

## Case law

### Case Details

**National ID:** VIII 126/05

**Member State:** Germany

**Common Name:** link

**Decision type:** Other

**Decision date:** 07/12/2005

**Court:** BGH (Supreme court)

**Subject:**

**Plaintiff:**

**Defendant:**

**Keywords:**

### Directive Articles

Consumer Sales and Guarantees Directive, [Article 3, 1](#). Consumer Sales and Guarantees Directive, [Article 3, 2](#). Consumer Sales and Guarantees Directive, [Article 3, 5](#).

### Headnote

With respect to the sale or barter of a riding horse, a buyer's claim for damages in lieu of performance generally only is to be considered, if the buyer has previously without result set a reasonable period for the seller to remove the defect.

If the buyer's claim for damages in lieu of performance is barred because the seller is not responsible for the breach of his obligation to supply the sold good without defects, the buyer can neither claim compensation for expenses resulting from him removing the defect on his own under § 326(2)(2), (4) BGB to the amount of what the seller saved due to his release from performance. This even applies if the buyer could not reasonably be expected to give the seller a prior possibility to remove the defect.

### Facts

On 8 February 2003 the parties traded a gelding belonging to the plaintiff with a mare belonging to the defendant. On 1 April 2003 the plaintiff discovered that the mare acquired by her suffered from a so-called periodic ophthalmitis. She had the horse treated by a veterinary. It was operated on 7 September 2003 and 21 November 2003. She initiated civil proceedings to demand compensation for the expenses for treatment and operation amounting to EUR 1.933,47 together with interest. The claim was upheld by the appellate court.

### Legal issue

The FCJ has upheld the defendant's appeal on a point of law.

The plaintiff was not entitled to compensation for the claimed expenses arising from the treatment and operation of the horse she had initiated, since she had omitted to give the defendant the possibility to have the animal treated by a veterinary himself due to the occurred periodic ophthalmitis.

The plaintiff was not entitled to a claim for damages in lieu of performance (§§ 480, 437 no. 3, 440, 280, 281 BGB). Under §§ 437 no. 3, 440, 280, 281 BGB, such a claim required that the buyer without result specified a reasonable period of time for the seller to remove the defect if none of the exceptions rules applied. This principle also applied to the sale of animals and thus also to the barter of animals (§ 480 BGB). None of the exceptions provided in §§ 440, 281 (2) BGB making the prior specification of such a period unnecessary did apply.

In addition, the buyer's motive to purchase the animal was of no relevance to the question whether he could be reasonably expected to demand the removal of the defect from the seller. It could neither be deduced from the relevant provisions of the German Civil Code (§§ 90a, 433 et seqq. BGB) nor from the principle of animal protection in Art. 20a GG that with respect to the sale of animals it was of any relevance for the precedence of the removal of the defect over the buyer's claim for damages in lieu of performance whether the purchased animal was a farm animal or - as was the case here - a riding horse bought by an amateur horseman.

The plaintiff was neither entitled to the asserted claim for compensation under § 326(2)(2) BGB nor could he rely on an analogy to this provision. Since the buyer could be reasonably expected to specify a period for the removal of the defect and the specification was thus necessary, § 326(2)(2) BGB (in analogy) did not apply.

But even if exceptional circumstances had made the setting of an additional period for the removal of the defect unnecessary here and thus had justified the immediate claim for damages in lieu of performance, the plaintiff would - contrary to the opinion of the appellate court - not be entitled to compensation for his expenses for the removal of the defect under § 326(2)(2), (4) BGB (in analogy) to the amount of what the seller saved due to his release from performance. If the buyer due to special circumstances could not reasonably be expected to give the seller the opportunity to remove the defect, but the seller was neither responsible for the defect nor for the circumstances that caused the defect not being removed by him, not only the claim for damages in lieu of performance (§§ 437 no. 3, 281, 280(1)(2) BGB) was excluded: In this case the seller also did not have to pay compensation for the expenses of the removal of the defect under § 326(2)(2), (4) BGB (in analogy). The provisions on the buyer's right arising from a defect of the purchased good (§§ 437 et seqq. BGB) were meant to exclusively govern the matter. This fact and the legislator's decision not to allow a buyer's right to remove defects at his own discretion barred a direct application of § 326(2)(2) BGB as well as an analogy to this provision in this case. In case one of the parties could not reasonably be expected to either tolerate (buyer) or effectuate (seller) the removal of the defect, the buyer was entitled to reduce the purchase price or to rescind the contract (§ 437 no. 2) even if the seller was not responsible (§ 280(1) BGB) for the breach of his duty to supply the purchased good free of defects (§ 433(1) (2) BGB), since these remedies - contrary to the claim for damages - did not require the seller's responsibility for the defect.

### Decision

Full text: [Full text](#)

### Related Cases

No results available

### Legal Literature

No results available

### Result