

## Jewish Claims Conference and the Statute of Limitations

*Comments on a verdict by the German Federal Court of Justice, BGH IV ZR 147/15, from January 27, 2016<sup>1</sup>*

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Since 1951, "**The mission** of the Claims Conference has always been to secure what we consider a **small measure of justice** for Jewish victims of Nazi persecution" (Highlighting F.E.).

These words appear at the beginning of the Jewish Claims Conference annual reports.<sup>2</sup>

A small measure of justice is what the plaintiffs had hoped for in a lawsuit that was struck down by the German Federal Court of Justice (BGH) on January 27, 2016. The BGH dismissed the case because the defendant, the JCC, objected based on the statute of limitations.

The legal institution of the statute of limitations serves to protect the debtor, it "... gives the liable party, in the interests of legal certainty (difficulty providing evidence, etc.), a *right of refusal*, in other words, it is merely an on-going objection that only works when it is asserted by the liable party."<sup>3</sup>

In the present case, the JCC had no grounds to invoke the statute of limitations. Moreover, the JCC should have been interested in having the Federal Court of Justice clarify the legal question left open by the Higher Regional Court (OLG). The verdict of the OLG<sup>4</sup>, which dismissed the lawsuit, covers several pages focusing on the question as to whether the defendant – without being recognized as an heir – should, as the legal successor, be required to assume the obligations of the heir. The OLG verdict does not support a legal defense based on the statute of limitations. However, the court maintained that the legal question raised needs to be clarified and used this as the basis for granting an appeal.

In other situations, the JCC rightfully objected to applying the statute of limitations to cases of Nazi injustice. This issue recently played a key role in conjunction with some works of art looted

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<sup>1</sup> In this issue on p. 18

<sup>2</sup> [www.claimscon.org](http://www.claimscon.org); [www.claimscon.de](http://www.claimscon.de)

<sup>3</sup> Creifeld Legal Dictionary

<sup>4</sup> Reprinted in ZOV, issue 2/2015, p. 144

by the Nazis. In his article<sup>5</sup> regarding "An Endless Debate?"<sup>6</sup> Rüdiger Mahlo, the representative of the JCC in Germany, expressed regret that (due to the statute of limitations) there has been no legal means of fulfilling claims since the late 1960s.

But Gurlitt's willingness to make restitution in accordance with the Washington Declaration "... shows how the difficult problem associated with the statute of limitations can be overcome with goodwill".<sup>7</sup>

Unfortunately, the actions of the JCC in court clearly demonstrate a lack of goodwill. In my opinion, the fact that the JCC invoked the statute of limitations is unethical and a breach of good faith.

The BGH sees things differently: "... from the standpoint of good faith in accordance with § 242 BGB (German Civil Code), there is nothing stopping the defendant from invoking the statute of limitations."

The fact that the JCC invoked the statute of limitations is clearly contradictory to the image it presents to the public: The organization has repeatedly emphasized that there should be no statute of limitations for Nazi injustice. This invocation of the statute of limitations also violates the JCC statute that outlines its objectives of providing support and assistance for Jewish survivors.

This is an intolerable double standard on the part of the JCC.

Ethical guidelines were adopted by the JCC Board of Directors in July 2014. Accordingly to these guidelines: "The trust and confidence placed in the Claims Conference depend on the Claims Conference continuing to maintain the highest standards of ethical and lawful conduct."<sup>8</sup>

Unfortunately, these standards are clearly missing in the way the JCC conducted itself in the court case discussed here. Since the statute-barred claim still exists, it could be honored after the statute of limitations enters into force. In other words, the JCC could have still fulfilled its obligations despite the BGH verdict.

### **Now we come to the verdict of the Federal Court of Justice (BGH).**

In a previous article, I wrote about this case in the discussion of the OLG verdict.<sup>9</sup>

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<sup>5</sup> Rüdiger Mahlo, The "Schwabing Art Treasure" and its importance for the restitution of art looted from Jewish owners, in Schöps, p. 201

<sup>6</sup> "An Endless Debate? Looted Art and Restitution in German-Speaking Countries," published by Julius H. Schöps and Anna-Dorothea Ludewig, Hentrich & Hentrich 2014

<sup>7</sup> Ibid p. 204

<sup>8</sup> Ethical Guidelines and Practices Including Conflict of Interest Policy, as adopted by the Board of Directors July 8-9, 2014: "The Board of Directors of the Claims Conference ... believes that the trust and confidence placed in the Claims Conference depend on the Claims Conference continuing to maintain the highest standards of ethical and lawful conduct."

The question of whether or not the plaintiff was entitled to claim a compulsory share (of the inheritance) was left unanswered by the BGH. But this is precisely the issue that should have been clarified – and the sole reason why the OLG granted an appeal.

The court regards the right to a possible compulsory share as expired under the statute of limitations and supports this argument with case law established by the Senate. Let's look at this a little closer.

Verdict from June 23, 1993 – IV ZR 205/92

A settlement was reached in 1970 between the heirs and the party entitled to a compulsory share. It came to the question of whether subsequent increases in the value of the estate were adequately compensated. More importantly, the issue was whether a new limitation period would begin with the emergence of new claims under the Property Act. The plaintiff had filed a declaratory action in May 1991 and the defendant invoked the statute of limitations based on succession in 1970. This was rejected by the court because a new limitation period begins when the Property Act enters into force.

Ruling from December 13, 1995 – IV ZR 342/94

This decision confirms that the statute of limitations as it applies to compulsory shares based on § 2313 BGB and received by the heir in accordance with the Property Act, begins when the Property Act enters into force.

Verdict from April 28, 2004 – IV ZR 85/03

The Senate confirmed its earlier ruling stating that the statute of limitation begins when the Property Act enters into force. In this case, the daughter of the testator had already received her compulsory share from the heirs in 1980, but made further claims because, after 1990, the heirs applied for restitution of the expropriated property and real estate was retransferred in 1994. In administrative proceedings, the point at which certainty is established for the amount of the claim is ostensibly irrelevant. It literally says, "A claim to part of the estate is not uncertain (nor questionable) within the meaning of § 2313 para 2 BGB, when, and because, the exact amount of the claim is not yet known. **Moreover, a claim is only uncertain when it has not been determined whether it even exists, or whether someone else is entitled**" (BGHZ 3, 394, 397; Senate decree from November 10, 1976 *ibid* p. 130, highlighting F.E.).

Verdict from 16 January 2013 – IV ZR 232/12

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<sup>9</sup> The Jewish Claims Conference – Legal Successor and Trustee?, ZOV 2/2015, p. 119

This case dealt with the question as to whether the statute of limitations is irrelevant when the presence of other assets does not become known until a later date. The Appeals Court affirmed this, but the BGH rejected it. Possible misconceptions and mistakes by the party entitled to a compulsory share regarding the objective composition of the estate ostensibly do not play a role in terms of when the statute of limitations comes into force.

None of these decisions are related to our case.

Deviating from earlier case law, the verdict states that the statute of limitations does not begin when the Property Act enters into force. Instead, it only begins after the claim application deadline, because only then can it be determined that the heirs have not filed a claim and the JCC can assume their role.

The verdict continues: "The uncertainty regarding the entitlement of the defendant was resolved, at the latest, after the deadline on June 30, 1993 ..."

**This is clearly objectionable.** The uncertainty regarding the entitlement of the JCC continued until the final ruling by the BADV (Federal Office for Central Services and Unresolved Property Issues)!

In the first place, this uncertainty was based on whether or not the heirs had themselves filed a claim, and secondly, whether the global application from the JCC would be recognized.<sup>10</sup>

"From this moment on (June 30, 1993, F.E.), a possible claim for a compulsory share vis-à-vis the defendant could in any case be pursued by way of a declaratory action." According to the Senate, any claim to a compulsory share by the plaintiff was time-barred by the statute of limitations at the end of 1996. A declaratory action would have had to be carried out before this date.

What would such a declaratory action against the JCC look like? Wouldn't such an action require a demand to be sent to the JCC?: "In the event that you get something, are we going to demand our compulsory share." Perhaps the court handling the case would have said, "Just wait and see if the JCC gets anything at all." Or the court would have denied the need for legal protection on the grounds that it is a matter of course that, as a fictitious heir, the JCC would be required to also assume the obligations of an heir.<sup>11</sup>

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<sup>10</sup> For details on the restrictive handling of global applications by the Federal Administrative Court (BVerwG), see Fritz Enderlein, "Restitution bypasses victims – Why the German government needs to take immediate action!" ZOV 4/2010 p. 170

<sup>11</sup> According to the legal handbook "Vermögen und Investitionen in der ehemaligen DDR" (Assets and Investments in the former GDR), commentary on § 2, points 57a and 79

According to statistics published by the JCC,<sup>12</sup> 67,876 claims for companies were filed as of June 30, 2015. Decisions were made on 58,302 of the claims and 7,445 of them were approved. In other words, only about 13% of the applications were approved and 87% rejected.

As stated in the Senate ruling from April 28, 2004, a claim is uncertain unless there is clarity as to whether it even exists. And that is certainly the case with a rejection rate of 87%. Even a declaratory judgment against the JCC in favor of the plaintiff would prove futile in 87% of the cases.

Added to this is the following: Before 1996, no one – neither plaintiff nor defendant – knew whether or not the heirs themselves had filed a claim. In fact, a claim application had been submitted by someone who professed to be the rightful heir.

The BADV, which had ruled in favor of the defendant on March 31, 2011, didn't start processing applications until after responsibility for all cases under § 1 para 6 of the Property Act was reassigned by the Compensation Law Amendment Act<sup>13</sup>, i.e. not before 2004.

The plaintiff did not know the heirs. Should he file a declaratory action against the unknown heirs of Bernhard K. with an unknown place of residence? In which court should he file the lawsuit?

"The reasonableness of such an action (against persons unknown? F.E.) also applied to the previous plaintiffs." What the BGH demanded here is truly outrageous.

Another thought speaks against the opinion of the BGH. The assertion of such claim presupposes maturity. If a claim were to fall under the statute of limitations prior to its due date, we would be dealing with claims that could never be enforced in the courts!

The regular statute of limitations begins with the end of the year in which the claim arose **and the creditors** gained knowledge of the claim's circumstances along with the identity of the debtor (§ 199 para 1 BGB, highlighting F.E.). **Before the official decree was adopted by the BADV, the plaintiff had no way of knowing who to name in his claim for a compulsory share.** The decision of the BADV has a constitutive effect.

For the claim legally established by the compensation decision, the statute of limitations is thirty years (§ 197 para 1 clause 3 BGB) or ten years (§ 199 para 4 BGB). **In any case, the lawsuit filed in December 2013 was not subject to the statute of limitations.** The BGH will not be able to avoid dealing with the legal question left open by the OLG Frankfurt.

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<sup>12</sup> See [www.claimscon.org/Asset Recovery and Pending Claims](http://www.claimscon.org/Asset Recovery and Pending Claims)

<sup>13</sup> Law amending and supplementing the Compensation Act and other provisions from 10 December 2013, BGBl (Federal Law Gazette) 2003 Part I, p. 2471