

**Regional Court of Chemnitz**

6 S 613/04 Regional Court of Chemnitz  
14 C 3579/03 Local Court of Chemnitz

Pronounced on 4 June 2004  
Registrar

**IN THE NAME OF THE PEOPLE**

In the dispute between

- **Plaintiff** -  
- **Appellant** -

Counsel for Plaintiff:

versus

- **Defendant** -  
- **Appellee** -

Counsel for the Defence:

**For claim arising from contract**

The 6. Civil Chamber of the Regional Court of Chemnitz - through ..., judge at the Regional Court, ..., judge at the Regional Court, and ..., judge at the Regional Court, by virtue of the oral hearing on 29 April 2004, issues the following

**JUDGMENT:**

- I. Following Plaintiff's appeal, the final judgment of the Local Court of Chemnitz dated 13 January 2004 - Az.: 14 C 3579/03 - will be **modified** as follows:
  1. It is established that Defendant cannot derive a claim against Plaintiff from the signature subscribed on 25 January 2002 as set out in Exhibit K 1.
  2. Defendant is liable to delete Plaintiff's entry in the register ...
- II. Defendant shall bear the litigation costs of both instances.
- III. The judgment is enforceable on a preliminary basis.
- IV. No appeal on questions of law is permitted.
- V. The amount in dispute in the appellate proceedings will be fixed at EUR 2,771.

**Reasons for the Decision:**

## I.

Pursuant to Section 540 I (1) Code of Civil Procedure, reference is made to the actual findings of the challenged judgment. With a view to the parties' submissions, the following is to be added: Plaintiff continues to pursue its first instance application - reaffirming, in principle, its previous legal opinion - and claims that Defendant's layout of the litigious contract form, Exhibit K1, Layout and language displace the real contents of the form - which is the conclusion of a contract against payment - whereas the (free) updating of the listing is highlighted for the client (reading the form only hastily). In addition, this compensation is demanded for a worthless service.

Defendant, in turn, seeks a dismissal of the appeal, claiming that the text of the form clearly indicates the possibility of the existing (and free) basic listing and the possibility of a listing against payment (bold print: order). Defendant claims that no misunderstanding arises and that Plaintiff was not willing to read the contract form.

As far as further details of the parties' submissions and the applications filed are concerned, the parties' legal briefs along with Exhibits as well as the record on the 29 April 204 hearing are incorporated by reference.

## II.

The appeal is admissible, satisfies the form requirements, was filed in time and is substantiated. Plaintiff's application for a declaratory judgment is justified pursuant to Section 823 II Civil Code in conjunction with Section 263 Criminal Code so that the *forum delicti* (Section 32 Code of Civil Procedure) was lying with the Local Court of Chemnitz.

1. The language of Defendant's offer submitted as Exhibit K 1 was such that the signing customers were led to believe that they would only take advantage of a free service. The small print of the text, in turn, which refers to the placing of an offer against payment, is, however, so disguised that an intention to deceive within the meaning of Section 263 I Criminal Code must be affirmed.

a)

The case in dispute was evaluated on the basis of the case law the German Supreme Court has issued on the use of invoice features in offers (NJW 01, 2187 and NJW 95, 1361). According to this case law, offers the layout of which resembles invoices qualify as implied deceit if, given their overall impression, they are misleading. In the relevant cases, these were typical features of invoices such as adding the transfer order, indicating the bank connection, the absence of a salutatory address and complementary close, the absence of information regarding the services offered, the indication of an order number. If such features of invoices (possibly in combination with the use of official terms) coin the overall impression so much that they entirely eclipse any indications as to an offer, this will constitute deceit, because they imply a pending payment obligation.

Deceit exists even despite the fact that an attentive reader will be able to realize the real character. Although "persons who are not generally unmindful must be protected from the consequences of their carelessness", hence the mere fact that the offers may be misunderstood (even if the author was aware of such misunderstanding) along with the hope that they will deceive is not sufficient to affirm the elements of an offence. The situation is, however, different if the author of the offer chooses a language which is "objectively suitable and subjectively intended to induce the addressee to misunderstand the actual circumstances". This can "(...) be the case even if the addressees of (...) letters, carefully scrutinizing them" should have been able to identify the real character of the letter (German Federal Court NJW 01, 2189). Deceit must therefore have been applied systematically and must not be simply a consequence but the purpose of the act (*ibidem*).

b)

The Chamber is convinced that the overall offer Exhibit K 1 shows that Defendant was pursuing such a systematic intention when drafting the offer Exhibit K 1 and therefore intended to induce frivolous customers reading the offer only superficially to sign the offer which they actually did not want and recognized as such.

This is evident from the overall text and layout:

- First, the overall appearance of an offer, e.g. salutatory address and complimentary close, is missing, and the service which is offered (against payment) is neither highlighted nor defined in more detail, but is put at the right bottom of the text at a subordinate place, a place where clients would rather suspect rather general business terms or similar information to be indicated.

- In contrast, the possibility of a free listing "with additional text and image in FAIRGuide" along with the request to complete the form is indicated in more conspicuous font, scope and graphic design.
- There exists only one signature line which apparently covers both the non-gratuitous order as well the updating of the entry and the offered free listing.

c)

The overall graphic design and text layout of the offer therefore imply an intention to conceal the non-gratuitous offer for a signing client who does not carefully read the form. This is clear particularly from the fact that the graphic design and layout of the non-gratuitous part - which, in view of the considerable fee, might be the relevant part for the client also from Defendant's point of view - is eclipsed, whereas print layout, font and graphic accentuation of the "request" to complete the form - in order to benefit from the free service - clearly comes to the fore. In order to benefit from this free service, the client will be inclined to subscribe his signature, which is possible only at one place. The latter fact illustrates Defendant's intention to deceive particularly clearly; In order to benefit only from the free service, the client would have to delete the part with the title "order". An inattentive client who wants to benefit only from the free service will frequently fail to do so.

d)

Defendant, in contrast, cannot point to the fact that the non-gratuitous character of the service would have been evident from the terms "non-gratuitous order, see below" and the term "order" in bold print. Defendant fails to realize that under the mentioned circumstances also unmindful and superficial consumers are protected. Similarly, Defendant fails to realize that the overall layout of the contract/form is relevant.

Defendant has certainly attempted to protect itself against the accusation of tort. Nevertheless, the unusual layout of the offer and the fact that the non-gratuitous offer is part of the "small print" are likely to deceive consumers. The Chamber is convinced that especially the hidden indications as to the non-gratuitous part of the offer weightily point to an intention to deceive: Nothing would have been more obvious in the course of fair business than to separate the gratuitous and the non-gratuitous part of the offer, to highlight the benefits of the non-gratuitous offer (which remain completely in the dark both in the contract and in Defendant's pleadings) and to provide for separate signatures.

e)

An offence under Section 263 Criminal Code also requires the plaintiff to suffer a pecuniary prejudice. Such a prejudice does exist, because it is not obvious how the non-gratuitous part of the service offered - as opposed to the offered free listing - shall constitute an equivalent to the compensation claimed. It is especially Defendant's particular circumstances that must be taken into account in the case at hand, because, even if recoverable, he cannot reasonably realize or sell without difficulties the services forced upon him (see Schönke-Schröder, Criminal Code, 26th edition, Section 263 - para 121). By the way, a

pecuniary prejudice has occurred already upon conclusion of the contract, because Defendant has to bear the risk of recognizing the deceit and seeking a cancellation of the contract (see Dreher-Fischer, Criminal Code, 50<sup>th</sup> edition, Section 263 Criminal Code, para 32 a).

2. The application referred to in paragraph 2 is also justified because Defendant cannot be assumed to have a warrantable interest in entering Plaintiff's data against the latter's will.

### III.

The cost decision is based on Sections 97, 91 Code of Civil Procedure. The decision on the preliminary enforceability of the judgment is based on Sections 708 (10), 711, 713 Code of Civil Procedure by analogy. An appeal on questions of law was neither applied for nor filed, because the requirements set forth in Section 543 II Code of Civil Procedure in conjunction with Section 26 (8) of the Introductory Act to the Code of Civil Procedure are not satisfied.

Judge at  
the Regional Court

Judge at  
the Regional Court

Judge at  
the Regional Court

Participated in the  
deliberations, but was not  
able to sign the decision  
because he was on vacation