EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Applications nos. 42609/08 and 32996/11
MAXIMUM INDUSTRIE- UND GEWERBEHOLDING GMBH and
MERLIN UNTERNEHMENSVERWALTUNG GMBH
against Germany

The European Court of Human Rights (Fifth Section), sitting on 24 March 2015 as a Committee composed of:

Boštjan M. Zupančič, *President,*
Helena Jäderblom,
Aleš Pejchal, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having regard to the above applications lodged on 2 September 2008 and 16 May 2011 respectively,

Having deliberated, decides as follows:

THE FACTS

1. The applicants, Maximum Industrie- und Gewerbeholding GmbH (the first applicant company) and Merlin Unternehmensverwaltung GmbH (the second applicant company), are German limited companies, based in Cologne and Potsdam respectively. They are represented before the Court by Ms Wenk, a lawyer practising in Lindau and – since December 2011 – by Mr Kempen, a law professor at the University of Cologne.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicants, may be summarised as follows.

1. Background to the case

3. In 1993 the first applicant company purchased real estate and property from a limited company based in Potsdam. The only shareholder of the

vendor was a Federal Trust Agency, the Treuhand Agency, charged with managing and, if possible, privatising the former State property of the German Democratic Republic.

4. On 27 April 1993 a contract for the sale was finalised before a notary public. The purchase price was about twenty-two million German marks (DEM) for the real estate and DEM 500,000 (plus value-added tax) for other company property. The contract cited "machines, tools, equipment and parts according to the attached inventory list of 31 December 1991, updated on 31 March 1993, appendix 5" and "all raw materials, according to the attached inventory list of 31 December 1992, updated on 31 March 1993, appendix 6." The contract further stated that "the appendices were read out loud." Appendix 5 consisted of eight pages, appendix 6 of seven pages. Both refer to the more detailed lists of inventory comprising 226 and 119 pages respectively which were added to the notary file (*Notarnebenakten*) but were not attached to the contract and not read out loud as originally intended. Instead, the parties to the contract decided to summarise the inventory lists and the notary public produced appendices 5 and 6. Whether these (shorter) appendices were actually read out loud remains unclear.

5. The purchase price, except for DEM five million, was paid. According to the contract, this last part was to be paid in instalments of DEM one million at the beginning of the years 1996-2000 respectively. The applicant would be relieved of the obligation to pay the instalments if 500 full-time jobs were maintained in the previous year. The second applicant company guaranteed the purchase price. The plant was handed over to the applicant company on 1 September 1993.

6. In 1995 the Federal Agency was renamed "*Bundesanstalt für vereinigungsbedingte Sonderaufgaben*" but continued to be the only shareholder of the vendor, now a limited company in liquidation.

2. The purchase price proceedings (application no. 42609/08)

7. The applicant companies did not pay the remaining purchase price. The Federal Agency took action before the courts regarding the instalments for 1997 to 2000. On 10 July 2001 the Berlin Regional Court ordered the applicant companies to pay the remaining purchase price, amounting – with interest – to over DEM five million. The Regional Court held that the first applicant had not provided for the 500 full-time jobs in the years in question.

8. The applicants appealed to the Berlin Court of Appeal. During the proceedings, they claimed for the first time that the purchase contract was void because its subject was not the plant as a whole but a limited number of objects present on the real estate. The detailed inventory lists were therefore necessary to determine what had been sold. However, in the view of the applicant companies, as these lists had not been read out loud, the

contract was formally flawed. Furthermore, the first applicant company declared avoidance (*Anfechtung*) of the contract on grounds of deceit according to Section 123 of the Civil Code. The applicant companies alleged that the vendor and the Federal Agency knew about plans within the decision-making bodies of the City of Potsdam to enact a development statute (*Entwicklungssatzung*) which would reduce the value of the real estate, and had not disclosed this information.

9. On 27 June 2003 the Court of Appeal dismissed the applicant companies' appeal on the grounds that the right to claim the contract to be void had been forfeited.

10. On 16 July 2004 this first dismissal was quashed by the Federal Court of Justice. It held that the right in question had not been forfeited and referred the case to the Court of Appeal for further examination.

11. On 4 November 2005 the Berlin Court of Appeal dismissed the applicant companies' appeal for a second time. It scrutinised the contract and concluded that it was valid. According to the Court of Appeal, it was clear that the parties to the contract had wanted to record only the shorter appendices 5 and 6 and not (as it might appear from the wording of the contract) the longer inventory lists. This followed from a remark on the appendices which asked the notary public to take the (longer) inventory lists to his files, meaning that they were not a direct part of the contract. Consequently, the statement in the contract that appendices 5 and 6 were read out loud referred to the shorter list that was actually attached to the contract. The Court of Appeal applied the legal assumption prescribed by Section 13 of the Act on Recording (*Beurkundungsgesetz*) that the reading out loud had taken place if such a remark on the notarised document had been signed by the parties involved. The applicant companies could not rebut this assumption because the hearing of witnesses – more than ten years after the event - did not establish that the notary public had not read out loud appendices 5 and 6 as attached to the contract. Furthermore, in the view of the Court of Appeal, the reference to the (shorter) appendices 5 and 6 instead of the (longer) inventory lists had possibly impeded the transfer of the ownership of some of the movable items for being insufficiently defined (*bestimmt*). However, it was sufficient in order for the contract to be valid that the objects were definable (*bestimmbar*). In this respect, the (shorter) lists sufficed. The Court of Appeal considered further, that the possible flaw in the ownership transferral had not led to the transaction as a whole being invalid according to Section 139 of the Civil Code. The subject of the contract was the property on the real estate at the date of delivery, which was scheduled for a later date. The parties to the contract had therefore expected that a change in the property would take place and thus had not meant to link the validity of the transaction as a whole to the successful transfer of ownership of all the objects on the inventory lists. Regarding the development statute, the Court of Appeal considered that the state of the

planning had not sufficiently progressed at that time to induce an obligation of the vendor and the Federal Agency to inform the applicant companies.

12. On 29 June 2006 the Federal Court of Justice rejected the applicant companies' request for leave to appeal on points of law because the case did not raise any question of fundamental importance nor require a decision in order to ensure the development or the uniform application of the law by the judiciary (no. V ZR 257/05). On 21 July 2006 it dismissed the applicant companies' objection, alleging a violation of the right to be heard.

13. On 3 March 2008 the Federal Constitutional Court did not accept the applicant companies' constitutional complaint for adjudication, without providing reasons (no. 2 BvR 1837/06). This decision was served on the applicants on 7 March 2008.

3. The compensation proceedings (application no. 32996/11)

14. In July 1995 the first applicant took action against the vendor and the Federal Agency before the Berlin Regional Court. It claimed, *inter alia*, compensation payments of about DEM five million because the vendor had allegedly sold or given away machines and equipment to third parties for no charge after the above-mentioned contract had been signed, but before the purchase object was handed over to the applicant company.

15. On 7 May 1996 the Berlin Regional Court dismissed the action. It held that the compensation claim was unfounded as the applicant company had bought the plant as a whole. In so far as the condition of the plant as a whole was possibly defective, the applicant company had not exercised its rights in case of defects (*Mängelgewährleistungsrechte*). Furthermore, the contract ruled out the exercise of these kinds of rights.

16. The first applicant company lodged an appeal before the Berlin Court of Appeal and expanded the claim, seeking to establish that the purchase contract was void and the applicant company was entitled to make rescission claims.

17. On 4 April 2008 the Court of Appeal dismissed most of the applicant company's claims and established in the operative part of its decision that the contract of April 1993 was valid. It mainly referred to the reasons in its judgment given in 2005 in the case concerning the purchase price (see above) and to the new hearing of witnesses.

18. On 7 May 2009 the Federal Court of Justice rejected the first applicant company's request for leave to appeal on points of law because the case did not raise any question of fundamental importance nor require a decision in order to ensure the development or the uniform application of the law by the judiciary (no. V ZR 92/08). On 2 July 2009 it dismissed the applicant companies' motion to be heard, stating that, based on the preliminary analysis of the research assistant and the judge rapporteur's report, it had come to the conclusion that all the applicant companies' arguments had been taken into account in its decision of 7 May 2009.

19. On 9 November 2010 the Federal Constitutional Court did not accept the first applicant company's constitutional complaint for adjudication, without providing reasons (2 BvR 1631/09). This decision was served on the applicant company on 17 November 2010.

4. Petition to the Federal Parliament

20. In October 2008 the first applicant company brought the matter of the development statute to the Petitions Committee of the Federal Parliament. The committee, which can make non-binding proposals to the Federal executive branch to solve individual cases, heard the applicant company's case concerning the Potsdam development statute. The applicant company submitted correspondence in which, on the day before the committee wanted to adopt a decision to submit the applicant company's petition to the Federal government for consideration, the Head of the Federal Chancellor's Office had "informed" committee members that this could have a pernicious effect on their political career. On the day following the date of the alleged communication, the committee rejected the petition.

21. The Chancellor's Office asserted to the applicant company that the letter was forged and announced that criminal charges had been filed. The first applicant company filed criminal charges, alleging coercion of a constitutional organ, and against the judges of the Court of Appeal for perverting the course of justice. The outcome of the proceedings has not been communicated.

B. Relevant domestic law and practice

22. Section 13 of the Act on Recording *(Beurkundungsgesetz)* provides that any notary record must be read out loud in the presence of the notary public to the parties involved, and thereafter authorised and signed by the parties involved.

23. Section 123 § 1 of the German Civil Code reads as follows:

> "A person who has been induced to make a declaration of intent by deceit or unlawfully by duress may avoid that declaration."

24. Section 139 of the Civil Code reads as follows:

> "If a part of a legal transaction is void, then the entire legal transaction is void, unless it is to be assumed that it would have been undertaken even without the void part."

25. Section 313 at the relevant time (now Section 311b) of the Civil Code reads as follows:

> "A contract by which one party agrees to transfer or acquire ownership of a plot of land must be recorded by a notary. A contract not entered into in this form becomes valid with all its contents if a declaration of conveyance and registration in the Land Register are effected."

26. The Federal Court of Justice has frequently ruled that a contract connected with a real estate purchase must also be recorded by a notary (judgments of 23 September 1977, no. V ZR 90/75; 20 December 1977, no. V ZR 132/73; 11 November 1983, no. V ZR 211/82; 16 July 2004, no. V ZR 222/03).

COMPLAINTS

27. The applicant companies originally complained in both cases under Article 6 of the Convention that the decisions of the domestic courts were arbitrary as they obviously disregarded domestic law regarding the proper recording by a notary public and – in the case no. 42609/08 – regarding the development statute of the City of Potsdam.

28. On 6 December 2011 the applicant companies made further observations. In the applicant companies' view, their right to a fair trial had been violated because the Berlin Court of Appeal had refused any kind of legal discussion during hearings. Furthermore, the applicant companies complain that the same judges who had been sitting in the compensation case had decided in the purchase case, and therefore lacked impartiality. They further submitted that the judges of the Court of Appeal were under political influence from the Federal Government which led to arbitrary decisions in favour of a Government agency – with the aim of protecting the financial interest of the Federal Republic. Political influence became obvious as political pressure on members of the Petition Committee of the Federal Parliament was exerted by the Government.

THE LAW

29. The Court considers that, in accordance with Rule 42 § 1 of the Rules of Court, the applications should be joined, given their similar factual and legal background.

A. Alleged violation of Article 6 § 1 of the Convention on account of arbitrariness

30. The applicant companies complained that the decisions of the domestic courts concerning the defective recording and – in case no. 42609/08 – the development statute were arbitrary. They relied on Article 6 which, in so far as relevant, provides:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

In the applicant companies' view the domestic courts have obviously disregarded German law as other courts had decided otherwise and as the decision of the Court of Appeal had been criticised by named scholars.

31. The Court reiterates that it is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. The role of the Court is to verify whether the effects of such interpretation are compatible with the Convention. Therefore, even though it has only limited power to review compliance with domestic law, the Court may draw appropriate conclusions under the Convention where it observes that the domestic courts have applied the law in a particular case manifestly erroneously or so as to reach arbitrary conclusions (*Kushoglu v. Bulgaria*, no. 48191/99, §§ 50, 60, 10 May 2007).

32. In the instant case, the Court notes that the Court of Appeal conducted an individual interpretation of what the parties had agreed on. It further considered that what had been agreed on had been sufficiently recorded. There is nothing in the applicant companies' submissions which shows that this application of the law is indefensible. The mere fact that some courts other than the Berlin Court of Appeal and the Federal Court of Justice had indicated that they might have applied the domestic law in a different way or that scholars expressed dissenting opinions cannot lead to the conclusion that the impugned judgments were arbitrary. As regards the development statute, the Court notes that the Court of Appeal decided that, at the time the contract was concluded, the vendor or the Federal Agency had not yet an obligation to inform the applicant companies that political discussions within the decision-making bodies of the City of Potsdam existed. Nothing indicates that the Court of Appeal had not duly heard and considered the applicant companies' arguments. Its legal conclusion on this issue lacks any appearance of arbitrariness or unfairness.

33. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. The remainder of the applicants' complaints

34. The applicant companies also complained that the Court of Appeal had acted under political influence, lacked impartiality and refused any kind of legal discussion during the hearings

35. The Court notes that these complaints were first made in the applicant companies' submissions of 6 December 2011 whereas the last domestic decision had been given by the Federal Constitutional Court on 9 November 2010 and served upon the applicant companies on

17 November 2010. The complaints have therefore not been made within the six-month period as required by Article 35 § 1 of the Convention. The mere fact that the applicant companies have relied on Article 6 of the Convention in the initial application is not sufficient to constitute introduction of all subsequent complaints made under that provision where no indication was initially given of the factual basis of these complaints and the nature of the alleged violations (see *Allan v. the United Kingdom* (dec.), no. 48539/99, 28 August 2001; *Adam and others v. Germany* (dec.), no. 290/03, 1 September 2005). In any event, the Court observes that none of these complaints were raised by the applicant companies before the Federal Court of Justice or the Federal Constitutional Court.

36. It follows that this part of the application has been introduced out of time and must therefore be rejected under Article 35 §§ 1 and 4 of the Convention and likewise for non-exhaustion of domestic remedies.

For these reasons, the Court unanimously

Decides to join the applications;

Declares the applications inadmissible.

Done in English and notified in writing on 16 April 2015.

Milan Blaško
Deputy Registrar

Boštjan M. Zupančič
President