

Case law

Case Details

National ID: XI ZR 150/99

Member State: Germany

Common Name: link

Decision type: Other

Decision date: 02/05/2000

Court: BGH (Supreme court)

Subject:

Plaintiff:

Defendant:

Keywords:

Directive Articles

Doorstep Selling Directive, [Article 1](#), 1. Doorstep Selling Directive, [Article 3](#), 2.

Headnote

1. A legal transaction concluded by a trustee cannot be revoked under § 1 para 1 no. 1 HWiG by a businessman on the grounds that he was persuaded to conclude a trust agreement in a doorstep selling situation.

Facts

The plaintiff requested that his loan agreement concluded with the defendant (a savings bank) in order to finance his stake in a property fund be rescinded. On the basis of a sales discussion with an investment broker in his flat, the plaintiff commissioned "M" Investment Brokers Ltd (M-Ltd) on 11th July 1986 to broker a trust agreement for a fee. The trustee was to conclude, on the plaintiff's behalf and at his expense, the necessary transactions totalling 50,000 DM in order to purchase and finance his stake in a property fund partnership (GbR). The trust agreement and full power of attorney to execute this agreement, which could not be revoked for the duration of the trust relationship, was formally notarised, as agreed, on 27th July 1986. When presented with the notarised power of attorney documentation, the trustee concluded, on the plaintiff's behalf, a loan agreement with the defendant for a sum of 50,000 DM to finance his stake in the fund. As agreed, the loan was paid to the fund partnership, which the plaintiff, represented by the trustee, became a member of. On 29th April 1998, the plaintiff stated in writing his decision to revoke the loan agreement, arguing that he had not been properly informed in accordance with § 2 HWiG. The defendant regarded the revocation as invalid.

The Regional Court upheld the claim for the payments made by the plaintiff under the revoked loan agreement to be reimbursed, having ruled that the defendant had no rights under the agreement. The Court of Appeal rejected the defendant's appeal. The defendant lodged a further appeal to challenge the verdict. This appeal was successful and the initial claim rejected.

Legal issue

The BGH did not concur with this view. It explained that although, under § 164 para 1 BGB, the plaintiff was the defendant's customer as per § 1 para 1 HWiG, he was not legally entitled to revoke the declaration, which the trustee had made for him, simply because he was persuaded to conclude the trust agreement as well as to grant the trustee power of attorney during the course of, or on the basis of, a doorstep selling situation. In this respect, the BGH considered § 166 BGB, which was not taken into consideration by the Court of Appeal, to be pivotal in the case. Under § 166 para 1 BGB, where an individual's intentions are uncertain, the key factor is not the person being represented, but rather the representative. While the right of revocation under § 1 para 1 HWiG is not dependent on the absence of any clear intentions in terms of § 166 para 1 BGB, it is nonetheless designed to afford protection against the threat of a consumer being hurried into a rash decision. However, this protection is only meant for the person enters into negotiations with the contractual partner in the doorstep selling situation and who subsequently makes a statement of intent to conclude a contract. Thus, with regard to the requirements for a right of revocation to apply as laid down in § 1 para 1 HWiG, it is essentially only the representative that has a decisive bearing in legal terms. This is also necessary to ensure that bona fide rights of protection are guaranteed. In contrast to the Court of Appeal's view, the BGH ruled that the fact that events had been taken out of the plaintiff's hands when he concluded the trust agreement and granted power of attorney was of no legal significance.

Furthermore, the BGH ruled that the plaintiff had failed to submit any compelling arguments as to why he should be entitled to revoke the trust agreement and/or the trustee's power of attorney. Since the defendant was given the notarised power of attorney for the trustee before the loan agreement was concluded, § 172 para 1 BGB applies in its favour. Thereafter, the defendant could legitimately rely on the contents of the notarised certificate.

Moreover, because the trust agreement and the power of attorney had been formally notarised, § 1 para 2 no. 3 HWiG states categorically that there is no right of revocation. The defendant could readily have relied on this. That would even apply if § 1 para 2 no. 3 HWiG was not compatible with Directive 85/577 /EEC – which does not exclude the right of revocation where a notarised statement is present – or, with due consideration of the Directive (which does not apply to property contracts (art 3 para 2 lit a)), was to be interpreted more narrowly.

Decision

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