JUDGMENT OF THE COURT (First Chamber)

16 March 2006 *

In Case C-234/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Landesgericht Innsbruck (Austria), made by decision of 26 May 2004, received at the Court on 3 June 2004, in the proceedings

Rosmarie Kapferer

v

Schlank & Schick GmbH,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, N. Colneric (Rapporteur), K. Lenaerts, E. Juhász and M. Ilešič, Judges,

* Language of the case: German.

Advocate General: A. Tizzano,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 8 September 2005,

after considering the observations submitted on behalf of:

— Schlank & Schick GmbH, by M. Alexander and M. Dreschers, Rechtsanwälte,

— the Republic of Austria, by H. Dossi and S. Pfanner, acting as Agents,

— the Czech Republic, by T. Boček, acting as Agent,

— the Federal Republic of Germany, by A. Tiemann and A. Günther, acting as Agents,

— the French Republic, by A. Bodard-Hermant, R. Abraham, G. de Bergues and J.-C. Niollet, acting as Agents,

— the Republic of Cyprus, by M. Chatzigeorgiou, acting as Agent,

— the Kingdom of the Netherlands, by C.A.H.M. ten Dam, acting as Agent,

— the Republic of Finland, by T. Pynnä, acting as Agent,

— the Kingdom of Sweden, by A. Falk, acting as Agent,

— the United Kingdom of Great Britain and Northern Ireland, by E. O'Neill, acting as Agent, and by D. Lloyd-Jones QC,

— the Commission of the European Communities, by A.-M. Rouchaud and W. Bogensberger, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 November 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 10 EC and Article 15 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2 The reference was made in the course of proceedings between Ms Kapferer, an Austrian national domiciled in Hall in Tirol (Austria), and Schlank & Schick GmbH ('Schlank & Schick'), a mail order company incorporated under German law established in Germany, concerning an action for an order requiring Schlank & Schick to award Ms Kapferer a prize because, in a letter personally addressed to her, it had given Ms Kapferer the impression that she had won a prize.

Legal background

Community law

3 Article 15(1) of Regulation No 44/2001 provides:

'In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and Article 5(5), if:

...

(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.'

4 In accordance with Article 16(1) of Regulation No 44/2001, '[a] consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled'.

5 Article 24 of Regulation No 44/2001 provides:

'Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.'

National law

6 Paragraph 5j of the Austrian Consumer Protection Law (Konsumentenschutzgesetz), in the version under the law which entered into force on 1 October 1999 (BGBl. I, 185/1999; 'the KSchG') provides as follows:

'Undertakings which send prize notifications or other similar communications to specific consumers, and by the wording of those communications give the impression that a consumer has won a particular prize, must give that prize to the consumer; that prize may also be claimed in legal proceedings.'

7 Paragraph 530 of the Austrian Code of Civil Procedure (Zivilprozessordnung; 'the ZPO') on the conditions governing the revision of judgments provides:

'(1) Proceedings that have been concluded by a decision resolving the case can be reopened on an application being made by one of the parties,

...

5. if a decision by a criminal court on which the judgment is based has been set aside by a subsequent final judgment;

6. if the applicant discovers the existence of, or is placed in a position to use, a previous judgment concerning the same claim or the same legal relationship which is already final and which determines the rights of and between the parties of the case to be reopened;

7. if that party becomes aware of new facts or discovers or becomes able to use evidence the adducing and use of which in earlier proceedings would have resulted in a decision more favourable to it.

(2) Revision is only permitted in the circumstances stated in point 7 of Paragraph 1 if, due to no fault of its own, the party was unable to plead the new facts or evidence before the close of the oral procedure on the basis of which the decision was pronounced at first instance.'

8 Article 534 of the ZPO provides:

'(1) Proceedings must be brought within a deadline of four weeks.

(2) That deadline is calculated:

...

4. in the case of point 7 of Paragraph 530(1), from the date on which the party was capable of bringing before the court the facts and evidence brought to its knowledge.

(3) Proceedings ... cannot be issued more than 10 years after the decision has become final.'

The dispute in the main proceedings

9 In her capacity as a consumer, Ms Kapferer received advertising material on a number of occasions from Schlank & Schick containing prize notifications. Two weeks after a further letter addressed to her personally, according to which a prize in the form of a cash credit in the sum of ATS 53 750 (EUR 3 906.16) was waiting for her, Ms Kapferer received an envelope containing, inter alia, an order form, a letter

concerning the final notice of that cash credit and a statement of account. According to the participation/award conditions on the reverse side of that notice, participation in the distribution of the prizes was subject to a test order without obligation.

10 Ms Kapferer returned the order form to Schlank & Schick after affixing a credit stamp and signing the reverse side of that order form below the words 'I have noted the participation conditions', but without having read the participation/award conditions. It is not possible to establish whether she also placed an order on that occasion.

11 Not having received the prize she believed she had won, Ms Kapferer claimed that prize on the basis of Article 5j of the KSchG, seeking an order directing Schlank & Schick to pay her the sum of EUR 3 906.16 plus 5% interest from 27 May 2000 onwards.

12 Schlank & Schick objected that the court seised lacked jurisdiction. It argues that the provisions of Articles 15 and 16 of Regulation No 44/2001 are not applicable because they presuppose that there should be a contract for valuable consideration. Participation in the prize game was subject to making an order, which Ms Kapferer never did. The right deriving from Paragraph 5j of the KSchG is not, in their view, of a contractual nature.

13 The Bezirksgericht (District Court) dismissed the plea of lack of competence and declared itself to have jurisdiction on the basis of Articles 15 and 16 of Regulation No 44/2001, on the grounds that there is, in its view, a contractual relationship between the parties to the dispute. As regards the merits of the case, the Bezirksgericht dismissed all of Ms Kapferer's heads of claim.

14 Ms Kapferer brought an appeal before the referring court. For its part, Schlank & Schick took the view that the Bezirksgericht's decision relating to its jurisdiction did not adversely affect it because it had, in any event, succeeded on the merits. For that reason Schlank and Schick did not challenge that decision on jurisdiction.

15 The national court observed, however, that Schlank & Schick could have challenged the dismissal of the plea of lack of jurisdiction because it could have been adversely affected by that decision alone.

The questions referred for a preliminary ruling

16 The Landesgericht Innsbruck (Regional Court, Innsbruck) expresses doubts about the international jurisdiction of the Bezirksgericht. Relying on the judgment in Case C-96/00 *Gabriel* [2002] ECR I-6367, the referring court asks whether a misleading promise of financial benefit calculated to induce a contract, and therefore to prepare the ground for that contract, has a connection with the consumer contract intended to result from it sufficiently close to give rise to consumer contract jurisdiction.

17 Since Schlank & Schick has not challenged the decision to dismiss the defence of lack of jurisdiction, the referring court wonders whether it none the less has an obligation under Article 10 EC to review and set aside a final and conclusive judgment on international jurisdiction if that judgment is proved to be contrary to Community law. The national court envisages the existence of such an obligation, asking specifically whether it is possible to transpose the principles laid down in the judgment in Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, concerning the obligation imposed on an administrative body to review a final administrative decision which is contrary to Community law, as it has been interpreted in the mean time by the Court.

18 In those circumstances, the Landesgericht Innsbruck decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) The court of first instance's decision as to jurisdiction:

(a) Is the principle of cooperation enshrined in Article 10 EC to be interpreted as meaning that, in the circumstances stated in the judgment of the Court of Justice in Case C-453/00 *Kühne & Heitz*, a national court is also obliged to review and set aside a final judicial decision if the latter should infringe Community law? Are there any other conditions applicable to the review and setting aside of judicial decisions in contrast to administrative decisions?

(b) If the answer to Question 1(a) should be in the affirmative:

Is the period given under Paragraph 534 of the ZPO for the setting aside of judicial decisions that are contrary to Community law compatible with the principle of full effectiveness of Community law?

(c) Furthermore, if the answer to Question 1(a) should be in the affirmative:

Does a lack of international (or local) jurisdiction that is not remedied by Article 24 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters constitute a breach of Community law that, under the principles concerned, can set aside the legal force of a judicial decision?

(d) If the answer to Question 1(c) should be in the affirmative:

Is a court of appeal obliged to review the issue of international (or local) jurisdiction under Regulation No 44/2001 if the jurisdiction decision of the court of first instance has become final but the decision on the merits of the case has not? If so, is that review to be conducted by the court of its own motion or only at the instigation of one of the parties to the proceedings?

(2) Jurisdiction over consumer contracts under Article 15(1)(c) of Regulation No 44/2001:

(a) Does a misleading promise of financial benefit that induces the conclusion of a contract — and, therefore, prepares the ground for a contract — demonstrate a connection with the intended conclusion of a consumer contract sufficiently close for jurisdiction over consumer contracts under Article 15(1)(c) of Regulation No 44/2001 to be afforded to consequent claims?

(b) If the answer to Question 2(a) should be in the negative:

Is jurisdiction over consumer contracts afforded to claims arising out of a pre-contractual obligation and does a misleading promise of financial benefit that helps to prepare the ground for a contract demonstrate a sufficiently close connection with the pre-contractual obligation thereby established for jurisdiction over consumer contracts also to be afforded thereto?

(c) Is jurisdiction over consumer contracts afforded only if the conditions stipulated by the undertaking for participation in the prize game are satisfied, even if those conditions are not to be given any consideration in the substantive claim under Paragraph 5j of the KSchG?

(d) If the answers to Questions 2(a) and (b) should be in the negative:

Is jurisdiction over consumer contracts afforded sui generis to a specific statutory form of contractual performance claim or sui generis to a constructive quasi-contractual performance claim which arises as a result of a promise of financial benefit made by an undertaking and the claiming of the financial benefit by the consumer?'

Question 1(a)

19 By Question 1(a), the referring court asks essentially whether, and, where relevant, in what conditions, the principle of cooperation arising from Article 10 EC imposes on a national court an obligation to review and set aside a final judicial decision if that decision should infringe Community law.

20 In that regard, attention should be drawn to the importance, both for the Community legal order and national legal systems, of the principle of res judicata. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become

definitive after all rights of appeal have been exhausted or after expiry of the time-limits provided for in that connection can no longer be called into question (Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 38).

21 Therefore, Community law does not require a national court to disapply domestic rules of procedure conferring finality on a decision, even if to do so would enable it to remedy an infringement of Community law by the decision at issue (see, to that effect, Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraphs 46 and 47).

22 By laying down the procedural rules for proceedings designed to ensure protection of the rights which individuals acquire through the direct effect of Community law, Member States must ensure that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and are not framed in such a way as to render impossible in practice the exercise of rights conferred by Community law (principle of effectiveness) (see, to that effect, Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 31 and the case-law cited). However, compliance with the limits of the power of the Member States in procedural matters has not been called into question in the dispute in the main proceedings as regards appeal proceedings.

23 It should be added that the judgment in *Kühne & Heitz*, to which the national court refers in Question 1(a), is not such as to call into question the foregoing analysis. Even assuming that the principles laid down in that judgment could be transposed into a context which, like that of the main proceedings, relates to a final judicial decision, it should be recalled that that judgment makes the obligation of the body concerned to review a final decision, which would appear to have been adopted in breach of Community law subject, in accordance with Article 10 EC, to the condition, inter alia, that that body should be empowered under national law to reopen that decision (see paragraphs 26 and 28 of that judgment). In this case it is sufficient to note that it is apparent from the reference for a preliminary ruling that that condition has not been satisfied.

24 Having regard to the foregoing considerations, the answer to Question 1(a) must be that the principle of cooperation under Article 10 EC does not require a national court to disapply its internal rules of procedure in order to review and set aside a final judicial decision if that decision should be contrary to Community law.

Concerning the other questions

25 Having regard to the answer given to Question 1(a), and the national court indicating that it is unable to review the decision on the Bezirksgericht's jurisdiction, there is no need to answer Question 1(b) to (d) or Question 2(a) to (d).

Costs

26 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

The principle of cooperation under Article 10 EC does not require a national court to disapply its internal rules of procedure in order to review and set aside a final judicial decision if that decision should be contrary to Community law.

[Signatures]