

Case law

Case Details

National ID: X ZR 178/02

Member State: Germany

Common Name: link

Decision type: Other

Decision date: 28/10/2003

Court: BGH (Supreme court)

Subject:

Plaintiff:

Defendant:

Keywords:

Directive Articles

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

Headnote

1. A consumer exhibition only constitutes a leisure event within the meaning of § 312 (1) No. 2 BGB if the leisure aspect and offers of sale are organisationally intertwined with each other in such a way that the customer, with regard to the advertising and execution of the event, is put in a leisurely easygoing mood and can only withdraw from an offer aimed at conclusion of contract with difficulty.
2. Also the Doorstep Selling Directive 85/577/EEC gives no cause to class consumer exhibitions per se as leisure events within the meaning of § 312 (1) No. 2 BGB.

Facts

The claimant seeks damages due to refusal to accept delivery of a fitted kitchen. On 3.11.1999 the respondent signed a document at a consumer exhibition with the heading "contract of sale of an exhibition fitted kitchen", according to which a fitted kitchen with the measurements and specifications agreed with the respondent was to be delivered and accepted by the end of 2001. In the conditions thereto the respondent declared himself bound to payment of a flat rate of damages of 30% of the entire obligation in the event of refusal to perform. At the beginning of October the claimant requested the respondent in writing to pay the agreed price. The respondent replied that he was not bound by the agreement. A subsequent claim to payment of the flat rate of damages of 30% of the agreed order price was successful in both preliminary instances. The Revision (appeal on points of law) by the respondent at the BGH (Bundesgerichtshof – Federal Supreme Court) was dismissed.

Legal issue

The German provisions on withdrawal in doorstep sales shall – according to the BGH – protect the consumer from the danger of being taken by surprise in certain typical situations of initiation and conclusion of contract where he is pushed to conclude contracts via an element of surprise or where his freedom to decide is manipulated in some other impermissible way. The aim and purpose of § 312 (1) No. 2 BGB (previously § 1 (1) No. 2 HWiG – Haustürwiderrufsgesetz – Doorstep Selling Withdrawal Act) consists of preventing the consumer being bound by statements in a situation in which the business purpose of the organiser is masked by the leisurely mood and expectations of the listener, engineered by the organiser, where comparisons of price and quality are not practically possible and the opportunity for quiet consideration and a change of mind are limited, if available at all.

Therefore, one can only speak of conclusion of contract on the occasion of a leisure event if the leisure offer and sale event are organisationally interwoven in such a way that the customer, with regard to the event, is placed in a leisurely easygoing mood and can only forbear from the statement aimed at concluding the contract with difficulty, be it due to factors of time or location, be it due to peer pressure or a sense of gratitude for the offer of conversation, that awake the feeling in the consumer, that he is obliged in some way to the business making the sale. The notion of leisure event is determined by both these interrelated factors of leisurely character and special organisational form, whereby the leisurely character is to be determined according to the standards of commercial practice and the organisational form by objective criteria.

The consumer exhibition was, in the view of the BGH, a normal exhibition and not a leisure event within the meaning of § 312 (1) No. 2 BGB, although a considerable programme of entertainment was offered. In addition, although there were around 400 commercial stallholders represented in a total of 20 halls offering goods and services in home extensions, renovations, living, energy, home economy, gastronomy, health and gardening, the main focus of the programme was clearly within the commercial area, which could not have escaped the average visitor. Also, the payment of an entry fee by the customer countered such any impression that he was in some way indebted towards the providers represented at the exhibition.

The Doorstep Selling Directive 85/577/EEC does not give any cause for qualifying consumer exhibitions per se as leisure events within the meaning of § 312 (1) No. 2 BGB in the court's view. According to Art. 1 (1), the Directive only applies if the contract was concluded during an excursion organised by the trader outside of his business premises. Art. 1 (3), (4) extend this catalogue merely to offers made under similar conditions. German law therefore goes, as permitted by Art. 8, beyond the mandatory level of protection by including excursions not only of a certain kind, but rather leisure activities of every kind. According to the recitals, a characteristic of the contracts within the scope of the Directive is that the initiative to conclude the contract emanates from the business and the consumer is not prepared for the contractual negotiations, which is also possible outside of classic doorstep sales. This does not however justify application of the Directive to all contracts concluded outside of business premises, although the rule in Art. 1 of the Directive does not explicitly so dictate. According to the case law of the ECJ, a contract is concluded during an excursion if a trader has invited a consumer to go in person to a specified place at a certain distance from the place where the consumer lives, and which is different from the premises where the trader usually carries on his business and is not clearly identified as premises for sales to the public, in order to present to him the products and services he is offering (Case C-423/97 Travel Vac [1999] ECR I-2195 at para 38). In the circumstances before the court there is no cause for reasonable doubt on the application of Community law. The BGH therefore declined to make a preliminary reference to the ECJ.

Decision

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