

**The development of the doctrine of hardship in Germany.
The interpretation of § 242. examples:**

Case:

BGH NJW 1976, 565 III. Civil Senate (III ZR 106/72) Bundesliga -decision

Date:

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Note:

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On 24 June 1971 the defendant, a football club and a member of the German Football League transferred W, one of the players, to the plaintiff for the fee of 40,000 DM. Both parties were unaware of the fact when he appeared for the defendant that in a League match against Arminia Bielefeld on 29 May 1971 he had accepted a bribe. After having played three times for the plaintiff W confessed. The plaintiff dismissed W with immediate effect and he was barred from playing by the German football league.

The plaintiff contended that the contract of transfer was void and demanded repayment of the transfer fee. The courts below gave judgment for the plaintiff. A second appeal by the defendant was rejected for the following

Reasons

I. The Court of Appeal has allowed the claim for the repayment of the transfer fee on the ground of a mutual mistake of the parties concerning the basis of the transaction when they concluded the transfer contract on 24 June 1971 and that the plaintiff had validly rescinded the contract because the basis of the transaction was absent.

II. The Court of Appeal started from the proposition that both parties were mistaken about the basis of the transaction when they concluded the contract of transfer and therefore applied to the present case the principles concerning the legal consequences of the absence of the basis of a transaction. This means that in the case of a mutual mistake of the contracting parties concerning the basis of the contract the legal consequences are governed by para. 242 BGB [references]. In such a case it may be contrary to good faith, if one party seeks to hold the other party to the contract [references].

1. The view of the Court of Appeal that a mutual mistake concerning the basis of the transaction had occurred in the present case cannot be questioned, contrary to the opinion of the appellant.

(a) The basis of a transaction consists of the common notions of the parties, which did not become part of the contract as such but had manifested themselves at the conclusion of the contract, or it consists of the notions of one of the parties which the other parties could recognise and did not question concerning the existence or future emergence of certain circumstances on which the intention of the parties to transact business is founded [references]. The Court of Appeal started from this rule.

(b) The Court of Appeal found that the plaintiff wishes, by concluding the contract of transfer, to be able to engage the player W and to employ him during the coming seasons as a member of its team in a regional league. The court found also that it was a matter of course for the parties to assume that the player was not subject to a charge which might endanger his licence to play for the club of his transfer. These findings ... of a factual kind bind the court and also support the view of the Court of Appeal...

2. If ... two football clubs, such as the plaintiff and the defendant, agree on the payment of a transfer fee in order to create the condition, required by the statutes of the German Football League, to enable a player to receive permission to apply for the club to which he is transferred, the parties in making a reasonable assessment of their mutual interests assume as a basis of their contractual intention that the player does not possess any personal characteristics which render him objectively unfit to receive a player's licence.

3. The Court of Appeal has not overlooked that not very disturbance of the basis of a transaction is significant. In view of the paramount importance in the law of contracts of the principle that contracts must be carried out, reliance on the fundamental disturbance of the basis of a transaction is only admissible in exceptional cases, if it appears imperative in order to avoid an unbearable result which cannot be reconciled with law and justice and which the party concerned cannot be expected to accept according to good faith [references] ... If a football player accepts bribes in order to tamper with the results of a game, he offends severely against the recognised rules of the sport and against the principles of decency in sport. As a rule he is no longer suitable to receive a licence to play for clubs of the German Football League. To pay a transfer fee for such a player is to make payment in a legal vacuum. As shown above (2) the agreement concerning a transfer fee only makes sense if the player fulfils the personal prerequisites that he can receive a player's licence according to the statutes of the German Football League. These prerequisites are lacking, as a rule, if a player has been prepared to accept money in order to influence the results of competition in sport through fraudulent activities.

Thereby a financial obligation between the clubs engaged in the contract of transfer loses its material justification. A player who is subject to such a serious charge has, objectively, also lost his value for his previous club because, after his defect has become known, he cannot play for any club at all. It does not appear justified to grant compensation to the transferring club for a loss which it would have suffered also if the player had not moved to another club, and to burden the club to which the player was transferred with a corresponding duty to pay compensation, although it cannot derive any benefit from the player, either financially or in sport. In these circumstances the basis of the transaction has been undermined to such an extent that the club which owes the money cannot be expected to adhere to the contract of transfer which was concluded in ignorance of the bribery. Nor can it be doubted that not only the

plaintiff, but also every other club, would have refrained from concluding a contract, if informed of the situation.

4. The Court of Appeal has also delimited correctly the respective spheres of risk. As the appellant points out correctly, the distribution of the risk is especially important for determining the question of the legal consequences of the disappearance of the basis of the transaction. It is established by the practice of the courts that circumstances which according to the purpose of the contract clearly fall within the sphere of risk of one of the parties do not as a rule entitle that party to rely on the collapse of the basis of the transaction [references]. This is not, however, the case here ...

(c) In the present case it is decisive that player W, having been involved in an act of bribery at the time when he changed clubs, could no longer be considered a licensed or contractual player for personal reasons in accordance with the rules established by the German Football League and recognised as binding by the parties. In consequence of his entanglement in the scandal in the Federal League he was afflicted with a personal defect which excluded him altogether as a player, for any club, as the legal outcome of the matter in the German Football League shows. It is irrelevant that the parties were ignorant of this when they concluded the contract. What matters is the objective situation, not the subjective knowledge of the parties. W lost his personal qualification as a football player within the area of the German Football League when he acted contrary to the rules of sport and not only when this became known to the public. Consequently already at the time when he changed clubs he lacked the legal pre-requisites for being used by a club belonging to the German Football League. Such a player also loses his objective "value" for his original club as a result of an act contrary to the rules of sport. If the defect adhering to the player is only discovered after the contract for a transfer has been concluded, this only discloses that the player had already lost the qualities which rendered him valuable for a club in the German Football League. Such a defect is to be attributed, as a rule, to his old club, for it originated in the latter's sphere.

(d) The Court of Appeal regarded as decisive for the distribution of the risk to what extent the misconduct with which the player must be charged touches in essence his internal relations with the club which employs him. It held that the nature of the obligation of a licensed player towards his club consisted in playing for and not against his club; accordingly it has placed the burden of the risk of any violation of this obligation upon the club that employed him, even if the player migrates to another club later on. The Court of appeal has rightly placed the risk upon the defendant as being the club which is "more closely involved", having regard to the circumstances of the case, than the plaintiff. The fact that the player W was bribed in connection with the league match of the defendant in Bielefeld on 29 May 1971, which constitutes the cause of the disruption of the basis of the transaction represented by the contract of transfer, belongs to the "sphere of risk" of the defendant not only from the point of view of time. The misconduct of the player is also directly connected with his activity for the plaintiff in sport and as an employee. In the light of such a situation it cannot be assumed according to good faith that the plaintiff assumed the risk.

5. The Court of Appeal held that as a result of the absence of the basis of the transaction the plaintiff is entitled to withdraw from the contract and has allowed the claim for the full repayment of the transfer fee. This too cannot be faulted on legal grounds.

(a) The absence or the failure of the basis of a transaction does not, of course, result in the complete elimination of the contractual relationship. The release of one or of both parties to a contract from their contractual obligations must only be allowed in so far as good faith so

requires. The first question is, therefore, whether the contract cannot be modified so as to accord with reality in a manner which takes into account the legitimate interests of both parties [references]. The Court of Appeal has observed these principles. It has held that a modification of the contract is excluded because the counter-performance of the defendant in releasing the player W prematurely was worthless in practice and, in particular, because an apportionment of the financial damage among both parties was ruled out in view of the obvious distribution of the risk. This conclusion, too, cannot be faulted ...