

The Forgotten Easement

Conditions for incapacity, the scope of the duty to perform the contract, and the consequences of a breach

Court	<i>Bundesgerichtshof – Federal Court of Justice, Fifth Civil Senate</i>
Date	<i>19 January 2016</i>
Case Number	<i>V ZR 273/16</i>
Reference	<i>DNotZ 2018, 686</i>
Finality	<i>Final</i>
Provisions	<i>Sections 242, 275 para. 1 first alt., 280 para. 1 German Civil Code (BGB)</i>

Official Headnotes

- a) *The contracting parties are obliged, on the one hand, to cooperate in achieving and realising the aim and purpose of the contract and to support each other insofar as this is reasonably compatible with their own interests. On the other hand, they must refrain from anything that could jeopardise or impair the achievement of the purpose of the contract and the success of the performance.*
- b) *Anyone who has undertaken to grant their contractual partner a limited right in rem to their property must, in any case, check before the limitation period for the claim to obtain the right expires whether the approved encumbrance has been entered in the land register when subsequently disposing of the property and, if this has not yet been done, must arrange the dispositions in such a way that registration of the approved right remains possible and is not at the discretion of a third party.*

Operative Part

The judgement of the 10th Civil Division of the Dresden Higher Regional Court of 20 October 2016 is set aside on the basis of the plaintiff's appeal.

The case is referred back to the Court of Appeal for a new hearing and decision, including on the costs of the appeal proceedings.

Ipso iure

Facts of the Case

- 1 *By notarised contract dated 8 February 2006, the plaintiff purchased parts of neighbouring properties from two sellers, including a 442 m² plot from the defendant housing association for approximately €1.4 million. In the purchase agreement, the defendant undertook to grant the plaintiff a right of way, right of access and right of conduit on the remaining part of the plot in the form of an easement. The purchase agreement was executed. The easement granted by the defendant in the purchase agreement has not yet been registered. The defendant sold and transferred ownership of the its remaining property to H. I. GmbH & Co. KG (hereinafter referred to as KG). By contract dated 8 July 2014, the plaintiff sold the property acquired from the defendant to S. AG (hereinafter referred to as AG). During the sale by the plaintiff, it turned out that the easement had not been registered. The plaintiff contacted KG, which signalled its willingness to subsequently register the easement, but then failed to respond to a draft contract from the plaintiff.*

- 2 *The plaintiff demands that the defendant have an easement registered on the KG's property in favour of the respective owner of the AG's property with the content described in the 2006 purchase agreement, in particular to obtain approval from the KG, or alternatively to indemnify it against claims for damages by the AG.*
- 3 *The Regional Court dismissed the action. The Court of Appeal rejected the plaintiff's appeal. With the appeal on points of law admitted by the Senate, which the defendant has moved to dismiss, the plaintiff is pursuing its claims.*

Reasons for the Decision

I.

- 4 *The Court of Appeal has doubts about the admissibility of the main claim. Admittedly, the plaintiff could no longer apply for an obligation on the part of the defendant to grant the easement, as the defendant was no longer the owner of the property to be encumbered. But it was unclear what means the defendant should use to influence KG with the aim of obtaining the easement and how a corresponding judgement against the defendant could be enforced. However, this might not be pursued further. The claim was unfounded because the objection of inability (Sec. 275 par. 1 alt. 1 BGB) precluded the asserted claim. Incapacity only existed if it was certain that the third party would in all likelihood refuse to cooperate in establishing the contractual legal situation. However, according to the plaintiff's own submission this was the case. She had argued that the KG had initially signalled its willingness to establish the easement, but then failed to respond to the draft contract. The defendant had rightly understood this as a refusal to cooperate.*
- 5 *The alternative claim was also unfounded. The plaintiff could only demand exemption from a specific liability. Whether and what claims the AG was asserting against her had not been established. The basis for such a claim remained unclear because the plaintiff had not submitted the contract with the AG. The witness K, who had been named as the person responsible for entering into an obligation to procure the easement on the KG's property, could not be heard because his examination would have amounted to inadmissible discovery evidence. Furthermore, a claim for damages failed due to the plaintiff's predominant contributory negligence. Prior to the sale to the AG, the plaintiff had learned that the agreed easement had not been entered in the land register and that the servient property had since been sold. Nevertheless, the plaintiff had committed itself to the AG to procure the easement and had thus caused its own damage.*

II.

- 6 *These considerations do not stand up to legal scrutiny. On the basis of the given reasoning, the plaintiff cannot be denied either the claim for legal redress pursued in the main claim (A. below) or the claim for indemnification pursued in the alternative claim (B. below).*
- 7 *A. Main claim*
- 8 *I. The plaintiff's main claim is admissible.*
- 9 *1. It satisfies the requirements of Sec. 253 par. 2 No. 2 ZPO (German Code of Civil Procedure) because it is sufficiently specific.*
- 10 *a) According to Sec. 253 par. 2 No. 2 ZPO, the statement of claim must contain a specific request. A request is generally considered sufficiently specific if it describes the claim in concrete terms, thereby defining the scope of the court's decision-making authority (Sec. 308 ZPO), reveals the content and scope of the substantive legal force of the desired decision (Sec. 322 ZPO), does not shift the risk of the plaintiff losing the case to the defendant through avoidable inaccuracy, and finally allows enforcement of the judgment without continuation of the dispute in enforcement proceedings. However, the*

requirements for specifying the subject matter of the dispute in the statement of claim also depend on the particularities of the substantive law applicable and the circumstances of the individual case. The requirements for the specificity of the statement of claim must therefore be determined by weighing the defendant's interest in being able to defend itself exhaustively against the action against its interest in legal clarity and legal certainty with regard to the effect of the decision, and the plaintiff's equally worthy interest in effective legal protection (Federal Court of Justice, Judgment of 28 November 2002 - I ZR 168/00, BGHZ 153, 69, 75; cf. for the surrender of objects: Senate, judgment of 10 July 2015 - V ZR 206/14, BGHZ 206, 211 marg. no. 9).

- 11 In an application for the performance of acts intended to achieve a specific result, the plaintiff need only specify the desired result. He may leave the choice between different means suitable for achieving the result to the debtor (cf. BGH, judgment of 28 September 2011 - VIII ZR 242/10, NJW 2012, 63 marg. no. 16; BAGE [i.e. Official Collection of Decisions of the Federal Labour Court] 136, 152 marg. no. 11; Musielak/Voit/Foerste, ZPO, 14th ed., Sec. 253 marg. no. 32; Stein/Jonas/Roth, ZPO, 23rd ed., Sec. 253 marg. no. 31). Depending on the nature of the claim pursued, the defendant may even be obliged to do so (for the claim for removal of a disturbance under Sec. 1004 BGB: Senate, judgments of 17 December 1982 - V ZR 55/82, NJW 1983, 751, 752, of 20 November 1992 - V ZR 82/91, BGHZ 120, 239, 246; cf. also Senate, judgment of 12 December 2004 - V ZR 98/03, NJW 2004, 1035, 1037).
- 12 b) The plaintiff's main claim satisfies these requirements. In it, she requested that the defendant be ordered to establish a right of way, right of access and right of conduit in the form of an easement in favour of the property now owned by the AG on the property now owned by the KG, in particular to obtain the KG's consent to this easement. The plaintiff has precisely defined the content of the claimed easement by referring to Annex G of the parties' purchase agreement dated 8 February 2006. The specificity of its application is not precluded by the fact that it has not specified how the defendant is to bring about the described result. It was entitled to leave this to the defendant because it specified the objective and the defendant is in a position to assess what needs to be done (see BAGE 70, 165, 169 f.: "influence" of a party to a collective agreement on its members).
- 13 2. Nor does the plaintiff lack an interest in legal protection.
- 14 In exceptional cases, a claim may lack an interest in legal protection if the performance demanded of the defendant – in this case, the defendant's demand for the creation of an easement – would be impossible or certainly unenforceable (Senate, judgment of 21 February 1986 – V ZR 226/84, BGHZ 97, 178, 181). However, this exceptional case only applies if the impossibility of the requested performance is established beyond doubt. This is not the case here.
- 15 II. On the merits, the main claim cannot be dismissed on the grounds given in the appeal judgement. Contrary to the assumption of the appeal court, the plaintiff's claim for the granting of the easement pursued in the main claim does not fail on the basis of the findings made so far due to the defendant's inability.
- 16 1. The Court of Appeal correctly assumes that the plaintiff can continue to demand that the defendant procure the easement agreed in the parties' purchase agreement.
- 17 a) However, this is not self-evident. The defendant had already granted the agreed easement in the parties' purchase agreement of 8 February 2006 and had thus done everything necessary on its part to fulfil its obligation. This is because, when establishing a limited right in rem to a piece of land, this only includes the granting of the registration permit and the removal of any obstacles to registration under land registry law, such as the lack of prior registration (Sec. 39 par. 1 GBO [i.e. Land register Act]), but not the registration required for the creation of the limited right in rem pursuant to Sec. 873 par. 1 BGB. This is an official act which the debtor cannot perform for legal reasons and which, subject to any agreements to the contrary between the parties, must be arranged by the creditor (see Senate, judgment of 15 October 2004 - V ZR 100/04, WM 2004, 2443, 2446 right column).

- 18 b) However, contrary to the defendant's opinion, this circumstance does not mean that she is no longer obliged to continue to cooperate in the creation of the easement.
- 19 aa) Each contracting party must take into account the interests of the other party known to it within reasonable limits (see RGZ 101, 47, 49). The contracting parties are obliged, on the one hand, to cooperate in achieving and realising the aim and purpose of the contract and, insofar as this is reasonably compatible with their own interests, to support each other (cf. Senate, judgments of 12 July 1968 - V ZR 161/66, WM 1968, 1299, 1301 and of 1 June 1973 - V ZR 134/72, WM 1973, 1270, 1272). On the other hand, they must refrain from doing anything that could jeopardise or impair the achievement of the purpose of the contract and the success of the performance (see Senate, judgment of 15 October 2004 - V ZR 100/04, WM 2004, 2443, 2446 I. Sp.; Federal Court of Justice, judgment of 5 April 2016 - XI ZR 440/15, BGHZ 209, 329 marg. no. 16).
- 20 bb) Due to the obligation to perform in good faith, a contractual partner who has done everything on his part to ensure the success of the contract can therefore also have caused the other party to be obliged to provide the other party with documents on which the latter is dependent for the realisation of the contractual objective (Senate, judgment of 12 July 1968 - V ZR 161/66, loc. cit.), to grant a deletion authorisation in advance to the notary as a trusted party in order to enable the other contracting party to pay out a loan with which the purchase price is to be financed (Senate, judgment of 1 June 1973 - V ZR 134/72 loc. cit.), to reissue a lost registration authorisation or to make land register declarations required by the land registry office for the execution of the agreed registrations. The requirement to refrain from anything that jeopardises or frustrates the purpose of the contract obliges the debtor, for example, not to damage the purchased item between the transfer of risk and the transfer of ownership (see Senate, judgment of 17 June 2005 - V ZR 328/03, BGH-Report 2005, 1371; BGH, judgment of 19 October 1977 - VIII ZR 72/76, WM 1977, 1423). Anyone who, like the defendant in this case, has undertaken to grant their contractual partner a limited right in rem to their property must therefore, in any case, check before the limitation period for the claim for the granting of rights expires, whether the approved encumbrance has been entered in the land register when disposing of the property at a later date, and, if this has not yet been done, must arrange the dispositions in such a way that the registration of the granted right remains possible and is not at the discretion of a third party.
- 21 c) According to the findings of the Court of Appeal, the defendant did not comply with this obligation. This is because the establishment of the easement, which the defendant undertook to create vis-à-vis the plaintiff, now depends on the willingness of KG to cooperate. According to Sec. 280 par. 1 and Sec. 241 par. 2 BGB, the defendant is therefore obliged to compensate the plaintiff for the damage incurred as a result of this failure. According to Sec. 249 par. 1 BGB, it must restore the situation that would have existed if it had fulfilled its obligation to perform. In this case, it would still be possible for it to establish the easement with the agreed content; it is therefore obliged to procure this right for the plaintiff.
- 22 2. However, an obligation to procure rights arising under Sec. 249 para. 1 BGB does not apply in the event of the debtor's insolvency pursuant to Sec. 275 para. 1 alt. 1 BGB.
- 23 a) The Court of Appeal does not fail to recognise that, according to the case law of the Federal Court of Justice, the debtor's inability to pay does not arise simply from the sale of the property and the associated loss of the right of disposal (BGH, judgment of 9. October 1974 - VIII ZR 113/72, NJW 1974, 2317) and does not already exist when performance depends on the will of a third party (cf. Senate, judgment of 21 June 1974 - V ZR 164/72, BGHZ 62, 388, 393 f.; BGH, judgments of 30 June 1971 - VIII ZR 147/69, BGHZ 56, 308, 311, of 24 June 1982 - III ZR 178/80, WM 1982, 1234 under 4 and of 22 November 1995 - VIII ZR 4/95, BGHZ 131, 176, 183). According to this, inability only exists if it is certain that the debtor can no longer obtain the power of disposal and cannot influence the matter in order to satisfy the asserted claim, for example because the purchaser, who could grant the limited right in rem to the acquired property, will in all probability refuse to cooperate (cf. Senate, judgments dated 21. June 1974 - V ZR 164/72, BGHZ 62, 388, 393 f., dated 20 November 1981 - V ZR 155/80, WM 1982, 206,

208, dated 7 October 1983 - V ZR 261/81, NJW 1984, 479 and of 26 March 1999 – V ZR 368/97, BGHZ 141, 179, 182; Federal Court of Justice, judgments of 15 June 2005 – VIII ZR 271/04, NJW-RR 2005, 1534, 1535, of 25 October 2012 – VII ZR 146/11, BGHZ 195, 195 marg. no. 33, of 4 December 2012 - II ZR 159/10, WM 2013, 320 marg. no. 41 and of 21 January 2015 - VIII ZR 51/14, WM 2015, 687 marg. no. 25).

- 24 b) However, the Court of Appeal misjudges the requirements for the debtor to demonstrate inability to pay and to provide evidence of inability to pay.
- 25 aa) If impossibility is a prerequisite for a claim, as in the case of claims under Sec. 311a para. 2 BGB or Sec. 280 para. 1 and 3 and Sec. 281 BGB, the Federal Court of Justice, in order not to overburden the creditor with the burden of proof and argumentation, has consistently held that resale indicates impossibility unless the debtor demonstrates that resale is not possible and burden of proof on the creditor, the Federal Court of Justice has consistently held that resale indicates impossibility unless the debtor demonstrates that he is willing and able to perform (Senate, judgment of 26 March 1999 - V ZR 368/97, loc. cit. p. 182 et seq.; Federal Court of Justice, judgments of 15 June 2005 - VIII ZR 271/04, loc. cit. p. 1536, and of 21 January 2015 - VIII ZR 51/14, loc. cit.). However, this presumption does not apply to debtors who, like the defendant in this case, oppose the creditor's claim for performance by invoking the defence of inability to perform under Sec. 275 para. 1 BGB. The circumstances relevant for assessing his inability to pay are largely based on his legal and factual relationship with the purchaser, in particular the agreements made with the purchaser and the other possibilities of influence which the debtor, unlike the creditor, can and must readily present in more detail from his own knowledge (see Senate, judgment of 26 March 1999 - V ZR 368/97, BGHZ 141, 179, 182 f.). He can and must explain and, if necessary, prove that and for what reasons it is not (or no longer) legally or factually possible for him to procure the promised right.
- 26 bb) Accordingly, it cannot be assumed that the defendant is incapable of doing so.
- 27 (1) The inability of the defendant may also be apparent from the submissions of the plaintiff, on which the Court of Appeal bases its decision in this case. This is because, unlike cases of exemption from the obligation to perform pursuant to Sec. 275 para. 2 and 3 BGB, the debtor's inability to perform is not only to be taken into account as a defence raised by the debtor, but also as a legally invalidating objection if the plaintiff himself presents the facts giving rise to the defendant's inability to perform. However, as in the case of a statement by the defendant, who is obliged to provide evidence, it must also be clear from the plaintiff's submission that and for what reasons it is impossible for the purchaser to still agree to cooperate in the creation of the easement or to legally enable the defendant to encumber his property accordingly.
- 28 (2) This is not the case here. According to the findings of the Court of Appeal, the plaintiff only argued that the KG had not responded to the draft contract for the creation of the easement sent to it, but not that it was no longer willing to cooperate in the creation of the easement. It is irrelevant whether the defendant, as the Court of Appeal believes, justifiably understood the plaintiff's submission in the latter sense or was entitled to understand it in this sense. Rather, either the court must determine that the purchaser – in this case the KG – is in fact not prepared to establish the easement under any circumstances (Sec. 275 para. 1 BGB), or the debtor – in this case the defendant – must demonstrate that the purchaser is only prepared to do so under conditions which entitle it to refuse performance under Sec. 275 para. 2 BGB. This has not happened. Incidentally, the plaintiff herself expressed the view in the passage cited by the Court of Appeal that KG's willingness to cooperate in the creation of the easement could not be ruled out from the outset despite its silence on the contract offer.
- 29 3. Contrary to the opinion expressed by its legal representative in the oral hearing before the Senate, the defendant's obligation to procure the right does not lapse due to contributory negligence on the part of the plaintiff.
- 30 a) However, the consideration of contributory negligence on the part of the plaintiff did not fail from the outset because the easement owed cannot be reduced. The defendant owes the provision of the

easement as compensation in kind. Therefore, any contributory negligence on the part of the plaintiff – which would have to be established – would also have to be taken into account in this respect. Technically, this could be achieved in a similar way to a claim for the removal of a disturbance pursuant to Sec. 1004 para. 1 BGB, to the occurrence of which the owner's fault contributed. There, contributory negligence is taken into account in such a way that the order to remove the disturbance is limited by the finding that the affected owner must contribute to the costs of removal in proportion to his share of liability (see Senate, judgment of 18 April 1997 - V ZR 28/96, BGHZ 135, 235, 239 f.). In the present case, the order for the defendant to provide legal redress would have to be limited, if necessary, by the finding that the plaintiff must contribute to the costs of legal redress in proportion to her share of liability.

- 31 *b) However, the plaintiff's contributory negligence does not arise solely from the fact that more than five years elapsed between the parties' purchase agreement of 8 February 2006 and the sale of the encumbered property to the KG on 29 September 2011, and more than eight years elapsed between the sale of the dominant property to the AG on 8 July 2014.*
- 32 *B. Subsidiary request*
- 33 *I. The plaintiff's alternative claim is ultimately admissible.*
- 34 *1. However, as a claim for exemption, it is inadmissible due to the lack of a specific description of the claim from which exemption is sought. The requirements of Sec. 253 para. 2 No. 2 ZPO also apply to a claim for exemption. Therefore, the plaintiff seeking exemption from a liability to pay damages must specify the reason for and amount of the debt from which exemption is sought (see Senate, judgment of 6 March 1987 - V ZR 216/85, BGHR ZPO § 253 Release 1; BGH, judgments of 4 June 1996 - VI ZR 123/95, WM 1996, 1986, 1987 and of 23 September 2004 - IX ZR 137/03, NJW-RR 2005, 494, 497 f.). This is lacking here because the plaintiff has not quantified its obligation to pay damages to the AG.*
- 35 *2. However, the inadmissible application for exemption must be reinterpreted as an admissible application for a declaration of the defendant's obligation to indemnify (cf. Zöller/Greger, ZPO, 32nd ed., Sec. 256 marg. no. 15c). This is also permissible in the appeal instance if the plaintiff's interest in an immediate determination – as in this case – results directly from his submission in the appeal judgment and thus without further findings (cf. BGH, judgments of 26 September 1957 - II ZR 42/56, WM 1957, 1335, 1338 and of 23 September 2004 - IX ZR 137/03, NJW-RR 2005, 494, 498).*
- 36 *II. Contrary to the opinion of the Court of Appeal, the plaintiff has conclusively presented the claim for indemnification asserted in the alternative, in the event that the main claim is dismissed. On the basis of the findings to date, this claim does not fail due to the plaintiff's predominant contributory negligence.*
- 37 *1. According to its submission, which must be assumed to be correct for the purposes of the appeal proceedings in the absence of any other findings, the plaintiff could demand compensation from the defendant in lieu of performance pursuant to Sec. 280 para. 1 and 3, § 283 BGB and, in this context, Sec. 249 para. 1 BGB, if the subsequent creation of the easement is unsuccessful.*
- 38 *a) The defendant is obliged to the plaintiff under the purchase agreement for the partial area to establish an easement with the claimed content on the property of KG. The defendant has not yet fulfilled this obligation, even though it has already granted the claimed right. This is because it owes not only the granting of the right, but also the establishment of the right by entry in the land register. It would be released from this obligation by operation of law pursuant to Sec. 275 para. 1 BGB if the KG definitively refuses to cooperate in the creation of the land charge, is not obliged to do so under the contract with the defendant, and the creation of the easement under this contract is not possible without its cooperation.*
- 39 *b) The defendant would also be responsible for its inability to perform (cf. Sec. 280 para. 1 sentence 2 BGB). This follows from the plaintiff's submission, which is to be assumed to be correct for the purposes*

of the appeal proceedings, that the defendant negligently breached its duty to perform. When selling the property to be encumbered to the KG, it did not ensure that it would remain possible to encumber the property with the easement independently of the KG's wishes.

- 40 c) This resulted in damage to the plaintiff.
- 41 aa) It has substantiated its claim that it undertook to the AG to "subsequently deliver" the easement in favour of the sold property, the creation of which it could demand from the defendant on the basis of the property purchase agreement with the defendant. Contrary to the opinion of the Court of Appeal, the assertion that such an obligation was entered into is sufficient to conclusively substantiate such an obligation. It is not necessary to submit the property purchase agreement with AG for this purpose.
- 42 bb) The defendant offered a suitable witness for its assertion. It named witness K, who was to be summoned at the address of the AG. This offer of evidence was admissible and sufficient, as the plaintiff made a specific assertion based on the witness's knowledge and the party presenting the evidence does not, in principle, have to comment on how a witness learned the fact to be proven and what evidence it has for the accuracy of the assertions based on the witness's knowledge (Senate, judgment of 16 January 1987 - V ZR 185/85, BGHR ZPO § 373 Substantiation 1; Federal Court of Justice, decision of 1 August 2007 - III ZR 35/07, juris marg. no. 7). For the appeal proceedings, it must therefore be assumed that the witness confirms the plaintiff's assertion that it is obliged to procure the easement for the AG.
- 43 cc) The AG would suffer damage due to the loss of the advantages associated with the promised easement if the easement were ultimately not established. The plaintiff would have to compensate the AG for this damage in lieu of performance in accordance with Sec. 280 para. 1 and 3, Sec. 283 BGB. The defendant would have to indemnify the plaintiff for this obligation in accordance with Sec. 249 para. 1 BGB (see: BGH, judgment of 16 November 2006 - I ZR 257/03, NJW 2007, 1809 marg. no. 20).
- 44 2. The defendant's obligation to pay damages would lapse pursuant to Sec. 254 para. 1 BGB if the damage was predominantly caused by the plaintiff's own fault. However, the findings of the Court of Appeal do not indicate any fault on the part of the plaintiff.
- 45 a) According to these findings, the plaintiff's own conduct contributed to the occurrence of the damage. She entered into the obligation to procure the easement even though she knew at the time of concluding the property purchase agreement with the AG that the right of way, right of access and right of conduit agreed with the defendant had not been entered in the land register and that the servient property had since been sold.
- 46 b) However, a claim for damages under Sec. 254 para. 1 BGB is not excluded simply because the conduct of the injured party contributed adequately to the occurrence of the damage, but only if a "Contributory negligence" on the part of the injured party contributed to the damage. This is only the case if the injured party disregards the care that a reasonable and prudent person would normally exercise to avoid damage to themselves (see Senate, judgment of 18 April 1997 - V ZR 28/96, BGHZ 135, 235, 240 f.; BGH, judgment of 17 June 2014 - VI ZR 281/13, WM 2014, 1979 marg. no. 9).
- 47 The findings made by the Court of Appeal do not show that the plaintiff disregarded this duty of care. It is true that it entered into the obligation to procure the easement even though it had not yet been established and the property to be encumbered had been sold. However, whether this was contrary to the required diligence can only be assessed by evaluating all the circumstances surrounding the assumption of this obligation. It must be taken into account that the plaintiff only entered into the obligation to procure the easement after KG had declared its willingness to grant the easement upon request. The assessment would also have to take into account the other circumstances, including the necessity of selling the property, which the plaintiff only raised in the appeal proceedings. The plaintiff would only be partly to blame if a reasonable and sensible person in her position, taking into account KG's declaration that it was prepared to grant the easement and the other circumstances, would have

refrained from entering into an obligation to procure the easement. The Court of Appeal did not make any findings in this regard.

III.

- 48 *The appeal judgment cannot therefore be upheld. The case is not ready for a decision because the necessary findings are lacking. It must therefore be referred back to the Court of Appeal, setting aside the appeal judgment.*

Note of the editors

It is a fundamental judgment to the buyers remedies in case of defect. It should be read carefully