

Landgericht [District Court] Hanover Decision, Ref. AZ 13 O 192/91, dated 26th February 1992

With its above Decision the Hanover Landgericht dismissed the Commission Agents' action against Mannheimer Versicherung, with costs. This Decision was subsequently confirmed by the BHG [Federal Court of Justice]. Prior to the fictitious robbery of 31st October 1981 the jewellery suppliers had made pieces available to Mr. Düe which had been valued at DM 13 million.

One of the most important reasons for dismissing the action - in conjunction with the fact of deceit - was the fact that Mr. Düe deposited 15 pieces of jewellery, which were hidden in a suitcase between towels, for the police agent Claude (Mauss) at the reception desk of the Hotel Columbus, Bremen, after having previously notified the insurance company that these had been stolen.

See reasons for the judges' decision concerning the deployment of the agent Mauss, given on pages 18 and 19 of the above mentioned Decision. [LINK]

Extracts from the Decision (word-for-word copy):

Hitzemann, court employee
as clerk of the court

D e c i s i o n
IN THE NAME OF THE PEOPLE
In the matter of

.... in the following 21 firms have been listed, which had supplied Mr. Düe with goods for sale on commission prior to the fictitious robbery of 31st October 1981.

All these firms being represented by
- Attorneys for the action: Rechtsanwälte Dr. A. Böx, Dr. I. Böx Nürnberger, L. Rilinger, H. Rilinger, Dr. Weinkauff, Gisy & Pappmeyer, Hanover

versus
Mannheimer Versicherung Aktiengesellschaft, represented by its Board, Messrs. Hans Schreiber, Gregor Böhmer, Klaus Bohn, Dr. Jörg, Dr. Stöckbauer, Augusta-Anlage 65, 6800 Mannheim 1,
Defendants,

- Attorneys for the action: Rechtsanwälte von Fromberg, von Buch, Bemmann, M. vom Fromberg, Klein & Riedesel, Hanover

due to an insurance claim

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After the hearing of 11th December 1991 the 13th Civil Chamber of the Hanover

Landgericht, acting through Presiding Landgericht Judge Brandes as well as Landgericht Judges Schmidt and Höpker found as follows:

The actions are dismissed.

Costs of the action to be borne by the Plaintiffs at the ratio of 1:21.

This Decision is provisionally enforceable against payment of a security of DM 36,000.00.

Statement of Facts (not quoted)

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Reasons for the Decision (of the Court)

The actions could not succeed altogether and therefore had to be dismissed.

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I.

With regard to the claims of the Plaintiffs ad 20. and 21., asserted in the extension of the action dated 19.06.1991, these fail due to the Plaintiffs' right of action not having been proved.

According to a declaration of assignment dated 27.05./01.06.1982 Mr. Düe assigned a partial claim for DM 344,707.73 to Messrs. "Les must de Cartier Vertriebsgesellschaft mbH", Venloerstraße 725, 5000 Cologne 30. On the basis of the extension of the action, however, the action is brought by Cartier GmbH, Heidstraße 28 a, 8000 Munich, represented by their general manager Dieter Zimmermann; though the relief sought with regard to that company does not correspond with the amount of the declaration of assignment. It cannot therefore be inferred that the two firms are identical, so it cannot be assumed that the Plaintiffs ad 20. have a right to claim with regard to the amount asserted on their behalf.

With regard to the Plaintiffs ad 21. also their right of action cannot be assumed. The Plaintiffs did not submit an assignment to them by Mr. Düe in this respect, in spite of a statement to that effect in the extension of the action, upon the denial of the Defendants. To this extent also, it cannot be assumed that the Plaintiffs ad 21. have a right to claim.

With regard to the Plaintiffs ad 14. there is also no right of action. The assignment of a partial claim by Mr. Düe on 30.03.82 was made to a Mr. Werner Zappe. Kelterstraße 29, Pforzheim. Whether the assignment was accepted at all, may be left open. The mentioned acceptance note of 30.04.82 has not been submitted; the submitted photocopy of an unsigned letter not indicating the sender, dated 30.06.82, does not provide information. In any case the succession in law of the prosecuting company has not been demonstrated.

Furthermore, the assignments made by Mr. Düe to Plaintiffs ad 1. to 13. and 15. to 19. have no legal effect since they are not sufficiently specific. It must thereby be pointed out

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that the assignments in the present action must be seen in conjunction with the assignment in the parallel action 13 O 233/91 which due to its factual connection has also been submitted here by both parties.

The Defendants are unable to find out for certain and in a reasonable manner to whom they should have to pay which amounts, both in the present action and in the parallel action 13 O 233/91 to be considered as one with the present. This, however, is a precondition for the validity of an assignment (see BGH NJW 65, page 2198).

Due to the incident of 31.10.1981 and according to the Plaintiffs' own pleading the assignor, Mr. Düe, lost - apart from goods for sale on commission of a value of DM 6,508,889.00 which are, however, not the subject matter of the action - jewellery of a total value of DM 6,558,168.00 as well as jewellery owned by him privately of a value of DM 498,915.00. The sum for which Mr. Düe was insured with the Defendants for the goods of his business was a total of DM 9,920,000.00 (Hanover shop: DM 4,950,000.00, Westerland shop: DM 3,970,000.00, goods for Messr. Heyman: DM 1,000,000.00). Consequently, the maximum of any amount of compensation for the loss of business goods which alone is the subject matter of this and the parallel action 13 O 233/81 would be DM 6,558,148.00. The amounts of DM 4,816,572.94 claimed in these proceedings, together with the amount from the parallel action 13 O 233/91 result in a total of DM 5,203,957.18. In addition, several attachment and transfer orders were made against Mr. Düe with regard to his claim for compensation against the Defendants, to which Mr. Düe has a right on the basis of the business robbery insurance. It is undisputed that these transfers and attachments including those of the present action amounted to more than DM 8,000,000.00 (DM 7,915,150.26 + US Dollars 389,994.40 + French Francs 693,985 + Dutch Guilders 339,452.67 + Italian Lire 7,075,790). The amount of compensation is thus exceeded considerably, quite apart from the fact that according to the Plaintiffs' pleading and contrary to the wording of the declaration of assignment

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the corresponding interest claims were also assigned, which - at an interest rate of 6 % on DM 5,203,987.18 for approx. 10 years - amounts to a further DM 3,122,374.20.

It is true that Mr. Düe indicated that the assigned claims in the present action and in the parallel action 13 O 233/91 were to rank equally with the assignments already or subsequently made. However, this intended equal ranking of claims is being cancelled by the other assignments with regard to which there was no indication how they should rank with the other assignments, and is especially also cancelled by the attachments. Since the Plaintiffs did not explain when the individual attachments took place and since they are not covered by the equal ranking of the assignments in the present action and action 13 O 233/91 with a claim for graduated interest, and since furthermore the total of the assigned and attached claims considerably exceeds the amount of the Defendants' liability to indemnify, it is to that extent not possible for the Defendants to ascertain which amounts they would possibly have to pay to the individual Plaintiffs. Nor is it possible to ascertain a sequence of priority between the assignments (of equal ranking) in dispute here and the remaining assignments and attachments. This, however, is a precondition for the effectiveness of the

assignments, since the total compensation amount is not sufficient to satisfy all claimants.

In the same way, any pro rata distribution of the sum insured to the Plaintiffs and the remaining assignees is out of the question. This would presuppose that the "amount for distribution" available for the various assignees can be calculated on the basis of the sum insured. In this respect, though, the Plaintiffs have given indications, especially also in view of the attachments against the assignor.

Here we also refer to the following:

The Plaintiffs ad 3. had been assigned an amount of DM 446,141.28 by Mr. Düe on 08.12.81.

Of this, they assigned 150,000.00 DM to

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the attorneys Rechtsanwaltskanzlei Dr. Ladenburger u. a. in Pforzheim.

In a contract dated 30.05/23.06.88 this Plaintiff assigned all further rights assigned to them to Bayer. Hypothekenbank, who notified the Defendants of this assignment on 24.07.91. Nonetheless this Plaintiff had brought an action for payment to them of the entire assigned amount; a declaration that no rights would be derived from further assignment has only been submitted by Bayer. Hypothekenbank.

The Plaintiffs ad 6. assert a claim for payment of 298,368.00 DM although the assignment was only for 295,393.72 DM. In the Plaintiffs' explanations, however, that one had agreed that the difference also should be considered assigned, the assertion produced in evidence is lacking that in this respect, equal ranking was to be assumed also, so that there is in any case no possibility for the difference to be taken into account.

The assignment to the Plaintiffs ad 8. was subject to the reservation of the additional explanation of 23.2.82. If the Plaintiffs granted the assignor a respite regarding their claims until 31.03.82, their asserted claim for interest as from 27.12.81 could for that reason alone not be justified. It is furthermore doubtful, whether they were to acquire an own right to claim at all through the assignment, since the latter was expressly described as an "assignment for security purposes" whose preconditions acc. to fig. 3 were not kept by the assignor, so that for this reason also the Plaintiffs' claim cannot succeed.

On the basis of writs of execution against the policyholder, Mr. Düe, the Plaintiffs ad 11. levied execution against the latter's alleged claims against the Defendants under the business insurance and his jewellery insurance and had this remitted to them for collection. They therefore fall outside - in any case outside the ranking achieved by them - the circle of remaining Plaintiffs, who are proceeding from the assumption of equal participation of all creditors.

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A purchase amount of US Dollars 389,994.40 including customs duty and VAT has been assigned to the Plaintiffs ad 13. According to the insurance contract, the assignor had no claim against the Defendants in US currency. And since the object of

an assignment is only the right to claim in itself, not the entire obligation, there is no effective assignment, which has not been restored by the arbitrary change to German currency.

The following considerations, excluding the ability to determine or even to ascertain, also speak against the assignments' effectiveness. According to the wording it is essential to all assignments that they all "rank equally with possible further or already made other assignments to and claims against other suppliers". This is to be taken into account by the Debtor. Equal rank is then expressly restricted to claims arising from goods "which were sold to me until 31.10.81" and which "were stolen prior to settlement of the respective supplier's invoice". As explained correctly by the Defendants, this would require a corresponding submission on the part of the Plaintiffs regarding time of delivery, submission of invoices for deliveries and description of the goods stolen from the delivery. The wording of the declaration of assignment leaves it open, whether only the claims in respect of the goods or also charges for bills of exchange and other claims, such as for default, may also be taken into account. Contrary to the Plaintiffs' view this is not a question of the effectiveness of the 'causal transaction' (principle of abstraction), but of the declaration of assignment's ability to determine (i.e. a question of the content) what has been assigned at all.

II.

Apart from this, the Defendants are also exempt from their liability to pay because of the conduct of the assignor, Mr. Düe.

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Insofar as Mr. Düe has been finally acquitted regarding the accusation of insurance fraud, this established fact alone does not justify any liability to pay compensation on the part of the Defendants. As regards the civil law aspect of the incident of 31.10.1981 it may be left undecided whether a robbery took place or not. The Chamber needs to deal with the party's detailed statement of facts regarding the actual circumstances of the case and subsequent events only insofar as this possibly implied grossly negligent conduct on the part of the assignor concerning the occurrence of the loss, as will be detailed more closely in the following:

In accordance with Section 61 VVG [Insurance Contract Law] in conjunction with Section 16 AGB [Law on General Business Conditions] the insurers are free from any liability to pay if the policyholder brought about an event insured against in a grossly negligent manner. This presupposes a conduct on the part of the policyholder of which he knew or had to know that it would be liable to further the occurrence of an event insured against or a loss increase, whereby the probability of loss obviously has to be so large as to suggest trying to avoid a loss by means of appropriate conduct (see Pröls, *Versicherungsvertragsgesetz* [Insurance Contract Law] 25th edition, Section 61 Note 4 B). In the present case these preconditions have to be answered in the affirmative, both objectively and subjectively.

It is undisputed that when the bell rang shortly after he had entered the shop with his mother and started to decorate the display for the intended exhibition, Mr. Düe operated the electrical door opener without previously closing the safe properly. It is true that Mr. Düe - and on the basis of the Plaintiffs' pleading the Chamber is

proceeding from this assumption - was expecting a business partner at the time who was to bring him more jewellery for the exhibition. But that circumstance alone did not entitle the assignor to leave the safe open when opening the shop. Because at that time and in view of the intended exhibition, there was a particularly large amount of jewellery, including an extensive amount of private jewellery, in the safe - a fact which alone justified an increased duty of care. Apart from the items which

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were the object of the insurance contract regarding the shop in Hanover, all the valuables from the assignor's shop in Westerland had also been moved to Hanover. For these items the Defendants had only agreed temporary cover, as can be seen from Mr. Bläsig's report (Defendants' member of staff), dated 03.11.1981 which was submitted by the Plaintiffs themselves as an enclosure to their pleading. According to this it was the Defendants' intention that these goods from Westerland which had a value of up to DM 4 million should be housed in a bank safe. This circumstances also had to be taken into account by Mr. Düe and in any case should have made him close the safe prior to opening up the shop without knowing whether it was indeed the business partner whose visit had been notified who had rung the bell.

For the reasons stated these risk-increasing circumstances (especially the large amount of jewellery in the safe for part of which there was only temporary cover) should have been taken into account by the assignor by locking the safe in any case prior to opening the door. This had to apply even more since in view of the intended exhibition a large group of people would have been aware of the much larger than usual accumulation of valuable jewellery. Even if Mr. Düe had only invited selected clients to the exhibition, it was not unlikely and should even have been obvious that other persons would also hear of the exhibition, particularly since he had announced a jewellery exhibition for the period of 30.10.81 in the Hanover daily press on 24./25.10.1981. In the view of the Chamber Mr. Düe's conduct in leaving the safe open without making sure whom he in fact granted access to the shop, is - to that extent and in the factual situation described - grossly negligent. It contradicts in great measure any conduct with regard to the observance of elementary safety precautions to be expected in this particular situation of an experienced jeweller.

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Furthermore, according to Section 16 AEB [General Conditions concerning Robbery and Theft], Mr. Düe also forfeited the Defendants' liability to pay with regard to this event due to fraudulent misrepresentation. According to court rulings fraudulent conduct in terms of the mentioned insurance provision concerning robbery is demonstrated sufficiently if statements are made during the negotiations to ascertain the loss which could be significant for the loss assessment or the insurers' decision concerning payment of compensation; whereby the intention to eliminate difficulties regarding the enforcement of justified claims is sufficient (see BGH Versicherungsrecht [Insurance Law] 1986, Page 77 et seq.). In the view of the Chamber these preconditions must be considered to have been met. It is undisputed that Mr. Düe initially reported the theft of several watches and rings, but did not correct this statement to the Defendants after having established that these items had not in fact been lost. On the contrary, he intended to use these items to pass them on to someone handling stolen goods, so that the Defendants - after reappearance of the items notified as having been stolen - would be convinced of a robbery and make a payment on account. With this attempt at deception, however,

Mr. Düe intended to influence the loss investigations in his favour. The value of the items in relation to the total value of all the items notified as having been stolen is thereby not relevant.

Nor are the Plaintiffs able to rely in this context on the fact that this plan had not been Mr. Düe's but that of the agent Mauss, who had persuaded him to do this and had basically been brought in on behalf of the Defendants with the aim of proving insurance fraud on the part of Mr. Düe.

Although it has been recognized in court rulings that insurance companies will have forfeited recourse to the plea of exemption from liability to pay due to conduct with intent to deceive on the part of the policyholder, if they themselves act with intent to deceive (BGH NJW 89, Page 2472 et seq.). However, no conduct with intent to deceive on the part of the Defendants can be established. Even if the plan regarding the pieces of jewellery which were to be offered to a person dealing in stolen goods had come from the agent Mauss, this cannot be seen as fraudulent intent on the part of the Defendants. As stated

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by the Brunswick Landgericht in the reasons for its decision of 13.03.1989, the Defendants brought in the agent with the aim to get back the pieces of jewellery which had been lost. This action had been agreed with the investigating police department and took place with the latter's consent. Even when, from January 1982 onwards, the investigations by the police and the department of public prosecution were directed against Mr. Düe, Mr. Mauss still acted on behalf of the state investigating authorities and at best indirectly also for the Defendants. With this state of affairs the agent's conduct cannot at that time either count against the Defendants. Even if they - as alleged by the Plaintiffs - passed a considerable amount of money to the agent, this must not be seen as conduct with intent to deceive on their part. In accordance with the case decided by the Federal Court of Justice (BGH loc.cit.), conduct with intent to deceive on the part of the insurance company is only to be assumed if an insurance agent makes an attempt to persuade witnesses by means of an offer of money to make statements in its favour. This is not the case here. On the one hand the agent was not an insurance agent but a person whose activities took place by agreement with the state investigating authorities. On the other the agent did not make an attempt to influence witnesses but at best the person immediately affected. Through his own earlier conduct, however (not notifying the Defendants that several of the items notified as stolen had in fact not been lost), the latter opened the possibility for the action proposed by the agent. To that extent the reason for the Defendants' freedom from liability to pay cannot be seen as having been forfeited.

The decision as to taxation of costs is based on Sections 91 and 100 ZPO [Code of Civil Procedure]. The decision on provisional enforceability follows from Section 709 ZPO.

Brandes Schmidt Höpker