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Supreme Court rules on diesel emissions scandal

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The Supreme Court recently made the first substantive decision in the diesel emissions scandal.⁽¹⁾ The Court decided that the car dealer must take back the car and pay back the purchase price, minus a usage fee for the duration of use. The buyer additionally receives interest on the purchase price in the amount of 4% per annum from the time of payment until reimbursement.

Facts

The plaintiff purchased a VW Tiguan Lounge TDI BMT from the defendant's car dealership in March 2015 for €26,890, with a mileage of 500 kilometres at the time of purchase and 70,680 kilometres at the conclusion of proceedings at the first instance. The remaining mileage of the vehicle at the time of purchase was assumed to be 249,500 kilometres. The car was equipped with a diesel engine type EA 189 of emission class EU 5.

In addition, the car was equipped with an inadmissible deactivation device that could manipulate the exhaust gas recirculation. Thus, the prescribed nitrogen oxide emission values could not be complied with in operation. The manufacturer, therefore, developed a software update, which was approved by the German registration authority. The deactivation device remains in the car even after the software update, and causes full exhaust gas recirculation to take place only in a temperature range of 15 degrees Celsius and 33 degrees Celsius.

The plaintiff refused the software update offered to him and sued the car dealer for rescission of the contract. He argued that due to the temperatures prevailing in Central Europe, and thus also in Austria, the full exhaust gas recirculation in the narrow "thermal window" mentioned above was only effective during a period of four or five months per year. This runs counter to the regulatory purpose of the relevant EU provisions on nitrogen oxide reduction, because the regular case of fully active exhaust gas recirculation occurs less frequently than the exception of exhaust gas recirculation that is not fully active. The car was, therefore, even defective if the software update had been made and the purchase had to be cancelled due to the lack of suitable improvement. For the duration of use, a usage fee had already been deducted in favour of the car dealer.

The car dealer conceded that the exhaust gas recirculation had been fully active only within the "thermal window", but essentially argued that the deactivation device was necessary to protect the engine from damage and to ensure the safe operation of the vehicle. Therefore, the deactivation device was not prohibited.

Decision

The Supreme Court, citing the relevant case law of the European Court of Justice (ECJ) on deactivation devices,⁽²⁾ came to the conclusion that the device remains prohibited even after the offered software update, because even then it would be active during most of the year (seven to eight months) under normal operating conditions, due to the prevailing temperatures in Austria.

This assessment renders immaterial the potential requirement for the device to protect the engine from damage and to ensure the safe operation of the vehicle.

The vehicle would, therefore, still be defective despite the software update. Since the car dealer didn't offer any other "improvement", and because a prohibited deactivation device cannot be considered only a minor defect according to rulings by the ECJ, the rescission was permissible under Austrian law.

Therefore, the purchase price had to be refunded to the plaintiff.

Conversely, the car dealer was entitled to a user fee for the duration of the use of the vehicle. The Supreme Court explained in great detail how this was determined. As a result, it adopted the calculation method of the German Federal Supreme Court on comparable cases.⁽³⁾ The principle was that the value of use was to be determined by comparing actual use (kilometres driven) and the expected total period of use (expected total mileage), so that the following formula is to be applied: the purchase price multiplied by the kilometres driven divided by the remaining mileage.

Applied to the case at hand, the following calculation resulted in the usage fee to be paid to the car dealer: €26,890.00 multiplied by 70,180 kilometres, divided by 249,500 kilometres, which equals €7,563.69.

However, remuneration in the form of interest is also due for the use of the purchase price. The plaintiff, therefore, received 4% interest from the car dealer (the statutory interest rate in Austria) on the purchase price until the time of reimbursement.

Comment

This decision was very carefully reasoned and contains clear guidelines for future cases that are expected to follow.

The plaintiff had also sued the manufacturer (Volkswagen). The Supreme Court has not yet ruled on this, but has suspended the proceedings pending the ECJ's decision on *QB v Mercedes-Benz Group AG*.⁽⁴⁾ That decision, meanwhile, was handed down by the ECJ on 21 March 2023 and, again, brought strengthened rights for consumers. The ECJ stated that claims for damages can be asserted against

the vehicle manufacturer based on a claim that the deactivation device is prohibited even if the manufacturer acted merely negligently. It is, therefore, no longer necessary to prove malicious intent or unconscionable conduct.

Therefore, it can be assumed that the plaintiff in the Austrian lawsuit will continue the proceedings before the Supreme Court and will also prevail with his claims for damages against the manufacturer Volkswagen.

In this context, the manufacturer stated that the proceedings before the Austrian Supreme Court and numerous other proceedings currently pending before the Austrian courts were based on incorrect facts regarding "thermal windows", when, in fact, the emission limits would be complied with at 10 degrees Celsius or lower due to the software update. In those proceedings, where this was still possible, Volkswagen corrected their assertions.

It is quite possible that Volkswagen and the other manufacturers struck by Dieselgate will benefit from global warming when it comes to the issue of the "thermal window" and might succeed in proving that, because of very few really cold days, the deactivation device is active much less often than assumed by the Supreme Court, rendering the device, or an updated version, lawful in the end.

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Endnotes

- (1) OGH 21 February 2023, 10 Ob 2/23a.
- (2) In particular, judgment C-145/20, *Porsche Inter Auto and Volkswagen*.
- (3) Most recently: BGH 12 October 2021, VIII ZR 111/20.
- (4) C-100/21.