

Case law

Case Details

National ID: 3 R 93/04f

Member State: Austria

Common Name: link

Decision type: Other

Decision date: 20/04/2004

Court: Landesgericht (Appellate court, Feldkirch)

Subject:

Plaintiff:

Defendant:

Keywords:

Directive Articles

Package Travel Directive, [Article 4, 4](#). Package Travel Directive, [Article 4, 7](#). Package Travel Directive, [Article 5, 2](#). Package Travel Directive, [Article 5, 4](#).

Headnote

1. Even before § 31e para 3 KSchG came into force on 1st January 2004, travellers were entitled to non-material compensation – in line with the aims of the Package Travel Directive 90/314/EEC and on the basis of §§ 1293, 1295 and 1323 of the Austrian Civil Code (ABGB) – where there was significant disruption to the services forming part of a package tour, caused either by non-performance or inadequate performance of the contract.
2. The “Frankfurt Table” can also serve as a guide in Austria for assessing the price reduction required to offset particular deficiencies in the holiday.
3. If the traveller fails to fulfil his duty to report defects under § 31e para 2 KSchG, this does not mean that he definitively forfeits his right to a price reduction. Rather, this merely constitutes a breach by the traveller of an obligation he has, which can count against the traveller’s claim on the grounds that he is also at fault.
4. In warranty law, minor defects are essentially discounted, unless they have a cumulative effect.
5. A claim for a 30% reduction of the trip price is justified where there is noise pollution from the kitchen, from evening events, and from bus traffic in the immediate vicinity of the room. A further 10% discount is appropriate where there is a cumulative effect from a number of minor defects in the room.

Facts

The plaintiffs booked an all-inclusive one-week package tour to Majorca with the defendant, a tour operator. When making the booking, they specified that they wished to enjoy a peaceful holiday. Contrary to the description in the brochure, the hotel was located right next to a bus-stop. Furthermore, there was an open air stage very near the hotel, and the hotel kitchen was right next to the plaintiff’s room. The result was that the plaintiffs were disturbed by noise and smells from 5am to 11pm. Moreover, the room had other defects, from mould on the walls and missing door hinges to a missing bath plug and a bed with four wooden joints causing an obstruction. The plaintiffs made a complaint at reception about these defects on the day they arrived. The following day they complained to the tour guide. Subsequently, they were offered a range of services (a rental car, complimentary snacks) by way of compensation, though they rejected the offers. The plaintiffs were not offered another hotel room, because the hotel was fully booked. It was not possible to rearrange their return flight. Believing that they had been deprived of the chance to enjoy their holiday and because of general expenses they had incurred, the plaintiffs claimed for a price reduction amounting to the total trip cost. They argued that the defendant had infringed the principle of providing true and accurate information in travel brochures. The defendant objected that the plaintiffs could not have expected an “oasis of calm” on the basis of the information in the brochure. Furthermore, he argued that the plaintiffs had failed to report any of the defects. Finally, he stated that the plaintiffs had been offered free services by way of compensation. The Court of First Instance awarded the plaintiffs a 30% price reduction, as well as a sum for general expenses they had incurred. However, the court refused compensation on the grounds that the plaintiffs had been denied the chance to enjoy their holiday.

Legal issue

The Court of Appeal increased the price reduction to 40 % and also awarded compensation because the plaintiffs had been denied the chance to enjoy their holiday. In terms of the percentage price reduction awarded, it stated that the Frankfurt Table could also be used in Austria for assessing the price reduction required to offset particular deficiencies in the holiday. However, the table could only act as a guide, meaning that the courts were not bound by it. Furthermore, the court stated that minor defects are generally not covered under warranty law. However, where such defects have a cumulative effect – as in this case with the formation of mould, missing door hinges etc – the traveller may have a warranty claim, meaning that a further 10% reduction in trip costs seemed an appropriate level of compensation.

As regards the defendant’s objection that the plaintiffs had failed to fulfil their duty to report defects under §31e para 2 KSchG, the court ruled that this did not mean that the plaintiffs had completely forfeited any right to a price reduction. Rather, they had simply failed to fulfil their obligations, which could count against their claim on the grounds that they were also at fault. With regard to the services offered as compensation by the defendant to the plaintiffs, the Court of Appeal ruled that travellers are under no obligation to accept these where the services are not equivalent to the missing services or where they would unreasonably disrupt the travel schedule.

With regard to compensation where the traveller has been denied the chance to enjoy his holiday, the Court of Appeal stated that this had been laid down in § 31e para 3 KSchG as part of the Act Amending the Civil Code (BGBl I 2003/91) for cases in which the tour operator can be held liable. However, in this case, § 31e para 3 KSchG did not apply, because it had not yet come into force at the time. Consequently, the question arose as to whether, in spite of any clear provisions in law, compensation could still be awarded with reference to Package Travel Directive 90/314/EEC. While, with just a few exceptions, Austrian compensation law did not award compensation for non-material damages, the European Court of Justice (ECJ) had ruled on 12th March 2002 that in principle the Directive did give the customer the right to claim compensation for non-material damages. However, it should be noted that Directives regulating legal relationships between private individuals cannot be applied to the direct detriment of a private individual where they have not been fully and properly transposed. However, once all provisions in Austrian law have been fully explored, it is permissible to interpret the case in line with the Directive. Here, §§ 1293, 1295 and 1323 ABGB were a point of reference for interpreting the facts of this case in line with the Directive. Under clauses §§ 1323 and 1324 ABGB, compensation for non-material damage can only be awarded where there is evidence of gross negligence. It should, however, be noted that, in the case of non-material damage based on breach of contract, § 1321 should be applied, under which compensation for non-material damage can only be

awarded in certain cases where one party is clearly at fault (malicious intent or malicious joy). In the case of contracts promoting ideal interests – as travel contracts indubitably do – compensation should be more comprehensive. Accordingly, compensation for non-material damage should also be awarded under §1323 ABGB. However, as § 31e para 3 KSchG demonstrates, a prerequisite for awarding compensation in this case is severe disruption to the services offered. Given the many clear instances of noise and smell disturbances in this case, compensation should be awarded on the basis that the plaintiffs had been denied the chance to enjoy their holiday.

Decision

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