

Case law

Case Details

National ID: 1 Ob 58/98f

Member State: Austria

Common Name: link

Decision type: Other

Decision date: 23/02/1999

Court: Oberster Gerichtshof (Supreme court)

Subject:

Plaintiff:

Defendant:

Keywords:

Directive Articles

Unfair Contract Terms Directive, [ANNEX I, 1.](#)

Headnote

A clause in STCs that entitles the purchaser, when making a claim under guarantee, to withhold only the expenses necessary to rectify the defect, constitutes an unacceptable limitation of the consumer's right to withhold monies and thus contravenes § 6 para 1 lines 6 and 7 KSchG. The same must be true of contracts of work if the KSchG applies in general terms to § 1052 ABGB.

Facts

The defendant, (co-)owner of a property and acting as (co-)builder, commissioned the plaintiff, a developer, to construct a semi-detached house. The contract included all the relevant Austrian Standards (ÖNORMs). The construction work was severely delayed and, in part, not carried out adequately. The plaintiff filed a lawsuit requesting essentially that the defendant be declared liable for repaying the outstanding monies for the work. The defendant invoked his right to refuse payment arguing that no repayment was therefore due.

Legal issue

In making its ruling, the OGH explored the question of whether the relevant ÖNORM-clause contravenes § 6 para 1 lines 6 and 7 KSchG. On this, the Supreme Court explained that the purchaser was granted the right to refuse payment under § 1052 ABGB above all because he should be able to secure his claim under guarantee and to persuade the supplier to make improvements speedily – even though it is not possible to offset improvement claims against payment demands because they are not equivalent. Precedents in the Supreme Court indicate that the purchaser is entitled to refuse payment of all outstanding monies – and not merely a portion thereof to cover the costs of rectifying the defect – until the supplier has made the requisite improvements. This is because the contract of work has not been properly fulfilled such as to trigger payment and thus payment is not due in accordance with § 1170 ABGB. According to case law, the consumer is denied this right to withhold monies only in the case of very minor defects, particularly where the consumer's behaviour has in fact degenerated into harassment (§ 1295 para 2 ABGB). However, in the case in question, there was no hint of minor defects, let alone harassment, given the ratio between the total payment for the work and the costs involved in rectifying the defects. A clause in STCs that entitles the purchaser, when making a claim under guarantee, to withhold only the expenses necessary to rectify the defect, constitutes an unacceptable limitation of the consumer's right to withhold monies and thus contravenes § 6 para 1 lines 6 and 7 KSchG. The same must be true of contracts of work if the KSchG applies in general terms to § 1052 ABGB. The plaintiff is therefore not permitted to invoke the relevant ÖNORM-clause in dealings with the defendant as a consumer since § 6 para 1 KSchG contains a catalogue of unacceptable and – even where individually negotiated – invalid contract terms. The defendant therefore has the right to refuse payment.

Decision

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