

Case law

Case Details

National ID: 1 Ob 176/98h

Member State: Austria

Common Name: link

Decision type: Other

Decision date: 25/08/1998

Court: Oberster Gerichtshof (Supreme court)

Subject:

Plaintiff:

Defendant:

Keywords:

Directive Articles

Unfair Contract Terms Directive, [Article 2](#) Unfair Contract Terms Directive, [Article 3, 1.](#) Unfair Contract Terms Directive, [ANNEX I, 1.](#)

Headnote

1.If a timeshare entitlement for a property is inextricably linked to being a member of a timeshare club, an excessively long binding membership agreement is in breach of good moral practice and, with regard to consumers in particular, contravenes § 6 para 1 line 1 KSchG. An acceptable period to be bound by such an agreement is, depending on the particular terms of the contract in questions, between ten and fifteen years.

2.A timeshare arrangement for a property, as a continuing obligation, can be cancelled at any time on compelling grounds. However, if the timeshare entitlement can be transferred, then there are no grounds for cancellation if the timeshare holder has a reasonable option of selling the entitlement at the prevailing market rates.

Facts

While on holiday in Austria in 1994, a German couple entered into a discussion about the possibility of agreeing a timeshare contract with a club that sells its members entitlements to use holiday accommodation on a continuing basis if they pay a given fee. The discussion evolved into contract negotiations, during which the couple explained that given their advanced years (they were born in 1940 and 1941), they would not consider purchasing timeshare entitlements over a 50-year period as was initially suggested. They were then offered 25-year membership of the club and the option of using their entitlements within a shorter period provided that the accommodation was available. The couple then joined the club on the agreement that they would be entitled to use two "studios" for two specific calendar weeks of the year and, as had been negotiated, that they could use their total entitlement of fifty weeks within a shorter timeframe. Their membership was limited to a maximum of 25 years. According to the club's constitution, members, as exclusive holders of the entitlement to use the holiday accommodation, were permitted to sell this entitlement, to give it way, to sublet it, to leave it to somebody in a will, to mortgage it etc. When the husband suffered a heart attack in 1995, the couple approached the club and stated their intention to withdraw from the contract. This was, however, rejected by the club. Given the husband's worsening health, the couple tried to cancel the contract again in 1996. When the club again refused to sanction this, the couple stated that they would be leaving the club with immediate effect and demanded repayment of the fees they had paid for the timeshare entitlement, minus what they had already used. The club took the view that the contract remained valid and that there were thus no grounds for repayment. This prompted the couple to file a lawsuit for the repayment of 205,814.47 Austrian Schillings. They argued that, as members of the club, they were allowed to leave at any time. Although the club's rules and regulations did not contain any provisions for leaving, they had a right to leave the club under "negative freedom of association". The defendant was therefore wrong to reject their withdrawal from the club and to refuse repayment of the monies claimed. The defendant objected that there were no grounds for granting the plaintiff a right of withdrawal. The club's statute did not provide for the right to leave and their actions were therefore not permissible. Even if this were permissible, this would have no effect on the timeshare entitlements the couple had already purchased.

Both the Court of First Instance and the Court of Appeal rejected the claim. The couple then appealed to the OGH.

Legal issue

In the OGH's opinion, the timeshare law (TNG) did not directly apply in this case since the dispute was based on a contract agreed prior to 1st April 1997. However, in the view of the Supreme Court, this did not mean that the TNG had no bearing on the legal issues under scrutiny, especially since a subsequent provision in law can help to guide interpretation of a particular point of law as was. The OGH thus explored the question of how long a binding agreement can justifiably be set for. § 2 para 1 TNG inferred that a binding membership agreement for a club may exceed three years. Even a five-year or longer binding agreement is not necessarily unlawful, but rather must be assessed in accordance with § 6 para 1 line 1 KSchG. This states that the content of the relevant terms in the joining contract should be checked with subjective circumstances in mind. The OGH ruled that a contract set for a five- to 15-year period is permissible, while a 25-year period is clearly excessive. However, in the case in question, it was not necessary to clarify exactly where the limit of acceptability lay, since the couple only purchased the entitlement in 1994 and thus had not yet reached the limit that could trigger the continuing obligation to be terminated on the grounds that the contract is partially invalid.

Thus, the key question in the case was whether the husband's health problems constituted compelling grounds entitling the couple to terminate the contract, since prevailing legal opinion was that early ex nunc cancellation of continuing obligations was permissible if the grounds were compelling. However, this right of cancellation on compelling grounds could be denied if the timeshare entitlements were transferable. Thus, if the couple could reasonably sell their entitlements for the prevailing market value, there was no need to cancel the contract. This would also apply even if the market value of the timeshare entitlement had depreciated since the contract was agreed. Such a loss had to be borne by the couple – provided it was not below a certain value – since they were simply guilty of "doing a bad deal".

The only certainty was that the first plaintiff (the husband) had suffered a heart attack. It had not yet been determined whether it was reasonable for him to continue travelling to and from the holiday residence. If this were only possible should he risk further health problems, then it was essentially not reasonable to expect him to remain bound by the continuing obligation. The second plaintiff (the wife) could also invoke this argument since, given her marriage to the first plaintiff, it would not be reasonable to expect her to travel abroad regularly when her husband was forced to stay at home for health reasons. Even if the husband's poor health meant that they could not make use of the holiday residence, the couple still had to demonstrate that they had no reasonable option of

selling their timeshare entitlements at the market rate. In attempting to make a sale, the couple would be obliged to use all methods open to consumers in their home country, such as adverts and brokers. Only if, in spite of such efforts, their timeshare entitlements remained impossible to sell either in the current marketplace or in the foreseeable future could the plaintiffs cancel the contract on compelling grounds without being expected to exercise their right of transfer. Since there was a lack of evidence on which to base a ruling, the OGH reversed the verdicts of the Court of First Instance and the Court of Appeal and ordered a retrial.

Decision

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