JUDGMENT OF THE COURT (First Chamber)

3 September 2009 *

In Case C-489/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Amtsgericht Lahr (Germany), made by decision of 26 October 2007, received at the Court on 5 November 2007, in the proceedings

Pia Messner

v

Firma Stefan Krüger,

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, M. Ilešič, A. Tizzano, E. Levits and J.-J. Kasel, Judges,

* Language of the case: German.

Advocate General: V. Trstenjak,
Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 11 December 2008,

after considering the observations submitted on behalf of:

— the German Government, by M. Lumma and J. Kemper, acting as Agents,

— the Belgian Government, by L. Van den Broeck, acting as Agent,

— the Spanish Government, by J. Rodríguez Cárcamo, acting as Agent,

— the Austrian Government, by E. Riedl, acting as Agent,

— the Portuguese Government, by L. Inez Fernandes and P. Contreiras, acting as Agents,

— the Commission of the European Communities, by V. Kreuschitz, W. Wils and H. Krämer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 February 2009,

gives the following

Judgment

1 The present reference for a preliminary ruling concerns the interpretation of Article 6 of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ 1997 L 144, p. 19).

2 The reference has been made in the course of proceedings between Ms Messner, a consumer, and Firma Stefan Krüger ('Stefan Krüger'), a company which operates an internet-based mail-order business, concerning reimbursement of the sum of EUR 278 following the rescission of a distance contract.

Legal context

Community legislation

3 Recital 14 in the preamble to Directive 97/7 provides:

'Whereas the consumer is not able actually to see the product or ascertain the nature of the service provided before concluding the contract; whereas provision should be made, unless otherwise specified in this Directive, for a right of withdrawal from the contract; whereas, if this right is to be more than formal, the costs, if any, borne by the consumer when exercising the right of withdrawal must be limited to the direct costs for returning the goods; whereas this right of withdrawal shall be without prejudice to the consumer's rights under national laws, with particular regard to the receipt of damaged products and services or of products and services not corresponding to the description given in the offer of such products or services; whereas it is for the Member States to determine the other conditions and arrangements following exercise of the right of withdrawal.'

4 Article 6(1) and (2) of Directive 97/7 provides:

'Right of withdrawal

1. For any distance contract the consumer shall have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any

reason. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods.

…

2. Where the right of withdrawal has been exercised by the consumer pursuant to this Article, the supplier shall be obliged to reimburse the sums paid by the consumer free of charge. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods. Such reimbursement must be carried out as soon as possible and in any case within 30 days.'

5 Article 14 of Directive 97/7 states:

'Minimal clause

Member States may introduce or maintain, in the area covered by this Directive, more stringent provisions compatible with the Treaty, to ensure a higher level of consumer protection. … '

National legislation

6 Paragraph 312d of the German Civil Code (Bürgerliches Gesetzbuch) ('the BGB'), which is headed 'Right of withdrawal and return in respect of distance contracts', states:

'1. In respect of a distance contract a consumer has a right of withdrawal under Paragraph 355. In the case of contracts for the supply of goods, the consumer may be granted a right of return under Paragraph 356 instead of the right of withdrawal.

2. In derogation from the first sentence of Paragraph 355(2), the withdrawal period shall not commence before the duties to provide information in accordance with Paragraph 312c(2) have been fulfilled; in the case of the supply of goods not before the date on which they are received by the recipient; in the case of recurrent supplies of goods of the same kind not before the date on which the first instalment is received by the recipient; and in the case of services not before the date on which the contract is concluded.'

7 Paragraph 355 of the BGB, which is headed 'Right of withdrawal in respect of consumer contracts', provides:

'1. If a consumer is granted a statutory right of withdrawal under this provision, he shall no longer be bound by his declaration of intention to conclude the contract if he has withdrawn from it in good time. The withdrawal does not have to be reasoned and must be declared to the seller in writing or by returning the item within two weeks; the withdrawal period shall be deemed to be observed in the case of dispatch in good time.

2. The period shall commence when the consumer has been informed in writing by a clearly formulated notice of his right of withdrawal which makes clear to him his rights in accordance with the requirements of the means of communication used and which also states the name and address of the person to whom withdrawal is to be declared and refers to the beginning of the period and the rules in the second sentence of paragraph 1. If notice is given after the contract has been concluded, the period shall be one month, in derogation from the second sentence of paragraph 1. If the contract is to be concluded in writing, the period shall not begin to run until the consumer has also been provided with a contract document, his written application or a copy of the contract document or of the application. If the time at which the period commences is disputed, the seller shall bear the burden of proof.

3. The right of withdrawal shall expire at the latest six months after the conclusion of the contract. In the case of the supply of goods the period shall not commence before the date on which they are received by the recipient. In derogation from the first sentence, the right of withdrawal shall not expire if the consumer is not given due notice of his right of withdrawal, and in the case of distance contracts concerning the provision of financial services it shall also not expire if the seller has not duly complied with his duties to provide information in accordance with Paragraph 312c(2)(1).'

8 Paragraph 357 of the BGB, which is headed 'Legal consequences of withdrawal and return', states:

'1. Unless otherwise provided, the provisions on statutory termination shall apply *mutatis mutandis* to the right of withdrawal and return. Paragraph 286(3) shall apply *mutatis mutandis* to the obligation to reimburse payments under that provision; the period laid down therein shall commence with the declaration of withdrawal or return by the consumer. In this connection the period shall commence, with regard to an obligation to reimburse on the part of the consumer, when that declaration is made and, with regard to an obligation to reimburse on the part of the seller, when that declaration is received.

…

3. In derogation from point 3 of the first sentence of Paragraph 346(2), the consumer shall pay compensation in respect of deterioration in the goods as a result of their proper use if he has been informed in writing of this legal consequence and of a means of avoiding it at the latest when the contract is concluded. This shall not apply if the deterioration is due solely to testing of the item. Point 3 of the first sentence of Paragraph 346(3) shall not apply if the consumer has been given due notice of his right of withdrawal or if he has become aware of it in some other way.

4. The above provisions shall be exhaustive as regards the rights of the parties.'

9 Paragraph 346(1) to (3) of the BGB, entitled 'Effects of termination of the contract', states as follows:

'1. If one party to a contract has reserved the right to terminate the contract or if he has a statutory right of termination, then, if termination occurs, any services received shall be returned, and the benefits derived from such services surrendered.

2. The debtor shall pay compensation for value, in lieu of restitution or surrender, where:

(1) restitution or surrender is excluded by virtue of the nature of what has been obtained;

(2) he has used up, transferred, encumbered, processed or transformed the object received;

(3) the object received has deteriorated or has been destroyed, any deterioration resulting from the proper use of the object for its intended purposes being disregarded.

If the contract specifies consideration, such consideration shall be taken as a basis for calculation of the compensation for value; if compensation is to be provided for the benefit deriving from use of a loan, evidence may be adduced to show that the value of such benefit was lower.

3. No obligation to pay compensation for value shall arise:

(1) if the defect which gives the right to termination became apparent only during the processing or transformation of the object;

(2) in so far as the creditor is responsible for the deterioration or destruction, or in so far as the damage would also have occurred in his hands;

(3) if, in the case of a statutory right of termination, the deterioration or destruction has occurred in the hands of the person entitled, even though he has taken the care that he customarily exercises in relation to his own affairs.

Any remaining enrichment must be surrendered.'

The dispute in the main proceedings and the question referred for a preliminary ruling

10 On 2 December 2005, Ms Messner bought from Stefan Krüger a second-hand laptop computer on the internet at a price of EUR 278.

11 At the time of that sale, Stefan Krüger placed general terms of contract on the internet, in which it was stated, inter alia, that the purchaser would be liable to pay compensation for value in respect of deterioration in goods through use for their intended purpose.

12 In August 2006 the computer display became defective. Ms Messner informed Stefan Krüger of that screen defect on 4 August 2006. The defendant refused to repair the defect free of charge.

13 On 7 November 2006, Ms Messner informed Stefan Krüger that she was revoking the contract of sale and offered to return the laptop computer in return for refund of the purchase price. That revocation was carried out within the period provided for in the BGB in so far as Ms Messner had not received effective notice, provided for in the provisions of that Code, such as to commence the period for withdrawal.

14 Ms Messner sought reimbursement from Stefan Krüger of EUR 278 before the Amtsgericht (Local Court) Lahr.

15 In opposition to that claim, Stefan Krüger submitted that Ms Messner was, in any event, obliged to pay it compensation for value inasmuch as she had been using the laptop computer for approximately eight months. For a comparable laptop computer, it argued, the average market rental price for three months would be EUR 118.80, with the

result that the compensation for the period during which Ms Messner had been using the computer at issue came to EUR 316.80.

16 In those circumstances, the Amtsgericht Lahr decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 6(2) in conjunction with the second sentence of Article 6(1) of Directive 97/7 … to be interpreted as precluding a provision of national law which provides that, in the case of a revocation by a consumer within the revocation period, a seller may claim compensation for the value of the use of the consumer goods delivered?'

The question referred for a preliminary ruling

17 By its question, the referring court asks, in essence, whether the provisions of the second sentence of Article 6(1) and Article 6(2) of Directive 97/7 should be interpreted as precluding a provision of national law which provides that, in the case of withdrawal by a consumer within the withdrawal period, a seller may claim compensation for the value of the use of consumer goods acquired under a distance contract.

18 Under the second sentence of Article 6(1) and Article 6(2) of Directive 97/7, the only charge that may be imposed on the consumer by reason of the exercise of his right of withdrawal is the direct cost of returning the goods.

19 In that regard, it follows from recital 14 in the preamble to Directive 97/7 that that prohibition of imposing on consumers charges other than those resulting directly from the return of the goods serves to ensure that the right of withdrawal guaranteed by that directive 'is to be more than formal'. Thus, the consumer could be dissuaded from exercising that right if it involved adverse financial consequences.

20 Furthermore, it also follows from recital 14 that the right of withdrawal is designed to protect the consumer in the particular situation of mail-order sales, in which he 'is not able actually to see the product or ascertain the nature of the service provided before concluding the contract'. The right of withdrawal is therefore intended to offset the disadvantage for the consumer resulting from a distance contract by granting him an appropriate period for reflection during which he can examine and test the goods acquired.

21 The prohibition laid down in the second sentence of Article 6(1) and Article 6(2) of Directive 97/7 must be interpreted in the light of those objectives.

22 In that regard, it should be noted that a general requirement to pay compensation for the value of the use of consumer goods acquired under a distance contract is incompatible with those objectives.

23 As was stated by the Advocate General in point 74 of her Opinion, if the consumer were required to pay such compensation merely because he had the opportunity to use the goods acquired under a distance contract while they were in his possession, he would be able to exercise his right of withdrawal only against payment of that compensation. Such an outcome would be clearly at variance with the wording and purpose of the second sentence of Article 6(1) and Article 6(2) of Directive 97/7 and would, in particular, deprive the consumer of the opportunity to make completely free and independent use of the period for reflection granted to him by that directive.

24 Likewise, the efficiency and effectiveness of the right of withdrawal would be impaired if the consumer were obliged to pay compensation simply because he had examined and tested the goods acquired under a distance contract. To the extent to which the right of withdrawal is intended precisely to give the consumer that opportunity, the fact of having made use of it cannot have the consequence that the consumer is able to exercise that right only if he pays compensation.

25 However, although Directive 97/7 is designed to protect the consumer in the particular situation of a distance contract, it is not intended to grant him rights going beyond what is necessary to allow him effectively to exercise his right of withdrawal.

26 Consequently, the purpose of Directive 97/7 and, in particular, the prohibition laid down in the second sentence of Article 6(1) and Article 6(2) thereof do not preclude, in principle, a legal provision of a Member State which requires a consumer to pay fair compensation in the case where he has made use of the goods acquired under a distance contract in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment.

27 In that regard, it follows from the last part of recital 14 in the preamble to Directive 97/7 that it is for the Member States to determine the other conditions and arrangements following exercise of the right of withdrawal. That power must, however, be exercised in accordance with the purpose of that directive and, in particular, may not adversely affect the efficiency and effectiveness of the right of withdrawal. Such would, for example, be the case if the amount of compensation, such as that referred to in the previous paragraph, were to appear disproportionate in relation to the purchase price of the goods at issue or also if the provision of national law were to place on the consumer the onus of proving that he did not use those goods during the period for withdrawal in a manner which went beyond what was necessary to permit him to make effective use of his right of withdrawal.

28 It is in the light of those principles that the national court must resolve the actual case before it, taking due account of all the elements of that case and, in particular, of the nature of the goods at issue and the length of the period at the end of which, as a result of the seller's failure to meet his obligation to provide information, the consumer exercised his right of withdrawal.

29 Regard being had to all of the foregoing, the answer to the question referred is that the provisions of the second sentence of Article 6(1) and Article 6(2) of Directive 97/7 must be interpreted as precluding a provision of national law which provides in general that, in the case of withdrawal by a consumer within the withdrawal period, a seller may claim compensation for the value of the use of the consumer goods acquired under a distance contract. However, those provisions do not prevent the consumer from being required to pay compensation for the use of the goods in the case where he has made use of those goods in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment, on condition that the purpose of that directive and, in particular, the efficiency and effectiveness of the right of withdrawal are not adversely affected, this being a matter for the national court to determine.

Costs

30 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

The provisions of the second sentence of Article 6(1) and Article 6(2) of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts must be interpreted as precluding a provision of national law which provides in general that, in the case of withdrawal by a consumer within the withdrawal period, a seller may claim compensation for the value of the use of the consumer goods acquired under a distance contract.

However, those provisions do not prevent the consumer from being required to pay compensation for the use of the goods in the case where he has made use of those goods in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment, on condition that the purpose of that directive and, in particular, the efficiency and effectiveness of the right of withdrawal are not adversely affected, this being a matter for the national court to determine.

[Signatures]