Moot Court SULEYMAN DEMIREL UNIVERSITY

Task: Write an appeal for V and for K. Even though the original decision was made in Switzerland, you have to appeal against the ruling as if it were made in your country and your according law. The appeal has to be brought before the supreme court of your country and you have to make statements concerning the formal entry requirements as well. The appeal and the answer to the appeal may not exceed 15 pages each (Arial, 11 pt).

Decision of the High Court of THURG – 03.03.2020

Facts:

K and V professionally breed parrots. On the 01.09.2018 a contract about the selling of six mealy parrots (Amazona farinose) was concluded, wherein K bought those paying a price of CHF 5'000.-. The mentioned parrots were – as is usual in the business – previously quarantined at V's Place for six months before the sale.

After transfer and stabling them in the shelter of K, aforementioned six parrots got sick on the 01.10.2018. K immediately called V and informed about the ongoing sickness and asked for advice. K also wrote V a letter concerning this sickness and demanded assistance as well as claiming warranty rights. Shortly after the beginning of the sickness, the six parrots died and as a consequence of the spreading sickness the rest of the parrots in K's shelter too. The parrots in K's shelter had a market value of CHF 1'000'000.-. Additionally, K had tickets for the opera with his wife on the 01.10.2018. He bought these tickets for a price of CHF 1'000.- Because of the sickness of the parrots, K stayed at the shelter and tried to help and prevent an additional spreading of the virus. K's expert concluded, that it is highly likely, that the six mealy parrots were infected with the Pacheco-virus and that the virus broke out because of the stress of the stabling. This evaluation cost CHF 4'000.-. K searched compensation from V, but was denied. K initiated a lawsuit against V on the 01.02.2019 in search of compensation for all damages mentioned before. The first court decided partly in favour of K, in particular for the damages of the six mealy parrots and the costs for the expert's evaluation. The rest was ruled against K.

K and V both appealed to this high court because they weren't satisfied with the aforementioned decision.

Considerations:

1. [Formal requirements]

2.a) According to Art. 197 Swiss code of obligation (OR), the seller is liable to the buyer both for the warranted characteristics and for ensuring that the goods do not have physical or legal defects that cancel or significantly reduce their value or suitability for the intended use. The seller's liability presupposes a defect in the purchased item, i.e. a deviation from the usually assumed or contractually agreed quality. The object of sale must be either objectively worthless or completely unusable as a result of the deviation or be impaired in such a way that the buyer, as a bona fide contractual partner, taking into account the views of the trade in the relevant branch of industry, would either not have concluded the purchase contract if he had known of the defect or would in any case only have been obliged to pay a lower price. In

application of Art. 8 of the Swiss Civil Code (ZGB), the buyer must in principle prove the defectiveness of the purchased item. The burden of proof that the defect existed at the relevant time, i.e. before the transfer of risk, also lies with him. It is sufficient to prove that the defect was in any case present in a seminal state. A small defect, which could have been easily remedied if it had been detected, often leads to a large loss. Proof is furnished when the judge is convinced of the correctness of a factual claim. He must be convinced of the existence of the fact from an objective point of view. However, the realisation of the fact need not be established with certainty, but it is sufficient if any doubts appear to be insignificant (BGE 128 III 275). In other words: proof is furnished when there is such a high degree of probability that the possibility of the contrary can no longer reasonably be expected; proof is failed when such conviction does not arise, not only when the judge is convinced of the falsity of the assertion.

b) It is considered undisputed that a mealy parrot has a significant deficiency in the sense of Art. 197 OR, if it was infected with a pacheco virus at the time the contract was concluded. V, on the other hand, claims that precisely this has not been proven. The expert had been able to detect the virus in even one of the deceased birds. The expert had merely expressed a suspicion to that effect.

In the expert's opinion, it was stated that there was a considerable risk that an animal infected with a pacheco virus could become infected in the event of a future stress situation such as a change of climate, location and temperature or during reproduction, and that such an animal was therefore completely unsuitable, particularly for a breeder. Although, according to the findings of the expert, no infectious agents could be detected, the conclusion of the previous instance appears to be correct that, on the basis of the course of the disease, the way in which it spread and the findings made, a viral disease had initially been present in at least one of the six mealy parrots; the virus had been imported from Cuba; and the disease had broken out in the sense of a stress factor as a result of the birds being introduced into the shelter. In particular, the first court must agree that alternative causes of death are a purely theoretical possibility, which are completely unlikely. It is important to note that the first deaths were observed in the mealy parrots and that the disease spread from these aviaries to the flock and broke out shortly after the stabling. This only allows the conclusion that the mealy parrots (or at least one of them) were carriers of the pacheco virus. It is true that no infectious agents could be detected due to the condition of the carcasses. However, due to the circumstances (course of the disease, type of spread), there is such a high degree of probability that a mealy parrot was carrying the pacheco virus that another cause of the birds' death can reasonably be ruled out. K thus proved in a legally correct manner that the delivery of V was afflicted with a defect within the meaning of Art. 197 OR.

c) Insofar as V continues to claim that K is responsible for this defect or that he is responsible for it himself because he violated the elementary duty to quarantine the birds again, the contested decision can be referred to in full. V did not deal with these considerations in any substantiated manner. He himself declared before the first court that no further quarantine would be carried out after quarantine had already been carried out. This was not necessary, nobody did it that way and he did not know any colleagues who would handle it that way. At these encores, he is to be detained. A self-inflicted disruption of the adequate causal relationship by K is therefore to be denied. This is a case of warranty. Therefore, K is entitled to reverse the sale with the conversion action (Art. 205 und 207 OR). V must reimburse the purchase price paid, including interest.

2.a) In addition, in accordance with the provisions on full defence, V must reimburse the costs of the proceedings i.e. the costs of the expert, the expenses of use and the damage directly caused to the purchaser by the delivery of defective goods (Art. 208 para 2 OR). The seller is also obliged to compensate for further damage unless he can prove that he is not at fault (Art. 208 para. 3 OR).

b) It is undisputed that V is not at fault, which is why he only has to compensate K for the damage directly caused by the delivery of the defective goods within the meaning of Art. 208 para 2 OR. The parties disagree in particular as to what falls under "direct" damage and whether K is also entitled to claim consequential damage under this title. The first court dealt with this legal question in detail and, contrary to the prevailing doctrine and following an opinion of Honsell (Schweizerisches Obligationenrecht, BT, S. 101 ff.; Basler Kommentar, Art. 208 OR N 8 f.), came to the conclusion that the purchaser is not liable for consequential damages based on Art. 208 para 2 OR.

c) Honsell argues that consequential harm caused by a defect should generally be subsumed under Art. 208 para. 3 OR. This is supported by the relationship of the cases to the so-called positive breach of contract under Art. 97 OR, which also presupposes fault. Apart from liability for material defects, fault is required everywhere in contract law for damages due to non-performance, poor performance or breach of secondary obligations.

d) Honsell's argumentation is not convincing. It is true that the fact that fault is assumed for liability in the rest of the law of obligations must be taken into account by interpreting the concept of direct damage restrictively. However, this must not have the consequence that Art. 208 Para. 2 OR is practically no longer applicable. In particular, it must be taken into account that the further-reaching causal liability is to be regarded as a compensation for the qualified formal liability requirements; these are the immediate notice of defects and the action within the time period of Art. 210 OR, whereby in addition, warranty claims of the buyer only exist if the material defect leads to a considerable reduction of the value or the usability of the object of purchase. The intensity of the adequate causal relationship or the length of the causal chain according to Keller/Siehr's (Keller/Siehr, Kaufrecht, 3.A., S. 76 f.) is suitable for delimitation. Dörig (Ersatz sogenannter "Mangelfolgeschäden" aus Kaufvertrag, Diss. Zürich 1985, S. 60, 65) uses a similar approach. Keller/Siehr emphasise that consequential damages caused by defects are only to be compensated on the basis of Art. 208 Para. 2 OR if they have occurred as a direct consequence of the defectiveness without the occurrence of further causes of damage. This corresponds to Dörig's view that it is justified to have the seller compensate the direct damage without fault because the damage occurred without any action on the part of the buyer, but solely because of the defectiveness of the object of sale delivered by the seller. This is to be agreed to. It is not necessary to decide here whether the loss of profit is to be subsumed under this concept of damage, as Dörig does.

e) The first instance objected to this approach, arguing that the criterion by which the intensity of the adequate causal link is assessed is determined only by the judge's discretion. According to the nature of the case, it was not possible to find precise criteria as to where the boundary should be drawn, which is why this approach was not very convincing, since it did not create a clear regulation. This objection may be correct. However, this is an inherent difficulty in the application of the law and, in particular, in case law. As a guideline for the decision, it should also be noted that the "direct damage" to be compensated on the basis of causal liability should be understood restrictively. This includes only the damage that occurred in "next sequence" without any other causes having to be added.

f) Applied on the case, it has to be taken into consideration, that the defect was already present in the parrots at the sale and the death of the other parrots (the value) represent consequential damages. The stabling represents the natural and next obvious sequence after the sale of quarantined parrots. The defect of the goods – the sickness of the parrots – spread in the stable and infected every other parrot, killing them in the end and causing significant damages. There is no other additional action or act between the stabling and the spreading of the sickness caused by the parrots. These damages are the direct cause of the defect of the sold goods (parrots) and therefore the damages have to be compensated as well. According to Art. 208 para. 2 OR K is entitled to receive a compensation of 1'000'000.- for his lost flock of parrots.

3. Insofar as the plaintiff wishes to derive claims for damages from lost opera enjoyment, it must be assumed that damage in the legal sense is an involuntary reduction in assets and may consist of a reduction in assets, an increase in liabilities or loss of profit. It corresponds to the difference between the current level of assets and the level that the assets would have been without the damaging event. The Swiss Federal Supreme Court rejected the concept of non-material damage in BGE 87 II 290 ff. The prevailing doctrine and the predominant cantonal jurisprudence have followed it in this view. The recognition of compensable non-material damage is to be rejected for Swiss law. Impairments which do not affect the assets do not constitute damage in the legal sense; the amount of money which may be paid for this is not compensation but reparation. This must also apply where a certain expenditure loses its intrinsic value because the purpose for which it was intended does not materialise or does not materialise completely. Therefore, the claim for compensation of the price for the tickets to the opera is rejected.

4. [Costs of the procedure and costs of the lawyers]

Decision:

1. The decision of the previous court is overruled and replaced as following:
2. V has to pay K the price of the sale of CHF 5'000.- (Reverse / Conversion claim of the contract)
3. V has to pay K compensation of damages in the amount of CHF 1'000'000.- (Dead parrots)
4. V has to pay K compensation of damages in the amount of CHF 4'000.- (Expert's evaluation)
5. K's claim for compensation of damages (Opera tickets) is denied.
6. [Costs]

[Information about the possibilities to appeal to the federal supreme court of Switzerland]