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INspiRE – European Integration – Rule of Law and Enforcement

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The Supreme Court of Justice of the Republic of Austria (Oberster Gerichtshof – OGH)
Judgment of 10 July 2012, file number: 4 Ob 80/12m
– Heizkörper (radiators) –

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Procedural history:

Preceding judgment *Landesgericht Wiener Neustadt, 19 January 2012, file number: GZ 18 R 211/11z-20*
Preceding judgment *Bezirksgericht Mödling, 18 August 2011, file number: GZ 14 C 114/11h-14*

Holding:

The appeal on points of law only is herewith granted.

The rulings of the prior instances are herewith overturned, and the case is remitted to the court of first instance for a fresh ruling subsequent to supplementary proceedings.

The costs of the appeal on points of law proceedings constitute further costs of the proceedings.

Rationale:

The Defendant operates as a wholesaler for sanitary wares; it resells products delivered by the manufacturer in their original packaging without randomly examining them. On 2 September 2010, the Plaintiff enquired of an employee in the Defendant's salesroom as to the prices, and then pur-

chased seven 600 x 1,400 mm radiators, as well as one 600 x 1,000 mm radiator, and small items, all for a total of 2,235.88 € (receipt enclosed). The Defendant delivered the merchandise to the Plaintiff's home, who assembled the radiators himself, assisted by a plumber with whom he is acquainted. In order to prevent the radiators becoming dirty during paint work, the Plaintiff left them in their packaging whilst installing them, and did not unpack them until immediately before turning the radiators on. He thereupon noticed that all seven 600 x 1,400 mm radiators were defective: They had welding spots which were clearly visible, and moreover had sharp edges; furthermore, there were small bubbles in the lacquer. Two or three of the radiators also had a leaking screw joint at the side, which led to water dripping out of them; it cannot be said with certainty whether this was caused by defects in the products themselves, or by their installation.

A few days after the sale had taken place, the Plaintiff complained about the defects in the radiators to the Defendant. The defendant offered to exchange the products by sending a driver to the Plaintiff who would deliver new radiators and collect the damaged ones. The Plaintiff did not approve of this, but instead demanded that an employee of the Defendant or of the manufacturing company examine the defects on the radiators in his home and then remove the radiators. He then commissioned a plumbing company to inspect the faulty radiators and estimate the cost of replacing the faulty radiators, including the small parts, sealing material and the working hours required for removing the old radiators and installing new ones, which came to 5,143.32 €. After drawing up this cost estimate, the Plaintiff himself drained the radiators and removed them in order to avoid moisture damage due to the leaking screw joints; then he handed the radiators over to a scrap merchant. The Plaintiff has not yet awarded a contract for the installation of new radiators, as he would like to wait for the outcome of the court case. During the hearing that was held on 15 June 2011, the Defendant once more offered to (only) deliver replacement radiators, which the Plaintiff again rejected.

With the action of 27 January 2011, the Plaintiff demands 5,143.32 € (encl.), including expenses, based on "compensation for damages/warranty claim" ("*Schadensersatz/Gewährleistunganspruch*"). The radiators purchased from the Defendant are said not to function, and to therefore be unusable; the Defendant is said to have failed to comply with the request to effect an improvement ("*Verbesserung*") through their removal and by delivering functional radiators, which led the Plaintiff to terminate the contract ("*Wandlung*"). The culpable non-fulfilment was said to have caused the Plaintiff damages amounting to the amount in dispute, which is said to be calculated on the basis of the costs of the removal and disposal of the defective radiators, as well as of the delivery and installation of functional, equivalent radiators. The fact that the sales contract had covered only the material and the delivery of the radiators, but not the installation of the radiators, is said not to preclude the claim pursued. Regardless of whether the Defendant is a distributor or the manufacturer, it is

said to be obliged to examine the goods that it sells, which it clearly failed to do. Given the fact that the Defendant refused to effect an improvement or to exchange the defective radiators, the Plaintiff is said to be entitled to replace them himself. Subsequent to a discussion on the conclusiveness of his request, the Plaintiff stated that he was requesting that the sales contract be terminated such that he be granted the right to "reclaim the purchase price of the radiators, as well as the costs of the removal and the installation of the new radiators" (see contentious hearing held on 25 March 2011, p. 3).

The Defendant moved for the dismissal of the request contained in the action. It stated that it had offered an inspection of the radiators to which the complaint had referred and, should they not be functional, to indeed exchange them, but the Plaintiff had rejected this. The Defendant claimed not to be obliged to meet the cost of removal, disposal and installation of new radiators. Defects in the goods delivered were not noticeable by the Defendant, as it is only a distributer; it claimed not to be liable for any defects.

The court of first instance dismissed the motion contained in the action. It found that the radiators had already been faulty on delivery, as undamaged paintwork could be expected as a matter of principle. It further found that the Plaintiff had the right to avail himself of the primary warranty remedies contained in Section 932 of the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch - ABGB*). The Defendant was said to have immediately offered to exchange the faulty radiators on receiving the complaint, on the condition that the Plaintiff remove the radiators himself. The Plaintiff rejected this offer, and was therefore unable to avail himself of the secondary remedies contained in Section 932 (4) of the General Civil Code (termination). As the contract had not also covered the installation and commissioning of the radiators, the Defendant was consequently not liable for the removal of the defective goods. The Court found that no compensation claims could be considered, as the Defendant could not be said to be culpable.

The court hearing the appeal on points of fact and law (*Berufung*) confirmed this judgment, and found that a normal appeal on points of law only (*Revision*) was admissible. The Court found that the tiered system stipulated in Article 3 (3) of Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (Sale of Consumer Goods Directive) had been transposed in the warranty rights. Section 932 of the General Civil Code is said to govern the legal appeals of which the person receiving a faulty performance (transferee) may avail himself or herself. There is said to be a strict hierarchy, this being in the interest of the transferor: The transferee is said to be initially limited to an improvement or exchange (primary remedy), as this is said to do best justice to the contractual intention. The transferee is said to only be able to assert the secondary remedies (reduction in price and termination) if

the subsequent and complete performance of the contract is impossible or unreasonable for one party, e.g. due to a severe delay. The improvement is to be carried out at the place of the original performance as a matter of principle; the costs of the improvement are to be paid by the transferor.

In accordance with the judgment of the European Court of Justice of 16 June 2011 in adjoined Cases C-65/09 and C-87/09, the seller is said to be obliged to either remove the consumer good from the item into which it had been installed, and to install the consumer good delivered as a replacement. Or to pay the expenses necessary for its removal and for the installation of the consumer good delivered as a replacement, if the contractual condition of a consumer good that was in breach of contract, which had been installed by the consumer in good faith and in accordance with its type and purpose prior to the defect manifesting itself, had been restored by means of the replacement delivery. Said obligation incumbent on the seller is said to exist regardless of whether he or she had entered into a contractual agreement in the sales contract to install the consumer good that had been purchased. Even if the fact of the consumer good not complying with the contract indeed did not arise from culpability on the part of the seller, the latter was said to have failed to fulfil the obligation into which it had entered in the sales contract by delivering a good that was not in compliance with the sales contract, so that it had to bear the consequence of the inadequate performance. In contrast, the consumer had already paid the purchase price, and therefore properly fulfilled his legal obligation. Furthermore, the circumstance was unable to constitute culpability on the part of the consumer in question that, trusting in the conformity of the delivered consumer good with the contract, the consumer had properly installed the delivered consumer good in good faith prior to the defect manifesting itself. In the event of neither party having acted culpably, it was justified for the seller to pay the costs of removing the consumer good that was in breach of the contract and installing the consumer good that was delivered as a replacement, as these additional costs could, firstly, have been prevented had the seller correctly fulfilled its contractual duties from the outset, and secondly had become necessary in order to restore the state of the consumer good conforming to the contract.

The Plaintiff was said to not have assembled the consumer good in good faith and in accordance with its type and purpose in the case at hand before the defect had come to light. He had in fact left the radiators in their packaging during installation; this was said not to conform to installation in good faith and in “accordance with its type and purpose”. The facts of this case are therefore said to differ from those ruled on by the European Court of Justice (ECJ), given that, in those cases, the subjects were microscratches on floor tiles, and the commissioning of a dishwasher which had to be installed and switched on in order to verify its functioning. In the present case, the Plaintiff could have easily detected the defects before installation if he had simply unpacked the radiators. Moreover, the seller

has the right to choose between either removing a consumer good that had been installed and installing the consumer good delivered as a replacement himself, or meeting the cost of removal and installation. The Plaintiff had demanded that an employee of the Defendant or of the manufacturing company come to his home to examine the defects and remove the radiators; the Defendant had refused to do so, for which it cannot be reproached. For this reason also, the contested ruling should be confirmed. The Appellant had not repeated his compensation claims.

The appeal on points of law only (*Revision*) is admissible and well-founded within the meaning of the motion to set aside the ruling.

The Plaintiff argues that the court of appeal on points of fact and law (*Berufungsgericht*) had failed to acknowledge the fact that he has an improvement claim against the Defendant regardless of culpability, based on the warranty resulting from the implementation of the Sale of Consumer Goods Directive, covering the removal of the defective item and the installation of a contractual replacement at the expense of the seller.

1. Section 932 of the General Civil Code states: (in the version of the Warranty Law Amendment Act [GewRÄG], Federal Law Gazette [BGBl I] 2001/48):

> "Rights of warranty
>
> Section 932
>
> (1) The transferee may demand an improvement (repair or provision of missing items), the exchange of the item, a reasonable reduction in the price (price reduction), or the rescission of the contract (termination, "*Wandlung*") in respect of a defect.
>
> (2) The transferee may, initially, demand only an improvement or the exchange of the item, unless an improvement or exchange is impossible or would constitute unreasonable efforts for the transferor in comparison with the other remedy. Whether this is the case shall also depend on the value of the asset free of any defects, the grievousness of the defect and the burdens for the transferee constituted by the other remedy.
>
> (3) …
>
> (4) If both the improvement and the exchange are impossible, or would constitute unreasonable efforts for the transferor, the transferee shall be entitled to a price reduction or, if it is not only a slight defect, the right of termination. The same shall apply if the transferor refuses to provide the improvement or exchange, or does not effect such within a reasonable period of time, if these remedies would constitute an unreasonable inconvenience for the transferee, or if they are unreasonable for him or her due to material reasons based on the person or the transferor."

2. In implementation of the tiered system stipulated in Article 3 (3) of the Sale of Consumer Goods Directive, the right of warranty in accordance with the Warranty Law Amendment Act (*Gewährleistungsrechts-Änderungsgesetz – GewRÄG*) assumes that the remedying of defects (improvement or exchange) takes precedence over the rights to influence a legal relationship (price reduction and termination). In the interest of the seller, the precedence attached to the rights to have defects remedied is deemed to constitute a certain compensation for the enhancement of the rights of the purchaser, given that as a rule, especially in cases of generic debt, the right to a second offer ("*Recht der zweiten Andienung*") constitutes the better alternative in economic terms for the supplier as oppose to the secondary remedies (price reduction and termination of the contract) (cf. 5 Ob 191/05g with further references).

3. In accordance with Section 932 (2) and (4) of the General Civil Code, the transferee may initially only demand an improvement or the exchange of the item. By virtue of the precedence allotted to an improvement, it is to be assured that the transferor is initially afforded an opportunity to restore the contractually-agreed state. The transferee may only assert the second-tier remedies, i.e. a price reduction or termination of the contract, if the improvement and exchange are either impossible or would constitute unreasonable efforts for the transferor, or if the transferor fails to comply with the request of the transferee, or fails to do so within a reasonable period of time. Furthermore, the transferee may demand a second-tier remedy if the primary remedy would constitute a considerable inconvenience for the transferee, or if the improvement or exchange is unreasonable for him or her due to compelling reasons inherent in the person of the transferor. The transferor is as a matter of principle to have a "second chance" to bring about the contractual state (cf. 8 Ob 14/08d with further references).

4. The owed performance in the instant case constitutes a generic sale. The Plaintiff was therefore initially only able to demand an improvement or the exchange of the defective item (Section 932 (2) of the General Civil Code). The exchange of the delivered faulty item for a contractual item constitutes an improvement in a broader sense, which self-evidently has to be effected at the expense of the transferor (P. Bydlinski in: Koziol/Bydlinski/Bollenberger (publishers), Allgemeines Bürgerliches Gesetzbuch, Kurzkommentar, Section 932, mn. 3).

5.1. According to these findings, the Plaintiff complained to the defendant seller about the defects in the radiators. The latter (only) offered to exchange the goods by sending the Defendant's driver to deliver new radiators and collect the damaged ones. The Plaintiff did not agree to this, but instead

demanded that an employee of the Defendant or of the manufacturing company come to his home to examine the defects and remove the already installed radiators. The Plaintiff subsequently drained the radiators himself, removed them and handed them over to a scrap merchant.

5.2. Given a realistic evaluation of these facts, it can be presumed without contention that the Defendant only agreed to the exchange of the radiators, as offered, and was not prepared to pay any further costs (e.g. for the removal of the radiators and installation of the radiators to be delivered as replacements).

5.3. In accordance with the rightly-cited case-law of the ECJ (adjoined cases C-65/09 and C-87/09 mn. 48 and 55), the delivery of the replacement free of charge (within the meaning of Article 3 (3) of the Sale of Consumer Goods Directive), which the Defendant was obliged to perform because of defective fulfilment (see Section 932 (2) of the General Civil Code: "exchange of the item"), comprises the seller's right to choose between either removing the faulty consumer goods from the item into which they had been built into and installing the goods delivered as a replacement itself, or meeting the costs necessary for such removal and installation of the goods delivered as a replacement.

5.4. If the Defendant was only willing to exchange the goods without effecting or paying for their removal, this constitutes facts in which the transferor refused to effect the (complete) improvement or the (complete) exchange (see Section 932 (4), second sentence, first alternative, of the General Civil Code). The consequence of this is that the Defendant is in default of its warranty obligations. The Plaintiff was hence entitled to avail himself of the second-tier remedies (price reduction or termination). His claim based on warranty in form of termination of the contract is hence fundamentally justified. The Defendant failed to assert the objection of the seller that might have rendered the claim null and void, namely alleging that the buyer had not installed the goods in good faith and in accordance with their type and purpose.

6.1. In accordance with the recently-adopted opinion in these cases, the circumstance that the purchased goods cannot be returned to the seller as they have already been handed over to a scrap merchant does not rule out the right to a termination per se, but it does lead to its value being subtracted from the repayment of the purchase price (cf. Reischauer in Rummel, ABGB § 932, mn. 4; 6 Ob 134/08m; Ris-Justiz RS0018593 [T2]).

6.2. The calculation of the value of the defective item is to be made according to the ratio between the value of the flawless good at the time of conclusion of the contract and the value of the defective item (relative calculation method, cf. Ris-Justiz RS0018764 [T1]).

7. As a result of the termination the following calculation shall be effected between the parties in dispute: The value of the defective goods which can no longer be returned (calculated according to the relative calculation method) shall be subtracted from the Plaintiff's right of repayment of the purchase price.

8.1. The claim relating to the removal of the defective radiators and installation of new radiators is however ill-founded.
8.2. Removal has been effected by the Plaintiff himself. If the damaged party carried out the repair himself or herself, which is permitted, he or she is entitled to claim compensation for the appropriate and expedient efforts expended while acting *negotiorum gestio*; these efforts cover all amounts (expenses, liabilities, loss of time) expended in order to carry out the transaction (2 Ob 128/89 = SZ 63/46). The Plaintiff has not submitted any estimation of such amounts.
8.3. It is uncontentious that the Plaintiff has not yet had any new radiators installed. The principle that the injured party is entitled to demand compensation for fictive repair costs (i.e. the expenses necessary for maintenance and reasonable costs, regardless of whether he or she actually has the repair carried out or whether the money will be used otherwise), also applies in application of Section 932a of the General Civil Code; the injuring party must effect payment on request in respect of an earmarked, offsettable amount in advance (6 Ob 154/09d with further references). The Plaintiff no longer pursued such a claim for the award of fictive repair costs based on damages during the appeal, so that he can no longer have recourse to such a claim, including in any continued proceedings.

9. Based on an incorrect legal opinion, the courts with jurisdiction for adjudging the facts had not handed down any findings with regard to the value of the defective items, which can no longer be returned. The impugned ruling is hence to be rescinded, and the case is to be remitted to the court of first instance for a fresh ruling subsequent to a broadening of the facts on which it is based within the meaning set forth herein.

10. The costs are herewith reserved in accordance with Section 52 (1), second sentence of the Code of Civil Procedure (*Zivilprozessordnung – ZPO*).