EN

Case law

Case Details

National ID: XI ZR 47/01
Member State: Germany
Common Name:link
Decision type: Other
Decision date: 12/11/2002
Court: BGH (Supreme court)
Subject:
Plaintiff:
Defendant:
Keywords:

Directive Articles

Doorstep Selling Directive, Article 3, 2. Doorstep Selling Directive, Article 4 Doorstep Selling Directive, Article 5 Doorstep Selling Directive, Article 7

Headnote

The HWiG (Haustürwiderrufsgesetz - Doorstep Sales Withdrawal Act) applies in relation to the granting of a collateral loan. Where a loan agreement is accompanied by conclusion of a participation agreement to acquire shares in closed property funds, withdrawal from the collateral loan agreement does not in principle affect the validity of the participation agreement.

Facts

The claimants seek rescission ab initio of a collateral loan agreement against the respondent bank, in particular the refund of interest and amortisation payments. By counter claim, the respondent seeks confirmation that the loan agreement is valid and that the claimants are bound thereby. In Autumn 1993 the broker S offered the claimants participation in a closed property fund in the form of shares in a BGB-Gesellschaft (civil-law association). S made a home visit accompanied by a banker and a financial adviser K, who identified himself with a business card of the respondent. During this visit the claimants signed the participation agreement and, to finance it, a contract with the respondent for a loan secured by a land charge. They also signed a supplementary declaration to the loan agreement, which stated that the respondent was acting exclusively in its capacity as creditor and excluded any liability in respect of the project. The respondent made no notification of the right of withdrawal. The claimants rescinded the loan agreement on 21.4.1997 due to fraudulent misrepresentation and furthermore withdrew from the contract according to § 1 HWiG as it applied until 30.9.2000. They claimed that they were deceived by the issue prospectus and the broker S about the true value of the object, the corporate connections between the estate agent and the initiator and the tradeability of the investment. It was submitted that K, who appeared on behalf of the respondent, supported the broker S, praised the investment and expressly recommended it.

The LG (Landgericht – district court) dismissed the claim and allowed the counter claim. The claimants' Berufung (appeal on points of fact and law) was unsuccessful. The claimants then made a Revision (appeal on points of law), which was allowed.

Legal issue

Initially the BGH (Bundesgerichtshof – Federal Supreme Court) agreed with the Berufung court, that the claimant had no claim from fault at conclusion of contract (culpa in contrahendo),as the respondent could not be held liable for the conduct of the financial advisor K. His statements did not relate to the credit agreement, but the transaction which it financed, and therefore lay outside the bank's sphere of duty.

Contrary to the Berufung, the BGH accepted that the claimant had a right of withdrawal according to § 1 (1) HWiG (Haustürwiderrufsgesetz – Doorstep Selling Withdrawal Act) as it then applied. This is not precluded by § 5 (2) HWiG, as this provision is to be interpreted consistently with Directive 85/577/EEC which it transposed. Therefore the judgment of the ECJ of 13.12.2001 is to be followed, which means that the Doorstep Selling Directive is to be interpreted to apply to collateral loan agreements also, so that the consumer must has a right of withdrawal in such contracts according to Art. 5 of the Directive and further, in the event of the consumer not being informed of his right of withdrawal according to Art. 4 of the Directive, the time period cannot expire one year following conclusion of contract.

At national level therefore, § 5(2) HWiG is to be interpreted to mean that credit agreements are not to be regarded as contracts which "fulfil the requirements of a credit agreement according to the VerbKrG (Verbraucherkreditgesetz – Consumer Credit Act)" as the VerbrKrG does not confer a right of withdrawal as extensive as the HWiG. The withdrawal provisions of the HWiG could only be ousted by the subsidiarity clause of § 5(2) HWiG if the VerbrKrG would also confer a right of withdrawal upon the consumer. That is not the case with respect to the collateral loan agreement at issue according to § 3 (2) No. 2 VerbrKrG. As in the present case the requirements of a valid withdrawal according to §§ 1 (1) No. 1, § 2 (1), 4th sentence HWiG as it then applied are also present, the judgment should have been overturned.

The BGH further held that the withdrawal of a collateral loan agreement does not in principle affect the validity of the participation agreement. The required interpretation of § 5 (2) HWiG consistent with the Directive does not require any change in this respect. It does not have the consequence, that the VerbrKrG is not relevant for transactions of the present kind. HWiG and VerbrKrG in this respect apply alongside each other just as do the Doorstep Selling and Consumer Credit Directives. This is not contradicted by the Doorstep Selling Directive, as Art. 7 thereof expressly leaves regulation of the legal consequences of withdrawal from doorstep sales to the individual Member State law.

IV. Comment:

See on this point the decisions of the ECJ in the cases C-350/03 (Schulte) and C-229/04 (Crailsheimer Volksbank eG).

Decision

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