20 YEARS LAW FIRM GROOTERHORST & PARTNER

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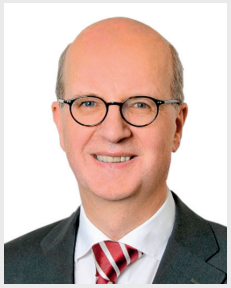

Dear readers,

As it is usually the case, our first newsletter of 2015 covers the wide fields of activitiy of our law firm: We are dealing with the new foundation law valid as of January 1, 2015. Questions of D&O liability, which are getting ever more important, also affect foundation law. The rulings of the higher and highest courts concerning commercial landlord and tenant law develop into plain case law, sometimes even with some surprise effects. Over and over again planning law has to try to settle conflicts between private and commercial property users (keyword "a spatially approaching residential development").

Last but not least, at the end of 2014 the Federal Labour Court (BAG) has attempted to provide a structure to disputes regarding clauses in the employer reference.

We report on all these issues. As usual, I wish you some stimulating reading.

In gratitude for your staunch support

Yours

Dr. Johannes Grooterhorst

A. Current News

Association and Foundation Law – D&O Liability and Remuneration – As of January 1, 2015 Law on Supporting the Work of Volunteers

Many people in Germany commit themselves to some volunteer work in associations and foundations: in local sports clubs and/or in charitable associations, which operate all over Germany and with a huge amount of organisation.

Apart from their members associations and foundations need a management board. Legal requirements may trigger substantial liability risks. They are of a particularly severe nature for board members in a voluntary capacity, since they do not generate any profit from their activity unlike managing directors of commercial companies (private limited company (GmbH) and board members of a public limited company (AG)).

The legislator has noticed the problematic nature of this and has, therefore, passed the "Law on Supporting the Work of Volunteers" in 2013 (law of March 21, 2013, Federal Law Gazette I 556) in order to thus enable a stronger commitment in associations and foundations and to limit potential reservations and liability risks. Parts of this law have come into effect on January 1, 2015.

1. New liability law: Pursuant § 31a German Civil Code (BGB) a board member who is either not paid or only receives an expense allowance of a maximum of 720 € p.a. is only liable to the association, if he acted with intent or with gross negligence. The association bears the burden of proof concerning intent or gross negligence.

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New Version of § 27 Sec. 3 German Civil Code (BGB) – Remuneration according to the statutes of association

It is not possible to deviate in the statutes of the association from the mandatory regulation as set forth in § 31a German Civil Code (BGB) to the detriment of the board members.

2. New remuneration law: Furthermore, the legislator has included a new sentence in § 27 Sec. 3 Sent. 2 German Civil Code (BGB): Board members are not paid (scl principally).

   So far, it has been a matter of controversial debate whether associations were allowed to pay their board members a remuneration exceeding the reimbursement of expenses.

   On the other hand it had been impossible to pay a renumeration if a provision in the statutes of association provided so. Board members had a statutory claim for the reimbursement of their expenses, however only in case of actual expenses incurred (for example, travel expenses), but not for the working time and labour invested.
   This matter of dispute has now been decided on by the legislator to the effect that a remuneration requires a respective regulation in the statutes.
   The new regulation in § 27 Sec. 3 Sent. 2 German Civil Code (BGB) does not constitute any compelling law (jus cogens). The statutes can waive the non-remuneration.

No renumeration without provisions in the statutes of association

If associations, now want to pay a remuneration, the statutes have to be adjusted accordingly. Otherwise the remuneration has no legal basis and would have to be refunded to the association. In the worst case the board of the association could be liable to prosecution for breach of trust. It is therefore recommendable to provide a clear remuneration clause in all statutes of assocations.

The statutes do not already have to specify the exact amount of the remuneration. The remuneration of the board then has to be stipulated in the contract of employment.

Applicability on full-time managers

3. From a legal point of view the question remains open, whether a full-time managing director can be paid without statutory provision. Especially bigger associations often experience the situation that the management board operates on a voluntary basis while having a full-time managing director who – apart from being involved in the ongoing management – prepares the daily work of the management and implements it respectively, if necessary.

   The new version of § 27 Sec. 3 by means of Sec. 2 German Civil Code (BGB) could lead to the assumption that no remuneration would be payble, if a managing director takes on tasks - at least in parts - which are normally reserved for the unpaid management board.

   For that reason it is recommendable to include a clarifying clause in the statutes whereby an appropriate remuneration can be paid to a full-time managing director. In this case, too, the statutes only have to provide the reason for the remuneration, whereas the amount of remuneration, however, it could be agreed in the contract of employment.

Impact on foundation law – § 86 German Civil Code (BGB)

4. Foundations have to apply the similar legal status: § 86 German Civil Code (BGB) refers to association law: remuneration payments to the management are only allowed if the statutes of the foundation provide so (at least based on the reason given). Without some statute

regulation the management of the foundation is, therefore, only entitled to claim the reimbursement of expenses.

Necessary review of the statutes of the foundation

Foundations therefore should also review their respective statutes as to whether the new legal requirements are reflected appropriately.

Rights of the foundation to restitution and their consequences

According to court rulings unjustified board resolutions are void in foundation law. Any remuneration has to be refunded. This is of great importance for the management of a foundation, especially if it acts in full-time employment for the foundation and if managers are deprived of their livelihood due to restitution claims. If the restitution cannot be asserted, the advisory board of the foundation granting the remuneration could be made liable for damages. Even reasons of breach of trust could not be ruled out.

Practical considerations

Foundations and associations intending to grant their board members a remuneration should review their statutes as to whether of the remuneration of the management board has been provided for. If this is not the case but if some remuneration for the management should be granted or at least be taken into consideration in future, an amendment of the statues is necessary. This also applies to the remuneration of (full-time) managing directors. In addition to the remuneration clauses in the statutes, a contract of employment has to be signed, specifying the mutual rights and duties.

Compare further references in the online commentary – www.bgb.kommentar.de.

Dr. Johannes Grooterhorst

B. Commercial and Company Law

D&O Liability – Foundation Law – No reduction of liability of the foundation's managing board in case of contributory negligence of some other executive body

In its ruling of November 20, 2014 (file ref.: III ZR 509/13) the Federal Supreme Court (BGH) has ruled on the issue as to whether a board member of a foundation could invoke contributory negligence of another exexecutive body of the foundation.

Sole managing director of a library foundation – regulation concerning the investment of assets

The defendant acted as sole managing director of the applicant foundation operating a library. The state foundation supervisory authority granted permission to the foundation to invest one third of the foundation capital without being gilt-edged, i.e. with a slightly higher risk. Furthermore, the board of management and the board of trustees (comparable to a supervisory board of a public limited company) agreed that a specific amount per year for the ongoing business activities should not be exceeded.

Violation of the investment regulations

The defendant managing director signed, without involvement of the board of trustees, two asset management agreements with banks thus resulting in about 71% of the assets being invested in a non-gilt-edged manner. Moreover the defendant exceeded the agreed annual

operating expenses. After the defendant had been recalled as managing director and after the employment had been terminated the plaintiff claimed damages against the defendant because of the asset investment, which had developed negatively, as well as because of the higher operating costs.

Objection: action taken by the board of trustees in breach of duty due to a lack of supervision

The defendant claimed, among other things, that the members of the board of trustees themselves acted in breach of duty because the members had shown a lack of the necessary supervision of the managing director. For that reason, the claim for damages had to be reduced respectively due to contributory negligence.

The Federal Supreme Court (BGH) has rejected a reduction of the claim for damages due to contributory negligence and referred to the court rulings concerning the discharge from liability applicable to executive bodies of commercial companies (corporate bodies):

No reduction of liability based on fault of other executive bodies in case of commercial corporate bodies – application to the foundation

If a claim for damages is made against an executive body of a legal entity (management board member, managing director, management board member of a foundation) on the basis of management activities contrary to its duties, the body often defended himself stressing that the breach of duty was not committed by the body alone. Other executive bodies (for example, the co-director or the supervisory board) could also be held responsible for breach of duty. Any claim for damages had, therefore, to be reduced corresponding to the contributory negligence of the other executive body. As far as private limited companies (GmbH) and/or the public limited companies (AG) are concerned, it has been recognised in court rulings for a long time that an executive body could not invoke a breach of duty of other executive body members so that there are no grounds for a reduction of a claim: Everybody is independently responsible for fulfilling its duties and has – in case of a breach of duty - to be held completely liable for damage caused to the legal entity.

With its ruling of November 20, 2014 the Federal Supreme Court (BGH) has conveyed these principles to foundation issues understood to be because the situation in a foundation is comparable to that in a private limited company (GmbH) as well as in a public limited company (AG).

Potential internal recourse against other executive bodies due to contributory negligence concerning the same damage

The objection to contributory negligence can, however, entitle the executive body member to assert him-/herself claims for recourse against another executive body members, who had contributed to the same damage due to a breach of duty. The amount of the inner recourse between the executive body members will be calculated on the basis of the share in contributory negligence in the relationship between these executive body members.

Practical consideration

The new ruling establishes legal certainty for the foundation law.

It is crucial to observe the risk of the statute of limitation in case of a potential claim for recourse against other executive body members: If a claim against an executive body member (irrespective of whether it is a private limited company (GmbH), public limited company (AG) or foundation) care has to be taken that through safeguarding measures a suspension of the statute of limitation concerning the compensation claims is achieved. It may be possible that there are other periods of limitation for the compensation claim than for the actual claims for damages. Legal proceedings between the aggrieved company and the executive body member do not suspend the period of limitation of the compensation claim. If measures suspending the statute of limitation are not taken, the executive body member against whom

damages are claimed, runs the risk that he/she is sued for paying the claim for damages, but that he/she him/herself has no claim for compensation anymore and will, therefore, "sit on" the claim for damages.

Dr. Johannes Grooterhorst

D. Commercial Landlord and Tenant Law

I. Unconditional exercise of a renewal option und unconditional subsequent rent increase – No loss of defect rights

New ruling – deviation from the prevailing opinion

The Federal Supreme Court has recently ruled– contrary to the prevailing opinion existing in court rulings and jurisprudence until now – that, in the case of a rental agreement, the exercise of a renewal option by the tenant or the amicable subsequent amendment of the rent without reserving defect rights with respect to known defects does not result in an exclusion of those defect rights (ruling of November 11, 2014 – XII ZR 15/12).

Repayment claim due to "reduced" rent

Among other things the tenants claimed a repayment of the allegedly overpaid rent. The rent had been reduced for years because – apart from other things – of defects concerning the interior ventilation systems. The landlord argued that the tenants had at first, on the one hand, exercised a renewal option granted in the rental agreement in spite of the existing defects and, on the other hand, the parties had agreed to an increase of the advance payment for the operating costs – each time without the tenants reserving their rights to assert defect rights.

Scope of § 536b German Civil Code (BGB) in case of a renewal option

The Federal Supreme Court (BGH) has ruled that the preceding unconditional exercise of the renewal option or the subsequent amendment of the rent did not result in an exclusion of defect rights pursuant to § 536b German Civil Code (BGB). According to § 536b German Civil Code (BGB) a tenant is principally not entitled to any defect rights if he/she is aware of the defect when concluding the contract, or if he/she does not know due to negligence, or if he/she accepts the defective rental object although knowing about the defect without reserving his/her defect rights upon acceptance. The opinion mainly represented in court rulings or the jurisprudence has assumed so far that § 536b German Civil Code (BGB) also applied if the tenant exercised a renewal option while being aware of the rental defect without reserving his/her defect rights. In its new ruling the Federal Supreme Court (BGH) has deemed this opinion incorrect. § 536b German Civil Code (BGB) was not applicable to the exercise of a renewal option or to the subsequent amendment of the rental amount. There was also no room for a respective application of the regulation in the cases mentioned given the clear wording, the will of the legislator and the purpose and spirit of § 536b German Civil Code (BGB).

Leonie Munz
Rechtsanwältin

No respective application of § 536b German Civil Code (BGB)

A respective application of § 536b German Civil Code (BGB) was not necessary, in particular because the general principles of good faith as set forth in § 242 German Civil Code (BGB) enabled sufficient consideration in the individual case of the respective behaviour of the tenant in connection with a renewal of contract or with the subsequent amendment of the rent and potential facts of trust on the part of the landlord. The unconditional exercise of the renewal option or the subsequent rent increase in spite of known defects did not represent - when seen in isolation - such a controversial behaviour of the tenant thus leading to a loss in defect rights.

Practical considerations

Renewal options in the rental agreement can now be principally exercised without reservation according to this ruling without being threatened by an exclusion of defect rights. However, since, the Federal Supreme Court (BGH) has not specified when in the individual case defect rights are excluded according to good faith when exercising renewal options, it is still advisable for reasons of legal prudence to expressly reserve already known defects when excercising the option. The same applies to a subsequent amendment of the rent.

Leonie Munz

II. Lessor's lien when selling real estate – Collision with assignment as security

Equal status of lessor's liens of the seller and of the purchaser (as landlord)

In its ruling of October 15, 2014 (XII ZR 163/12) the Federal Supreme Court (BGH) has ruled that in case of the sale of a property an independent lessor's lien of the purchaser is established. This would be equal in rank to the lessor's lien of the seller and covering the same items. The question as to whether an item added to the rental space is subject to the lessor's lien of the purchaser depends on the point in time when the item was added to the rental space. An assignment as security of the item in the period after being added to the rental space and prior to a change of tenants due to the sale did not prevent the fact, therefore, that the lessor's lien of the purchaser covered the item added.

Claim for damages of the purchaser of the rental premises against the insolvency administrator because of a violation of the lessor's lien right

The plaintiff was the purchaser of a property rented out. The rental agreement had been concluded between the former owner and the tenant even prior to the sale to the plaintiff. After the sale insolvency proceedings were opened involving the assets of the tenant. The plaintiff claimed damages against the insolvency administrator since the latter had paid out the proceeds of the realisation of the assets of the tenant's furniture and equipment to a third party (sales proceeds amounted to € 782.000,00) by disregarding her lessor's lien. The insolvency administrator invoked an area protection contract according to which the furniture and equipment had been assigned to a bank as security prior to the sale.

Due date principle: Relation of the claim resulting from the first rental agreement (seller and tenant) and the second rental agreement (purchaser and tenant)

The Federal Supreme Court (BGH) has affirmed the claims for damages of the plaintiff. By the transfer of ownership to the plaintiff a new tenancy to the premises came into being between the landlord and the new tenant. However, with the same content with which it had existed with the seller before. In doing so, this, in fact, resulted in a caesura with the consequence that any claims that had accrued and had been due for payment prior to the sale remained with the seller. The purchaser was only entitled to claims due for payment subsequent to the time of change of ownership (so-called due date principle). However, this caesura did not affect those rights and duties decisive for the commencement of the tenancy. If that was relevant, the commencement of the original rental agreement would be decisive and not the (new) commencement of the rental agreement between the purchaser and the tenant.

Decisive point in time in case of an assignment as security - collision with lessor's lien

The statutory lessor's lien (§ 562 German Civil Code (BGB)) came into being with the items of the tenant being added to the rental space. An assignmment as security which took place subsequent to the contribution left, therefore, a lien of the landlord which had once come into being unaffected. The latter was not transferred to the purchaser in the context of the sale (§ 566 German Civil Code (BGB), since he/she did not become a legal successor. Instead an independent lien of the purchaser came into being in addition to the lien of the (original) landlord securing his claims resulting from the tenancy. This new lessor's lien of the purchaser did not

fall short of - as far as its scope was concerned – that of the seller and was particularly not affected by means of an assignment as security subsequent to adding the item.

Practical considerations

As far as in practice not rare cases are concerned in which a collision of ownership by way of security and lessor's lien occur, it is important at which point in time the tenant transferred (by way of security) the items to a third party. For items already transferred to a third party prior to adding them to the rental space, the lessor's lien comes to nothing. If the tenant transfers ownership to a third party subsequent to contributing it to the rental space, the lessor's lien is prior in rank to the rights of a third party. Even the sale of a property does not change this.

Dr. Rainer Burbulla

III. No entitlement of the landlord to utilize an item resulting from a lessor's lien

In its ruling of September 17, 2014 (XII ZR 140/12) the Federal Supreme Court (BGH) has clarified that the landlord was principally not entitled to utilize an item subject to a lessor's lien. If the landlord derived some benefit from the item subject to a lessor's lien, he had to pass the latter on to the tenant pursuant to the provisions governing the management and without being commissioned to do so.

Dr. Rainer Burbulla
Partner

Rental agreement concerning business premises– tenant with his/her own furniture and equipment – new letting with furniture and equipment belonging to the previous tenant

In the facts underlying the ruling a rental agreement between the former tenant and the landlady existed concerning business premises in which the tenant operated a fitness studio with her own furniture and equipment. The landlady terminated the tenancy because the tenant defaulted in payment. She rented out the fitness studio together with its existing furniture and equipment to a third party; a rental share of 476 per month including VAT related to the furniture and equipment. After insolvency proceedings had been opened regarding the assets of both contracting parties the insolvency administrator for the assets of the former tenant claimed from the defendant insolvency administrator of the landlady a compensation for use which was in arrears and still to be continued a monthly amount of 476 until the surrender of the business equipment.

Satisfying the (landlord) pledgee through the sale (§ 1228 German Civil Code (BGB) – use only in case of lien of use (§ 1213 German Civil Code (BGB))

The Federal Supreme Court (BGH) affirmed claims concerning a user fee resulting from the management without being commissioned. As far as the lessor's lien (§ 562 German Civil Code (BGB)) was concerned, the provisions regarding the lien commissioned by the legal transaction applied respectively. Satisfying the pledgee from the pledge took place subsequent to the maturity of the pledge coming into being by the sale (§ 1228 German Civil Code (BGB)). The pledgee was only entitled to utilizations resulting from the pledged asset in order to be offset against secured claims if a lien of use had been agreed (§ 1213 German Civil Code (BGB)). In this case the net proceeds of the utilizations would be offset against the outstanding service, and if costs and interest had to be paid, then against those first (§ 1214 Sec. 1, 2 German Civil Code (BGB)). The landlady and the tenant, in fact, had not arranged such lien of use. The landlady was, therefore, not entitled to the possibility of deriving uses from the pledged asset because it was contrary to the deposit obligation (§ 1215 German Civil Code (BGB)). If the pledgee nevertheless seized uses he/she was not entitled to, he/she managed a business of the pledgor either for the latter (§ 677 German Civil Code (BGB)) or as his/her own business (comp. § 687 Sec. 2 German Civil Code (BGB)). In any case, he/she had to return the obtained to the pledgor (§§ 681 Sent. 2, 667 German Civil Code (BGB)).

Practical considerations

A landlord does not gain an "additional source of income" with a lessor's lien by "using the pledged asset for profit". In this case the landlord runs the risk of not only having to return benefits made but also of becoming liable to damages. Therefore, it can be an advantage for both parties to conclude agreements arranging a profitable use of the pledged asset.

Dr. Rainer Burbulla

IV. Validity of a contractual penalty (even) without upper limit

In its ruling of November 14, 2014 (2 U 111/14) the OLG Celle has decided that as a rule the landlord was not to be released from his contractual duties to hand over rental space as a result of the fact that he did not acquire property of the rented plot of land. He then also owed the payment of a contractual penalty provided for in case of a delayed handover even if the respective term and condition of contract did not include an upper limit.

Rental agreement covering commercial space still to be built – contractual penalty for reasons of delayed handover

In the facts underlying the ruling the landlady rented out commercial space to the tenant in a building still to be built. In the event of a delayed handover the rental agreement regulated that the landlady would have to pay a contractual penalty of 300,00 per each day of delayed handover. This amount exceeded the net rent to be paid per day by 3%. An upper limit of the contractual penalty was not provided for. When the rental agreement had been concluded the landlady had not yet been owner of the areas on which the building was intended to be built. An acquisition of property failed. For that reason the rental object had never been built. The tenant asserted a contractual penalty in the amount of 37.000,00 for the first four months of the envisaged rental period.

Handover obligation even in the case of a failed acquisition of property

According to the opinion of the OLG Celle the claim for contractual penalty of the tenant was justified. The landlady was not released from her obligation to hand over the rental space due to the failed property acquisition. An impossibility of performance did not apply since the impediment to performance had not been insurmountable for the landlady. The landlady did not yet advance an argument according to which she had not been able to acquire the property concerning the space rented out to the tenant by making use of additional financial means or by the help of a third party. Furthermore, there were no indicators suggesting a gross disproportion between such expenses and the interest in performance of the tenant.

Effective regulation of a contractual penality without upper limit – no unreasonable disadvantage (§ 307 Sec. 1 German Civil Code (BGB))

The contractal penalty regulation was valid in spite of the absence of an upper limit. An unreasonable disadavantage (§ 307 Sec. 1 German Civil Code (BGB)) did not apply. Such an upper limit was not necessary in cases of commercial premises still to be built. In the event of renting them out with the obligation to build them the landlord assumed a guarantee liability regardless of culpability. For that reason, the non-completion of the property constituted one of the biggest conceivable breaches of contract. A contractual penalty not limited concerning the amount fulfilled its purpose as a form of pressure guaranteeing the punctual commencement of business operations.

Practial considerations

Handing over the rental object represents an essential contractual duty of the landlord. If handing over is not possible at the contractually agreed date, the tenant is entitled to be discharged from the contract in two ways. He can either terminate the agreement without notice (§ 543 Sec. 2 No. 1 German Civil Code (BGB)) or to rescind the rental agreement (§§ 326 Sec. 5, 323 German Civil Code (BGB)). If the tenant rescinds the rental agreement, he can

additionally claim compensation (§325 German Civil Code (BGB)). If the tenant sticks to the contract - which can be satisfied - he/she is entitled to indemnity for damage resulting from delays (§§ 2580 Sec. 2, 286 German Civil Code (BGB)). Additionally – and as is frequently the case in practice – tenants demand some contractual penalty in such a case. The limit existing in rulings regarding the contractual penalty in building law (in most cases 5% of the building sum, comp. Federal Supreme Court (BGH), ruling of January 23, 2003 – VII ZR 210/01) is not transferable to landlord and tenant law (comp. also Federal Supreme Court (BGH), ruling of March 12, 2003 – XII ZR 18/0). Only recently, the OLG Celle has once again expressly confirmed that.

Dr. Rainer Burbulla

E. Public Law

Isabel Strecker
Rechtsanwältin

I. Planning Law – Preclusion of the judicial review (§ 47 Sec. 2 Administrative Procedure Code (VwGO)) only upon a local announcement of the public display made in a proper manner

The Federal Administrative Court (BVerwG) has stated in its ruling (ruling of September 11, 2014 – 4 CN 3.14) that an application for judicial review was only precluded (§ 47 Sec. 2 a Administrative Procedure Code (VwGO)) if the local announcement of the public display was made in a proper manner.

Purpose of preclusion pursuant to § 47 Sec. 2a Administrative Procedure Code (VwGO)

The application of judicial review was invalid if the applicant only asserted objections which he did not assert in the context of the public display of the legally binding land-use plan or if he asserted them too late, but if he could have asserted them (§ 47 Sec. 2 a Adminstrative Procedure Code (VwGO)). The statutory regulation had the objective to add respective interests to the material under consideration in time and to avoid - with respect to the basic distribution of tasks between the party providing the plan and the administration courts - that factual objections against the legally binding land-use plan were asserted without any specific need later in legal proceedings.

The issue dealt with was about applications of judicial review of several applicants which were valid although those applicants did not raise any objections in the procedural context of publicly displaying the legally binding land-use plan, as pointed out by the Federal Administrative Court (BVerwG). The preclusion regulation of § 47 Sec. 2a Administrative Procedure Code (VwGO) assumed that the local announcement of the place and duration of displaying the draft version of the legally binding land-use plan was made in a proper manner. In the case referred to, the local announcement was faulty pursuant to § 3 Sec. 2 half Sent. 1 Federal Building Code (BauGB) because it did not include sufficient information as to which types of environment-related information was avaible (comp. Newsletter 04/2014, p. 14).

Irrelevance of an annual deadline pursuant to § 215 Sec. 1 Sent. 1 No. 1 Federal Building Code (BauGB) for preclusion regulations

The Federal Administrative Court (BVerwG) has also made it clear in this context that it was irrelevant for the preclusion regulation concerning judicial review proceedings whether the violation of the duly made local announcement became insignificant after a period of one year (§ 215 Sec. 1 Sent. 1 No. 1 Federal Building Code (BauGB).

Practical considerations

The a.m. ruling has revealed that an application for judicial review can be valid in the individual case although no objections had been raised during the period of public display. If according to § 3 Sec. 2 Federal Building Code (BauGB) formal errors occurred within the context of locally announcing the public display, judicial review proceedings can still be an option for the applicant in the individual case.

Isabel Strecker

II. Planning Law: Defence claim of a commercial property owner against a spatially approaching residential development

In its ruling of July 23, 2014 the VG Munich (administrative court) had to deliver a ruling on the question of a defence claim of a business against a spatially approaching residential development for reasons of unacceptable smell impairment (M 9 K 13.2908).

Agricultural enterprise – building permit for a semi-detached house on the adjacent plot of land

The plaintiff was owner of a plot of land on which he operated an agricultural enterprise. The defendant municipality granted a building permit for a semi-detached house for the adjacent plot of land, which was only separated by a small path from the agricultural enterprise. The plaintiff brought an action of annulment against this building permit since the residential development would be exposed to some unacceptable smell impairment due to his agricultural enterprise. Hence, granting such a building project was reckless towards the enterprise of the plaintiff.

The action has been successful before the VG Munich.

Wide separation of commercially/industrially used areas and residential use pursuant to § 50 Federal Immission Control Act (BImSchG)

In the case of some spatially approaching residential development (or vice versa also of some approaching commercial use) the owner and operator of the existing type of use ask themselves the question in how far they are entitled to a defence claim against the spatially approaching use conflicting with their own use. Pursuant to § 50 Federal Immission Control Act (BImSchG) commercially or industrially used areas are to be spatially widely separated from residential uses. In doing so, it is intended to ensure that these two conflicting types of use are not adjacent to each other. In fact, in a spatial co-existence of commercially or industrially used area and some residential use conflicts often develop regarding the question which immissions (noise, dust, smell, etc.) the residential use has to accept or which restrictions the business has to make. This question occurs in particular if such a “conflict situation” has not existed so far and has only come into being due to some urban land-use planning.

Invalid smell pollution (prognostic)

The VG Munich has ruled, therefore, that this spatially approaching residential use was invalid. Actually, subsequent to the immission forecast obtained the residential use would be exposed to an immission limit, especially with respect to smell, that would never have been permitted in village areas. Since according to relevant directives higher immission values are permitted in village areas than in general residential areas, the forecast smell pollution was invalid for a residential area. The respective residential project was, therefore, invalid under planning law.

The plaintiff was entitled to a respective defence right since so far he was able to emit without hindrance into the direction of the planned residential use. Thus a respective residential use would restrict his agricultural enterprise in an invalid manner.

The VG Munich emphasized in accordance with the ruling of the Federal Administration Court (BVerwG) that even the affected home owners' consent concerning the smell situation was irrelevant. The immission protection law provides an objective consideration of the decisive protection level which is not at the discretion of the parties affected.

Irrelevance of an consent – objective consideration of the immission protection level

The VG Munich had to rule on a matter which often occurs when answering the question as to whether to grant a building permit or to establish urban land-use plans. If a commercially used area has so far not been surrounded by a residential development, there have been no conflicts regarding immissions in most cases. If some residential use spatially approaches resulting from a building permit or some urban land-use plan, conflicts concerning immissions are frequently only a question of time, since the new residents would sooner or later claim the compliance with immission guide values. If immission values are exceeded it cannot be ruled out that the regulatory authorities issue respective subsequent orders regarding the compliance with the guide values. The fulfilment of these subsequent orders often come with substantial costs or operational restrictions for the businesses. The businesses are, therefore, well advised if - on the occasion of a spatially approaching residential development – they contribute their interests during urban land-use procedures at an early stage so that the municipality is able to sufficiently protect the interests of the business people.

Practial considerations

Dr. Johannes Grooterhorst

III. Planning Law – Administrative law proceedings– Prohibition of use towards a business (immediate enforcement)

In its ruling of July 4, 2014 (2 B 508/14) the OVG North Rhine-Westphalia has dealt with the question under which conditions a prohobition of use for a business is valid for reasons of formal illegality and whether immediate enforcement can be decreed.

The ruling was based on the following facts: Since approx. 25 years the applicant had been operating a fence-producing business on premises that had been commercially used for more than 100 years. Due to complaints from neighbours because of noise and smell immissions the competent authority issuing building permits announced an immediate prohibition of use due to formal illegality and decreed immediate enforcement. At first, the temporary relief practised by the applicant was not successful before the VG, however, the OVG North Rhine-Westphalia granted his application and decreed condition precedent of his legal his remedy against the prohibition of use.

Prohibition of use because of formal illegality on premises used for commercial purposes for 100 years – restitution of the condition precedent

The OVG North Rhine-Westphaliae has justified its ruling by stating that some particular enforcement interest would be required. Principally illegality of use justified a prohibition of use. However, a legal prohibition of use could not be enforced immediately when adressed to an established and operating business and when a risk of insolvency could be conncected. The more a prohibition of use and a removal order virtually amounted to the same, the higher the requirements made to an established and operating business due to the constitutionally protected right and, therefore, the higher the requirements for assuming a particular interest of enforcement.

Order of immediate enforcement with removal effect only in case of a particular enforcement interest – No immediate enforcement towards an established and operating business

Dr. Steffen Schleiden
Rechtsanwalt

In the present case the OVG North Rhine-Westphalia has affirmed such an exceptional case. As a matter of fact, the business depended on the location. By contrast, the competent authority issuing building permits had not sufficiently justified the particular enforcement interest. In particular, the levels of noise and air pollution in the neighbourhood had not been investigated.

Furthermore, the applicant submitted a respective noise certificate stressing that he complied with the noise protection level in a mixed area.

For that reason the applicant's interest in suspension outweighed the enforcement interest of the authority issuing building permits so that the OVG North Rhine-Westphalia has ordered the condition precedent of the legal dispute against the prohibition of use.

Practical considerations

This ruling shows that the competent authorities cannot simply order an immediately enforceable prohibition of use even in case of the absence of building permits for a business. As individual cases had to be looked after and to be reviewed precisely whether and in how far the legal interests of the affected business dominate so as to continue operation.

Jörg Looman
Rechtsanwalt

Dr. Steffen Schleiden

F. Labour Law

Performance Assessments in Employer References

In its ruling of November 18, 2014 (9 AZR 584/13) the Federal Labour Court (BAG) had to rule on the issue for which grades in the employer reference either the employer or the employee bears the burden of presentation and proof.

Doctor's assistant – Employer reference "to full satisfaction"

The plaintiff worked for the defendant as a doctor's assistant. When the employment was terminated the employer issued an employer reference in which he certified that she had fulfilled the tasks delegated "to full satisfaction" (zur vollen Zufriedenheit). With the action the plaintiff requested a better assessment of the work performance.

Classification of the assessment "satisfactory" as a good grade

The Federal Labour Court (BAG) ruled the formulation "to full satisfaction" corresponded to the school grade "satisfactory". A formulation "always to full satisfaction" represented a good grade, the formulation "always to the fullest satisfaction" had to be classified as a very good grade.

"Satisfactory" as starting level for assessement, deviation and burden of presentation or proof borne by the employee or employer respectively

The starting point for issuing the employer reference would be the grade denominated "satisfactory". If the employee wanted a better final assessment, he/she had to outline the respective performance and, if necessary, to prove it. On the other hand, the employer bore the burden of presentation and proof if he/she intended to issue a worse assessment than "satisfactory".

The Federal Labour Court (BAG), therefore, referred the legal dispute back to the previous instance, which now has to review whether the plaintiff outlined sufficient facts justifying a better grading.

With the present ruling the Federal Labour Court (BAG) has clarified a legal issue frequently occurring in practice. When granting a grade worse than "satisfactory" the employer has to check in advance whether sufficient reasons can present and proved. If the employee seeks a better grade than "satisfactory", he/she has to check in advance whether there is evidence of a performance required for that grade.

Practical considerations

Jörg Looman

H. Procedural Law

I. Legal Proceedings concerning Landlord and Tenant Law – Residential rent – Validity of legal proceedings based on documentary evidence in case of subsequent payments of operating costs

In its ruling of October 22, 2014 (VIII ZR 41/14) the Federal Supreme Court (BGH) has ruled that claims of the landlord concerning subsequent payments of operating costs (resulting from residential rental agreements) could be asserted in legal proceedings based on documentary evidence only.

Residential rental agreement – additional charge resulting from the billing of operating costs – legal proceedings based on documentary evidence

In the facts underlying the ruling a residential rental agreement existed between the tenant and the landlady. When billing the operating costs the landlady asserted some additional charges amounting to 1.147,54 for the year 2011. The tenant did not pay the claim. She invoked deviating (residential) area values. The landlady sued for the additional charges resulting from billing the operating costs in the context of legal proceedings based on documentary evidence.

Scope of the presentation (proof) of the facts justifying the claim and requiring proof by means of documents – rental agreement and billing of operating costs with proof of delivery

According to the opinion of the Federal Supreme Court (BGH) the landlady was entitled to do so. Legal proceedings based on documentary evidence were valid indiscriminately for all claims concerning the payment of an amount of money. This also applied to additional charges resulting from the billing of operating costs. For the validity of the legal proceedings based on documentary evidence it was necessary that the landlay was able to prove by means of documents the facts justifying the claim and requiring proof (§§ 592 Sent. 1, 597 Sec. 2 Code of Civil Procedure (ZPO)). Indisputable, conceded and obvious facts did not require any proof and thus no submission of documents. By submitting both the rental agreement - revealing the obligation of the tenant to bear certain costs – and the billing of operating costs (together with a proof of delivery) the landlady met those requirements. The submission of further documents, such as, for example, those concerning the calculation of residential areas, was not necessary since the tenant did not contest the area values in the required manner, but only in an unsubstantiated manner. In fact, the tenant should have responded and explained in a substantiated manner (i.e. with more detailed positive information) what actual area values she assumed.

Practical considerations

The German Civil Code has clarified a legal issue very important for the practice and has affirmed the applicability of legal proceedings based on documentary evidence even for additional charges resulting from the billing of operating costs. Legal proceedings based on documentary evidence enable the suing landlord/landlady to obtain an enforceable title faster than in ordinary proceedings which he/she is entitled to enforce without security deposit, however,

with the risk of being made liable to damages (§§ 600 Sec. 2, 303 Sec. 4 Sent. 3 Code of Civil Procedure (ZPO)). The ruling of the Federal Supreme Court has been made with respect to residential landlord and tenant law. Since lower requirements apply in the case of commercial landlord and tenant law, it can also be transferred to commercial landlord and tenant law.

Dr. Rainer Burbulla

II. Invalidity of a (simplified) temporary injunction of eviction regarding commercial rent

In its ruling of November 24, 2014 (2 W 237/14) the OLG Celle has declared invalid the issue of a temporary injunction concerning the eviction of commercial space rented out against a third party, who is the owner of the rental object in the context of (simplified) proceedings of § 940a Sec. 2 Code of Civil Procedure (ZPO).

Commercial rental agreement

The landlord of a shop requested an injunction of eviction against a third party in possession (without right of ownership) of whom the landlord only obtained knowledge subsequent to successful eviction proceedings against his tenant.

Absence of a reason for an injunction – no simplified injunction pursuant to § 940a Sec. 2 Code of Civil Procedure (ZPO)

According to the opinion of the OLG Celle there were no legal grounds for an injunction. The (simplified) injunction pursuant to § 940a Sec. 2 Code of Civil Procedure (ZPO) was out of the question in commercial landlord and tenant law. § 940a Sec. 2 Code of Civil Procedure (ZPO) exclusively applied to residential tenancies. Given the clarity of the statutory regulation an analogous application outside residential tenancies could not be taken into consideration.

Decisiveness of the "general injunction of performance", §§ 935, 940 Code of Civil Procedure (ZPO) – exceptions in the case of endangered livelihood or of an emergency situation of the applicant or of the procurement of irreversible facts

When issuing an injunction of performance the provisions of the "general" injunction of performance of §§ 935, 940 Code of Civil Procedure (ZPO) applied. In that respect there was a lack of the required special emergency. Temporary injunctions resulting in the unlimited satisfaction of the main claim were only admissible in exceptional cases. Such exceptional cases applied, for example, if the existence of the applicant was at risk of if he/she was in an emergency situation and then only if action or performance owed had to be provided at such short notice that it would no (longer) be possible to effect a title in ordinary proceedings, i.e. if otherwise unavoidable disadvantages would come into being without the requested temporary injunction being issued. A further exception was accepted if obtaining a title in the main proceedings would have created irreversible facts and if the reference to ordinary proceedings would have practically corresponded to a denial of justice. The landlord did not present such exceptional facts. Losses resulting from unpaid rent until the main proceedings did not, in fact, suffice the strict admission criteria.

Practical considerations

The opinion has become consolidated that the simplified injunction pursuant to § 940a Sec. 2 Code of Civil Procedure is not applicable to commercial landlord and tenant law. If a third party is, therefore, in possession of the rental space, and who is not included in the eviction title, only a "normal" injunction of performance regarding the eviction of a (commercial) rental object can be taken into consideration. The prerequisites for this are very high and are only fulfilled in rare cases. In such cases landlords should – in cases of doubt – rather choose the traditional route of main proceedings.

Dr. Rainer Burbulla

EVENTS:

JANUARY 27 AND 28, 2015
11th German Congress for Commercial Real Estate in Berlin, Swissotel, Kurfürstendamm
Panel Talk Consequences under building law of the boom in online trading
Rechtsanwalt Dr. Johannes Grooterhorst, Partner
Grooterhorst & Partner Rechtsanwälte mbB

JANUARY 28, 2015
Commercial Landlord and Tenant Law in Düsseldorf, MaxHaus, Düsseldorfer AnwaltService
Talk: Current Commercial Landlord and Tenant Law 2015
Speaker: Rechtsanwalt Dr. Rainer Burbulla, Partner
Grooterhorst & Partner Rechtsanwälte mbB

MARCH 24 AND 25, 2015
7th German Summit for Commercial Real Estate 2015 in Düsseldorf, S-Forum in the Finanzkaufhaus of the Stadtsparkasse Düsseldorf
Panel Talk: German and International Capital Search for German Commercial Real Estate: In what and how far has the work of investors changed in recent years?
Rechtsanwalt Dr. Johannes Grooterhorst, Partner
Grooterhorst & Partner Rechtsanwälte mbB

MAY 19 AND 20, 2015
German Shopping-Center Forum 2015 in Düsseldorf, Hyatt Regency Hotel
Talk: Turnover rent clauses in commercial rental agreements - contractual design possibilities (May 19, 2015)
Speaker: Rechtsanwalt Dr. Rainer Burbulla, Partner
Grooterhorst & Partner Rechtsanwälte mbB
Talk: Most recent developments in commercial landlord and tenant law (May 20, 2015)
Speaker: Rechtsanwalt Dr. Johannes Grooterhorst, Partner
Grooterhorst & Partner Rechtsanwälte mbB

AUGUST 26, 2015
Trade Dialogue NRW
Program still to follow
Rechtsanwalt Dr. Johannes Grooterhorst, Partner
Grooterhorst & Partner Rechtsanwälte mbB

OCTOBER 20 AND 21, 2015
7th German Specialist Store Real Estate Congress 2015 in Wiesbaden
Program still to follow
Rechtsanwalt Dr. Johannes Grooterhorst, Partner
Grooterhorst & Partner Rechtsanwälte mbB

PRESS/PUBLICATIONS:

Special edition “Commercial Law Firms” “Rheinische Post” Copy of March 20, 2015, p. E 4

BGB Online Kommentar
Author: Dr. Johannes Grooterhorst
BGB Online-Kommentar – (Göler Komme)

German Council Magazine 01/2015, p. 62 – 63
Planning Law in Transactions
Shopping centers and further large commercial real estate still continue to be popular
Author: Dr. Johannes Grooterhorst

Legal Obstacles Concerning Quarter Conversions
Requirements regarding urban land-use planning when living and work are located next to each other
Author: Dr. Johannes Grooterhorst
Polis 01/2015, page 62/63

Legal consequences when assigning the right of recourse against the insurer in the context of D&O insurance
Authors: Dr. Johannes Grooterhorst and Jörg Looman
in NZG 6/2015, p. 215

The Expensive Subtenant
Authors: Dr. Rainer Burbulla and Prof. Dr. Klaus Schreiber
in JURA Juristische Ausbildung 2015, Volume 37, Issue 3, p. 276 – 281

Temporary Legal Protection in Slovenia (Part I)
Co-author: Ralf-Thomas Wittmann
in AnwaltZertifikatOnline, juris, Deutsche Anwalt Akademie, 4/2015

Temporary Legal Protection in Spain (Part I)
Co-author: Ralf-Thomas Wittmann
in juris, Deutsche Anwalt Akademie, 4/2015

Temporary Legal Protection in Spain (Part II)
Co-author: Ralf-Thomas Wittmann
in AnwaltZertifikatOnline, juris, Deutsche Anwalt Akademie, 2/2015

Rental agreements with an obligation to build in procurement law
Author: Dr. Rainer Burbulla
in ZMR 2014, 933

No contributory negligence when not wearing a bicycle helmet
Ruling of the Federal Supreme Court (BGB) – VI ZR 281/13 of June 17, 2014
Author: Ralf-Thomas Wittmann
in HAVE/REAS 3/2014

Books published:

Powers of Attorney in Companies
Author: Dr. Ursula Grooterhorst, Rechtsanwältin und Mediatorin
6th, newly revised and extended edition 2014

Current Commercial Landlord and Tenant Law – Court Rulings and Contract Design
Author: Dr. Rainer Burbulla
2nd, completely newly revised and substantially extended edition 2014

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