

The Jewish Claims Conference – Legal Successor and Trustee?

Prof. Fritz Enderlein, Attorney at Law, Potsdam

Zeitschrift für offene Vermögensfragen 2/2015, p. 119

Two recent appellate court verdicts handed down by the Higher Regional Court (OLG) in Frankfurt/Main and concerning the role of the JCC as a legal successor and trustee are worthy of comment. Both of these verdicts are reprinted in this publication.

The first lawsuit, the case of **Ruth W.** (11 U 16/14, verdict from February 3, 2015), focused on the role of the JCC as a trustee for entitled parties who had failed to register a claim before the deadline specified by the second Property Rights Amendment (December 31, 1992). It also dealt with JCC guidelines that deviate from German inheritance law.

The second lawsuit, the case of **Bernhard K.** (19 U 84/14, verdict from February 11, 2015), focused on claims from those entitled to a compulsory share of an inheritance. It also dealt with the role of the JCC as a trustee, although in my opinion, this has nothing to do with a claim for a compulsory share. Since both of the courts present the same arguments to reject the role of the JCC as a trustee, I will address this issue only in the first part of my article. All quotes from court verdicts appear in *italics*.

The case of Ruth W.

1. The Jewish Claims Conference granted the plaintiff Ruth W. restitution from the Goodwill Fund, but limited the amount to one-third.

Goodwill Fund guidelines originally specified that if the person persecuted by Nazis was deceased, the parties who would have otherwise been entitled under German inheritance law would have a right to the inheritance, providing they had filed an application before the specified deadline. In other words, anyone who presented proof of inheritance would be entitled. Although this position was defined in the Goodwill Fund guidelines in 2010,¹ it was

¹ Goodwill Fund Guidelines as approved by the Board of Directors on July 19, 2000 and incorporating decisions of the Executive Committee from November 2000, the Board of Directors of the Claims Conference on July 19-20, 2005, the Executive Committee on November 2-3, 2005, the Executive Committee on March 7, 2006, Board of Directors on April 27, 2006 as circulated to the Board of Directors on October 9, 2006 and incorporating the decisions of the Executive Committee on March 31, 2009 and Successor Organization Committee of January 5, 2010. Updated guidelines as of June 2010

unfortunately limited in its practical application.² More specifically, the great-nephews and great-nieces were excluded as heirs – although, as in this case, they are the only living descendants of the former property owner.

Hermann H. owned real estate in Berlin. His only living heir is his great-granddaughter Ruth W. However, as a result of the JCC guidelines, she only received one-third of the proceeds from the property (which was assigned to the JCC and subsequently sold). This was based on the following: Hermann H. had three sons, Julius, Alfred and Willy. Alfred and Willy, who had no children, were both murdered in concentration camps. After Julius and his wife Rosalie died, their inheritance went to their daughter Margot, who also inherited the shares of her two uncles. This placed the entire estate in the hands of one person, namely the granddaughter of Hermann H.

Margot immigrated to Shanghai, where her daughter Ruth was born in 1946. She later moved to Palestine, but the hardships she suffered led to her early death at the age of 46 in Jerusalem. Ruth, who grew up in an orphanage after her father died, knew nothing about the property owned by her great-grandfather. It wasn't until after the filing deadline that she found out about the property. She then decided to approach the Claims Conference and request restitution from the Goodwill Fund. She was informed that she would be entitled to the share of inheritance from her grandfather Julius, but not to the share from her great-uncles Alfred and Willy, who were both murdered by the fascists.

Had the loss of property not taken place in 1938, but after the death of brothers Alfred and Willy, when Margot was assigned sole ownership, Ruth would have – according to the Claims Conference guidelines – been eligible for the entire sum of proceeds received from the sale of the property.

2. Unwilling to accept the JCC's refusal to recognize her as the heir to her two great-uncles, Ruth W. initiated a lawsuit against the JCC in the Frankfurt Regional Court on July 25, 2013. She based her claim on the premise that the JCC only serves as a trustee for entitled parties who failed to file a claim prior to the application deadline. Therefore, the JCC would be obligated to surrender the assets.

The Frankfurt Regional Court rejected the lawsuit in a decision handed down on January 24, 2014 (2-10 O 332/13). According to the court, the JCC is not legally required to surrender the

² Fritz Enderlein, "What the guidelines and deadlines of the JCC Goodwill Program are all about," *Jüdische Zeitung*, August 2008, p. 2; *idem* "The Claims Conference and German inheritance law," *Jüdische Zeitung*, September 2011, p. 20

assets. Furthermore, the organization is not regarded as a trustee for entitled persons who failed to file a claim on time, but as a trustee for the Jewish people.

"According to the clear and unambiguous wording of § 2 para. 1 sentence 2 of the Property Act, the defendant shall be deemed the legal successor (and not a trustee or agent) for any claims that were not filed on time by entitled Jewish applicants."

"Consequently, the entitled parties, or their heirs, irrevocably lose their rights to reassignment (of property)." The court asserted that "this legal succession was not accidentally, but deliberately" determined by lawmakers.

Therefore, the Frankfurt Regional Court assumed that, from the very beginning, German lawmakers sought to achieve an expropriation of the entitled parties to the benefit of the Jewish Claims Conference.

3. An appeal against this decision submitted by the plaintiff to the Frankfurt Higher Regional Court (OLG) was rejected on February 3, 2015.

The OLG essentially followed the reasoning of the Regional Court (LG) and asserted that the role of the defendant (JCC) was defined in the Property Act. Furthermore, the court claimed that the Property Act does not contain any provisions pertaining to rights and obligations between the defendant and the originally entitled parties, for example, in the context of a trustee relationship. The court maintained that there is *"no indication that lawmakers simply 'forgot' to include a corresponding provision governing the relationship between a successor organization and the originally entitled parties."*

A verdict by the Federal Constitutional Court from October 20, 1998 (1 BvR 1730/98) was also cited as follows: *"The ... loss of rights suffered by the originally entitled party is a permissible limitation of the content and scope of the legal position in line with Article 14, para. 1, sentence 2 of Basic Constitutional Law."*

In a verdict reached more than 16 years ago by the Federal Constitutional Court, The focus was not on the issue of whether the JCC is a trustee and, if so, for whom, it was on the justification of the deadline.

In a verdict from April 24, 2013 (ZOV 2/2013, p. 75), the Federal Administrative Court also referred to the verdict handed down by the Federal Constitutional Court: *"This [limitation of content and scope] is admissible because the deadline for property claims is justified by particularly important reasons of public interest and is also in line with the constitutional principle of proportionality."*

The "... omission of the right to return of property or entitlement to compensation is still reasonably commensurate with the ... more important normative purposes of legal certainty and clarity or eliminating investment barriers."

It states further that there is nothing preventing the lawmakers from "*introducing deadlines, even though this results in certain unavoidable hardships*."

"The hardships associated with the introduction of a cut-off date are, in any case, objectively and sufficiently justified by the legislative intent of § 30a para. 1 sentence 1 of the Property Act."

It is obvious in all of these arguments that the focus was on the deadline for further claim applications, and not on the question of a trustee relationship.

Important reasons of public interest were undoubtedly a factor in the introduction of a deadline. But there is no public interest in the repeated or continuing expropriation of Jewish heirs. This would clearly contradict Germany's obligation to provide restitution.

Claims filed in accordance with the Property Act are restitution claims. If the relevant laws passed by the Nazis are voided by the Allied Control Council Law No. 1 and subsequent German legislation, the original owners have not lost their legal position, which is passed on to their heirs. These property claims are also protected by of Article 14 of Germany's Basic Constitutional Law.

Even if expropriation would have been necessary, appropriate compensation would be required in accordance with Article 14 of Basic Constitutional Law.

Expropriation was not necessary to ensure legal certainty and clarity.

4. According to the opinion of the Higher Regional Court (OLG), the role of the defendants is defined in the Property Act. Regarding the trustee position of the JCC, it was assumed that "*this could only be defined through an interpretation of the provisions of this Act*". At the same time, the OLG determined that "*in terms of a trustee relationship, the Property Act contains no provisions pertaining to the rights and obligations between the defendants and the originally entitled party; such provisions are also not included in other laws*."

Let us therefore focus on the interpretation of the law.

According to the opinion of the OLG, the literature cited by the plaintiffs, which in no way objects to the introduction of a deadline or questions its necessity, "*predominantly assumes that such a trustee position does not exist de lege lata and would first have to be created by the lawmakers (see Wasmuth, ZOV 2003, 224, 229 ...)*."

This is clearly not the case. In fact, according to Wasmuth, the trustee position of the JCC results from "the system of the Property Act." In other words, it already exists. The Property Act has, thus far, "not clearly established the position of the JCC. The lawmakers apparently presume that the observance of this function by the JCC is self-evident."³

Wasmuth regards the JCC as a "trustee for victims who came too late." "The fact that the lawmakers have not legally clarified the obligations to these victims arising from the JCC's position as trustee is, given their involvement in the implementation of deadlines, an oversight that needs to be rectified."⁴

Stegemann also assumes that a **statutory trustee relationship exists** and he clearly substantiates this point (Stegemann, ZOV 6/2012, p. 313). The Higher Regional Court (OLG) is not convinced by this reasoning. At the same time, the court does not address the arguments presented by Stegemann.

Interpreting the Property Act in such a way that ultimately includes an expropriation of those affected insinuates that this expropriation is intentional or at least condoned by the German state.

A legal consequence that obliterates the legal position of the entitled parties cannot be intentional. "The actual heirs would, without their knowledge, be suddenly deprived of all rights. This interpretation would overturn the meaning and purpose of the law."⁵

Stegemann does not think that the supplement to § 2 para. 1 sentence 3 of the Property Act suggested by me in previous articles⁶ is necessary, because the consistent application of the existing rules would lead to the same conclusion. He maintains that § 2 para. 1 sentence 3 of the Property Act clearly specifies who is actually entitled. It could be deduced from the wording of the provisions that the lawmakers assume an order of preference among the entitled parties. The regulations show that the JCC could only be regarded as an entitled party if those persecuted, or their heirs (those primarily entitled) had not filed a claim.⁷

The application of § 2 para. 1 sentence 3 of the Property Act must not result in a reversal in the order of those entitled. The Federal Republic of Germany is primarily obligated to provide

³ Johannes Wasmuth, ZOV 4/2003 p. 229, text highlighted by F.E.

⁴ *idem* "Aufarbeitung der unter NS-Herrschaft verübten Entziehung von Kunstwerken" (Reappraisal of the works of art confiscated under Nazi rule), NJW 11/2014, p. 752

⁵ Jan Stegemann, "Die Conference on Jewish Material Claims Against Germany als gesetzliche Treuhänderin der Erben der durch die Nationalsozialisten enteigneten Eigentümer" (The Conference on Jewish Material Claims Against Germany as a legal trustee on behalf of the heirs of property owners who were expropriated by the Nazis), ZOV 6/2012, p. 313 ff

⁶ Fritz Enderlein, "Is the Federal Republic of Germany responsible for how compensation funds paid to the JCC are used?" Berliner Anwaltsblatt 10/2009, p. 354

⁷ Stegemann, loc. cit.

restitution and compensation to those who have lost their property as a result of Nazi persecution. The JCC was never persecuted: The real victims are those individuals who suffered and their descendants who are still suffering the consequences.⁸

The wording of § 2 para. 1 sentence 3 of the Property Act assumes "only a fiction of legal succession in favor of the JCC. The JCC is regarded as a legal successor 'only in view of the rights defined in the Property Act,' i.e., only in conjunction with the provisions of the Property Act. Conversely, this means that the legal fiction is actually limited to the proceedings in accordance with § 2 para. 1 sentence 3 of the Property Act. Outside of these proceedings, the JCC neither becomes a bona fide legal successor, nor is it to be regarded as such." "Thus, the legal status of the actual heirs is not affected by § 2 para. 1 sentence 3 of the Property Act. From a legal standpoint, they remain the rightful successors of the expropriated victims."⁹ Also, "in applying the provisions of § 2 para. 1 sentence 3 of the Property Act, it (must) be ensured that the heirs become the general legal successors within the meaning of § 1922 of the German Civil Code. With the assets or compensation payments, the JCC has received something that would not realistically be permitted due to nonexistent inheritance rights (which is only a legal fiction)." Therefore, pursuant to § 2018 of the German Civil Code, the heir, as the inheritance holder, would be entitled to reclaim what has been acquired by the JCC.¹⁰

If there were no fiction of legal succession, the unclaimed assets would (initially) go to the German national treasury. As soon as the heir finds out about this, he would have a right to recover the property.

5. The assertion of the OLG that most of the literature cited by the plaintiff indicates a trustee position does not exist *de lege lata*, also does not apply to me. The court decision cites earlier articles written by me and fails to mention that, in subsequent published statements, I fully supported the opinions of Wasmuth and Stegemann, which clearly indicate that a trustee relationship already exists and only needs to be more precisely elaborated.

Rodenbach also assumes that the JCC is required to hand over the assets of persecuted Jews "in accordance with the special provisions of § 2a of the Property Act aimed at collective

⁸ See "Missed application deadlines – Correspondence with MP Siegfried Kauder," ZOV 4/2010, p. 174, letter from July, 2010; also Wasmuth loc. cit. p. 229, "Die JCC war zu keinem Zeitpunkt Verfolgungen ausgesetzt" (The JCC was never subject to persecution)

⁹ Stegemann, loc. cit. p. 314

¹⁰ loc. cit. p. 315

restitution, or to forward these assets to those entitled applicants who failed to file a claim within the short application period."¹¹

Originally, there was no intention to redistribute Jewish property. Instead, the successor organizations should have only received **uninherited** Jewish property.¹²

This is also how Spannuth regards the objective of the Property Act. For him, the "task assigned to the Claims Conference by the Property Act" is ... "to ensure the return of all heirless assets."¹³

After the War, those involved (other than the successor organizations) unanimously shared the opinion that the successor organizations should only be assigned the position of a trustee for property for which entitled parties still exist.¹⁴

A trustee position is also assumed in a commentary on the restitution laws of the American military government.¹⁵

This idea is also included in the Federal Restitution Act of 1957. In § 29 et seq., the focus is on reopening the application deadlines. According to § 29 paragraph 3: "If the entitled party files a claim based on paragraph 1 or 2, a transfer of this claim to a successor organization is regarded as not have taken place."

6. The Higher Regional Court (OLG) interprets the decision by the Federal Administrative Court from April 24, 2013¹⁶ differently than the plaintiff. *"To the extent the Federal Administrative Court referred to the defendant as a 'trustee,' it is merely meant that the defendant is not entitled to use the assigned property as it sees fit, but is required by statute to hand it over to the survivors of the Holocaust."*

Apparently, the Higher Regional Court ignored the JCC bylaws, which I have repeatedly cited. Accordingly, JCC activities should primarily support the individuals who were persecuted. The Court also ignores the oft-cited criticism of the JCC's distribution practices

¹¹ Hermann-Josef Rodenbach, "Das deutsche Recht der offenen Vermögensfragen. Sterbendes Rechtsgebiet oder Vorbild für andere Länder?" (German law related to unresolved property issues. A dying branch of law, or a model for other countries?), ZOV 6/2012, p. 316, text highlighted by F.E.

¹² Fritz Enderlein, "Heirless and unclaimed. Unclaimed?" ZOV 6/2012, p. 324

¹³ Jan Philipp Spannuth, "Der Umgang der DDR mit dem „arisierten“ Eigentum der Juden und die Rückerstattung im wiedervereinigten Deutschland (How the GDR deals with "aryanized" Jewish property and restitution in reunified Germany), Klartext Verlag 2007, p. 7

¹⁴ Evidence provided in Enderlein, "Heirless..."

¹⁵ Kohlhammer Kommentare, Die Rückerstattung in Westdeutschland und Berlin, 1950, (Kohlhammer Commentary on restitution in West Germany and Berlin), remarks on article 10

¹⁶ ZOV 2/2013 p. 75

that not only provide social assistance, but also support other projects that have nothing to do with restitution to the persecuted German Jews.¹⁷

There has been ongoing criticism for many years from leading Jewish groups – especially from Israel – about the way the JCC distributes these funds.¹⁸

7. The OLG attempts to use legislation history to support its rejection of the JCC trustee status. The idea behind establishing the JCC as a legal successor was purportedly to ensure that heirless or unclaimed assets would not revert to the national treasury of a state, "in whose recent history the injustice that needs to be rectified took place," which is what it says in the justification of the Property Act (BT publication 11/7831, p. 4).

However, the exclusion of the national treasury does not necessarily give the JCC unrestricted rights of disposition. The treasury is also excluded as an heir when the role of the JCC is that of a trustee.

Unfortunately, the Property Act does not completely prevent the use of Jewish property to benefit the German state (or Aryanizers). This is because the JCC is not generally designated as the legal successor to heirless assets. Instead, the organization is required to file a claim within the time limits specified by § 30 of the Property Act.¹⁹ The global applications filed by the JCC were, for the most part, not recognized.²⁰

In another section, it says that the appointment of the JCC *"enables proceeds to be distributed, if not to the heirs, then to other needy Jewish citizens through support provided by the defendant's organization. This provides partial financing for the defendant's various social programs."*

The JCC's social programs, which are clearly in line with the organization's founding principles, are thus financed with money that has been withheld from those who are actually entitled. The advantage for Germany lies in the fact that the more money received by the JCC – at the expense of the defrauded heirs of the murdered Jews – the less is required for JCC

¹⁷ In preparation for the annual meeting of the Board of Directors in July 2014, a working group discussed the idea of using the remaining funds for educational purposes in commemoration of the Holocaust, or for the construction of synagogues in Central Asia.

¹⁸ Reports appear regularly, particularly in the Jerusalem Post. Articles have also been cited by Spannuth, loc. cit. p. 200

¹⁹ This issue was critically addressed in detail in my article "§ 2, para. 1, sentence 3 of the Property Act: Is it unconstitutional? Thoughts on the Goodwill Fund administered by the Jewish Claims Conference," ZOV 6/2008

²⁰ See also Johannes Wasmuth, "Global applications by the Jewish Claims Conference and deadlines in accordance with the Property Act," ZOV 4/2003, p. 225 ff. However, special rights were subsequently granted to the JCC, see below

relief funding as specified, for example, in the agreement between the GDR and the FRG governing the implementation and interpretation of Article 2 of the Unification Treaty.²¹

8. The OLG very briefly addressed an earlier decision by the Federal Court of Justice, which was cited by the plaintiff. In 1955, this court clearly stated that *"in the interests of those persecuted and the protective intention of the restitution law, the successor organization (i.e. the predecessor to the JCC), should assume (a trustee) role."*

*"The displacement of the actual heirs by the JRSO would, in the first place, basically mean that the Nazi injustice would be fully borne by those persecuted ... The concept of justice, which serves as a basis for the compensation and restitution laws, would only be fundamentally satisfied if the compensation goes to those who actually suffered the damage."*²²

According to the OLG, this was merely a case of *"obiter dictum"* and it was allegedly *"moreover not further substantiated from a legal standpoint."*

This is not correct in this form. The Federal Court of Justice deals in detail with a legal opinion of the CORA and cites the negative criticism of Rosenthal, Börner, Weißenstein, Engler and Moser. This also gives the decision special meaning, because it is a decision by all civil divisions of the Federal Court of Justice.

With its current decision-making approach, the OLG circumvents case law established by German courts back in the sixties.

9. The OLG refused to consider an appeal, *"because the case has no fundamental significance, nor does it serve the development of legal rights or ensure a uniform administration of justice requiring a decision by a court of appeals."*

The plaintiff does not see it this way and plans to file an appeal against the denial of leave to appeal with the Federal Court of Justice.

The case of Bernhard K.

1. The grandchildren in the United States knew that their grandfather, Bernhard K., was the majority shareholder of a large company and owner of a plot of land in East Berlin. As a Jew, their grandfather lost his entire fortune to the Nazis in 1938.

²¹ Agreement between the German Democratic Republic and the Federal Republic of Germany for the implementation and interpretation of the Agreement signed in Berlin on 31 August 1990 agreement between the German Democratic Republic and the Federal Republic of Germany on the establishment of German unity - Unification Treaty - Journal of Laws of the DDR, Part I No. 64 p. 1979

²² Verdict of the Federal Court of Justice from February 28, 1955, GSZ 4/54

Prior to the deadline in 1992, they filed a claim with the authorized property office in Berlin. They were greatly disappointed to receive notice that their claim was rejected. The reason given was that they were not regarded as heirs and would only be entitled to a compulsory share of the proceeds.

Their grandfather had written a joint testament with their grandmother in 1922, in which the couple appointed each other as primary heirs and their children as secondary heirs. The testament also contained a clause stating that the surviving spouse was entitled to specify new provisions. The applicants' grandmother died in 1925.

When the Nazis came to power, the four children left Germany as a precautionary measure. Werner and Helene moved to Switzerland in 1933, Hanna went to Great Britain in 1933, and Ilse emigrated to the U.S. in 1936.

Bernhard K. later remarried. Shortly before his death in 1941, he wrote a new testament that named his second wife, M.K. as the beneficiary. His four children were not mentioned in the will – for good reason.

The 11th decree of the Reich Citizenship Laws stipulated that Jewish persons who establish residency outside of Germany would automatically lose their German citizenship. At the same time, the loss of citizenship meant that any property owned by this person would be forfeited to the German Reich.

Appointing the children as heirs would have led to their disinheritance. In other words, the testament was clearly written under duress.

Shortly before Bernhard K.'s widow was sent to a concentration camp, where she was murdered in 1942, she was awarded a certificate of inheritance as the sole heir to Bernhard K. She left a testament that specified M.M., her only daughter from a previous marriage, as the sole heiress.

After the war, M.M. filed a claim for return of the assets once held by Bernhard K., who had also owned several properties in West Berlin. His four children submitted a claim for the same property, but this claim was rejected due to the certificate of inheritance held by M.M. The four children tried to challenge this certificate of inheritance, but failed. They discontinued their efforts to be named as heirs after reaching an agreement with M.M. to divide the estate of Bernhard K. into five equal parts. Following the advice of her lawyers, M.M. later retracted this agreement.

M.M. died in 1982 in Great Britain, leaving no descendants.

After the claim filed by Bernhard K.'s grandchildren was rejected by the BADV (Federal Office for Central Services and Unresolved Property Issues), they initiated another attempt to be recognized as heirs and filed a petition to nullify the certificate of inheritance in which the grandfather's widow M.K. was named as the sole beneficiary. This was based on the premise that, after her death, there were no remaining descendants, which meant that the estate would therefore be considered as heirless – although there were direct descendants who were only excluded from the inheritance because of the Nazi persecution of Jews. Their application was rejected by the Charlottenburg District Court (AG) and the Berlin Court of Appeals (KG).

2. The Jewish Claims Conference filed a global application for Bernhard K.'s assets in December 1992. This application was later supplemented with further details. The JCC was recognized as an entitled party and received a larger compensation sum for a majority share of the company owned by Bernhard K. as well as for his property.

The grandchildren then approached the JCC, the legal successor to their grandfather, and demanded their compulsory share of the inheritance. The JCC, claiming that it is not the legal heir, rejected the request.

After this, one of the grandchildren, P.L., took the case to the Frankfurt Regional Court and demanded his compulsory share of the inheritance from the JCC. This case was rejected by the court on April 4, 2014.

This decision is absolutely unacceptable. Statements that refer to the actual reason for the claim can only be found at the beginning and end of the court ruling. At the beginning it says: *"Under § 2303, para. 1 of the German Civil Code, the defendant is not required to honor the payment claim. The defendant is not an 'heir' within the meaning of the legal provision, but has gained ownership rights through an act of law ... "*

At the end it says: *"Because, if the entitled parties (who were expropriated in favor of the JCC) remain, from a legal standpoint, the legal successors, any claim to a compulsory share of the inheritance under § 2303 para. 1 BGB could only be directed against them."*

Between these two statements, the Regional Court focused its reasoning on the question of whether the JCC, based on the fiction of legal succession, becomes a trustee for the entitled party. But this had nothing to do with the reason for the lawsuit.

The plaintiff did not base his claim to a compulsory share of the inheritance from the JCC because he regards the organization as a trustee, but because, as a legal successor, the JCC has not only fictionally, but factually gained possession of the estate. Therefore, the JCC is required to assume not only the rights of the entitled heirs, but also the obligations.

3. Generally speaking, the JCC must accept the burdens associated with the property assets. This applies to the repayment of any amounts received in previous equalization proceedings as well as to the repayment of mortgages or the payment of compensation for the purchase price to the previous buyers. The plaintiff commented on this in detail in a letter dated March 3, 2014, but these statements were completely ignored by the Regional Court (LG).

Consequently, this case is a refusal of the right to a fair hearing.

In a decision from November 26, 2013 (8 BVerwG B 20/13), the Federal Administrative Court dealt *inter alia* with the question of when the right to a fair hearing is violated. This right requires the court to hear the arguments from all parties and to take these into consideration insofar as they are relevant to the decision (with reference to a verdict by the Federal Constitutional Court from November 17, 1992, 1 BvR 168/89).

A violation of the right to a fair hearing occurs when it is clear in an individual case that the court has not complied with this obligation. And this is precisely the situation in this case. The court deals with the loss of rights when an entitled party fails to meet the deadline: *"When the actual heir is no longer permitted to file a claim against the JCC after the application deadline has expired, this must also apply to the plaintiff who is merely (!) entitled to a compulsory share of the inheritance, because placing the person entitled to a compulsory share in a better position than the actual heir would be unreasonable."*

The court completely ignores the fact that the plaintiff already filed a claim before the deadline with the property office. But this isn't the point. Entitlement to a compulsory share of the inheritance has nothing to do with the deadlines specified in the Property Act.

The Regional Court (LG) expects the person entitled to a compulsory share to approach the heir or heirs – who have no money because their assets have been assigned to the JCC. The situation in this case, however, is different – which is something that is overlooked by the court. Namely, there are no heirs. The JCC gained its legal position not because the heirs missed the deadline, but because there are no heirs. In other words, this case is about truly heirless assets.

4. An appeal filed by the plaintiff against the Regional Court (LG) decision was rejected by the Higher Regional Court (OLG) in Frankfurt on February 11, 2015.

The OLG largely agreed with the reasoning of the LG. A demand for a compulsory share is directed against the heirs. But the JCC cannot be regarded as an heir because it has gained its legal status not from an inheritance, but from a legislative order. How the JCC gains its legal status is undisputed.

The OLG reiterated the objectives of § 2 para. 1 sentence 3 of the Property Act by maintaining that the JCC prevents use of the property by the German state, or Aryanzers. At the same time, it enables funds to be distributed, if not to the heirs, then to other needy Jewish citizens. The OLG fails to answer the question: And why not to the heirs? How would that conflict with the stated objectives?

The JCC is tasked with handling restitution claims for the purpose of collective restitution. But where does the law exclude individual restitution? According to its own statutes, the JCC is also directly responsible for individual restitution.

The exclusion of the 'entitled' party is regarded as a conscious decision on the part of the lawmakers. Thus, the OLG repeated the assertion of deliberate expropriation. The lawmakers purportedly made no provisions for cases in which the heirs file a claim after the deadline has expired. This is obviously true, but at the same time, it pinpoints the oversight that needs to be criticized.

Following the opinion of the Federal Constitutional Court, the OLG argues that the exclusion of proprietary claims for cases in which the claimant failed to meet the deadline is not the same as expropriation, because this should have been asserted anyway and its termination could have been easily prevented within a reasonable time and in a simple form. All this is nothing more than theory. In practice, the situation was very different. I have already provided the necessary comments on this in other articles.²³

The OLG also repeated the premise that there is no inadvertent loophole. But this is precisely the case. The JCC should have been named as a trustee for the entitled party.

The other repetitions in the reasons for the judgment – limitation of the content and scope of ownership based on the important needs of public interest (which could all be satisfied without expropriation of the entitled parties), eliminating barriers to investment (which would have been eliminated even if the JCC was named as a trustee for the entitled parties), deadlines created in the general interest of economic development – are all noble objectives that have nothing to do with the trustee position of the JCC.

The legislative intent purportedly justifies the specification of an appropriate and necessary deadline aimed at achieving the desired goal.

²³ Enderlein, "The Supreme Constitutional Court and § 30a of the Property Act," ZOV 5/2010, p. 212; *idem* "Expropriation pursuant to § 30a of the Property Act," ZOV 5/2009, p. 219

In my opinion, all of this misses the point. Nothing speaks against the idea of a deadline, but this doesn't have to result in an expropriation of the entitled parties. Expropriation does not contribute to the suitability of a limitation period, nor was it necessary.

Incidentally, the deadline has not been consistently applied to the JCC. The organization was granted a new time limit for filing claims as a result of § 1 para. 1a of the Compensation Act for Victims of Nazi Persecution (NS-VEntschG) included in the 2nd Compensation Act Supplement (EntschRÄndG) from September 1, 2005.²⁴ This clearly infringes the principle of equality defined in Article 3 of Basic Constitutional Law.

5. In its 12-page decision, the Higher Regional Court (OLG) comprehensively addresses the trustee position on behalf of the entitled parties, which in the court's opinion, is non-existent. But the court hardly looks at the issue of why the JCC is not required to satisfy claims for a compulsory share of the inheritance. Is this simply because the JCC is not regarded as an "heir" but as a fictitious legal successor?

There is obviously no doubt about the plaintiff's entitlement to a compulsory share of the inheritance. Consequently, the arguments regarding the absence of a trustee position for the JCC do not hold water. Whether or not the JCC is a trustee does not play a role in terms of its obligation to satisfy any claim for a compulsory share.

Why can't the basic principle, stating that the party who receives a property asset be required to assume the associated burdens, be applied? What does 'legal successor' actually mean? The legal successor assumes all rights, along with all responsibilities. Examples of this were cited in the notice of appeal and can be further supplemented. For example, the purchaser assumes responsibility for a contaminated plot of land, or a building owner is liable to tenants for hidden defects, etc. This principle permeates civil law and was probably included in Roman law.

The following is stated in the justification of the Property Act: "In the appropriate application of the law in accordance with § 1 paragraph 6, the term 'legal successor' is to be broadly interpreted."²⁵ It is precisely this broad interpretation that the OLG has failed to implement. The OLG approved the appeal because the matter is of fundamental importance. Clarification from the highest court is apparently required to determine whether the JCC should be regarded as an heir, against whom relevant inheritance claims can be asserted.

²⁴ Hermann-Josef Rodenbach, "Das 2. Entschädigungsrechtsergänzungsgesetz" (2nd Compensation Act Supplement), ZOV 5/2005, p. 271

²⁵ BT publication, as previously mentioned

Excursus

In their decisions, both divisions (11 and 19) of the Higher Regional Court of Appeal address the trustee status of the JCC in detail. The Federal Administrative Court also dealt with this issue in 2013 and, in my opinion, came to some very different conclusions. In its decision, the court arrived *inter alia* at the following conclusions:

The JCC is "***solely entitled to serve as a trustee on behalf of Jews persecuted by the Nazi regime or their heirs.***"

I have commented in detail on the Federal Administrative Court decision.²⁶

It is obvious that the Property Act was "hastily thrown together."²⁷

Although the standard rules in § 2 paragraph 1 of the Property Act are absolutely correct and necessary, the fact that the Property Act does not differentiate between a) heirless assets, and b) assets for which there are heirs who did not file a claim before the deadline, was a mistake. In the first case, a) the JCC serves as a trustee for all Jewish people. In the second case, b) the JCC serves as a trustee for individuals.

Due to a lack of clarification of the JCC's role, § 2 para. 1 sentence 3 Property Act results in a redistribution of Jewish assets and an expropriation of Jewish heirs. This constitutes a violation of Article 14 of Basic Constitutional Law and is contrary to Article 1, Protocol No. 1 of the European Convention on Human Rights.

The goal of not letting the German state or the Aryanizers benefit from stolen Jewish property was not fully achieved. If the JCC also failed to file a claim, the situation remains unchanged. It also remains unchanged for cases in which the initially generous handling of the global applications submitted by the JCC were later revised.

There are various reasons why entitled parties failed to file their claims within the time limits specified in § 30a of the Property Act.

In many cases, claims were not resubmitted at the time because proceedings had already been initiated in the 1950s and 1960s. To the extent that these old claims were rejected because the property assets were outside the scope of restitution laws, the process should have been resumed through official channels without requiring the submission of a new claim.

Some claims were not submitted because the (Jewish) owner was still listed in the land register. In these cases, the failure to submit a claim led to the absurd result that the heirs were expropriated and the property was assigned to the JCC.

²⁶ Fritz Enderlein, "Justice at last for the heirs of Holocaust victims?" ZOV 2/2013, p. 53

²⁷ See the interesting comments from Spannuth regarding the legislative history, *ibid* p. 183

Claims were often rejected because the heirs – who were scattered all over the world – had no knowledge of the assets of their ancestors, and no effort was made to locate or notify them, although verification of their existence and their addresses were available in official documents.

Hopefully, regarding the two verdicts of the OLG discussed here, the cases pending in the Federal Court of Justice will reaffirm the line of thinking it followed in 1955.