GROOTERHORST
& PARTNER
RECHTSANWÄLTE

NEWSLETTER 02/2011

Dear Reader

The second newsletter of 2011 presents itself in a new format.

Our report commences with current topics: The German regional banks have accumulated huge losses due to wrong decisions made. The liability of the parties involved as well as the standards of liability are widely discussed. National as well as European courts concentrate on the Planning Law for the large-scale retail trade.

Company Law deals with those rights regulating the access to documents for a board member who has to defend him-/herself.

Rulings related to the Law of Association, Banking Law, Bankruptcy Law, Private Planning Law, and the Commercial Landlord and Tenant Law, which are described in this issue, characterize the activities of our law firm when providing legal advice to institutions and municipalities, companies and individual entrepreneurs.

I hope you enjoy reading this issue of our newsletter.

Dr. Johannes Grooterhorst
Lawyer

Content

Impressum

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A. Current News

I D&O Liability:

Nullity of liability limitations for members of the supervisory board of public regional banks

The case of BayernLB

On March 15, 2011, the board of management decided to claim damages against the former chairman of the supervisory board as well as against the former deputy chairman because of grossly negligent breaches of duty in connection with the purchase of the Austrian Bank Hypo Group Alpe Adria (HGAA). As far as former simple members of the supervisory board are concerned, it would only be possible to prove simple grossly negligent breaches of duty, for which there is no legal basis of claims due to the liability privilege included in the statutes of the BayernLB. Whoever criticizes the ethic-moral aspect of the liability privilege, has to turn to other people, according to a statement made by the CEO Häusler. He believes that the board of management has to apply the regulations existing in the present statutes.

A new academic article

An academic article (ZIP 2011, 212 et seq.) made by us reveals that the liability privilege is unlawful and that the respective provision in the statutes of BayernLB is invalid. Based on this legal conception, the court which will be in charge of dealing with this claim for damages of the BayernLB will have to review the validity of the statutes, with the consequence that liability has to be affirmed already for simple negligent behaviour.Even the legal supervision body competent for the regional banks has to deal with the topic, since it is obliged to instruct the regional banks to nullify an invalid provision in the statutes The limitation on claiming damages based on gross negligent behaviour of the former member of the supervisory board and his deputy is not justified.

No abrogation from the general principle of liability of §§ 276 Civil Code (BGB), 93/113 Stock Corporation Act (AktG)

Limiting the standard for determining the fault of members of the supervisory board of public regional banks (for example, BayernLB, LBBW, Helaba) to intent or gross negligent behaviour is inadmissible. On the contrary, the general standard for determining fault effective in German law has to be applied. According to that, liability is linked to intentional as well as to any form of negligent behaviour. Limiting the standard for determining fault by means of the statutes is not within the limits of the freedom to form statutes awarded to the regional banks by the Regional Bank Law. The organisational power thus granted only includes the authority to determine the internal organisation of the regional bank. Limiting the standard of determining fault, however, exceeds the regulation of the internal organisation of the regional bank. The activities of the supervisory board may have damaging effects which not only jeopardize the existence of the regional bank. Due to the interconnectedness of the banks, other banks could be adversely affected as well and the entire economy could be damaged. Mitigation of liability necessitates a statutory basis for such authority which, however, is not included in the Regional Bank Law.

No application of the Savings Bank Law

The regional banks as universal banks

Even though the Savings Bank Law as well as the Civil Service Law permit a limited standard for determining fault, the basic legal principle stated there can not be transferred to the liability of members of the supervisory board.Public regional banks are universal banks, and their members of the supervisory board bear an increased degree of responsibility for crucial decisions they make. This would be contradicted by a limitation of liability. Even the liability privilege in the Civil Service Law constitutes an unsuitable parallel. This serves the purpose of promoting active administrative work. It would be absurd if members of

the supervisory board in performing their duties, which also includes preventing harm, are motivated to accept a damage by means of a liability limitation!

Contravention of the dual system of the board of management and supervisory board

The limited standard of determining fault is not compatible with the "dual" system implemented in the Regional Banks Law. The allocation of competences concerning the board of management and the supervisory board leads to an interlocking of both bodies which does not justify an unequal standard of determining fault in the event of a breach of duty. According to the intention of the body drafting the statutes, the board of management and the supervisory board have to cooperate closely. In addition to the pure control activities of the supervisory board, through the reservation of consent in case of specific legal transactions, there is the entrepreneurial co-administration of the supervisory body. Especially those transactions of the board of management which are subject to approval require increased diligence on the part of the supervisory board. If in these cases the supervisory board was only made liable in case of intent or gross negligence, then an efficient supervision of the board of management would be called into question. In this case, the supervisory board would have to make only the most simple and the most obvious considerations which would exempt the board from any additional liability. The board would not have to take the responsibility for complex issues. The dual system would be undermined.

Practical considerations

Moreover, the regional banks – due to their public mandate – are expected to refrain from high-risk business transactions. This special duty, a limitation of liability to intent or gross negligence, is not compatible with a limitation of liability for members of the supervisory board who are expressly expected to guarantee the fulfilment of this duty by means of their control activities! (see in detail ZIP February 4, 2011)

The development of the BayernLB case gives the legal system the opportunity to review the liability limitations, if this is necessary for a decision to be made. Insofar as the board of management follows the incorrect assumption of not being entitled to claims and, therefore, does not take legal proceedings against members of the supervisory board, the members of the supervisory board are called upon to review claims against the board of management in office.

Dr. Ursula Grooterhorst

II European Law right of establishment – Planning Law-limitations of establishing large-scale retail projects in violation of EU law (here:Catalonia)

In its judgement of March 24, 2011 (C-400/08) the European Court of Justice had to make a decision about the compatibility of the regulations for the settlement of large-scale retail centres in the area of the Autonomous Community of Catalonia (Spain) with the right of establishment (Art. 43 EC).

Large-scale retail trade in the "developed area"

Among others, a regulation was being dealt with forbiddinga limited number of communities to establish extensive retail centres outside consolidated urban areas (comparable to the "developed area" in accordance with the Building Code). Furthermore, another regulation was in dispute according to which the establishment of new consumer markets was restricted to specific districts, whereby those new consumer markets are only supposed to cover not more than 9 % of expenditure for products for everyday needs and 7 % for expenditure for mid-term and long-term needs. Finally upper limits were found anchored in the law concerning the

density of settlement as well as the impact on the existing retail trade according to which it is impossible to open new huge and/or medium-sized retail centres as soon as these limits are exceeded.

Infringement of art. 43 EC

In a breach of contract action of the European Commission versus the Kingdom of Spain, the European Court of Justice held that these regulations are incompatible with the freedom of establishment. Limitations with regard to location as well as the size of retail centres are quite appropriate means to achieve the aims of regional planning, environmental and consumer protection, since these aims could justify limitations in the individual case based on compelling reasons of the general welfare. Purely economic reasons, however, could not be considered compelling reason regarding the general good. The European Court of Justice decided the Kingdom of Spain did not present sufficient aspects explaining why the limitations in question are necessary to reach the targeted aims.

Practical considerations – application to German regulations

For Germany this judgement should be of interest as well: The European Commission sent a reminder to the Federal Government which classified the federal state's regional planning specifications for establishing extensive retail trade in North Rhine Westphalia and Baden-Wuerttemberg as incompatible with the EC Treaty. The Federal Government reacted to this reminder with a statement of August 2009. Breach of contract proceedings against Germany are still not pending. It remains to be seen whether the European Commission deems the regulations of North Rhine Westphalia and Baden-Wuerttemberg as sufficiently justified and founded in the light of the current rulings of the European Court of Justice, or whether the German regulations, too, have to be reviewed by the European Court of Justice by means of a breach of contract action.

Isabel Gundlach

B. Commercial and Company Law

I Stock Corporation Law / D & O Liability:
The former board member's right to have access to business documents in case of having to defend him-/herself against a liability claim

Numerous cases of liability following the financial, banking and real estate crisis

Given the most recent incidents at the BayernLB and the increasing number of cases of claims against former board members because of alleged breaches of duty when holding office as members of the board of management or supervisory board, the question of the scope of being entitled to have access to documents on the part of the accused member of the board of management or the supervisory board is more controversial than ever before:The accused board members face a particular difficulty. Without the business documents on the specific business transaction which should evidence their liability, it is often difficult or even impossible to plan an appropriate legal defence.

Impossible legal defence without access to business documents

No special legal regulation

The German Federal Supreme Court has acknowledged the problem and allows the former member of the board of management access to the relevant business documents, "provided this is necessary for his defence" (see AG 2003, 381 (382)). The German Federal Supreme Court has not specified in detail the scope and the enforcement of the right to access . Even the remaining rulings as well as the relevant literature provide different solutions.

A short overview of the procedural possibilities of solutions partly suggested in literature – which primarily intend to submit the documents at the competent court or which aim at a solu-

tion by producing the burden of proof and explanation – reveals that only a substantive and at the same time independently actionable claim takes the interests of the member of the board of management into account. Hence, as a rule, the procedural starting points require that the former member of the board of management is able to define the respective business documents in detail and that he/she only needs these documents to specify the already developed presentation of the party's case in even more detail and to prove it according to the judicial requirements. However, in most cases this is of no particular help for the former member of the board of management, in which he/she can not refute the presentation of the opposing party's case due to lacking knowledge of the complicated and extensive business documents.

Procedural solutions or material claim

Bases of the claim (§§810, Civil Code (BGB) §242 Civil Code? (BGB)

Board members sued for damages in order to, for example, "create" alternative solutions for the company as to the D&O insurance, should therefore right from the beginning base their defence on the documents provided by the company and should try to enforce this claim in a separate lawsuit or in one that is connected to the current one (for example, by means of a counterclaim).

Practical considerations

In the event that the company refuses to provide the respective documents by means of an out-of-court request, the former member of the board of management is entitled – by consistently applying the rulings of the Federal Supreme Court – to a substantive, actionable claim to inspect the relevant business documents.In the event that the former member of the board of management has already been held liable by the company because of a breach of board duties – which is almost always the case – such a petition for inspection would have to be asserted in the form of a counterclaim. This is most of all demanded by the necessity of an equality of arms between the company and the former board member. Furthermore, there is no reason why the former board member should be in a worse position in the context of such legal proceedings than an active board member. Consequently, the resignation and the therefore associated lack of access to business documents depends on a random point in time.

Johanna Nosske

II Law of Associations:

Reimbursement of expenses and payment of attendance fees at non-profit associations

So-called non-profit associations are – contrary to the original concept of the Civil Code – active in many areas of economic life, especially in cultural and social fields: They operate training facilities and social services. Faulty expense claims are a popular link in the – planned – replacement of unwanted board members. They also belong to the favourite topics of the public opinion.

This new sensitivity requires a new debate on an "old topic". For non-profit associations the question continually arises, whether and in how far board members and members of associations can receive payment for expenses as well as for attendance fees related to their activity in the association. According to the ruling of the Federal Supreme Court (judgement of December 14, 1987, File:II ZR 53/87), a clear distinction has to be made between reimbursement and remuneration when paying "expense allowances" for members of the association.

Reimbursement compensates for the financial sacrifices made by the member of the association when carrying out his/her association activity (for example as a board member). This includes expenses such as travel cost as well as additional cost for food and accommodation.

Distinction between reimbursement and remuneration

A compensation for working time invested is not included. All other services provided for the association are considered to be of a remuneration kind. Even though it is insignificant whether such a payment is specified as remuneration or allowance.

Lump sums paid to members of the association concerned can only be classified as reimbursement if they cover the actually occurred and provable cost for carrying out the mission / board activity. Attendance fees being additionally granted as expenses represent a remuneration.

Legal basis for reimbursement

According to §27 Sec 3 in connection with §670 Civil Code board members are entitled to a legal claim for compensating their expenses. A compensation for the working hours invested does not arise from this. This right can also be claimed by other board members of a non-profit association, for example, by members of the board of association. But even (simple) members of the association are entitled to compensation for expenses according to §670 Civil Code, if the association has allocated tasks to them.

The statutory right to claim attendance fees does not exist. Such attendance fees can only be paid if a respective regulation forms an explicit part of the statutes.

In practice a clear distinction has to be made concerning expenses to be refunded to members of the association. Expenses can only be refunded in compliance with the legal claim upon submission of the respective invoices or by means of lump sums.

In the event that in addition to the reimbursement of expenses, a compensation for the working hours spent should also be made, then a respective regulation in the statutes of the association becomes necessary.

Dr. Steffen Schleiden

III Banking Law:

Authorization of a direct debiting mandate by repeated operations

In its judgement of November 23, 2010 (File: XI ZR 370/08) the Federal Supreme Court decided that an implied authorization of a direct debiting mandate pursuant to the General Terms and Conditions of the credit institute can be derived from that fact that the account holder- as a consequence of being aware of the debits made – effects sufficient coverage for further transactions by either specifically paying in money or by making remittances.

The plaintiff acted as insolvency administrator of a Private Limited Company (GmbH). Immediately upon his appointment as provisional insolvency administrator subject to approval he informed the defendant, the bank of the private limited company, that he will not approve of direct debits which have not already been authorized, neither now nor in the future. Before his appointment the account of the private limited company had already been debited by direct debits. The plaintiff now demands to have those direct debits refunded. The Federal Supreme Court has thus to decide whether an implied authorization of a direct debiting mandate by the private limited company had already taken place prior to the appointment of the insolvency administrator.

In its decision the Federal Supreme Court first of all stated that the further use of the account with the knowledge of debits, does not represent an implied authorization. Actually in this be-

haviour no additional explanatory value can be seen with respect to an authorization. Hence it can not be concluded from such mandates, without additional circumstances arising that the account holder approves of former debits or of the balance of account reduced by these debits.

No explanatory value (implied authorization) by the continued use of the account

However, according to the Federal Supreme Court, specific transactions can represent an implied authorization. Such a transaction exists, if and when the account holder by means of payments into the account or by remittances guarantees just in time sufficient funds for further transactions. Actually in doing so the account holder intends to avoid a back transfer of new debit items or the return of transfer orders for lack of coverage of his/her account. Since he/she could have easily effected this coverage by objecting to older and – according to him/her – unjustified debit entries, his approval of these debit entries can be concluded from this. Consequently by guaranteeing sufficient coverage an implicit authorization of direct debits can be assumed.

Approval of account by guaranteeing sufficient coverage

In practice this means that especially commercial account holders should regularly control transfer activities in their account. In the event of unjustified debit entries, one should immediately notify the bank to object to these debit entries.Otherwise the account holder runs the risk of impliedly approving of these debit entries with his/her behaviour.

Practical considerations

Dr. Steffen Schleiden

C. Bankruptcy Law

Questions of liability arising from the payment of taxes and social security contributions at the point of insolvency

In its judgement of January 25, 2011 (File: II ZR 196/09) the Federal Supreme Court decided that the managing director of a private limited company (GmbH) can not be held liable pursuant to §64 clause 1 Limited Liability Companies Act (GmbHG), if he pays VAT and income tax after entering the point of insolvency.Likewise the managing director can not be held liable either for the payment of employees' contributions to social insurance after entering the point of insolvency.

The defendant was the managing director of a private limited company against the assets of which insolvency proceedings have been opened. The plaintiff is the insolvency administrator. Before the commencement of insolvency proceedings but after entering the point of insolvency the defendant made payments to the tax office to settle the arrears in payment of income tax as well as VAT and he/she also made payments to the AOK to settle outstanding social security contributions. The plaintiff claims compensation for these payments from the defendant.

The Federal Supreme Court concluded that the payment of VAT and income tax subsequent to entering the point of insolvency is compatible with the diligence of a prudent businessman pursuant to § 64 clause 2 Limited Liabilities Companies Act (GmbHG) and that an obligation to pay compensation according to § 64 clause 1 Limited Liability Companies Act (GmbHG) does not exist. Because in this case the managing director of a limited liability company is confronted with a conflict of duties. On the one hand there is an interdiction of payment pursuant to § 64 clause 1 Limited Liability Companies Act (GmbHG) after entering the point of insolvency. On the other hand he/she commits a summary offence effecting

No obligation to pay compensation for taxes paid – conflict of duties

a fine, if he/she does not pay taxes that are due to the tax office and he/she is also held personally liable.

Tax arrears

Even when paying tax arrears the conflict of duties plays a part. Because the voluntary payment of tax arrears has to be assessed in his/her favour when imposing the fine and personal liability has to be dropped as well. That is the reason why in this case there is no obligation to pay compensation according to § 64 clause 1 Limited Liability Companies Act (GmbHG).

No claim for compensation because of paying employees' contributions to social security insurance

This conflict of duties also exists when paying the employee's contributions to social security insurance at the point of insolvency, so that once again there is no claim for compensation. Because due to failure of payment the managing director is held liable and liable to pay damages. Therefore, the payment of employees' contributions to social security insurance at the very point of insolvency is compatible with the diligence of a prudent businessman as defined in § 64 clause 2 Limited Liability Companies Act (GmbHG). This also applies to the payment of contributions in arrears. In this case, too, the conflict of duties applies since the managing director can achieve with his/her payment impunity, exemption from and mitigation of punishment or a closing of the preliminary proceedings as well as an exemption from compensation claims.

Breach of duty of care by paying employer's contributions

However, the payment of employer's contributions to the social security insurance contradicts the diligence of a prudent businessman.It is only the withholding of employees' contributions that can be proceeded and justifies liability for damages. Consequently, with respect to the employer's contributions, the conflict of interest is absent and the managing director is liable for damages as defined in § 64 clause 1 Limited Liability Companies Act (GmbH).

Practical considerations

In case of a possible point of insolvency it has to be specifically taken care of which claims of the social insurance bodies have to be paid. In doing so, special attention has to be paid to the fact, that all employees' contributions to social security insurance were paid so that no criminal offence can be invoked. In case of tax demands one has to observe, that non-payment represents a summary offence. The payment of employer's contribution at the time of the point of insolvency triggers the obligation to pay compensation as specified in § 64 clause 1 Limited Liability Companies Act (GmbHG).

Dr. Steffen Schleiden

D. Real Estate Law

I Private Building Law:

Limitation of claims for defects – fraudulent concealment – organisational culpability

Only recently the Federal Supreme Court has once again to deal with the institute of organisational culpability in connection with claims for defects. Just as the District Court Frankfurt in its judgement of January 27, 2011, the Federal Supreme Court has in its judgement of July 22, 2010 – VII 77/08 dealt with the problem of fraudulent concealment of defects and the – possibly – longer limitation period resulting from this.

Pursuant to §634 Sec 1 No.2 Civil Code (BGB) claims for defects become time-barred regularly in five years for a building or a work, the success of which consists in the rendering of planning and supervisory services for this.

§ 634 a Sec 3 Civil Code (BGB), however, provides an exception in case the entrepreneur or the planner has fraudulently concealed the defect. In the event of fraud the standard limitation period of three years as defined in §§ 195,199 German Civil Code (BGB) applies. According to, this the regular period of limitations begins with the termination of that year in which the entitlement for a claim has commenced and in which the creditor has become cognizant of the circumstances justifying the claim as well as of the person of the debtor or in which he/she should have obtained knowledge without gross negligence.

Organisational culpability as fraudulent concealment

The established jurisdiction has thus developed the construct of the so-called organisational culpability. According to the rulings of the Federal Supreme Court, the objection of organisational culpability is justified if the architect is rightly accused of wanting to avoid the liability for fraud with his/her organisation. This reproach can result from the fact that the architect without becoming active him-/herself totally refrains from calling in assistants in order to fulfil his duty of disclosure. The reproach is also justified in case the architect employs personnel for this, knowing that this personnel will not or can not fulfil its duty, either because he/she has not selected sufficiently competent assistants or because he/she has not offered them sufficient possibilities to identify defects and to disclose these dutifully. The same applies if he/she does not have the respective know-how, but closes his/her eyes when confronted with such knowledge (Federal Supreme Court (BGH), New Legal Weekly Journal (NJW), Jurisdiction Reports (RR) 2010, 1604).

Huge obstacles providing grounds for organisational culpability

The requirements for proving organisational culpability are very high. The Federal Supreme Court has thus decided that a seeming breach of a construction supervision duty could only in exceptional cases create the further impression that the architect in charge of construction supervision inaccurately selected and employed the staff commissioned for the site management. Even in case of serious construction defects such an impression does not arise if such a mistake occurring during construction supervision can also be made by a carefully selected and appointed site manager (Federal Supreme Court (BGH), Building Law 2010, 1959).In the context of this ruling the District Court in Frankfurt decided that defects in the fire protected areas do not automatically lead to the assumption of a mistake, which would justify putting an engineer on an equal footing with an entrepreneur who fraudulently concealed a defect (District Court Frankfurt, judgement of January 27, 2011 – 2-20 O 273/07-).

Practical considerations It is not rare that a building may develop defects only 5 years after the final inspection. If in such a situation the building owner intends to sue the architect, he/she has to prove fraudulent concealment on the part of the architect.

Ralf-Thomas Wittmann

II Acquisition right to land:
Effective exercise of a right of first refusal upon annulment of the purchase contract by mutual agreement

In its judgement of October 1, 2010 (File VZR 173/09) the Federal Supreme Court decided that the pre-emptor can even exercise his/her right of first refusal effectively if the two parties to the purchase contract have annulled the purchased contract by mutual agreement.

In the record of facts the judgement is based on, the seller sold his property to a buyer on the basis of a notarial purchase contract. The property is encumbered with the right of first

refusal in favour of another home owner. The two parties of the purchase contract annulled the purchase contract by mutual agreement. Immediately subsequent to the annulment of contract, the pre-emptor exercised his right of first refusal and demanded the transfer of the property ownership to him/her.

Independent – second – contract of purchase by exercising the right of first refusal

In the opinion of the Federal Supreme Court (BGH), exercising pre-emption is effective and leads to the fact that an effective contract between the home owner entitled to pre-emption and the seller is concluded.This contract of purchase is a further independent contract of purchase in addition to the (annulled) contract between the person obliged to pre-emption (seller) and the third-party purchaser. The annulment by mutual agreement of the (first) purchase contract does not necessarily exclude the right of first refusal. The law connects the accrual of the right to exercise pre-emption only to the conclusion of a legally effective purchase contract (§ 463 Civil Code (BGB)). Once this pre-requisite exists, the pre-emptor's right to alter a legal relationship is principally independent in its continued existence of the future fate of the purchase contract between the person obliged to pre-emption and the third party (see also Federal Supreme Court (BGH), judgement of February 11, 1977 – V ZR 40/75). A subsequent annulment by the parties of the purchase contract is irrelevant to the relationship between the seller and the pre-emptor as well as to the contract coming into being in the context of this relationship and this sales practice.

Independence of the existence of the two purchase contracts

Practical considerations

When selling an item subject to pre-emption and when exercising the right of first refusal by the pre-emptor, the person obliged to pre-emption (seller) is confronted with two purchase contracts.Since the person obliged to pre-emption can normally not fulfil both contracts of purchase, he/she faces the risk of liability for damages. For this reason the person obliged to pre-emption should agree on clear regulations with the buyer in the (first) purchase contract whereby, for example, he/she is entitled to rescind the (first) contract or to otherwise undo the purchase contract in case pre-emption is exercised. It may also be possible that the seller concludes the purchase contract provided that the sale is made.

Dr. Rainer Burbulla

E. Commercial Landlord and Tenant Law

I Time limitation of the right of reduction in the event of periodically occurring defects

In its judgement of December 15, 2010 (File: XII ZR 132/09) the Federal Supreme Court (BGH) decided that in case of periodically occurring defects (here: high temperatures in the rented rooms during the summer period), the rent can be reduced by law only for this specific period.

No rent reduction in autumn because of excessive temperature in the previous summer

Thelandlord rented property to the tenant of a paediatrician's surgery. During the summer months the rented premises were only of limited use due to the high temperature. The tenant reduced the rent in October as well as in November. The landlord demands payment of the complete rent.

According to the Federal Supreme Court (BGH) the tenant is not entitled to reduce the rent. During the months in which the tenant reduced the rent, there was no overheating of the rental premises. That is the reason why the tenant was not entitled to reduce the rent for that period. In the event that the defect only occurs periodically, a legal reduction of the rent can only be considered for this specific period.

Practical considerations

In commercial landlord and tenant law the rent has to be principally paid in advance (§§ 556b, 579 Sec 2 Civil Code (BGB). At this point in time the tenant is not in a position to notice whether a periodical impairment will also occur in the following month. In case the tenant reduces the rent, i.e. he/she only pays a lower amount than the contractually due rent, he can fall into arrears with the outstanding part (in case of fault), hence the landlord may possibly derive rights to cancel. The Federal Supreme Court (BGH) solves this dilemma of the tenant in so far as, first of all, the rent for the summer months can be reduced, as long as it has been a warm month in the previous years.In case the expected temperature does not occur, the remaining amount to the non-reduced rent has to be paid.

Dr. Rainer Burbulla

II Invalidity of a compensation for non-use because of withholding the rental object in the amount of 150 % of the rent

Compensation for non-use in case of not returning the rental object following cancellation

In its judgement of January 28, 2011 (File: 2 U 135/10) the Higher Regional Court of Frankfurt decided that a compensation for non-use because of withholding the rental object after termination of contract in the amount of 150 % of the last rent paid as agreed upon in the general terms is invalid.

No lump sum damages in the Commercial Landlord and Tenant Law

The defendant was the tenant of a retail unit in a shopping centre. The landlady cancelled the tenancy because of default without observing the period of notice. The tenant objected to the default and thus objected to the prerequisites of a termination without notice. She remained in the retail unit. The lease produced in the form of General Terms and Conditions determined that in case of not returning the rental object at all or not in time a compensation of non-use amounting to 1,5 times of the monthly rental amounts last paid by the tenant has to be paid plus VAT. The landlady then sued among others for the payment of the compensation of non-use in the amount of 150 % of the rent last paid. The defendant invoked the invalidity of the aforementioned clause.

According to the Higher Regional Court in Frankfurt, a compensation of non-use can exclusively be claimed in the amount of the last rent due for payment. The plaintiff would be prevented – in view of a compensation claim according to the aforementioned provision of the lease – from demanding the 1.5-fold of all recent amounts due by the tenant. This clause violates § 307 Sec 1 Clause 1 Civil Code (BGB) and is thus invalid. Because according to § 310 Sec 1 Clause 2 Civil Code (BGB),it contravenes the fundamental idea of § 309 No. 5 b) Civil Code (BGB), which also applies in business transactions. In the context of leases, too, lease clauses not expressly permitting to submit evidence of no or minor damage are principally invalid.

No pressurizing surcharge for lower rental value

Furthermore this clause contradicts the legal reasoning behind § 308 No. 7 Civil Code (BGB). A surcharge of 50 % can never be justified with the argument that the agreement about a compensation for non-use – which compared to the rent is considerably higher – in case of withholding the rental object after termination of the tenancy agreement, would be justified as a “pressurizing surcharge”, because it is up to the tenant to avoid the increased payment obligation by clearing the rental object at any time. In this case a higher damage than the rent lost is in fact not apparent. On the contrary the description of the situation at hand made by the defendant suggests that the rental area was offered to a new tenant at a considerably lower rent due to the dubious profitability of the project.

Practical considerations

Pursuant to § 310 Sec 1 Civil Code (BGB) §§ 308 and 309 do not apply to General Terms and Conditions used for a businessman. However, the general clause of § 307 Sec 1 and 2 Civil Code (BGB) finds application even for businessmen in so far as it leads to an invalidity provision of contract in §§ 308 and 309. In turn the valuations of §§ 308 and 309 Civil Code (BGB) also apply via the "detour" of § 307 Civil Code (BGB). Practices and customs applicable in trading have to be given due regards (§310 Sec 1 clause 2 Civil Code (BGB)).

Ralf-Thomas Wittmann

III Special right of cancellation when purchasing partial areas of a rental object during compulsory auction proceedings

In its judgement of November 8, 2010 (AZ 8 U 43/10) the Supreme Court of Berlin decided: The purchaser of partial property in the context of compulsory auction has a special right of cancellation (§ 57 a, Compulsory Auction of Immovable Property Act (ZVG)) related to the partial property he/she purchased.This also applies if all partial areas of a rental object are the subject-matter of a standardized lease, and if these partial areas have been purchased in temporal connection with several individual purchasers.It is not necessary that all purchasers uniformly exercise the special right of termination .

Principle: Uniformity of the tenancy – community of landlords

The principle of the uniformity of tenancy usually leads to the fact that a community of landlords is created by various persons in the process of purchasing several areas that are all included in one lease.Accordingly, a cancellation on the part of the landlord principally must be exercised uniformly by all landlords in relation to the entire rental object. The cancellation with respect to a single partial area would represent an inadmissible partial notice of termination.

Special regulations applying to compulsory auction proceedings

This, however, differs in case of the special right of cancellation of the first purchaser pursuant to § 57 a, Compulsory Auction of Immovable Property Act (ZVG). In this case the principle of the uniformity of the tenancy is broken:

The purchaser of partial areas can – without consulting the remaining landlords – cancel the existing lease only in relation to the purchased partial area. In doing so, he/she does not have to take into consideration how the purchasers of the other partial areas deal with the rental object.

Priority of the special right of cancellation

With its decision the Supreme Court of Berlin once again underlines the already existing ruling of the Supreme Court of the German Reich: The statutory and, in a way, material special right of cancellation won at compulsory auction proceedings can not be negatively affected in that the tenancy also includes further partial areas. The key focus is, of course, the aim and purpose of the special right of cancellation to secure, in the interest of the creditors, proceeds as high as possible. This, however, always requires that the purchaser is able to relief him-/herself of the legal obligation arising from the lease, because the tenancy in itself may represent a sales obstacle or, at least, a value-diminishing factor.

Practical considerations

This drastic effect of § 57 a, Compulsory Auction of Immovable Property Act (ZVG), represents a risk for the commercial tenant or leaseholder which must not be underestimated. This particularly applies to cancellation on the part of the purchaser in those cases where the tenant or leaseholder has sublet or subleased the contractual rental object. For the di-

rect tenant violates – without having any influence on it – his/her contractual obligations in that he/she can no longer let the rental object to the subtenant.

Once again this decision shows how far-reaching the special right of cancellation of the purchaser is. There are only a few limitations so that the aim and purpose of the special right of cancellation, that is, to generate the highest possible proceeds, is not put at risk.

Therefore the commercial tenant is well advised to register an easement which is secured by the local land registry. Such a secured land registry entry can not preclude the cancellation of the purchaser. However, such cancellation is without economic value for the purchaser, since the tenant can continue to use the rental object due to the registered easement.

Johanna Nosske

F. Public Law

I Planning Law:
Requirements for specifying the product range for Factory-Outlet-Centres (FOC) in development plans

The Federal Administrative Court has upheld in its ruling as of February 9, 2011 the judgement of the Higher Administrative Court Schleswig in the case FOC Neumünster (Federal Administrative Court (BVerwG): 4 BN 43/10 Higher Administrative Court (OVG) Schleswig: 1 KN 19/09; for further reference: Newsletter 1/2011).

The Federal Administrative Court, in fact, dealt with the question of specifying the product range for factory outlet centres (FOC) in great detail. The specification of the product range is of particular importance for FOCs. Only through these specifications of the product range does the FOC differ from traditional shopping centres while having a considerable impact on important planning issues of urban land-use planning, including compatibility with urban development.

Open questions – the decision-making power of the product range producer – supplementing urban development contract for reasons of definition

The basis was a development plan allowing in the Factory Outlet Centre the sale ofgoods of second quality, discontinued models of previous seasons, remnants as well as products for market test purposes, and excess productions. The Higher Administrative Court (OVG) considered these specifications as sufficiently specified.

For procedural reasons the Federal Administrative Court (BVG) could not question these actual specifications in third instance which led to the confirmation of the judgement of the Higher Administrative Court (OVG). However, in this context the Federal Administrative Court has raised two questions, namely whether the differentiation of the aforementioned product portfolios is solely rooted in the decision-making power of the respective producer and whether the terms are by all means so unspecified that they necessitate an additional urban development contract.

The decision shows clearly that even in the future one has to be careful when specifying the product portfolio of FOCs.

Niklas Langguth

II Planning law – intra-municipal shift of turnover as a matter relevant to assess

In its judgement of January 20, 2011 (1 C11082/09 OVG) the Higher Administrative Court (OVG) of Coblenz refused the claim of the owner of a neighbouring residential and office building for a judicial review against the development plan "Zentralplatz". The development plan establishes the right to build a "Cultural Building" and a "Shopping and Adventure Mall" with three parking levels above ground and a total of 800 parking spaces.

The moment such inner-city shopping locations are about to be created, the competitors in the market expecting a (partially considerable) decrease in turnover due to the new establishments ask themselves regularly in how far they can proceed against such projects.

The principle of competitive neutrality of urban land-use planning

The principle is: Urban planning legislation in general as well as urban land-use planning are neutral to competition. The general impact initiated by urban land-use plans are, therefore, principally harmless. Other conditions can apply in the individual case if the existing retail trade is threatened by some ruinous predatory competition.

When creating development plans, issues significant for consideration have to be identified and to be assessed; in doing so the relevant public and private concerns have to be fairly weighedagainst and among each other (§ 1 Sec 7 and § 2 Sec 3 Building Code (BauGB)). In the context of this process of considerations it becomes obvious whether the respectively identified shifts of turnover can be accepted.

Significance of weighing up decisions of the municipality – 10% limit for turnover losses?

The case decided upon by the Higher Administrative Court (OVG) of Coblenz revealed that in some areas of the inner city of Coblenz some "considerable competitive impact" is to be expected due to the establishment of the project. The areas are according to the statements in the judgement central coverage areas in compliance with the Building Code (BauGB). The Higher Administrative Court (OVG) of Coblenzheld that the basic decision made by the city of Coblenz in the context of the urban land-use planning considerations whereby the "intra-municipal" shifts of turnover are to be accepted in the context of the triggered remediation planning, can not be legally objected to. A 10 % limit for turnover losses – as known from other contexts – could only then be accepted, if the replanning is not an integrated location which absorbs retail turnover at the expense of the inner city. Furthermore, the 10 % threshold would only be slightly exceeded in the inner city main shopping location. Hence the Higher Administrative Court (OVG) deemed the decision of consideration made by the city of Coblenz correct.

Practical considerations

Competitors in the municipality can in individual cases take legal proceedings against a development plan if after the realization of the planned project a ruinous predatory competition can be noticed at the expense of their location. According to the statements of the Higher Administrative Court of Coblenz this, in fact, only applies if the limit of 10 % is significantly exceeded.

Isabel Gundlach

III Planning Law – planning duty of the municipalities

In its judgement of November 15, 2010 – 1 C 1023/09 – OVG (comp. Newsletter 1/2011) the Higher Administrative Court (OVG) of Coblenz refused the claim for judicial review of the county town of Limburg against a development plan with a right to build a FOC in Montabaur. In this context it is worth mentioning that the Higher Administrative Court (OVG) marginally

(because it was not of a decision-making importance for the present context) pointed out in particular the planning duty of the municipalities originating from the regulation of § 1 Sec 4 Building Code (BauGB). In our previous newsletter we have already reported about the judgementof November, 15, 2010 (1 C 1023/09 OVG, of the Higher Administrative Court (OVG) of Coblenz in which the Higher Administrative Court (OVG) of Coblenz refused the claim for judicial review of the county town Limburg against the development plan creating the right to build a FOC in Montabaur.

Obligation of adjustment for existing plans (no recourse to existing development plans in case of objection to (new) regional planning target values

Practice has shown that municipalities are not always aware of their duty of planning. Pursuant to the regulation of § 1 Sec 4 Building Code (BauGB) the urban land-use plans – i.e. the development plans and zoning plan – are to be adjusted to the targets of the regional planning. The aims of regional planning in this sense are binding specifications made by the responsible body of country and/or regional planning by finally weighed-up textual or graphic specifications in spatial development plans designed for the development, planning and securing of the regional space.

The Higher Administrative Court (OVG) has once again expressly pointed out, that the municipality is not only obliged tomake adjustments if it creates and changes urban land-use plans through its own decision and for reasons of urban development. The municipality has to be active in planning, too, if changed or new aims of regional planning require an adjustment of the urban land-use plans.

Municipalities might in fact assume that they are only tied to the specifications of the respectively existing development plans when judging the legitimacy of a project subject to planning law. In the event that the respective development plan is based on an older version of the Federal Land Utilisation Ordinance, the applied-for project can more easily seem suitable for approval on this basis. Seen in individual cases this might not be queried, but only as long as adhering to the older version of the development plan does not counteract the target values for spatial planning.

As a matter of fact, the respective municipality is responsible for the target values for the country's regional planning, which have come into effect in the meantime, to be enforced by amending the respective development plan and adapting it to the now applicable targets of the regional planning.

Practical considerations

Naturally, the municipalities are not summoned to continuously review all development plans in terms of their conformity with the target values specified for the regional planning. However, in case, the question arises concerning the legitimacy of a settlement project intending to benefit from the development plan which is not in line with the aims of the regional planning, the municipalities can be legally obliged, pursuant to § 1 Sec 4 Building Code (BauGB), to adjust the development plan accordingly. By not modifying the development plan, the implementation of applicable aims of regional planning would by made impossible which has to be prevented as defined in § 1 Sec 4 Building Code (BauGB).

Therefore the municipal planning body has obligations of permanent observation and adjustment, which the municipality can not ignore if it does not want to expose itself to the accusation of acting unlawfully.

Isabel Gundlach

IV Maintaining territorial claim

In case of building law related disputes, the question arises again and again in how far third parties involved can refuse to accept the permission of a project which contradicts the specifications of the development plan. In this case the ruling of the Federal Administrative Court differentiates between the owner of plots of land within andoutside the same planning area (see judgement of May 11, 1989, case:4 C 1/88; ruling of December 18, 2007, case: 4 B 55/07).

Maintaining territorial claim

Owners of plots of land within the same planning area are entitled to maintaining territorial claim. With this they are able to refuse to accept any territorially adverse use independent of the fact whether they are negatively affected by this project. The Federal Administrative Court arrives at this conclusion, because there is a mutual relationship of exchange between the owners in a planning area. This means that local residents who are subjected to public limitations regarding the use of their plot of land can demand that also their neighbours adhere to these public limitations.

In exceptional cases maintaining this territorial claim can also be granted to land owners outside the respective planning area. This is only then the case, if the respective development plan specifies that even third-party land owners outside the planning are supposed to benefit from this protective effect. Such a case may, for example, occur if the development plan manifests the extension of an already existing development area and if both planning areas can be seen as one uniform development area.

Neighbours outside the planning area

In case of territorially adverse use neighbours outside the planning area can, as a rule, only invoke the imperative of care. In doing so, the degree of necessary care pursuant to § 15 Sec 1 Clause 2 Federal Land Utilisation Ordinance (BauNVO) depends on the special circumstances of the individual case. This ban is violated if the neighbour can prove an individual and qualified infringement in his protected neigbouring rights. In practice this is regularly connected to considerable difficulties because the courts set high standards in this respect.

Practical considerations

In practice there is a crucial difference whether a neighbour who intends to take legal action against a use which is adverse to planning law, is within or outside the same planning area. In case the affected neighbour is outside the planning area, it has to be proved very precisely in how far the person's protected rights have been violated. In practice this will involve considerable difficulties. In the event, however, that the neighbour is in the same planning, he is entitled to defend himself against any use contradicting the specifications of the development plan.

Dr. Steffen Schleiden

EVENTS

6th and 7th of September 2011

in Warnemünde, Certification Course "Legal Knowledge Real Estate"
Referee: Dr. Rainer Burbulla, Lawyer Partner, Grooterhorst & Partner, Lawyers

In case you are interested to participate, please contact the referee: www.grooterhorst.de