluation, contrary to the appeal, without having to break this down for individual balance sheet items and compare the selected balance sheet item with the appropriate balance sheet item in each case.

Even if it were possible (as it is not) to only focus on the missing trust balances in account 650841620001 (cf. 1 b above at the end), trust balances of

around €327 million (i.e. around 17 % of the balance sheet total in 2017) and of around €305 million (i.e. around 13 % of the balance sheet total in 2018) respectively would be missing. Even this finding alone would, in the opinion of the Senate, justify a significant overvaluation of the assets.

4. In conclusion, the Senate also shares the assessment of the Regional Court that in the event of the existence of the trust balances in accounts other than those indicated in the relevant balance confirmations (Variant (2) above), this results in an overvaluation of the assets pursuant to section 256 (1), (5)(1) AktG. In this respect, however, the approach of the Regional Court needs to be clarified, irrespective of the correct result.

The balance confirmations on which the accounting was based were incorrect in terms of content (cf. above); at OCBC in any case, the trust balances shown in the balance sheet did not exist. This means that (in the case assumed here in Variant (2) of the existence of the trust assets in other accounts) there was no objective evidence of the existence of these trust assets. From this point of view, the opinion of the Regional Court is to be upheld: A knowledgeable third party cannot obtain an overview of the company's situation, contrary to section 238 (1), sentences 2 and 3 HGB (Handelsgesetzbuch [German Commercial Code]), because the trust assets recorded are not documented. Thus, the accounting of the (unsubstantiated) trust balances (as cash and cash equivalents) also materially violates the principle of prudence (section 252 (1)(4) HGB), because balances, of which there is no knowledge based on evidence of where they are located, are objectively worthless from the required economic point of view. This applies all the more in the case of trust assets which the trustee handles differently from the way they are presented to the trustor (in this case, by means of incorrect balance confirmations), thus de facto withdrawing the assets from access by the trustor at any time.

Thus, from a precise perspective, there is not (only) a violation of the principles of proper accounting, but (also) a direct overvaluation according to section 256 (5)(1) AktG. The Regional Court also recognised this on the merits when it referred to a devaluation requirement resulting from this for the question of the materiality of the infringement (LGU 23 below). Contrary to the opinion of the appeal, the argument of the Regional Court does not prove to be contradictory. Rather, it takes into account the relationship between paragraphs 1 and 5 of section 256 AktG, namely the limiting function of the elements of offence in paragraph 5 for breaches within the meaning of paragraph 1 (cf. BGH, judgement of 15/11/1993 - II ZR 235/92, margin no. 21) was ultimately correct.

On this basis, the need for devaluation as such and its materiality result from the same considerations as above under 3.

5. The intervenor argues unsuccessfully that the accounting of the trust assets on the basis of the trustee's balance confirmations on the balance sheet dates or on the dates of the preparation of the balance sheet corresponded to the state of the art in business and accounting practice. In the circumstances of the case, the objective overvaluation of the assets cannot be declared irrelevant.

aa) Unlike an undervaluation pursuant to section 256 (5)(2) AktG, nullity due to overvaluation pursuant to section 256 (5)(1) AktG does not require intent on the part of those responsible for the balance sheet. However, this does not have the consequence that every objective breach of valuation, as long as it is only material, leads to nullity. Instead, according to the general opinion, nullity only occurs if the incorrect valuation was recognisable by prudent business people according to the circumstances existing on the balance sheet date (cf. e.g. Koch, AktG, 17th ed., section 256 margin no. 10, 56; Beck OGK AktG / Jansen, section 256 margin no. 68; only in the diction differently Schmidt / Lutter / Schwab, AktG, 4th ed., margin no.10). This is intended to exempt unavoidable incorrect valuations from the verdict of nullity; also a material valuation

could not have been avoided after exhausting all potential knowledge (Koch loc. cit. margin no. 56; Schwab loc. cit. margin no. 10).

In this context, it must be taken into account that the balance confirmations on which the accounting was based and which led to the overvaluation of the assets were false in the sense of being incorrect; the confirmed balances did not exist in the accounts referred to (cf. above). Although it may be assumed that the balance confirmations were sufficient for accounting purposes according to the accounting standards applicable in the years 2017/2018, the incorrect valuation was not unavoidable because the persons responsible for the Respondent's balance sheet did not make use of all conceivable (and quite obvious) potential knowledge, such as requesting account statements. Thus, for example, on the basis of the now available account statements according to Annex K 66, the non-existence of trust assets on account 650841620001 would have been easily recognisable. The Senate deliberately leaves the question of whether the persons responsible for the balance sheet are accused of negligence in this respect undecided, but in any case it cannot be said that the incorrect valuation was unavoidable.

bb) The above result is confirmed by the following consideration. The content of the balance confirmations was incorrect. A prudent business person would not have based their accounting on confirmations that were incorrect in content if they had recognised the fact that they were incorrect. It follows that the Respondent cannot rely on compliance with the standards of proper accounting applicable in 2017/2018 if the relevant persons in the Respondent's sphere of influence were aware of the incorrect nature of the content of the balance confirmations. This is to be assumed according to the facts and status of the dispute, regardless of whether the balance confirmations were "genuine" (i.e. originating from the issuer Citadelle) or "forged" (i.e. not originating from Citadelle).

(1) If the balance confirmations were genuine, i.e. originated from Citadelle, those responsible at Citadelle, in particular its director [REDACTED], who signed the balance confirmations, knew that their content was incorrect. It is inconceivable that a trustee who certifies the safekeeping of funds does not know which accounts hold which amounts.

This knowledge of the trustee about the incorrect nature of the contents of the balance confirmations must be attributed to the Respondent according to the principles of attribution of knowledge analogous to section 166 BGB (Bürgerliches Gesetzbuch [German Civil Code]). A knowledge representative in this sense is anyone who, according to the principal's work organisation, is called upon to carry out certain tasks in legal transactions on their own responsibility and to take note of the information arising in the process (cf. e.g. Grüneberg / Ellenberger, BGB, 82nd ed., section 166 margin no. 6 with further references). The Respondent organised its third-party business in such a way that the trustee Citadelle was appointed to receive and manage the payments from the third-party partners, but also to document them for accounting purposes (balance confirmations). The Respondent must therefore accept responsibility for Citadelle's knowledge of the fate of the trust balances in the area of bookkeeping and accounting, and thus also for its knowledge of the incorrect nature of the content of the balance confirmations.

(2) If, on the other hand, the balance confirmations were forged, i.e. if they did not originate from Citadelle, this forgery must have been carried out within the sphere of influence of the Respondent, so in this case, too, knowledge of the incorrect nature of the content of the balance confirmations was present within the sphere of influence of the Respondent. In this case, too, the Respondent cannot therefore claim that accounting standards were observed.

6. Due to the correct determination of the invalidity of the Respondent's annual financial statements 2017 and

2018, the resolutions on the appropriation of profits of 21 June 2018 and 18 June 2019 based on those statements are also null and void (section 253 (1) sentence 1 AktG). In this respect, reference can be made to the correct statements of the Regional Court.

III.

The Senate therefore suggests that the appeal be withdrawn in order to avoid further costs. In the event of withdrawal of the appeal, the court fees at second instance will be reduced by half.

Signed

Neumair
Presiding Judge at
the Higher Regional
Court

Kunnes
Judge
at the Higher Regional
Court

Reichel
Judge
at the Higher Regional
Court



For the accuracy of the
transcript, Munich, 14 June
2023

Honold, Court Employee
Court official