Order of the Regional Court of Hamm

In the case of

Mr Saul Ananias Luciano Lliuya, Provincia de Huaraz, Peru,
Plaintiff/Appellant,

Counsel: Rechtsanwälte Günther & Partner, Mittelweg 150, 20148 Hamburg

v

RWE AG, represented by the Chairman of the Executive Board, Dr Rolf Martin Schmitz, Opernplatz 1, 45128 Essen,
Defendant/Respondent,

Counsel: Rechtsanwälte Freshfields Bruckhaus Deringer, Feldmühleplatz 1, 40545 Düsseldorf,

the defendant's argument, presented to the Senate on 14 December 2017, has given no reason to reverse the decision of 30 November 2017.

Reasons

1.

The claim pursued by the plaintiff in subparagraph 1) (the main claim [*Hauptantrag*]) meets the criteria for specificity stated in section 253(2) of the Code of Civil Procedure [*Zivilprozessordnung* (ZPO)]. Contrary to the opinion of the defendant, the claim is not too imprecise in light of the facts of the matter and the status of the dispute to date because the 'suitable measures' that would apply are not specified therein. It is true that, in its 2004 decision (NJW 2004, 1035 et seqq.), the Federal Court of Justice [*Bundesgerichtshof* (BGH)] ruled that a judgment can specify a concrete measure for the elimination of a disturbance if further measures, though possible, cannot reasonably be given serious consideration. This determination was an exception in favour of an owner filing suit to eliminate a disturbance, however; it should not necessarily be understood to mean that the claim in the present case must designate the appropriate measure from the outset to fulfil the requirements for precision. Moreover, the defendant does not state which suitable measure is the only reasonable solution.

2.

The main claim does not seek to establish a future legal relationship. The existing legal relationship relevant to the plaintiff's claim is the possible relationship between himself and the defendant, arising in connection with section 1004 of the German Civil Code [*Bürgerliches Gesetzbuch* (BGB)]. Based on the existing legal relationship, in the future, the plaintiff can file a claim for reimbursement of costs against the defendant under the conditions (and with the limitation) cited in the claim. The plaintiff seeks to determine this legal relationship, based on the provisions of section 1004 of the BGB; the legal consequence of this relationship—namely the reimbursement of costs incurred if the plaintiff eliminates the disturbance himself or has it eliminated by a third party (and incurs costs as a result)—can be concluded from sections 683, 684, and 670 of the BGB or section 812 of the BGB. These costs, however, are ultimately based on the existence of a legal relationship between the parties as defined under section 1004 of the BGB. The Federal Supreme Court (BGH, judgment of 5 June 1990 with the reference: VI ZR 359/89, published, inter alia, in NJW-RR 1990, 1172 et seqq.) confirmed the admissibility of the declaratory judgment, although the relevant work had not yet been performed and the additional costs not yet been incurred. Whether any (additional) costs would be incurred was still undecided and

depended on whether any future work was required on the plaintiff's main water pipe. On this point, the BGH has stated as follows:

> 1. The BerGer. rightly found the positive declaratory action admissible. The objections submitted in the response to the review are without foundation. The plaintiff seeks to assess the defendant's obligation to compensate him for the additional costs of the manual excavation, which became necessary as a result of the fact that the defendant had laid its power supply line along the same route as his water pipe. The purpose of the plaintiff's action is to determine the legal relationship to the defendant based on the stated facts of the case, and thus to ascertain the existence of any (existing) legal relationship as specified under section 256(1) of the ZPO. That the claim submitted by the plaintiff arises from the necessity of work on the main water line, in no way affects the admissibility of the legal action (cf. BGHZ 87, 321 (324) = NJW 1984, 560 = LM LandbeschG No 31; further BGH, NJW 1984, 2950 = LM section 256 ZPO No 130; BGH, NJW 1986, 2507 = LM section 256 ZPO No 142).

3.

The legitimate interest required to take legal action is not absent in the present case. The motion for a declaratory judgment would also be admissible if, in the end, the plaintiff were indeed able to demand only €0.33 from the defendant. Whether, and in what amount, the plaintiff will incur future costs for protective measures is not yet certain, contrary to the defendant's view, and does not need to be adjudicated at present, in light of the fact that this motion for a declaratory judgment was conditioned on the actual imposition of such costs on the plaintiff. The opinion of the Peruvian law firm, submitted by the defendant, does not alter this fact. One cannot rule out the possibility that provisions in force in Peru, including those applicable on a case-by-case basis, may change, with the result that the plaintiff may incur costs in the future. It is also possible that the municipality on whose property the lagoon is located will permit the plaintiff, or an association of several affected property owners, to take certain measures on their property at their own expense. Incidentally, it is also conceivable that, on his property, the plaintiff himself may take measures appropriate to protect that property from flood damage. These could include other, more promising measures than those previously implemented, on which subparagraph 6) of his claim was based.

4.

The defendant fails to make a compelling argument that the invocation of section 1004 of the BGB might have been opposed on the grounds that it would have impossible or unreasonable implications: i.e., that a pro rata construction of a dam or a permanent, pro rata reduction of the lake volume would be impossible, and that, as a result, it would not be in the defendant's interest to implement measures associated with the reimbursement claim for agency without authorisation (*negotiorum gestio*). First of all, this objection will need to be considered only if there is proof of the causal relationship that, the plaintiff alleges, can demonstrate the active contribution of power plant operations to the acute flood risk. Moreover, as the defendant's argument ultimately seeks to establish, the fact that multiple parties have caused the interference ('disturbers') does not necessarily mean that eliminating that interference would be impossible. On the contrary, the established interpretation is that, in the case of multiple 'disturbers', each participant must eliminate its own contribution, and joint and several liability is only considered if the contributions cannot be separated and there is equal importance (cf. MijKoBGB/Baldus, 7th ed. 2017, section 1004 BGB marg. no. 232 with further reference). In addition, it is not necessarily the case, and has not yet been determined, that the protective measures will ultimately be implemented by the public authority. The Senate did not interpret the term 'third party', as it was used in the plaintiff's claim, as referring exclusively to the state.

5.

The Senate has already pointed out, in its decision of 30 November 2017, that, in accordance with prevailing opinion, the illegality of the offense is largely associated with the lack of any obligation for the owner to tolerate an action or situation in accordance with section 1004(2) of the BGB (see also MUKoBGB/Baldus, 7th ed. 2017, section 1004 BGB, marg. no. 192 et seq.). In other words, the condition that conflicts with the ownership of the object (section 903 of the BGB) must be unlawful, not the action leading to it. This is the prevailing opinion and settled case law of the Federal Court of Justice (see BGH judgment of 4 December 1970, with the reference: V ZR 79/68, marg. no. 8 quoted according to Juris; BGH judgment of 24 January 2003 with the reference: V ZR 175/02, marg. no. 25, published, inter alia, in NJW-RR 2003, 953; Palandt - Herrier, BGB, 76th ed. 2017, section 1004, marg. no. 12 and 34).

6.

Insofar as the general interest precludes the cessation of business operations, in this case of a power plant company, the Federal Court of Justice has also already ruled that a claim for financial compensation may be submitted in this case (BGH, judgment of 7 April 2000 - V ZR 39/99, marg. no. 20, published, inter alia, in BGHZ 144, 200 et seqq., which referred to the operations of a drug assistance centre). The passage quoted by the defendant, from the explanatory memorandum on the implementation of the Environmental Impact Assessment Directive [*Umweltverträglichkeitsprüfung* (UVPG)], does not alter this position, because comments in explanatory memoranda do not constitute an authentic interpretation of the law.

7.

In this context, it is correct to state that, in the oral proceedings on the issue of liability, the motivations of historical legislatures did not have a *'decisive'* influence on the Senate's position. The Senate has pointed out, among other things, that even in the motivations for the BGB, the issue of cumulative and long-distance damage, and accountability for it, was recognised as a significant problem and thoroughly discussed.

8.

Whether the defendant's argument is true—i.e., that there is no causal relationship between CO2 emissions and the increase in the water level in the lake—can be determined only on the basis of the evidence already taken. It is the Senate's opinion that the case is not ready for judgment without taking evidence as ordered, and therefore the defendant has not been subject to a violation of its constitutionally protected right to be heard in court or its right to effective legal protection.

9.

The Senate has modified the deadline given in the Indicative Court Order and Order for the Hearing of Evidence of 30 November 2017: it has set a new deadline of **2 March 2018** for the plaintiff to submit the advance payment, in the amount specified in the Court Order, to the central court cashier's office.

This corresponds to the deadline, extended in the Court Order of 21 December 2017, for the parties to reach an agreement and designate suitable experts. If it is already apparent

beforehand that the parties cannot agree on suitable experts, the Senate requests a notice to this effect.

Hamm, 1 February 2018

Higher Regional Court – 5th Civil Senate