JUDGMENT OF THE COURT (Fourth Chamber)

16 October 2008 *

In Case C-313/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Juzgado de lo Mercantil No 3 de Barcelona (Spain), made by decision of 26 June 2007, received at the Court on 5 July 2007, in the proceedings

Kirtruna SL,

Elisa Vigano

v

Red Elite de Electrodomésticos SA,

Cristina Delgado Fernández de Heredia,

* Language of the case: Spanish.

Sergio Sabini Celio,

Miguel Oliván Bascones, acting as insolvency administrators of Red Elite de Electrodomésticos SA,

Electro Calvet SA,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, T. von Danwitz, R. Silva de Lapuerta, E. Juhász and J. Malenovský (Rapporteur) Judges,

Advocate General: Y. Bot,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Kirtruna SL, by J.O. Miret Corretgé, abogado,

— Ms Vigano, by M. Morales Sabalete, abogado, and C. Garcia Girbés, procuradora,

— Red Elite de Electrodomésticos SA, by A. Carreño León, abogado, and M. Pradera Rivero, procuradora,

— the Tesorería General de la Seguridad Social, by M. Alcaraz García de la Barrera, acting as Agent,

— the Spanish Government, by M. Muñoz Pérez, acting as Agent,

— the Commission of the European Communities, by J. Enegren and R. Vidal Puig, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Articles 3 and 5 of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).

2 The reference has been made in eviction proceedings brought by the company Kirtruna SL ('Kirtruna') and Ms Vigano, as proprietors and landlords of commercial premises situated in Sitges, near Barcelona, against Red Elite de Electrodomésticos SA ('Red Elite de Electrodomésticos'), its insolvency administrators, and Electro Calvet SA ('Electro Calvet').

Legal context

Community legislation

3 Recital 3 of the preamble to Directive 2001/23 states: '[i]t is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded'.

4 Under Article 1(1)(a) of that directive:

'This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger.'

5 Article 2 of Directive 2001/23 provides:

'1. For the purposes of this Directive:

(a) "transferor" shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), ceases to be the employer in respect of the undertaking, business or part of the undertaking or business;

(b) "transferee" shall mean any natural or legal person who, by reason of a transfer within the meaning of Article 1(1), becomes the employer in respect of the undertaking, business or part of the undertaking or business;

...

2. This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship.

…'

6 Article 3 of that directive provides:

'1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.

…'

7 Under Article 4(1) of that directive:

'The transfer of the undertaking, business or part of the undertaking or business shall not in itself constitute grounds for dismissal by the transferor or the transferee. This provision shall not stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.'

8 Article 5 of Directive 2001/23 provides:

‘1. Unless Member States provide otherwise, Articles 3 and 4 shall not apply to any transfer of an undertaking, business or part of an undertaking or business where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of a competent public authority (which may be an insolvency pract[it]ioner authorised by a competent public authority).

2. Where Articles 3 and 4 apply to a transfer during insolvency proceedings which have been opened in relation to a transferor (whether or not those proceedings have been instituted with a view to the liquidation of the assets of the transferor) and provided that such proceedings are under the supervision of a competent public authority (which may be an insolvency pract[it]ioner determined by national law) a Member State may provide that:

(a) notwithstanding Article 3(1), the transferor’s debts arising from any contracts of employment or employment relationships and payable before the transfer or before the opening of the insolvency proceedings shall not be transferred to the transferee, provided that such proceedings give rise, under the law of that Member State, to protection at least equivalent to that provided for in situations covered by Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer [OJ 1980 L 283, p. 23]

…’

National legislation

9 Transfers of undertakings are governed in Spain by the Royal Legislative Decree 1/1995 of 24 March 1995 on approval of the consolidation of the Law on the status of employees (Estatuto de los Trabajadores, BOE No 75 of 29 March 1995, p. 9654), as amended by Law 12/2001 of 9 July 2001 (BOE No 164 of 10 July 2001, p. 24890, the 'Employees'Statute').

10 Article 44(1) provides:

'The transfer of an undertaking, business or independent production unit of an undertaking shall not in itself terminate the employment relationship; the new employer shall take over the former employer's rights and obligations with respect to employment and social security, including commitments linked to pensions, on the conditions laid down by the specific applicable legislation and, in general, all obligations in the area of additional social protection which were borne by the transferor.'

11 However, in accordance with Article 57a of the Employees' Statute, in the event of insolvency proceedings the specific conditions laid down by Law 22/2003 of 9 July 2003 (Ley Concursal [Law on Insolvency] BOE No 164 of 10 July 2003, p. 26905, the 'Ley Concursal') are to apply in the event of the alteration, suspension or termination, by virtue of the insolvency proceedings, of contracts of employment and contracts for transfers of undertakings.

12 The Ley Concursal provides for two possible outcomes of insolvency proceedings, namely composition or liquidation. In the liquidation stage, Articles 148 and 149 of that legislation apply, and establish different legal rules according to whether or not a liquidation plan has been produced and approved.

13 Under Article 149 of the Ley Concursal:

'1. Where no liquidation plan has been approved or, should the case arise, where some matters are not covered by such a plan, the process of liquidation shall follow the following rules:

(a) All the business establishments, operations and other units which are productive of goods and services and which belong to the debtor shall be disposed of as a single unit, unless, on receipt of a report from the insolvency administrators, the court considers that it is more beneficial to all of the creditors that all of the components, or some only, be first divided or transferred in isolation …

2. A transfer of the undertaking is deemed to have taken place for the purposes of employment when the effect of the transfer referred to in the paragraph 1(a) is that an economic unit retains its identity, meaning an organised grouping of resources which has the objective of pursuing a central or ancillary economic activity. In that event, the court shall have the power to declare that the acquirer should not have any liability by subrogation for unpaid salaries and compensation payments arising prior to the disposal which are covered by the Fondo de Garantía Salarial (Wages Guarantee Fund) in accordance with Article 33 of the Employees' Statute…'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 Red Elite de Electrodomésticos is a commercial undertaking whose main business is the sale of electrical household goods. Before the main proceedings, it had more than 40 stores and employed more than 400 people.

15 In 2005 Red Elite de Electrodomésticos lodged an application for a voluntary insolvency with the Juzgado de lo Mercantil No 3 de Barcelona. Although various viability plans were envisaged and compositions proposed to the creditors, the creditors rejected them.

16 Accordingly, the stage of liquidation was opened by decision of 12 June 2006.

17 At the same time, when the liquidation stage was opened, the decision was made, by order of 12 June 2006, to award some of the stores and other business establishments of Red Elite de Electrodomésticos to Electro Calvet, which accepted liability by subrogation for the contracts of 127 employees at 27 business establishments, and undertook to safeguard their contracts of employment. The order specified, inter alia, that the liquidation related solely to a transfer of assets of the insolvent company, which remained responsible for all its liabilities of any kind and that the only obligations attributable in law to Electro Calvet were those laid down in Article 149 of the Ley Concursal which arose from the transfer of contracts of employment. Lastly, that order provided that the award of part of the undertaking's business was without prejudice to any rights of landlords of premises concerned set against the rights accorded by that decision to Electro Calvet and third parties so far as relating to the business.

18 Kirtruna and Ms Vigano are the owners of commercial premises situated at Sitges, near to Barcelona, which were leased to Red Elite de Electrodomésticos, which used them as the location for one of its stores. That store was part of the production unit transferred to Electro Calvet by virtue of the abovementioned order of 12 June 2006, and the latter company therefore took over those store premises.

19 Following that order, Kirtruna and Ms Vigano brought before the referring court an action for eviction, on the ground of assignment of the lease without consent, against Red Elite de Electrodomésticos, its insolvency administrators and Electro Calvet. They submit that, under the lease, they must give their consent to assignment of the lease and there is no statutory provision which obliges them to accept assignment to Electro Calvet.

20 Article 32 of Law 29/1994 of 24 November 1994 on urban leases (Ley de Arrendamientos Urbanos, BOE No 282 of 25 November 1994, p. 36129) does, they admit, establish the general rule that a tenant may assign a lease of commercial premises without necessarily obtaining the landlord's consent. However, application of that provision is expressly excluded when the lease at issue stipulates that any assignment of the lease must be with the landlord's consent, failing which the landlord may apply for termination of the lease.

21 The referring court considered that, if the action for eviction were to be successful, Electro Calvet would be obliged to quit the premises and therefore to cease business, which would be likely to entail termination of the contracts of employment and adversely affect the employees of the store concerned.

22 In that regard, the referring court raises the question of the effect of Directive 2001/23 on the transfer of assets from Red Elite de Electrodomésticos to Electro Calvet.

23 In those circumstances, the Juzgado de lo Mercantil No 3 de Barcelona decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) Should the guarantee, that the transferee who acquires a business in insolvency or a production unit of that business does not take on liability for debts arising out of employment contracts or other employment relationships provided that the insolvency proceedings give rise to protection at least equivalent to that provided for in Community directives, be considered to relate uniquely and exclusively to debts which are directly linked to employment contracts or other employment relationships, or, in the framework of an overall protection of the rights of employees and the safeguarding of employment, should that guarantee be extended to other contracts which are not strictly related to employment, but nonetheless affect the premises in which the business of the undertaking is carried out, or affect specific methods or instruments of production which are essential to the continuation of the business activity?

(2) In the same context of protecting the rights of employees, can the purchaser of the production unit obtain from the court which has charge of the insolvency and which authorises the award a guarantee not only in relation to rights which arise from the employment contracts but also in relation to other contracts and obligations of the insolvent party which are essential to guarantee the continuation of the business?

(3) If a party acquires an insolvent business or a production unit of such a business and gives an undertaking to safeguard all or some of the contracts of employment, and accepts liability for them, does that party obtain the guarantee that

there will not be asserted against him or transferred to him either other debts of the transferor connected to the contracts or relationships where he accepts liability by subrogation, particularly tax contingencies or social security debts, or rights which may be exercised by the holders of rights and obligations arising from contracts entered into by the insolvent party and which are transferred to the acquirer as a package or as part of a production unit?

(4) In brief, can Directive 2001/23 be interpreted to mean that, as regards the transfer of production units or businesses which have been judicially or administratively declared insolvent and in liquidation, not only are contracts of employment given protection, but so also are other contracts which have a direct and immediate effect on the safeguarding of those contracts?

(5) The final question is whether the wording of Article 149(2) of the Ley Concursal, when it refers to the transfer of an undertaking, is inconsistent with Article 5(2)(a) of Directive 2001/23, to the extent that subrogation transfers to the transferee the obligations of the bankrupt or insolvent party relating to or associated with employment, notably the social security debts which might be unpaid by the insolvent company?'

Admissibility

24 In their observations, the Commission of the European Communities and Ms Vigano have questioned the admissibility of the questions referred for a preliminary ruling which, in their opinion, are of no relevance to the disposal of the main proceedings.

25 In that regard, it must be recalled that, in accordance with settled case-law, the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts, by means of which the Court provides the national courts with the points of interpretation of Community law which they need in order to decide the disputes before them (see, in particular, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22, and Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 20).

26 In the context of that cooperation, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is, in principle, bound to give a ruling (*Schneider*, paragraph 21 and case-law cited).

27 It follows that questions on the interpretation of Community law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25, and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22).

28 First, the Commission has challenged the admissibility of the fifth question because it is hypothetical. Given that the transferee's obligations which are directly or indirectly linked to contracts of employment are not the issue in the main proceedings, it

is, according to the Commission, of no relevance to those proceedings to put a question to the Court on whether Article 5(2)(a) of Directive 2001/23 precludes a provision such as Article 149(2) of the Ley Concursal, which provides for the transfer of such obligations to the transferee.

29 That ground of inadmissibility also applies to the third question. By the third and fifth questions, the referring court seeks, in essence, to know whether Article 5(2)(a) of Directive 2001/23 must be interpreted to mean that when a party acquires an undertaking which is insolvent, commits itself to safeguarding the contracts of employment of the employees concerned and accepts liability for the obligations arising from those contracts, that provision requires that it does not become liable for other obligations of the transferor linked to those contracts, in particular tax or social security debts.

30 It must be observed that what is at issue in the main proceedings is an application for the eviction of a tenant from commercial premises. There is nothing, however, in the documents before the Court to suggest that the dispute before the referring court relates to the existence or extent of liability by subrogation for obligations relating to contracts of employment, such as debts due to the tax and social security authorities.

31 Since the third and fifth questions do not relate to the legal relationship between landlords and tenants of commercial premises but to the possible transfer of obligations relating to contracts of employment, those questions are obviously not relevant to the resolution of the dispute in the main proceedings.

32 It follows that the third and fifth questions are hypothetical and, consequently, are not admissible.

33 Secondly, Ms Vigano submits that the questions referred for a preliminary ruling are inadmissible on the ground that the facts of the dispute in the main proceedings have not been correctly set out by the referring court. In addition, the questions have no relevance to that dispute since Directive 2001/23 does not apply in the present case with the result that the directive is not a legal basis for its resolution. The dispute should be resolved exclusively on the basis of Spanish law.

34 In that regard, it is clear from the case-law that the presumption of the relevance of the questions referred cannot be rebutted by the simple fact that one of the parties to the main proceedings contests certain facts, the accuracy of which is not a matter for the Court to determine and on which the delimitation of the subject-matter of those proceedings depends (*Cipolla and Others*, paragraph 26, and *van der Weerd and Others*, paragraph 23).

35 Contrary to what is submitted by Ms Vigano, the reference for a preliminary ruling therefore cannot be held to be inadmissible on the sole ground that the court has acted on the basis of facts which are alleged to be erroneous.

36 The second ground of inadmissibility relied on by Ms Vigano must also be rejected. As is clear from recital 3 of the preamble to and from Article 3 of Directive 2001/23, the objective of that directive is to protect employees in the event of a change of employer, and in particular to ensure that their rights are safeguarded. The dispute in the main proceedings turns precisely on a transfer of an undertaking from one legal person to another, that transfer being likely to affect adversely the position of their employees.

37 If Electro Calvet were obliged to quit the premises at issue in the main proceedings following the transfer of the economic unit from Red Elite de Electrodomésticos, it might be forced to cease that unit's business, which would be likely to entail the termination of contracts of employment and adversely affect the employees

concerned. Taking account of the objective of Directive 2001/23, it is not obvious that the matters at issue in the main proceedings are excluded from the scope of that directive.

38 In those circumstances, the plea of inadmissibility raised by Ms Vigano to the effect that the provisions of Directive 2001/23 are not applicable in the dispute in the main proceedings cannot be upheld.

The first, second and fourth questions

39 By those questions, which can be examined together, the referring court seeks, in essence, to know whether Article 3(1) of Directive 2001/23 requires, in the event of transfer of an undertaking, the preservation of a lease of commercial premises entered into by the transferor of the undertaking with a third party where the termination of that lease is likely to entail the termination of contracts of employment transferred to the transferee.

40 First, notwithstanding the derogation laid down in Article 5(1) of Directive 2001/23, Article 3 of that directive is intended to govern a situation such as that at issue in the main proceedings. It is clear from the national legislation that the statutory provisions transposing that article apply, as a general rule, to the transfer of an undertaking when the transferor is subject to insolvency proceedings of the kind involving Red Elite de Electrodomésticos.

41 The wording of Article 3(1) of Directive 2001/23, quoted in paragraph 6 of this judgment, clearly states that it is the transferor's rights and obligations which arise from a 'contract of employment or from an employment relationship' which are transferred to the transferee. However, as is also clear from Article 2(1) of Directive 2001/23, a contract of employment or employment relationship entails, in terms of that directive, a legal relationship between the employers and the employees, its purpose being to regulate the conditions of employment. A lease does not obviously have such attributes, since it defines the legal relationship of a landlord and a tenant, its purpose being to regulate the conditions of lease.

42 In those circumstances, it must be held that Article 3(1) of Directive 2001/23 does not require, in the event of a transfer of the undertaking, preservation of a lease of commercial premises entered into by the transferor of the undertaking with a third party.

43 It is true that, as stated in paragraph 36 of this judgment, the objective of Directive 2001/23 is to protect employees in the event of a change of employer, and in particular to ensure the safeguarding of their rights. Their employment relationships could be under threat in circumstances such as those in the main proceedings. If there is no automatic transfer of the lease, there is a risk that the transferee of the undertaking may be obliged to quit the premises, to cease business and consequently to terminate the contracts of employment of the employees concerned.

44 However, the need to achieve that objective of protection of employees cannot permit the unequivocal wording of Article 3(1) of Directive 2001/23 to be ignored and the rights of third parties who are not connected with the transfer of the undertaking to be adversely affected, by imposing on them an obligation to accept an automatic transfer of the lease which is not clearly provided for in that directive.

45 That conclusion is, furthermore, confirmed by Article 4(1) of Directive 2001/23. That provision states that the transfer of an undertaking is not in itself to constitute grounds for dismissal by the transferor or the transferee but that it is not to stand in the way of dismissals that may take place for economic, technical or organisational reasons entailing changes in the workforce.

46 In circumstances such as those in the main proceedings, the possible termination of the contracts of employment would not be due solely to the transfer of the undertaking. It would be caused by additional circumstances such as the failure of the transferee and the landlords to agree a new lease, the impossibility of finding other commercial premises or the impossibility of transferring the staff to other stores. Those circumstances can be described as economic, technical or organisational reasons for the purposes of Article 4(1).

47 In light of the foregoing, the answer to the first, second and fourth questions must be that Article 3(1) of Directive 2001/23 does not require, in the event of a transfer of an undertaking, the preservation of the lease of commercial premises entered into by the transferor of the undertaking with a third party even though the termination of that lease is likely to entail the termination of contracts of employment transferred to the transferee.

Costs

48 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 (Fourth Chamber) hereby rules:

Article 3(1) of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses does not require, in the event of transfer of an undertaking, the preservation of the lease of commercial premises entered into by the transferor of the undertaking with a third party even though the termination of that lease is likely to entail the termination of contracts of employment transferred to the transferee.

[Signatures]