Restitution pursuant to the Property Act when the owner is still listed in the land register?

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Neue Justiz, 9/2003, p. 462

In a ruling from 9 January 2003,[1] the Federal Court of Justice (*BGH)* issued an opinion on a legal dispute regarding a compensation claim from an administrator pursuant to the Property Act. The *Regional Court of Berlin* (*LG Berlin)* as well as the *Court of Appeal (Kammergericht, KG)* rejected the claim due to statutory limitation. According to the *BGH*, non-statute barred claims by the complainants cannot be excluded and so referred the case back to the Court of Appeal for re-trial and a new ruling.

The difference between the legal opinions of the Berlin courts and the *BGH* is that the *LG* as well as the *KG* assumed that there is an administrator relationship between the parties, while the *BGH* sees the claimant as a person with power of disposition who is entitled to assert claims according to § 3 para. 3 sentence 4 of the Property Act.

In essence, the issue is whether the dispute was about the end of state administration or a case necessitating the return of title (not done), which is what the BGH believes[2].

In my opinion, the interpretation of the *BGH* regarding the ownership position of the real estate is wrong.

The real estate property in question, based on § 5 of the so-called Polen-VO (regulation governing the treatment of assets belonging to citizens of the former Polish state, hereafter called Poland Regulation) from 17 September 1940 (RGBl[3] .I p. 1270) was placed under provisional administration by the German Reich. After the war, the real estate continued to be administered based on order no. 124 of the Soviet Military Administration in Germany (SMAD). Ownership of the real estate was never transferred to the German Reich nor did it become the property of the people. The heirs of the former owner produced a certificate of inheritance and were registered as the property owners.

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[1] BGH, NJ 2003, 314 (edited by V. Kolb) = ZOV 2003, 99

[2] Cf. Fritz Enderlein, "Rückübertragung oder Aufhebung der staatlichen Verwaltung?" (Restitution or end of state administration?), ZOV 2003, p. 154 f.

3 RGBl = Reichsgesetzblatt, Reich Legal Gazette

The *BGH* considers this to be wrong. It believes that the order of the provisional administration according to the Poland Regulation from 17 September 1940 counted as a case of seizure and that this is to be regarded as a divestment of property according to the provisions of the Allied Restitution Law and pursuant to § 1 para. 6 of the Property Act. According to the BGH, the Property Act focuses on actual circumstances, and it is of no significance whether the injustice committed by the Nazis led to a loss of assets as defined by civil law.

Ultimately, this constitutes subsequent expropriation of Jewish property.

Angela Kolb acknowledges and agrees with the decision.[4] She writes: "... initially the *BGH* had to deal with the underlying question of whether the relevant provisions of the Property Act apply, or whether it civil law takes precedence." Like the *BGH,* Kolb does not ask what the relevant provisions of the Property Act are for a case in which the owner persecuted by the Nazis is still listed in the land register.[5] Along with the *BGH,* she assumes that "persons who were persecuted for racist, political, religious or ideological reasons in the period between 30 January 1933 and 8 May 1945 and have therefore lost their assets, have only a position on paper in the land register even if they were still listed in the land register as the owner.

It is generally debatable whether the people in question have lost their assets, since all relevant Nazi laws were annulled in 1945 by the Allies. Aside from this, when it comes to the *BGH* ruling mentioned above, it must be kept in mind that the real estate was only placed under provisional administration and that the seized assets were not confiscated for the benefit of the German Reich, which would have been possible according to § 9 of the Poland Regulation.

As Kolb rightly commented, a peculiarity of the matter under decision was that "…a formal transfer to the property of the people never took place." But at the same time, ownership was never transferred to the Reich prior to that!

Like the *BGH,* Kolb states that this is "therefore not a case of state administration in accordance with §§ 1 para. 4, 11 ff. of the Property Act" and she regards this to be "in conformity with actual practice, which meant that the owners listed in the land register had no opportunity to access their property." Make of that what you will. When the owners are

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4 A. Kolb, NJ 2003,315

5 Cf. F. Enderlein, "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 2002,263 ff.

unable to access their property, is this not a case of state administration? What were the owners permitted to do in the case of state administration? Was this not precisely characterized by the fact that, *practically speaking*, they were only owners on paper? The law passed on 31 December 1992 ended state administration and abolished restraints on property – and this should also benefit the people persecuted by the NS regime who are still listed in the land register.

Kolb's opinion that the subsequent and resulting expropriation "takes into account the equal treatment of those who suffered loss of property" does not make sense. Rather, this is precisely a case of unequal treatment of Jewish owners, who were refused reinstatement of their rights after the end of state administration.

There is also no reason why the Jewish heirs should have to resort to a return of title pursuant to § 1 para. 6 of the Property Act when the same result can be brought about by ending state administration as specified in § 1 para. 4 of the Property Act. In other words, why do it the easy way when it can also be made so complicated?

Kolb's mention of a "socially responsible reconciliation of interests" when it comes to disputes between the heirs of Holocaust victims on one side, and the legal successor of the communal property management on the other, is incomprehensible.

Unfortunately, the *BGH* decision does not contribute to legal clarity. One can only hope that the Court of Appeal will uphold the differentiation between § 1 para. 4 and § 1 para. 6 of the Property Act.