

Case law

Case Details

National ID: VIII ZR 21/04

Member State: Germany

Common Name: link

Decision type: Other

Decision date: 22/11/2004

Court: BGH (Supreme court)

Subject:

Plaintiff:

Defendant:

Keywords:

Directive Articles

Consumer Sales and Guarantees Directive, [Article 5, 3](#).

Headnote

1. For consumer sales, the reversal of the burden of proof according to § 476 BGB (Bürgerliches Gesetzbuch – German Civil Code) (=Art. 5 (3) Consumer Sales Directive 99/44/EC) also applies if the consumer has the good installed by a third party.

Facts

The claimant purchased a garden pond made from fibreglass-reinforced material for private use from the respondent garden centre on 11.7.2002. The pond was delivered to the claimant the following day. The claimant then had the pond installed on his property by a separate specialist firm. After filling the pond, it became clear that it was leaky and ripped. The claimant returned the pond to the respondent on 24.7.2002. The respondent carried out repairs without acknowledging a legal duty to do so. The (separate) company engaged by the claimant collected the pond and reinstalled it on the claimant's property; once again, the pond was leaky. The respondent refused to supply a new pond or undertake further repairs. The claimant declared his withdrawal from the contract of sale by letter of 3.11.2002 through his authorised proxy and claimed inter alia repayment of the sale price as well as interest from the date of claim.

The Amtsgericht (1st instance court) entered judgment against the respondent to repay the sale price alongside interest from the date of claim. The Landgericht (district court) by contrast dismissed the claim on appeal by the respondent. The Landgericht stated in its reasoning that the reversal of the burden of proof prescribed in § 476 BGB (= Art. 5 (3) Consumer Sales Directive 99/44/EC) did not apply, as the installation of the subject of sale was carried out by a third party in direct chronological connection with the delivery of the product and therefore the possibility exists that the lack of conformity could have been caused by this third party. The Revision (appeal on points of law) by the claimant resulted in the judgment being overturned and the matter being sent back to the Landgericht.

Legal issue

In the view of the BGH (Bundesgerichtshof – Federal Supreme Court) the claimant can assert the reversal of the burden of proof in § 476 BGB. This is not affected by the fact that the claimant had the pool installed by a third party. According to § 476 BGB, there is a presumption that the lack of conformity already existed at the time the product was delivered, if a lack of conformity becomes apparent within six months of delivery, unless this presumption is irreconcilable with the nature of the product or the nature of the lack of conformity. This wording does not give any cause to suppose that the reversal of the burden of proof could be excluded due to installation by a third party. The conditions of the norm are fulfilled in the present case, as the pond was already leaky a few days after delivery on 12.7.2002, neither does the nature of the lack of conformity justify any differing view.

Furthermore, the purpose of the norm supports an application of the reversal of the burden of proof. The provision serves the protection of the consumer and contains a presumption that a lack of conformity appearing within six months since delivery of the good already existed when the good was delivered.

According to the travaux préparatoires, the justification for the reversal of the burden of proof lies in the lack of possibility for the consumer to adduce such proof and the business' – at least in close chronological connection with the passing of risk – better possibilities and superior knowledge thereof. With a correct installation by a third party the consumer is nevertheless, with respect to the proof of the nature of the good at the time of delivery, just as worthy of protection as the consumer who installs the product himself. Firstly, evidential difficulties for the buyer with regard to the nature of the product at the time of delivery are not reduced if he has the product installed by a third party; secondly, whether or not the purchaser installs the product himself or instructs a third party to do so does not affect the seller's ability to recognise lack of conformity in the good.

In the outcome, the BGH referred the matter back to the Landgericht as it was unable to decide on the facts before it; the latter had to determine whether the respondent can adduce facts which rebut the presumption in § 476.

Decision

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