

Case Details

Case Details

National ID	200.046.921/01
Lidstaat	Nederland
Common Name	link
Decision type	Overige
Decision date	23/11/2010
Gerecht	Gerechtshof
Onderwerp	
Eiser	
Verweerder	
Trefwoorden	

Directive Articles

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

Headnote

Presumption of non-conformity if defect had materialized within 6 months. The seller needs to prove that the good was in fact conform the contract at the moment of the delivery and not only that it is likely that there was conformity.

Facts

In mid September 2007 consumer who collects exotic birds examined two hyacinth macaws from a shop selling exotic birds. Before he decided to purchase them, the consumer had the birds tested by his vet who has found them in good health. The birds were bought on the 4th of October 2007. As of the 26th of November 2007 one of the birds showed less activity, therefore, two days later the consumer had it submitted in his vet's clinic. The bird remained tested as of 11th of December until the 21st of December. As of 24th of December the bird started vomiting and neurological problems arose. Since the bird's health was worsening, it was euthanized. On the 11th of February 2008 the consumer notified the seller of the death of the bird and demanded compensation for the bird.

Legal issue

Uitspraak

Art. 7:18 Sec. 2 BW implements Art. 5 Sec. 2 of the Directive, pursuant to which if non-conformity of the consumer goods materializes within 6 months from the delivery, there is a presumption that the good was non-conforming at the moment of delivery, unless the nature of the good opposes such a presumption. The seller claimed that since the consumer sale concerned a living macaw, that is more fragile than other living stock and which needs to be carefully cared for, as well as taking into account that the illness with which the bird was diagnosed has an incubation period of 1-3 months, therefore, the presumption should not be applied in this case. The nature of the good opposes such an application, pursuant to the seller. However, the court considered that the seller managed only to prove that it is likely that the non-conformity did not exist at the moment of delivery. In case of such an uncertainty, it is the consumer who is supposed to benefit from the presumption set by the European legislator, and not the seller. The seller needs to prove that the bird was conforming the concluded contract at the moment of the delivery, and not only that there is doubt as to whether the bird was in non-conformity.

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