

THE DISTRICT COURT OF AARHUS
JUDGMENT
delivered on 4 June 2020

Case BS-18164/2019-ARH

[XX]
(Attorney Lars Broni)

and

[XX]
(Attorney Lars Broni)

v

Qudos Insurance A/S in bankruptcy represented by the trustee, Attorney Boris Frederiksen (Attorney Christian Bo Kolding-Krøger)

Decision made by Judge Anette Fogh.

The background of the case and the Parties' claims and pleas

This legal action was brought on 17 April 2019. The subject-matter of the case is insurance cover under home warranty insurance regarding damage to the property [...] that the Plaintiffs bought on 1 March 2015.

The Court decided by a ruling of 7 November 2019 that the case is to be limited to the objection on a point of law regarding the dismissal of the case, see section 253 of the Danish Administration of Justice Act.

The Plaintiff, [XX], has raised the following claims:

Primarily: the case be admitted for proceedings on the merits.

In the alternative: the case be stayed until the bankruptcy estate has formally examined the claims after which the case will be referred to the bankruptcy division of the Danish Maritime and Commercial High Court for continued consideration.

The Defendant, Qudos Insurance A/S in bankruptcy represented by the trustee, Attorney Boris Frederiksen, has pleaded dismissal of the case.

The facts of the case

This judgment does not contain a full statement of facts, see section 218a of the Danish Administration of Justice Act.

On 20 December 2018, bankruptcy proceedings were commenced against Qudos.

The lawsuit was brought on 17 April 2019.

The Parties' points of view

[XX] has stated the following in its case summary:

"that there is no doubt that a lawsuit may be brought against a bankruptcy estate;

that the authority to bring a lawsuit against a bankruptcy estate outside of the rules on examination of claims must be sought in the general rules on administration of justice that apply to all lawsuits unless otherwise stipulated in the Danish Administration of Justice Act or special legislation;

that special legislation, including the Danish Bankruptcy Act, does not prevent bringing a lawsuit against a bankruptcy estate before the ordinary courts of law outside of the rules on examination of claims of part 16 of the Danish Bankruptcy Act;

that a bankruptcy estate as other parties in dispositive cases is subject to the negotiation mechanism, and there is therefore nothing preventing a bankruptcy estate from accepting a lawsuit against the estate even though the claim raised has not yet been examined;

that Attorney [XX] has appeared to be authorised to receive procedural notices on the estate's behalf, see Exhibits 52 and 53 (Frida Forsikring Agentur A/S's and Attorney Boris Frederiksen's report on

the continued claims handling, including first and foremost that the claims examiner continues to handle the claims) and Exhibit E (Attorney [XX's] email of 28 January 2019 with a request to raise the claim against Qudos Insurance A/S in bankruptcy);

- that Attorney [XX] also had the formal authority to make decisions on administrative measures, including to accept lawsuits against the estate;
- that Attorney [XX] appeared as an agent (within the meaning of the Danish Contracts Act) for the bankruptcy estate and therefore was able to bind the bankruptcy estate within his power of attorney;
- that Attorney [XX's] power of attorney included the right to accept a lawsuit against the bankruptcy estate outside of the rules of part 16 of the Danish Bankruptcy Act (whether Attorney [XX] has failed to observe his authority in respect of the bankruptcy estate is an internal matter between the bankruptcy estate and Attorney [XX]);
- that Attorney [XX] has accepted, with binding effect on the bankruptcy estate, a lawsuit against the bankruptcy estate outside of the rules of part 16 of the Danish Bankruptcy Act; and
- that Attorney [XX] has accepted, with binding effect on the bankruptcy estate, a lawsuit before the ordinary courts of law with the District Court of Aarhus as the venue.

It is also claimed that:

- that the trustee, who clearly stated in his notification of bankruptcy of 7 January 2019, see Exhibit 53, that it must be expected that the bankruptcy estate and the Guarantee Fund for Non-life Insurers will reject claims rejected by the claims examiner, must be deemed to have actually conducted a (general) examination of claims that has as a result that the case against the bankruptcy estate may be brought without waiting for a specific examination of claims;
- that the bankruptcy estate's plea in the alternative of dismissal of the claim illustrates that the recommendation in respect of the Plaintiffs' claim will be rejection if it is examined by the trustee;
- that in any circumstance a court case must be conducted about the Plaintiffs' claim with the consequences as to costs and resources that such a case may have on both the bankruptcy estate and the Plaintiffs; and

that the bankruptcy estate does not have a legitimate and creditable interest in a dismissal of the case as the only thing that is obtained by a dismissal of the case is prolonged and more administration which is neither in the bankruptcy estate's (the creditors') nor the Plaintiffs' interest.

In support of the claim in the alternative of a stay and referring the case to the bankruptcy division of the Danish Maritime and Commercial High Court it is claimed:

that the bankruptcy estate's and Attorney [XX's] statement that the handling and a lawsuit against Qudos Insurance A/S have given the Plaintiffs a justified expectation that the case against Qudos Insurance A/S in bankruptcy could be brought before a formal examination of claims; and

that it will result in an unnecessary waste of resources, including payment of another court fee, to bring a new lawsuit after the examination of claims in the bankruptcy estate which, all other things being equal, must be expected to result in a rejection of the claim filed by the Plaintiffs.

...”

Qudos Insurance A/S in bankruptcy represented by the trustee, Attorney Boris Frederiksen, has stated the following in its case summary:

"The case is to be dismissed because it has not been brought in accordance with the rules laid down in part 16 of the Danish Bankruptcy Act regarding a trustee's examination of claims against a bankruptcy estate and creditors' right to commence claims adjudication proceedings against an estate after the trustee has examined the claims.

Part 16 of the Danish Bankruptcy Act describes the procedure to be followed if a creditor has a claim against a bankruptcy estate, and the creditor wants the courts to hear the claim.

Bankruptcy proceedings were commenced against Qudos Insurance A/S on 20 December 2018. The Plaintiffs lodged proof of their claim against the bankruptcy estate by an email of 28 January 2019 (Exhibit B) and brought the lawsuit on 11 April 2019. No examination of claims had or has been conducted.

It means that the Plaintiffs brought the lawsuit after the issue of the bankruptcy order and before the trustee had examined the claim. Part 16 of the Danish Bankruptcy Act stipulates that in such circumstances the Plaintiffs are precluded from bringing a lawsuit against the bankruptcy estate about the insurance claim that they believe that they have against the bankruptcy estate. It thus follows from part 16 of the Danish Bankruptcy Act that a plaintiff, as all the other creditors against the estate, must wait for the trustee's examination of claims. It is clear from the rules laid down in part 16 of the Danish

Bankruptcy Act, the legislative history of the Danish Bankruptcy Act and case law that it will be contrary to the examination of claims concept if the Plaintiffs are still permitted to bring a lawsuit about acknowledgement of a claim against the bankruptcy state contrary to the rules laid down in part 16 of the Danish Bankruptcy Act.

The fact that the claim is a claim under an insurance policy that Qudos Insurance A/S deemed had been finally processed at the end of October 2018 cannot result in a deviation from the statutory method for lodging proof of a claim and examining a claim against a bankruptcy estate. The bankruptcy estate notes that, in addition to the practicalities regarding a bankruptcy estate, the examination of claims presupposes a decision on the opinion (Exhibit 48) only obtained by the Plaintiffs that only became available after Qudos Insurance A/S had complied with the ruling of 12 September 2018 by the Danish Insurance Complaints Board (Exhibit 46) in October 2018.

If the Plaintiffs' claim should be admitted by the trustee in connection with a subsequent examination of claims, then this lawsuit has been brought without reason. If, however, the claim should be rejected by the trustee in connection with a subsequent examination of claims, the Plaintiffs may then bring the lawsuit as claims adjudication proceedings before the bankruptcy division of the Danish Maritime and Commercial High Court.

But at this point in time the case must be dismissed.

4.2 The bankruptcy estate's interest in a dismissal of the case

The Plaintiffs have claimed that the Defendant does not have a legitimate interest in the plea for dismissal. The Defendant's legitimate interest in a dismissal of the case can be found in part 16 of the Danish Bankruptcy Act. It is not for the Defendant to explain in detail why the rules of part 16 are reasonable and must be complied with.

The Defendant does not either need to give a detailed explanation because of the Plaintiffs' points of view that the proved claim will be rejected in connection with an examination of claims. The reason is that the claim has not been examined, which is why the trustee has not taken a position on the justification of the claim.

It is natural that the Defendant has made a plea in the alternative of dismissal of the claim as the Defendant must have a plea if the Court should decide not to dismiss the case and as the Defendant cannot notoriously admit the claim as the claim has not been examined.

Irrespective of whether the trustee should decide in connection with a subsequent examination of claims to reject the claim and the Plaintiffs then may institute claims adjudication proceedings before the bankruptcy division of the Danish Maritime and Commercial High Court, it does not change the fact that the Defendant has a legitimate interest in the case not being heard at this point in time, but that the examination of the claim and any claims adjudication proceedings are brought in compliance with the rules of part 16 of the Danish Bankruptcy Act.

4.3 [XX's] actions

The Plaintiffs have also claimed that Attorney [XX] has acted in such a way that the Defendant must accept this case and cannot plead dismissal of the case. This is not correct.

[XX's] information that the right defendant was Qudos Insurance A/S in bankruptcy and not Frida Forsikring Agentur A/S does not in any way entail that [XX] thereby accepted on behalf of the Defendant that the case could be brought contrary to the rules laid down in part 16 of the Danish Bankruptcy Act.

The fact is that Attorney [XX] loyally answered Attorney Lars Broni's question in the letter of 28 January 2019 (Exhibit D) about where to file the writ of summons. Attorney [XX] did not by this answer (Exhibit E) bind the Defendant in any respect and did not give any information about the pleas that the Defendant would make if the writ of summons was actually filed. Moreover, the Plaintiffs were already at that point in time represented by an attorney who is assumed to know about part 16 of the Danish Bankruptcy Act.

If the Plaintiffs are of the opinion that by his/her email Attorney [XX] has inflicted some kind of loss on them by getting them to lodge a writ of summons then it is a matter between the Plaintiffs and Attorney [XX]. It is of no concern to the Defendant.

It must be emphasised for the avoidance of doubt that the trustee does not find that Attorney [XX's] actions have been wrong/given rise to liability."

During the final hearing the Parties have elaborated on their views of the case.

The Court's reasoning and ruling

The right defendant in the case is undisputedly Qudos Insurance A/S in bankruptcy ("Qudos"). The calculated claim is based on property damage calculated by the Plaintiffs that is claimed to be covered by the home warranty insurance that the Plaintiffs took out through the Defendant's agent, Frida Forsikring Agentur A/S ("Frida") when the property was acquired on 1 March 2015. All the correspondence in the beginning about the existence of the damage and its extent, including bringing the matter before the

Danish Insurance Complaints Board, was therefore exchanged with Frida and later on their Attorney Lars Høy Andersson.

The Plaintiffs were informed most recently by Frida's email of 7 January 2019 that the underlying insurance company Qudos Insurance A/S had gone bankrupt as a result of a bankruptcy order of 18 December 2018, but that Frida would continue the claims handling of loss that had already been notified.

The trustee's notification of bankruptcy of the same date was attached to the email. It appears from the notification that Frida handles the claims and that the claim, if accepted, will be covered by the Danish Guarantee Fund for Non-life Insurers whereas claims rejected by the claims examiner may be filed against the bankruptcy estate and the Guarantee Fund for Non-life Insurers that is likely to reject the claim in accordance with the claims examiner's instructions.

This guidance is in compliance with part 16 of the Danish Bankruptcy Act that specifies the procedure for dealing with claims against the estate.

As the case was brought after the issue of the bankruptcy order and as the claim had not been examined in the estate when the case was brought, the defendant bankruptcy estate's plea of dismissal of the case is allowed. The case has therefore been brought contrary to current law which the Plaintiffs' claim in the alternative cannot fix.

The Court notes that the Plaintiffs' allegations about their interest in a hearing of the case for litigation costs reasons and to secure the evidence cannot lead to any other result. The Court refers to the existing options to secure evidence by an expert valuation without at the same time bringing a lawsuit just as the Plaintiffs do not seem to have any special protectable interest in preference to the other creditors against/the policyholders in Qudos.

Moreover, the Court does not find that the statements by the attorney representing Frida, Attorney Lars Høy Andersson, in the correspondence with the Plaintiffs' attorney give the Plaintiffs any special guarantee. The Court notes in this connection that guidance, to a colleague who is an attorney, was only given about the possibility of coverage from the Guarantee Fund for Non-life Insurers and about payment of any legal costs from the bankruptcy.

Considering the amount of the claim, the proceedings and the outcome, the legal costs have been determined to be a lawyer's fee of DKK 25,000. Qudos Insurance A/S in bankruptcy is registered for VAT, but the attorney representing the estate has informed the Court that it is unclear whether the estate has a right to deduct VAT on costs relating to conducting the case. The legal costs to cover reasonable costs relating to legal assistance have therefore been fixed inclusive of VAT. When determining the amount

the Court had regard to the fact that the case has been decided following a final hearing in part and without the examination of witnesses.

IT IS HELD THAT:

The case is dismissed.

[XX] and [XX] shall pay Qudos Insurance A/S in bankruptcy represented by the trustee, Attorney Boris Frederiksen, legal costs of DKK 25,000.

The amount must be paid within 14 days.

The legal costs carry interest under section 8a of the Danish Interest Act.