

Supreme Court's JUDGMENT

delivered in Stockholm on 8 March 2024

Case no.

T 3654-22

PARTIES

Appellant

Le Croissant i Sverige AB in bankruptcy, 556215-1851
Gamla Värmdövägen 4
131 37 Nacka

Agent: NM

Counsel: Attorney OP

Respondent

Frölunda Café AB's bankruptcy estate, 556893-3427
c/o Norma Advokater HB
Box 2259
403 14 Göteborg

Receiver in bankruptcy: Attorney MJ

THE MATTER

Recovery to the bankruptcy estate

RULING APPEALED

Judgment of the Court of Appeal of Northern Norrland of 03/05/2022 in case T 894-21

JUDGMENT

The Supreme Court modifies the judgment of the Court of Appeal and rejects the action of Frölunda Café AB's bankruptcy estate.

The Supreme Court also modifies the judgment of the Court of Appeal in respect of litigation costs and relieves Le Croissant i Sverige AB in bankruptcy from the obligation to pay Frölunda Café AB's bankruptcy estate for litigation costs in the District Court and the Court of Appeal, and orders Frölunda Café AB's bankruptcy estate to compensate Le Croissant i Sverige AB in bankruptcy for litigation costs

- in the District Court in the amount of SEK 160,000, of which SEK 135,000 pertains to counsel fees, and interest in accordance with Section 6 of the Interest Act from the date of 20 August 2021, and
- in the Court of Appeal in the amount of SEK 38,400, which pertains to counsel fees, and interest in accordance with Section 6 of the Interest Act from the date of 03 May 2022,

The Supreme Court orders Frölunda Café AB's bankruptcy estate to pay compensation to Le Croissant i Sverige AB in bankruptcy for its litigation costs in the Supreme Court in the amount of SEK 112,500, of which SEK 90,000 pertains to counsel fees and SEK 22,500 to value added tax, and interest in accordance with Section 6 of the Interest Act from the date of this judgment.

CLAIMS IN THE SUPREME COURT

Le Croissant i Sverige AB in bankruptcy has requested the Supreme Court to dismiss the claim, relieve the company from the obligation to pay Frölunda Café AB's bankruptcy estate's litigation costs in the District Court and the Court of Appeal, and order the bankruptcy estate to pay the company for litigation costs in those instances.

The bankruptcy estate has opposed modification of the judgment of the Court of Appeal.

The parties have requested payment of their costs of litigation incurred in the Supreme Court. The bankruptcy estate has also requested that Le Croissant's agent NM shall be ordered to pay the bankruptcy estate's costs jointly and severally with the company.

The Supreme Court has granted the leave to appeal as stated in para. 7.

REASONS FOR THE JUDGMENT

Background

1. Frölunda Café AB was a franchisee of Le Croissant i Sverige AB and operated a café business in premises which it sublet from Le Croissant. By a judgment of mid-March of 2018, Frölunda Café was ordered to pay Le Croissant slightly less than SEK 600,000 in respect of overdue rents and litigation costs. Frölunda Café appealed the judgment.

2. A few weeks later, on 27 March 2018, the parties entered into a settlement agreement which stated that Le Croissant was acquiring the business operated by Frölunda Café on the premises. The business included the franchise and lease agreements with Le Croissant, as well as inventory and equipment. The agreement stated that Le Croissant had claims against

Frölunda Café totalling just over SEK 1,176,000 and that Frölunda Café had a minor counterclaim. The agreement settled the parties' claims against each other and ended their contractual relationship.

3. Frölunda Café was, at its own request, declared bankrupt on 7 June 2018.

4. The bankruptcy estate brought a recovery action against Le Croissant under Chapter 4, Section 10 of the Bankruptcy Act, claiming that the settlement agreement constituted the payment of a debt, and that the company should be obliged to pay compensation for the value of what had been taken over pursuant to the agreement. Le Croissant opposed the action.

5. During the proceedings before the District Court, Le Croissant closed the café business on the premises.

6. The District Court and the Court of Appeal have found that the settlement agreement constituted the payment of a debt which is to be reversed in accordance with Chapter 4, Section 10 of the Bankruptcy Act, and that Le Croissant must pay compensation for the value of the property, since the property is not retained. The courts also concluded that compensation should be determined on the basis of the value on the date at which the settlement agreement was concluded, and that this value corresponded to Le Croissant's claim against Frölunda Café, i.e., just over SEK 1,176,000. After deducting Frölunda Café's counterclaim, Le Croissant has been ordered to pay approximately SEK 1,151,000 and interest to the bankruptcy estate.

The issue in the Supreme Court

7. The Supreme Court has granted leave to appeal on the basis of the Court of Appeal's assessment that the settlement agreement constituted a payment that is to be reversed in accordance with Chapter 4, Section 10 of the

Bankruptcy Act, and that Le Croissant is obliged to pay compensation for the value of the property that Frölunda Café has provided.

8. During the proceedings before the Supreme Court, Le Croissant has been declared bankrupt. The receiver has declared that Le Croissant's bankruptcy estate will not enter the proceedings alongside Le Croissant.

9. As the case stands in the Supreme Court, the question is whether compensation for the value of the property is to be determined on the basis of its value at the time of the settlement agreement or its value at the time of the judgment in the recovery case.

Reversal of debt payment

10. Chapter 4, Sections 5-13 of the Bankruptcy Act sets out the conditions for recovery to the bankruptcy estate, i.e., the reversal of certain legal acts. The purpose of the recovery rules is to seek to restore the situation as it was before the recoverable legal act was undertaken in the common interest of the bankruptcy creditors (cf. "Franslast" NJA 2001 p. 805).

11. According to Chapter 4, Section 10 – which is applicable in this case – the payment of a debt shall be reversed if it has been made later than three months before the day of grace and has been made with other than customary means of payment, prematurely or in an amount that has significantly deteriorated the financial position of the debtor, unless the payment nevertheless can be considered ordinary in view of the circumstances. In order to reverse a legal transaction, it is also necessary that the contested legal act has been detrimental to the creditors or at least one of them.

Should the property be returned, or should compensation be paid?

12. The effect of recovery is regulated in Chapter 4, Sections 14-18. The general rule is that the property provided by the debtor is to be returned to the

bankruptcy estate. The party subject to the recovery action shall return the property received from the debtor and is, with certain exceptions, entitled to recover what he or she has provided to the debtor. (See Chapter 4, Section 14, first and second paragraphs.)

13. In some circumstances, the party subject to the recovery action shall pay compensation for the value of the property instead of returning the property. This is the case if the property has not been retained. Furthermore, the party subject to the recovery action may be entitled to pay compensation in place of the property, if it would cause significant inconvenience to return the property. (See Chapter 4, Section 14, third paragraph.)

14. This value compensation refers to compensation for property which cannot or shall not be returned, and is to be set at a monetary amount corresponding to the value of the property.

What point in time shall be the basis for the valuation?

15. The value of the property may change over time, which raises the question of the point in time which is to be used as a basis for determining the value compensation. With reference to the general rule that the property in question is to be returned, the Supreme Court has found that the compensation, where possible, shall be based on the value of the property at the time of the judgment in the recovery case (see "2B Consult" NJA 2010 p. 709 para. 8). Using this point in time when determining the compensation permits the bankruptcy estate to benefit from any increase in the price of the recoverable property and suffer from any fall in the price of that property – just as if the property itself were returned.

16. In certain situations, a different valuation date may be applied. In the case "2B Consult" it is stated that if the value of, e.g., shares has decreased due to measures taken by the party subject to the recovery action with regard to the

substance of the limited liability company, this may mean that the shares no longer are considered to be equivalent, recoverable property, and that compensation must be paid according to the value of the property at a point in time prior to the judgment in the recovery case (see para. 6 of that case). The legislative history states that if the property has been lost and is substituted by a claim for value compensation, such compensation should be based on the value at the time of the loss (Govt. bill 1975:6 p. 240).

17. Determining the compensation pursuant to Chapter 4, Section 14, third paragraph on the basis of the date of the legal act would satisfy the bankruptcy estate's interest in being compensated for the disadvantage incurred and is consistent with the idea that the original situation should be restored. However, this would be incompatible with the basic premise that compensation is primarily intended to compensate for property which cannot or shall not be returned, and would also mean that the risk of, for example, a drop in price would be wholly born by the party subject to the recovery action. Therefore, the date of the legal act is normally not a suitable valuation date.

The assessment in this case

18. As noted by the Court of Appeal, a result of the parties' cause of action is that the valuation date can only be either the date of the settlement agreement or the date of the judgment in the recovery case.

19. The value compensation shall in general be determined based on the value at the time of the judgment in the recovery case (see p. 15). The facts in the case do not support the view that anything occurred in connection with the settlement that caused the property to be lost at that time, or that Le Croissant at that point in time took any measures with regard to the property which justifies determining the amount of the value compensation on the basis of the

value at the settlement (cf. para. 16). Nor has anything else emerged in the case which justifies doing so.

20. The compensation should therefore be determined on the basis of the value of the property at the time of the judgment in the recovery case. The parties agree that the property at the point in time has no value. No compensation is therefore payable.

21. The Court of Appeal's judgment shall therefore be modified and the bankruptcy estate's action dismissed.

22. As a result of the outcome of the case, Le Croissant shall be relieved of the obligation to pay the bankruptcy estate for its costs of litigation before the District Court and the Court of Appeal, and shall be reimbursed for its own costs in these instances. The amount claimed in the District Court is reasonable. The cost in the Court of Appeal has been attested.

23. The bankruptcy estate shall also be ordered to pay the costs of litigation incurred by Le Croissant before the Supreme Court. The company is reasonably compensated with an amount equivalent to 30 hours of work.

Justices of the Supreme Court Anders Eka, Svante O. Johansson, Dag
Mattsson, Johan Danelius and Jonas Malmberg (reporting Justice, addendum)
Judge referee: Sophie Welander

ADDENDUM

On his own behalf, reporting Justice Jonas Malmberg adds the following.

To elaborate my opinion on how compensation under Chapter 4, Section 14, third paragraph of the Bankruptcy Act should be determined, the following can be said.

In which situations is value compensation to be paid?

In the case of recovery to the bankruptcy estate, the general rule is that the property provided by the debtor is to be returned (in kind) to the bankruptcy estate. However, in certain situations, the party subject to the recovery action shall or may instead pay compensation for the value of the property, so-called value compensation (see Chapter 4, Section 14 of the Bankruptcy Act).

Value compensation shall be paid if the property is not retained at the time of the judgment in the recovery case. If the property is only partially retained, what is left must be returned, while compensation is paid for the remainder. The absence of the property includes situations where the property no longer exists, e.g., because it has been destroyed or consumed. The same applies to property which has been substantially altered or which has been incorporated into other property in such a way that in-kind performance is not acceptable. (See Govt. bill 1975:6 p. 239 et seq. and 243 and, e.g., the case "Hjärtervägen Invest" NJA 2003 p. 37.) A change in the value of what is to be returned is not in itself an impediment to returning the property. Even then, the property is considered equivalent and recoverable, unless the change in value is due to a significant change in the substance of the property (cf. "2B Consult" NJA 2010 p. 709 para. 6). One may say that the property remains the same, only its value has changed (cf. Marigó Oulis, *Värdeersättning vid återgång*, 2021, p. 517).

Value compensation may also be used when the property exists, but is not accessible to the party subject to the recovery action, for example, as a result of a sale (see Govt. bill 1975:6 pp. 240 and 243). Thus, for the property to be considered no longer "retained" in the legal meaning, it is sufficient that it is not retained by the party subject to the recovery action.

If what is to be returned is so-called fungible property – e.g., Swedish or foreign currency, oil or shares – the party subject to the recovery action is generally considered to have the right and obligation to return equivalent property in place of what was received (see "2B Consult" para. 6).

Furthermore, the party subject to the recovery action may be permitted to pay compensation in place of the property, if returning the property would bring about significant inconvenience (Chapter 4, Section 14, third paragraph).

What is to be compensated?

The value compensation thus refers to compensation for the property that cannot or shall not be returned in kind and is to be set at a monetary amount corresponding to the value of the property. The person who is to return the property may also be obliged to pay returns and interest (Chapter 4, Section 15, first and second paragraphs). The question of whether the party subject to the recovery action can, furthermore, be ordered to pay other compensation, must be examined under tort law. (Cf., e.g., SOU 1970:75, p. 165, Gertrud Lennander, *Återvinning i konkurs*, 4th edition, 2013, pp. 358 and 362 et seq., Eugène Palmer and Peter Savin, *Konkurslagen*, version 53, 2023, Juno, commentary on Chapter 4, Section 14, and Gösta Walin, *Materiell konkursrätt*, 2nd edition, 1987, p. 226 et seq.)

In other words, compensation pursuant to Chapter 4, Section 14, third paragraph must, as a rule, correspond to the full value of the property, neither more nor less. The law does not specify which method should be used to

determine this value. The legislative history and literature refer to general principles of civil law for calculating value compensation in recovery situations (see, e.g., SOU 1970:75 p. 166 note 31 and Mikael Mellqvist and Lars Welamson, *Konkurs och annan insolvensrätt*, 13th edition, 2022, p. 159).

The general civil law principle is assumed to be that the choice of valuation method is made on the basis of the claimant's preferred use of the property, had it remained his or hers. Depending on the individual situation, it may be a question of compensating the replacement value, the value determined on an earnings basis or market value. (See, e.g., Sven Bramsjö, *Om avtals återgång*, 1950, p. 255 et seq., Johnny Herre, *Ersättningar i köprätten*, 1996, p. 139 ff and Knut Rodhe, *Obligationsrätt*, 1956, p. 551 et seq.)

The principal task of the receiver is to sell the assets of the bankruptcy estate as quickly as possible in order to pay the creditors. In the light of this, it is suggested that the value compensation in recovery actions should be based on the market value. (See Mikael Möller, *Insolvensrättsliga utlåtanden*, 2016, p. 647 et seq.).

What point in time shall the valuation be based on?

The value of the property may change over time, which raises the question of which point in time to use as a basis for determining the compensation. The changes in value may result from price changes in the overall market or in the type of property concerned. The value of the property can also be affected by changes to its condition, i.e., a change in its substance, quality or quantity. (See, e.g., Sven Bramsjö, *op. cit.*, p. 255 et seq.).

The case '2B Consult', which concerned shares in a public limited company whose price had fallen, focussed on changes in the price. The Supreme Court stated that the compensation should be determined on the basis of the value at the time of the judgment in the recovery case, whenever possible (para. 8).

Using this method to determine the compensation means that the bankruptcy estate – in the same way as in the case of the return of the property in kind – benefits from any increase in the price of the recoverable property, but suffers from any fall in the price of that property.

The above-mentioned method is not fully upheld if the party subject to the recovery action has sold the property or received compensation as a result of it being damaged. In the case "2B Consult", the Supreme Court ruled that the bankruptcy estate, in the event of recovery pursuant to Chapter 4, Section 5 of the Bankruptcy Act (which presupposes bad faith on the part of the party subject to the recovery action), may claim the amount paid by a third party. The same should apply in the case of so-called objective recovery, if the party subject to the recovery action at the time of disposal of the property was in bad faith, in the sense of holding the property on behalf of another should the debtor be subject to bankruptcy and the bankruptcy estate seek recovery. This exemption protects the bankruptcy estate to some extent, if the price has fallen after the party subject to the recovery action has disposed of the property. If, on the other hand, the price has risen after the party subject to the recovery action in good faith has disposed of the property, there may in some cases be exceptional reasons to adjust the compensation in accordance with Chapter 4, Section 17 (cf. Govt. bill 1975:6 p. 98 and 250 et seq. and Sven Bramsjö, *op. cit.*, p. 268).

The date of the judgment shall also be used as a basis for the valuation when it comes to the condition of the property, if the property is retained, i.e., exists (see Govt. 1975:6 pp. 240 & 243). In this context, it may be noted that any decrease in value brought about by normal wear and tear does not constitute an impediment to the return of property in kind (*ibid.*). In view of the fact that value compensation is intended to compensate for property that cannot be returned in kind, it is reasonable to carry out the valuation of the property

based on its condition, including normal wear and tear, at the time of the judgment in the recovery case. The same applies if, at the date of the judgment, the condition of the property has been improved since the date of the legal act. However, if the improvement is due to necessary or useful expenditures made on the property by the party subject to the recovery action, he or she is entitled to compensation for such expenditures, unless there are special reasons for not doing so (see Chapter 4, Section 15, third paragraph).

The situation is different if the property no longer exists at the time of the judgment in the recovery case, e.g., if it has been destroyed or consumed. In this case, it is not possible to determine the value of the property on the basis of its condition at the date of the judgment. In cases where the property has been lost, the legislative history states that compensation should be calculated according to its value at the date of the loss (see *ibid.* and SOU 1970:75 p. 166). This statement seems to refer to the assessment of the condition of the property, and is well in line with the fact that the party subject to the recovery action is considered liable to compensate the bankruptcy estate if property that he or she has received has been destroyed, even through no fault of his or her own (cf. Govt. bill 1975:6 p. 98 et seq. and 250 et seq., and Ulrik Hägge, *SvJT* 2009 p. 646 and Gertrud Lennander, *op. cit.* p. 353). For this to be possible, the value of the property cannot be determined on the basis of its condition at the date of the judgment. At that point, the property has ceased to exist and therefore has no value.

The same applies if the condition or substance of the property has been substantially altered in such a way that it can no longer be regarded as equivalent, recoverable property, at least if the measures were taken by the party subject to the recovery action. In the case "2B Consult", it was stated that compensation in such cases must be "paid according to a value at a date prior to the judgment in the recovery case" (para. 6 of the decision). In such

cases, the valuation should be based on the condition of the property at the time it was substantially altered, if possible (cf. Gertrud Lennander, *op. cit.*, p. 359).

Thus, the valuation of the property shall in general take into account the price and condition of the property at the date of the judgment in the recovery case. If the property no longer exists or if it has been substantially altered the value shall in general be based on the condition of the property when it was destroyed or altered, if possible, at least if it is a result of measures for which the party subject to the recovery action is responsible.
