EN

Case law

Case Details

National ID: IX ZR 56-95
Member State: Germany
Common Name:link
Decision type: Other
Decision date: 14/05/1998
Court: BGH (Supreme court)
Subject:
Plaintiff:
Defendant:
Keywords:

Directive Articles

Doorstep Selling Directive, Article 1, 1.

Headnote

1. A contract of guarantee, concluded in order to secure a financial liability, which the principal debtor entered into within his official business capacity, does not constitute a transaction as per § 1 para 1 HWiG. This is also the case where the principal debtor entered into such a commitment, secured against a contract of guarantee, as a consumer, albeit not within a doorstep selling situation.

Facts

In a written declaration dated 11th September 1992, the defendant became the guarantor for his parents' liabilities in relation to debts owed to the plaintiff (a bank) up to 100,000 DM. The defendant's father ran a building company, for which the plaintiff had, inter alia, provided a current account with an credit facility. The declaration of guarantee was made in the defendant's parents' house, which an employee of the plaintiff had visited after prior agreement with the defendant's mother by phone. The defendant was not informed of his right to revoke his declaration of guarantee. In May 1993, the plaintiff cancelled with immediate effect all credit facilities and overdraft allowances (a total of more than 1.6 million DM at the time) granted to the defendant's parents. The plaintiff demanded a 50,000 DM part payment of the guarantee from the defendant. The defendant revoked his declaration of guarantee under the HWiG. The Regional Court upheld the claim, though the Court of Appeal overturned the verdict. In its appeal before the BGH, the plaintiff was seeking the reinstatement of the Court of First Instance ruling. The BGH requested a preliminary ruling from the ECJ. The appeal was successful and the verdict overturned and rejected.

Legal issue

In the BGH's view, the plaintiff was entitled to claim for payment as a result of the declaration of guarantee. The defendant had no right of withdrawal under § 1 HWiG, because the HWiG did not apply to the case in question.

In previous verdicts, the 9th Senate of the BGH had ruled that the guarantee agreement did not constitute a contract based on payment for a service as per § 1 para 1 HWiG, since the financial liability only applied to one party, the guarantor (BGH, Neue Juristische Wochenschrift (NJW) 1991, 975). However, it has been argued in academic literature that contracts of guarantee and other security contracts are also covered by the protective measures in art 1 para 1 of the Doorstep Selling Directive 85/577/EEC. The 9th Senate also supported this point of view in two rulings (BGH, NJW 1993, 1594; BGH, NJW 1996, 55 on debt secured against land charges). Thus, the BGH, with its decision of 11th January 1996, presented the case to the ECJ for a preliminary ruling. In its ruling of 17th March 1998 (NJW 1998, 1295 Ditzinger), the ECJ decided that a guarantee contract that is not concluded by physical entity acting in a business capacity does not fall within the scope of the Directive if it secures the repayment of a debt, entered into by the principal debtor while acting in a business capacity.

According to the BGH, this meant that, in the case in question, the Directive did not apply to the defendant's guarantee, insofar as it secured his father's debt. This was because the father had taken on the financial liabilities towards the plaintiff as the company owner; he was thus acting in a business capacity.

The fact that at the same time the defendant was acting as guarantor for his mother's debt, which was linked to his father's credit arrangement, did not in any way alter the outcome. Although it could be assumed that the defendant's mother was not acting in a business capacity, the ECJ made it clear in giving reasons for its verdict that "a debt guarantee can only fall within the scope of the Directive if the financial liability is entered into by a consumer in the context of a doorstep transaction with a supplier as payment in return for goods or services." There was no such payment for a service in this case.

The HWiG could potentially apply in this case only if the act has a broader scope of protection in this respect than the Directive. Under art 8 of the Doorstep Selling Directive, it is possible that a provision in the national law of a Member State goes beyond the scope of the Directive. In the BGH's view, however, it cannot be assumed that in this matter the German HWiG wishes to go beyond the Directive. The wording of § 1 para 1 HWiG, which requires "payment for a service", is in fact narrower than the corresponding provisions in the Directive, which does not use this term.

This conclusion is supported by the historical context in which this law was conceived. The German Bundestag's Legal Select Committee and the Bundestag itself, during the final consultations, worked on the basis that the law to be put on the statute books was to be kept in line with the draft Directive, which was to be passed almost simultaneously (Bundestagsdrucksache (Bundestag publication) 10/4210, p 9; see also ruling of 11th Jan 1996, NJW 1996, 930). There was no indication that German legislators intended to afford a greater level of protection than the Directive in the matter at stake in this case.

Moreover, the BGH did not consider this case to have reached a stage at which a ruling could be made, since the possibility of the contract of guarantee being null and void because it contravened good moral practice under § 138 BGB could not be ruled out. For example, it was possible that the defendant's commercial inexperience had been unfairly exploited when the contract was concluded. In this respect, further investigation was required, meaning that the case should be referred back to the Court of Appeal.

Decision

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