Restitution or end of state administration?

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ZOV (Zeitschrift für offene Vermögensfragen) 3/2003, p. 154 ff.

Let's return to the need for return of title when the former owner is still listed in the land register[1]. A ruling by the Federal High Court of Justice (BGH) from 9 January 2003 (III ZR 121/02 = ZOV 2003, 99) sanctions the subsequent expropriation of Jewish assets. The circumstances of the case were as follows:

Ms. A.B. from Lodz, Poland was listed as the owner of a property in Berlin since 7 January 1924. She died on 7 September 1943 and Mr. J.B. inherited her estate. After his death on 15 January 1957, the defendant inherited the estate together with her mother, the former defendant, who had died before service of process. In accordance with this succession, the defendant and her mother were entered in the land register on 30 May 1995 as part of the rectification of the land register, without a return of title decision by the AROV (Office for Unresolved Property Issues). The BGH considers this to be wrong.

Following the request from 12 November 1941 by the Haupttreuhandstelle Ost (Main Trusteeship Office East), delegated by the Four Year Plan, the provisional administration of the Jewish-owned real estate was assigned to the German Reich and the relevant entry was listed in the land register under charges and limitations. Furthermore, after the War, the comment "List C" was added to the land register under the "changes" column.

The VEB Kommunale Wohnungsverwaltung Berlin (nationally owned residential property management company in Berlin), the legal predecessor of the complainant, managed the real estate on the basis of SMAD (Soviet Military Administration in Germany) order number 124 and the main administration order of the Magistrate of Greater Berlin from 21 April 1953.

The proceedings focused on the issue of whether this was a case of state administration – as was assumed by the Berlin Regional Court[2] (Landgericht Berlin, LG) and the Berlin Court of Appeal[3] (Kammergericht Berlin) – or whether the original owners were forced to relinquish their ownership as a result of NS laws, which would mean that a return of title was required.

The BGH does not consider this to be a case of state administration in accordance with § 1 para. 4, § 11 ff of the Property Act, which would have legally ended on 31 December 1992. The explanation

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[1] Cf. F.E., *Keine Rückübertragung erforderlich, wenn der Alteigentümer noch im Grundbuch steht* (No return of title necessary if the prior owner is still listed in the land register), ZOV 5/2002, p. 263 ff.

[2] 35 O 650/98, ruling from 7 March 2000

[3] 12 U 3570/00, ruling from 18 February 2002

provided by the BGH is weak. The Senate refers to the joint order by the Finance Ministry and the GDR Ministry of the Interior from 11 October 1961[4]. This order states that entries in the land registers referring to property of the German Reich, the Prussian State, the Wehrmacht (army) and its institutions, and the states, administrative districts and municipalities should be deleted and identified as "property of the people" in the Liegenschaftskataster (real estate register).
As determined by the Senate itself, this excluded real estate that had become property of the Reich as part of the NS racial legislation, regardless of whether this transfer of ownership was listed in the land register or not. This joint order therefore does not prove that public property was created.
It is unclear whether a provisional administration based on the Polen-VO (a regulation governing the treatment of assets belonging to members of the former Polish state, hereafter referred to as the Poland Regulation) has created Reich property, since this would have required additional decrees. (§ 9 of the regulation stipulated that seized assets **could** have been confiscated by the relevant authority in favor of the German Reich, which did not take place in the case presented here.)
It is astounding that the BGH refuses to assume a case of state administration and merely laconically references "a.A. LG Berlin ZOV 1998, 142 f."[5]. It would have been logical to consider the detailed reasoning provided by the Berlin Regional Court, which was, in my opinion, convincing. According to the regional court, a provisional administration following the Poland Regulation did not lead to formal expropriation and that clearly, according to SMAD order number 124 from 30 October 1945, expropriation is clearly prohibited.
A return of title would only have been required if the real estate had not only been an asset subject to a provision according to § 1 Property Act, but indeed a property asset that was nationalized or sold to a third party. Not only the Berlin Regional Court disagrees with the BGH. The Court of Appeals also disagrees, because it confirmed the original decision – 15 U 4217/96 – on 24 October 1997. However, this is not mentioned in the BGH decision.
In either case, the action taken by the NS authorities would have to be regarded as null and void. But the Senate denies this and refers to the fact that, in practice, these real properties were regarded by the GDR as public property, according to an internal memo from an anonymous administrative body. The same notice that appeared in the BAROV[6] series, issue 7, document 64 also states that the provisions of the regulation from 18 December 1951 pertaining to the management and protection of foreign property in Greater Berlin apply to this real estate complex.

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[4] See the BAROV (Federal Office for the Settlement of Unresolved Property Issues) series, issue 7, document 24
5 Dissenting opinion, Regional Court Berlin

6 Federal Office for the Settlement of Unresolved Property Issues

The subsequent document number 65 from 1983 clearly states that the real estate of Jewish Polish owners seized as a result of SMAD order number 124 was placed under trustee administration. The reasons for the decision included the following: *"Because the Property Act is also specifically intended to compensate for property expropriated by the NS state that did not lead to loss of assets."* (p. 5.)

This is true, but the Property Act does not only contain § 1 para. 6. The Senate entirely ignores § 1 para. 4 of the Property Act. One of the issues regulated in this section is "The end of the administration of foreign property that was entrusted to the government of the German Democratic Republic (hereafter referred to as state administration) and the associated claims by owners and eligible persons."

Despite the precise legal wording, the BGH denies there is a case of state administration. There was no discussion on the relationship between §§ 1 para. 4 and 6. Evidently, if the facts of the case are in line with § 1 para. 6, para. 4 is not taken into consideration.

Property Act § 1 para. 6 only applies to citizens and associations who were persecuted and lost assets based on racial, political, religious or ideological grounds in the period from 30 January 1933 to 8 May 1945. In the case presented here, the defendants did not lose their assets. However, they did not have rights of disposal until the end of state administration.

According to the BGH, "*Cases falling under § 1 para. 6 n of the Property Act are to be viewed as cases of restitution, for which – unlike cases of state-administered real estate – the regulations regarding the priority for investments (Precedence of Investment Act) in the case of return of title claims based on the Property Act, generally apply.*" It is not clear what this is intended to prove.

The Senate concedes: "*Although, according to § 22 of the Precedence of Investment Act, the real estate in List C (and this is true for the case presented here, F.E) is excepted from the priority regulations. […] This, however, does not change the fact that these properties are subject to the restitution law. The cases in which a person other than the victim of persecution is listed in the land register as owner, do not require any further justification. But also in cases where the victim of persecution was still registered, at least in the case of heirless asset, return of title proceedings are necessary when an eligible person*[7] *submits a return of title claim according to § 2 para. 1 sentence 3, para. 1a of the Property Act.*"

So far so good. But in the case presented here, the assets are not heirless. In fact, after the end of state administration, the heirs were subsequently entered in the land register as owners.

7 That is the Jewish Claims Conference

In contrast, according to the BGH: *"A consequence of the applicability of the Property Act on the property divestment under discussion in this case (which did not lead to loss of property, F.E.), the eligible person can regain the lost legal status only under the preconditions specified in the Property Act."* (p. 5) One could agree with this if it meant that the precondition for regaining the legal status is the end of state administration according to § 11a of the Property Act. However, this is not the position taken by the BGH:

"The Senate agrees with the opinion of the Federal Administrative Court (BVerwG) that § 1 para. 6 of the Property Act fundamentally justifies return of title claims for the first time for the group of persons mentioned (BVerwGE 98, 261,265). However, the defendant and her mother were able to regain ownership of the lost real estate based on their inheritance right only because the Office for the Settlement of Unresolved Property Issues clearly ruled in their favor on the basis of an application filed within the time limit specified in § 30a para. 1 sentence 1 of the Property Act (§ 34 Abs. 1 Property Act). It is immaterial that the real estate was neither nationalized nor sold to a third party. For § 3 para. 1 of the Property Act to apply, it is sufficient in the case of a return of title claim according to § 1 para. 6 Property Act that the real estate was transferred to Reich ownership (cf. BVerwGE 98, 137, 140)." I could agree with this if such a transfer had taken place, but this precisely was not the case.

"Even in the case of a forfeiture of assets that must be regarded as null and void by law, the persons eligible to make such a claim were not relieved from exercising their rights, particularly against possible applicants according to § 2 para. 1 sentence 3 of the Property Act." (p. 6)

Although the heirs of the original owner, who was still listed in the land register, obtained a rectification of the land register in their favor after presenting a certificate of inheritance and are now registered in the land register as owners, they have not, according to the BGH, become the true owners. this is because they failed to submit a return of title claim to the AROV within the specified time limit and consequently, there is no decision by the AROV with constitutive effect in their favor.

But what if no application[8] was submitted by the JCC, or not submitted in time? Who then is the true owner? The Federal Republic of Germany as successor of the German Reich?

Although, based on the Poland Regulation, the order of the provisional administration was entered in the land register, which was considered confiscation, Reich ownership did not come into effect (and if it had, all the relevant legal acts would be regarded as void by law according to the Supreme Constitutional Court (BVerfG)). Reich, or more specifically, **federal property comes about today**

[8] See the recent decision by VG Berlin (Administrative Court of Berlin), ruling of 27 September 2002, VG 31 A 371,99, ZOV 6/2002, p. 372 ff.

only through the application of § 1 Abs. 6 of the Property Act in conjunction with § 30 a of the Property Act to circumstances that do not require this application.

The plaintiff has *"questioned whether the correction of the land register could have been legally effective for the entitled heirs (which the Court of Appeals simply assumes to be the case). The doubts are justified. The defendant and her mother managed to achieve a return of title ... basically through successfully concluded return of title proceedings. If, for example, they missed the deadline specified in § 30 a para. 1 of the Property Act … they would not have been able to recover the divested assets. This clear return of title provision in the Property Act ... would not be reconcilable with the case in which the heir of the victim of persecution, through the simple (?) proof that he or she is the heir could recover the assets*[9] *because the land register still listed the victim of persecution as the owner."* (p. 10)

In this specific case, the JCC withdrew its return of title claim *"because it recognized the material entitlement of the defendant and her mother to the expropriated assets."* The AROV also *"expressed that, from its point of view, there is nothing in the way of returning the real estate to the owner listed in the land register."*

According to the BGH, this was a clear case of "misjudgment" (p. 11) According to the opinion of the BGH, *"no simple correction of the land register, effectively bypassing the AROV, establishes (secure) ownership for the defendant and her mother."* (p. 10)

What now? The defendant has exercised her right as an heir vis-à-vis the land register office, has effected a change to the land register and then sold the real estate. The buyer purchased it, trusting the entry in the land register. Must the real estate sales contract be regarded as void by law? Does the seller have to return the sales proceeds to the buyer? Or to Germany as the real owner? These questions are likely to be of interest not only to those directly involved in the case. In recent years, many cases that I know of have been dealt with in precisely the same way. The original owners were still listed in the land register, the heirs did not file a return of title application, but based on the presentation of certificates of inheritance, the land register was amended as a result of which the JCC (if indeed it filed an application) abandoned its claim.

[9] Why would assets have to be recovered if the action taken by the NS state did not lead to loss of assets in the first place?