

possibility of open recourse to the notion of good faith in cases of this kind) has come under attack in recent years. On the other hand, however, a certain reluctance is also apparent in other legal systems (notably in Greek and Norwegian law) to tamper with prescription rules under the auspices of good faith, or abuse of right: such interference might obviously undermine the policy of these prescription rules.

Case 22: Sitting on one's rights

Case

Lessee Lester has to pay to his landlord Mark a monthly rent of DM 1,000. Since he regards the rent as too high, he pays only DM 900. The landlord does not protest. Three years later, however, he demands payment of the remaining DM 100 per month for the past three years. (The prescription period for these kinds of claims has not yet expired.)

Discussions

GERMANY

The claim of Mark would be unfounded if the parties had implicitly changed the amount of rent required. But the first payment of DM 900 does not yet constitute an offer by Lester to change the contract. From the point of view of the recipient, it may as well have appeared as an error on Lester's part.¹ At least the second payment of only DM 900 does, however, constitute an implied offer to change the agreement. But Mark has not accepted the offer. His silence in principle constitutes neither an acceptance nor a rejection. Silence can only be regarded as a legally relevant declaration in exceptional cases, e.g. where the parties agreed that it would have this effect or where this is determined by statute.² The present case does not reveal any such exceptional circumstances.

Likewise, there has been no waiver (§ 397 I BGB). For on the one hand, there are insufficient indications that by not exercising his right to claim

¹ Cf. Werner BB 1984, 221 (222) (concerning the analogous problem of paying too much or too little under a contract of sale).

² Medicus, *Allgemeiner Teil* nn. 345 ff.; Palandt/Heinrichs, *Einf. v. § 116*, nn. 7 ff.

the full rent Mark can be taken to have intended to waive his right to the remaining amount.³ On the other hand, the waiver of a claim requires a contract⁴ which has not been concluded in the present case, not even tacitly.

Nevertheless, Mark may have lost his right to payment of the arrears. Loss (*Verwirkung*) in these kinds of cases is based upon an abuse of right in the specific form of *venire contra factum proprium*.⁵ It constitutes a subcategory of behaviour not in accordance with the requirements of good faith and requires, firstly, that the creditor does not exercise his right for a relatively long period of time. The length of time must be determined by reference to the circumstances of the specific case; particularly the extent to which the debtor deserves protection has to be taken into account.⁶ In the present case, the amount of rent was obviously of considerable importance to Lester, and Mark should therefore not be allowed to keep him in the dark for three years. Thus, the time requirement appears to be met.

Apart from the time factor, however, loss of a right requires something more: there have to be additional factors inducing the objective observer to regard the delay in the exercise of the right as a hardship which is contrary to good faith. This circumstantial requirement will, as a rule, be satisfied if the debtor has already organised his patrimonial affairs on the supposition that the right will not be exercised.⁷ In lease relationships it can be accepted that it will constitute an economic hardship for the lessee if the unpaid amounts which have been piling up are later claimed. If the rent had been claimed in time, Lester could have adjusted his lifestyle accordingly.⁸ The circumstantial requirement is therefore also met on the facts.

Mark has forfeited his claim to the arrears. Of course, he can claim the sum originally agreed upon for the future.

Loss of right on account of lapse of time is of practical significance particularly where claims are subject to a very long prescription period (cf. the regular prescription period of thirty years according to § 195 BGB).

³ Waiver requires conduct which may be interpreted as a declaration of will, i.e. a declaration communicating the will to waive the right in question; see, e.g., Palandt/Heinrichs § 242, n. 89. As usual, of course, a tacit declaration is sufficient.

⁴ I.e. acceptance of the declaration of intention mentioned in the previous footnote; cf., e.g., MünchKommBZRG von Feldmann § 397, n. 1.

⁵ Cf. Jauernig/Vollkommer § 242, nn. 53 ff.; Palandt/Heinrichs § 242, nn. 87 ff.; MünchKommBZRG von Roth § 242, nn. 360 ff.

⁶ Cf. Palandt/Heinrichs § 242, n. 95.

⁷ Palandt/Heinrichs § 242, n. 95.

⁸ Cf. Palandt/Heinrichs § 242, n. 95.

GREECE

The issue to be considered in the present case is whether Mark, who did not protest when Lester only paid DM 900, made Lester believe that he had accepted a rent of DM 900 rather than DM 1,000. The answer would probably have to be that a period of three years seems too short to apply the doctrine of deactivation of rights as recognised under art. 281 Gr. C.C. The principle of deactivation of rights (forfeiture, equitable estoppel, *Verwirkung*) which has been developed in Germany has been also accepted in Greek law. The acceptance has, however, been rather hesitant since Greek courts fear that the principle might undermine the prescription periods. Under Greek law, Mark's claims would be barred after a period of five years (art. 250 Gr. C.C.).

The principle of deactivation of rights may only be applied if the creditor has failed to exercise his right for an inordinately long time under conditions that have led the debtor reasonably to believe that the right would not be exercised. Moreover, enforcement of the right would have to render the condition of the debtor especially onerous.⁹

AUSTRIA

Quite apart from the limitation of actions, in Austrian law a creditor may lose a right by doing nothing as long as this inaction is to be interpreted as an implicit¹⁰ waiver of the right in question.¹¹ Therefore, loss of a legal right by a creditor occurs only if the debtor reasonably infers from the behaviour of the creditor that the latter will no longer assert his claim. In Austrian law, such a loss of a right is subject to the law relating to legal transactions and that is why (in contrast to German law) a creditor is allowed to rescind the 'loss of his right' (*Verwirkung*) on the ground of mistake.¹²

The different positions reached in Austria and in Germany can be explained by the fact that the Austrian Civil Code gives much greater legal significance to a person's reliance than does the German Civil Code. One result of this is that the need in Austrian law for a special legal doctrine of *Verwirkung* is much less pressing. The Austrian approach has two

⁹ See, among others, Simantiras nos. 329-93, pp. 236-9; Symeonides, in: *Introduction* 61; Areopagus 295/1987 EEN 55, 35.

¹⁰ See § 863 ABGB.

¹¹ OGH in JBI 1989, 649; ORZ 1993/17; Kramer, JBI 1962, 540; Bydlinski, *Privatautonomie* 184 ff.

¹² Cf. Bydlinski, *Privatautonomie* 184 ff. at 189.

particular consequences. First, it is generally held that it is the *objective* meaning of a statement which is of decisive importance and that, therefore, a declaration of intention is effective even if the person who appears to be making it is not conscious of making a legally relevant declaration of intention (if, in other words, he has no *Erklärungsbewusstsein*).¹³ Secondly, rescission on the ground of mistake is only permissible if the other party to the transaction does not deserve the law's protection.¹⁴ The other party will be considered undeserving in this context if he himself caused the other's mistake, should have recognised it or was informed of it before he arranged his affairs in reliance on the existence of the contract.¹⁵

The question whether in Austrian law Lester can plead waiver by Mark of his rights to the rent in case 22 depends on several factors. First, it must have been reasonable for a person in Lester's position to interpret Mark's behaviour as an implicit waiver of these rights, and in deciding this issue it must be taken into account that in the course of business activities it is unusual for a legal right to be given up without recompense. The yardstick in judging any conduct so as to imply such an intention must therefore be a very strict one.¹⁶ On the other hand, the Austrian Supreme Court has accepted the existence of waiver in a case in which a landlord collected the same rent as before even though he was entitled to a higher rent,¹⁷ though the court restricted the effect of this waiver to the landlord's accrued claims for rent and found no waiver as to his future claims.¹⁸

Even if it is accepted that Mark has waived his rights in the present case, Mark may be able to avoid the effect of any such waiver if he can show that he was mistaken about the significance of Lester's inaction. Thus, for example, if Mark was mistaken as to the real amount of the rent because Lester had carried on paying DM 900 month by month, then any 'implicit declaration' of waiver which he is taken to have made was made under a mistake as to what was owing. Since in this example, Lester can be said to have caused Mark's mistake, Mark is entitled to avoid the effects of his waiver by way of application of § 871 ABGB. By contrast, if Mark did indeed know the correct amount of the rent which had been agreed upon and was mistaken only as to the meaning of Lester's behaviour, then Lester would not be said to have caused his mistake.

¹³ Cf. Koziol/Welser, *Bürgerliches Recht* I 94. ¹⁴ § 871 ABGB.

¹⁵ According to the Supreme Court (e.g. SZ 67/136 = JBl 1995, 48) the prerequisites provided in § 871 ABGB must also be present if a gratuitous contract (*unentgeltlicher Vertrag*) is rescinded for mistake in motive; disapproved by Koziol/Welser, *Bürgerliches Recht* I 127.

¹⁶ OGH in JBl 1993, 592. ¹⁷ OGH in MientSg 19,099 (1967).

¹⁸ OGH in RdW 1985, 75.

Finally, it should be noted that a person may lose a right not only by waiver (which requires a declaration of intention even if implied), but also by simple inactivity over a period of time.¹⁹ This position may be derived from § 418 ABGB,²⁰ which concerns the situation where a person by mistake builds on another's land. However, the general rule is kept within narrow limits in Austrian law. A first requirement is that the person against whom the holder of the right asserts the right in question be honest, in the sense that he neither knew nor ought to have known of the right. Secondly, there must have been a risk that the inactivity of the holder of the right would cause harm to the other party. And thirdly, the holder of the right must have been 'knowingly inactive', i.e. he did not take any action whatsoever even though he knew of his rights and realised that the other party would be prejudiced by his behaviour. If these three requirements are fulfilled, the effect of the application of the doctrine is to prevent the holder of the right from exercising it. However, the 'honest defendant' does not acquire these assets for nothing, but has to pay compensation.

Applying these rules to the facts of case 22, it is clear that Lester does not deserve the protection which they offer as he knew that his creditor, Mark, was entitled to DM 1,000 per month. Furthermore, any loss by Mark of his claim to the outstanding DM 100 per month would lead to a gratuitous transfer of property and this is precisely where § 418 ABGB would not give protection.

FRANCE

The tenant Lester cannot claim that the lease has been varied under French law, since a lease must be varied in writing.²¹ In fact Lester may not be able to prevent Mark from claiming the arrears of rent unpaid over the last three years, though he might be able to prevent him from claiming it all at once.

Under French law there is insufficient evidence here to suggest that Mark has really reduced the rent and given satisfaction for the debt. It would be necessary to adduce evidence of an agreement between the parties as to the waiving of rent and the mere fact that Mark does not

¹⁹ E.g. if his behaviour has to be interpreted as a mere *Wissenserklärung* (declaration of knowledge). ²⁰ See Bydłinski, *Privatautonomie* 192 ff.

²¹ L. no. 89-462 of 6 July 1989, art. 3 amending L. no. 86-462 of 23 December 1986. This law applies to all types of leases.

protest when Lester pays less rent would probably be insufficient. The courts require that the creditor expresses an unequivocal desire to release the debtor.²² Tacit acceptance by the debtor may constitute an agreement that the debt had been satisfied, but it is unlikely that it can be deduced from the creditor's silence.

While Mark has the right to exercise his contractual rights, the tension between art. 1134 al. 1 and art. 1134 al. 3 is illustrated here again. Thus Lester could perhaps protest if Mark were to attempt to recover the arrears all at once. An analogy can be drawn with the case law concerning landlords abusively invoking forfeiture clauses²³ and particularly the decisions of the *Cour de cassation* concerning a lessor's failure to demand arrears of rent over a long period.²⁴ Moreover, there is an analogy in a recent case in which an agreement made by lender and borrower to suspend interest for late payment of a loan was subsequently disregarded by the lender and the *Cour de cassation* criticised the lower court for omitting to take into account this bad faith on the lender's part.²⁵ Lester may well be able to show that Mark is in bad faith in demanding all the arrears in one go and if the *juges du fond* are convinced by this argument, they might award extra time to Lester to pay (a *délai de grâce* under art. 1244-1 of the Civil Code) and order Mark to recover the arrears in instalments, obliging him as a creditor to act in good faith.²⁶

BELGIUM

Such cases are highly debated in Belgium. Litigation is common. Given the political sensitivity surrounding conflicts in the field of housing, legislation with respect to such contracts is frequently changed.

Most case law concerns situations where the landlord has a right to adapt the rent every year ('indexation') and forgets to do so. In 1983, a prescription period of one year was introduced for such cases (this prescription only concerns the top-up amount and only relates to past amounts; it does not prevent the landlord from asking that in future the rent be calculated as if it had been adapted every year). Case 22, however, is not a

problem of non-indexation. As to the rent itself, the prescription period is normally five years (art. 2277 C.C.). We will have to discuss (i) waiver and (ii) abuse of right in the form of *venire contra factum proprium*.

(i) As in case 20, the solution is simple if the conduct of the landlord may be interpreted as waiver. Waiver requires communication of intention; it does not require acceptance. Silence as such does not constitute a communication of intention; only under specific circumstances can it acquire such significance.

A Belgian judge will probably find that the facts of case 22 do not constitute a sufficient indication of waiver, and not even of a temporary waiver (i.e. for the past only). This, at least, would be the position of the *Hof van cassatie*. Judges of lower courts tend to accept waiver more readily. Thus, it may not be excluded that, depending on the surrounding circumstances, such behaviour might be interpreted as waiver.

It is much debated in Belgium whether legal acts, including waiver, require a 'real' intention (established *a posteriori* by the judge), or whether it is sufficient that the other party could legitimately deduce such an intention from the circumstances at the time of the communication of intention. The latter view seems to be gaining ground.²⁷

(ii) The doctrine of abuse of right (good faith) could apply to cases where one party tolerates a certain interpretation of the contract by the other for a lengthy period of time. It is not necessary that the other party legitimately believed the landlord to have waived his right to the full rent of DM 1,000. But the behaviour of the landlord must be manifestly unreasonable.

The *Hof van cassatie* accepts the doctrine of *venire contra factum proprium* (*rechtsverwerking*) only in cases where the behaviour of the creditor is manifestly unreasonable, i.e. abusive. Judges of lower courts, again, tend to be more flexible and regularly accept it in cases like the present one.²⁸ As the *Hof van cassatie* wants to see one of the specific formulas for abuse of right it has coined (disproportionality, or a manifest excess of the limits of normal use), lower court judges will normally dress up their acceptance of *venire contra factum proprium* by using one of these formulas.

Where, however, a landlord does not protest for thirty-six months

²⁷ For an example, see *Hof van Beroep* (Appeal) Brussel 26 May 1992, ARCO, TBBR 1993, 333 ff.; for a recent discussion, see M. E. Storme, in: *Vetrouwensbeginsel passim*.

²⁸ Cf. also *Hof van Beroep* (Appeal) Gent 12 Apr. 1995, TBH 1996, 737 (terms of payment granted, without interest, for twenty years).

²² Versailles 20 May 1994, RTDCiv 1994.863 obs. J. Mestre.

²³ See the French report to case 7 above.

²⁴ Com. 7 Jan. 1963, Bull. civ. IV, no. 16, p. 14; Civ. (3) 8 Apr. 1987, Bull. civ. III, no. 88, p. 53.

²⁵ Civ. (1) 31 Jan. 1995, D 1995.389 note Jamin.

²⁶ Cf. the French reports to cases 6, 8 and 13 above for an explanation of the application of art. 1134 al. 3 C. civ. to creditors.

against the fact that the tenant pays a lower rent than the one provided by the contract, this will often be accepted as evidence that he has agreed on a rent reduction. But it must be doubted whether the tenant could legitimately believe that the landlord really accepted such rent reduction.

SPAIN

In Spanish law, silence or even forbearance by the holder of a right is not taken to mean that he thereby gives it up, as long as the right has not expired as a result of lapse of time (prescription) and as long as there has been no genuine (*concluyente*)²⁹ renunciation of it. As regards the latter, the High Court has held that a renunciation cannot be inferred from silence alone.³⁰ Nevertheless, in circumstances where the prescription period is considered to be too long (the general prescription period in Spanish law being fifteen years³¹) and where the silence of the holder of a right has been *very prolonged*, the courts usually find that the right has been renounced on the facts.³² However, in the present case the time during which Mark has not insisted on his full rent does not appear to be quite long enough to support such an inference of a renunciation on his part, especially because Lester has not incurred any expense by placing confidence in his landlord's conduct. Therefore, it follows on the facts of case 22 that the contractual rent is still owed.

It is to be noted that Spanish courts, unlike their German counterparts, have not yet developed a clear juristic approach to the relationship between the extinction of legal rights by prescription and (unilateral) unfair delay in the exercise of those rights, even though the approach of legal scholars in this area has been directly influenced by the doctrine of *Verwirkung* in German law.³³ The High Court has on one occasion adopted this doctrine, but it did so in a case which is better explained in terms of other legal rules.³⁴

²⁹ *Concluyente* is to be contrasted with 'presumed' (*presunto*) rather than 'silent' (*tácito*) and may in this context signify a real or genuine intention.

³⁰ See the High Court judgement of 4 March 1988 (RJA 1988, 1551), confirming many earlier decisions. ³¹ Art. 1964 C. civ.

³² See the High Court judgement of 19 June 1985 (RJA 1985, 3298).

³³ For example, Miquel, in: *Comentario*, sub art. 7.

³⁴ High Court judgement of 13 June 1986 (RJA 1986, 3549). In this case, a husband and wife had agreed to separate and had lived independently of each other for thirty years without any judicial order or divorce. After the husband's death, the wife claimed from his heirs the rights to his estate which would be accorded in Spanish law to a widow, but her claim failed on the basis of the doctrine of *Verwirkung*.

ITALY

Lester must pay Mark the arrears, but if sued for them by Mark a court may give him extra time to pay under special legislative rules applicable to residential leases in order to avoid hardship.³⁵

It is to be noted that Italian law has not developed a doctrine of *Verwirkung* ('sitting on one's rights') along the lines of German law,³⁶ though in certain areas of the law sitting on one's rights may indeed bar their enforcement, a result which is usually justified in terms of a tacit renunciation of the right in question.³⁷ On the facts of case 22, however, it seems difficult to resort to this technique, because silence by the creditor in itself does not warrant the inference that he has decided to give up his right.

THE NETHERLANDS

It is a principle, deduced from settled case law, that not acting on one's right cannot, on its own, lead to a good faith defence that the right has been given up. Something more is needed. In this case it could be argued that the landlord should have realised that he received DM 100 less than he was entitled to. The period of three years is long enough to react and protest. Waiting for so long and then suddenly demanding payment might therefore be considered to be against good faith. (Although a judge may not dismiss the whole claim, but only a part of it, given that Lester knowingly paid less than the rent he owed and that he must have known that he violated clear contractual rights of the landlord.)³⁸

ENGLAND

English law takes a bifurcated analysis of these sorts of facts.

At common law, the rule is that part payment of a debt is not full discharge and that a promise to accept a lesser sum in full discharge is not binding.³⁹ This second proposition remains the case even if (which does

³⁵ L. 27 Jul. 1978, n. 392, art. 55.

³⁶ See the German report on this point.

³⁷ Once more, Italian law sides with French rather than with German law. On this subject see Ranieri, *Rinuncia, passim*; Ranieri, in: *Mélanges Bastian* 427; Ranieri, *Digesto*, 4th edn, sez. civ., VII, 1991, 311.

³⁸ Cf. *Hoge Raad* 5 April 1968, NJ 1968, 251 (*Pekingsenden*); and see Asser-Hartkamp, *Verbitenissenrecht II* nr. 320 ff.

³⁹ *Pinnel's Case* (1602) 5 Co Rep 528; *Forbes v. Beer* (1884) 9 App Cas 605.

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not appear to be the case on the facts) receipt of part payment constitutes a real or practical benefit to the creditor.⁴⁰

However, equity has since the decision of the Court of Appeal in *Central London Property Trust Ltd v. High Trees House Ltd*⁴¹ applied the doctrine of promissory estoppel recognised in *Hughes v. Metropolitan Rly Co.*⁴² to the context of promises to accept part payment of a debt. To attract the application of this doctrine, there must be a promise or representation by the person to be estopped (Mark) that he will accept a lesser sum for his rent, either in full discharge or for the time being. While such a statement need not be express and may in appropriate circumstances be made by conduct, mere inactivity will not normally suffice as it is insufficiently unequivocal. According to *Treitel*, '[u]nless the law took this view, mere failure to assert a contractual right could lead to its loss; and the courts have on a number of occasions rejected this clearly undesirable conclusion'.⁴³ If, therefore, Mark has simply received the lesser sum without more (for example, by post or in his bank account) this would be insufficient to raise an estoppel. However, if Mark's conduct in the circumstances can be interpreted as representing to Lester that he would not require the balance of rent due and if Lester can establish that he has relied on this to his detriment as a result and that it would be inequitable for Mark to go back on his representation, then an estoppel would be raised and the court would prevent Mark from claiming the balance of rent due until Mark gives reasonable notice that he wishes to return to the contract rent.

IRELAND

In Irish, as in English, common law part payment of a debt does not result in full discharge of the debt.⁴⁴ Also, as in English law, Irish law has accepted a similar equitable qualification to this rigid common law rule on the basis of 'promissory estoppel'.⁴⁵ According to this equitable doctrine, if the tenant could show that an unequivocal promise or representation has been made to him that the lesser amount would be accepted as a valid discharge of the monthly rent, and, furthermore, if the tenant can

⁴⁰ *Re Selectmove*, *The Times* of 13 January 1994, CA. ⁴¹ [1947] KB 130.

⁴² (1877) 2 App Cas 439. ⁴³ Guest, *Chitty on Contracts* § 3-069.

⁴⁴ *Fookes v. Beer* (1884) 9 App Cas 605.

⁴⁵ *Central London Property Trust Ltd v. High Trees House Ltd* [1947] KB 130 is the leading English decision (see also the Irish report to case 12 above). An Irish example of the doctrine's application may be found in *McCannbridge v. Winters* (unreported, High Court, 28 August 1984).

show that he had relied to his detriment on such a promise or representation, then the courts will prevent the landlord from resiling from his representation or promise. However, on the facts of case 22, it is doubtful that the mere inactivity of the landlord can reasonably be construed as a promise not to enforce the full amount of the rent.

However, certain differences may be noted between the Irish and English positions as regards promissory estoppel. Certain English authority suggests that promissory estoppel would only suspend a person's rights, thereby allowing the promisor (typically a landlord) to return to the *status quo ante* by the giving of notice. Irish authority has shown a willingness to extend the application of the estoppel beyond the mere suspension of contractual right so as to prevent a promisor from ever enforcing the entire debt.⁴⁶ Another difference between the two systems relates to the growth in Irish law of the notion of a person's 'legitimate expectations' as a ground of action separate from promissory estoppel. In *Kenny v. Kelly*⁴⁷ this notion was pleaded as an alternative to contract and to estoppel and while estoppel has traditionally placed emphasis on the reliance on promises, the notion of a person's 'legitimate expectations' does not seem to. On the other hand, the leading commentator on Irish contract law sees these developments as most likely to lead to a more expansive doctrine of promissory estoppel than that which obtains in England, a doctrine in which 'injurious reliance' is no longer central to the plaintiff's claim.⁴⁸ If this were to occur, then it is possible that it could apply to a situation like the one in case 22.

SCOTLAND

Is Mark personally barred⁴⁹ from claiming the rent arrears because he has delayed his claim even though the obligation has not prescribed? The right to enforce his claim may be barred by his acquiescence. His *mora* (delay) is not enough; the true basis of the plea of personal bar in this instance is acquiescence from which consent to the shortfall in rent may be inferred: '[M]ere *mora*, taciturnity, or silence has no legal result (a) where it is not in breach of an express or implied condition of promptness, or (b) where it does not come up to the appropriate statutory period of prescription or to the common law equivalent (in certain cases) of time immemorial'.⁵⁰

⁴⁶ *Revenue Commissioners v. Moroney* [1972] IR 272. ⁴⁷ [1988] IR 457. ⁴⁸ Clark 65-7.

⁴⁹ See the Scottish reports to cases 20 and 21 above. ⁵⁰ Rankine 117.

Mora and taciturnity are merely evidence of acquiescence. The principle of this plea is that because the creditor has done nothing to enforce his claim for a considerable period, an inference may in certain circumstances be drawn that he has abandoned it; *Pearl Mill Co. Ltd v. Ivy Tannery Co. Ltd*.⁵¹ In this case it was held that 'an inordinate lapse of time . . . may . . . give rise to the implication of abandonment'.⁵² Delay (short of prescription) will not in itself bar a claim; *MacKenzie v. Cattori's Trustees*.⁵³ *Mora* is not a good *nomen juris*. There must either be prescription or not. We are not to rear up new kinds of prescription under different names.⁵⁴

To be effective, delay must at least be accompanied by something which can be described as acquiescence; *Moncrieff v. Waugh*.⁵⁵ In *Assets Co. Ltd v. Bain's Trustees*⁵⁶ the law is stated in the three propositions: (i) that delay *per se*, so long as it is within the years of prescription, does not bar a pursuer's claim; (ii) that to avail a defender anything it must be delay in prosecuting a known claim – that is, a claim known to the pursuer to exist; and (iii) that the delay has been prejudicial to the defender in depriving him of evidence which would or might have supported his defence. Here the pursuers had 'lain asleep' on their rights for so long that witnesses had died.

So Lester will have to demonstrate that aside from Mark's delay in claiming the rent due Mark has in some other way indicated that he did not object to Lester underpaying him. Delay and taciturnity if combined with other circumstances, i.e. some conduct on the part of Mark, could raise the presumption that Mark had abandoned his claim. Negative actings are not grounds for claiming that the agreement has in any way been varied. For the contract to be varied, there would need to be positive actings, i.e. proof of consent to vary the agreement. If Mark has merely delayed making the claim, because the period of prescription has not lapsed, he will not be personally barred from making the claim.

DENMARK AND NORWAY

In addition to the very strictly formulated rules on extinctive prescription, and the somewhat more discretionary complaints rules, West Nordic law also recognises the non-codified so-called principles of laches which will cause a claim to lapse due to failure by the holder of the right to assert it in time.

⁵¹ [1919] 1 KB 78. ⁵² At 83, *per Judge McCordie*. ⁵³ (1877) 5 R 313.

⁵⁴ *Ibid.*, at 317 *per Lord Deas*. ⁵⁵ (1859) 21 D 216. ⁵⁶ (1904) 6 F 692.

There is a certain parallel to case 22 in a Norwegian ruling by the Høyesterett in Rt. 1954, p. 980. The parties to a lease of land, entered into in 1914 for ninety-seven years, had for a number of years performed the contract in such a way that the tenant did not pay the rent of his own accord, as he had to under the contract, but that the owner himself collected the rent at somewhat irregular intervals. After many years, in 1937, the owner wanted to terminate the lease for substantial breach, because the tenant had not of his own accord paid the rent for many years. It was quite clear that the tenant was financially well-off and otherwise met all his obligations. The Høyesterett concluded that there was no default on his part. When the landlord had for a number of years accepted an arrangement with regard to payment that was different from that laid down in the contract, he could not, without reasonable notice to the lessee, demand compliance with the agreement. The same attitude is reflected in a lower court decision from Denmark reported in U 1923, p. 348 regarding a purely commercial relationship.

In the light of these and similar rulings it must at least be held that the tenant, in the present case, may not be given notice to leave because of failure to pay rent for three years. Whether the claim for payment should be deemed to have ceased to exist due to the doctrine of laches is an issue which may be open to doubt. Personally I would tend to say that the claim for payment has lapsed.

The doctrine of laches is, as mentioned above, not codified, and whether rights must be deemed to have ceased to exist in terms of it is based on an overall evaluation of all circumstances of the case.⁵⁷ This evaluation will very much depend on the area of law concerned. In commercial affairs, a quick reaction is often called for, while, for example, in matters of family law and succession, it will not always be regarded as desirable that rights are enforced with precision and carried to their extreme. Similar reflections may apply in affairs between neighbours, between landlord and tenant, and other, more complex legal affairs. Another important consideration is a comparative evaluation of the detriment suffered by the debtor, if the right could still be enforced, to that of the creditor, if he were to lose his right. Significant weight must also be given to whether it requires little to speak out, compared with the loss the other party might suffer. One example here is a ruling by Norway's Høyesterett in Rt. 1902, p. 641. A built a house, but by mistake he built it in such a way that a small part of it stood on the neighbouring land; it occupied a total of 3.10 sq m

⁵⁷ Arnholm, *Privatrett* I 275 ff.

of that land. The neighbour B had been aware of the violation of his border but had done nothing. When A's house was completed, however, B raised objections and demanded substantial compensation for the infringement of his property if he were to refrain from demanding that the house be pulled down. The *Høyesterett* concluded here that there was blameworthy inactivity on B's part since he had long had the opportunity of taking steps against the construction.

The duration of the inactivity will, of course, also be an important point. Regard must, furthermore, be had to the intentions of the party concerned. If the inactivity is intentionally disloyal, i.e. where a party merely waits in order to attack the other party in due course, the law may react particularly strongly. Here the above-mentioned ruling in Rt. 1902, p. 645 is illustrative.

Finally, the rules on prescription have always had strongly positivistic features in the West Nordic countries. It is characteristic of them that they only apply to loss of so-called mandatory rights. The rules concerning complaints have not had such firm contours, and, moreover, their basis in positive law has been slender. The doctrine of laches has emerged through legal usage. The courts of law have here followed a very casuistic approach. Today, however, as the usage has gradually developed, it is possible to show that true principles of laches do exist in West Nordic law. Inactivity has a double nature: in some instances it expresses a tacit acquiescence. What is characteristic of the principles of laches, in this context, is that the lapse of rights takes effect independently of the wishes of the party entitled to the right.⁵⁸

SWEDEN

There are rules related to specific contractual relationships demanding some activity by the creditor when performance is defective, e.g. in the legislation on sales, consignment and lease of land. According to some of these rules the creditor, after some time, loses his right not only to cancel or terminate the contract but also to demand the quality or quantity of goods originally agreed upon (especially in sales law). The rules demanding some activity after knowledge of the incomplete performance may be applied by analogy though, presumably, limitation rules which may already be applicable after the lapse of a certain period of time cannot be extended to this case.

⁵⁸ Gomard, *Obligationsret* 3 227 ff.

Now the issue in the present case is whether the landlord Mark may, a long time after the lessee Lester has paid the lesser sum, demand that the missing amount be paid. The case does not seem to be solved by legislation or by an easily comparable Supreme Court precedent. However, in the literature there are statements to the effect that, as a general principle, a right may cease to exist, should the creditor not take action within a reasonable time of receiving a performance which he realises is defective. In this case, where the amount paid was nine-tenths of the full amount, I suppose that the debtor can after a while rely upon the landlord being satisfied, and consequently the tenant is discharged as far as the past is concerned (cf. the reverse case of *condictio indebiti* and the duty of a purchaser to complain 'as to non-conformity' within a reasonable time if it can be presumed that the seller thinks he has delivered in full; s. 43, Sale of Goods Act of 1990). It is also possible, but unlikely, that the contract is changed for the future and that it has to be terminated for the purposes of re-negotiation, if the landlord wishes to return to the rent originally agreed upon. This could only be assumed, if the landlord had, in a manifest way, created the impression of being satisfied with the lower amount also for the future.⁵⁹

FINLAND

This is really a matter of evidence, but usually a Finnish court would not interpret the failure by Mark to protest as a tacit approval of a lower rent than that agreed upon.⁶⁰ The preconditions for accepting such approval are clearly not met in this case, since the amount of the rent was in no way ambiguous according to the contract.

As mentioned above⁶¹ Finnish law, generally speaking, employs very liberal prescription periods, and for this reason it is understandable that passivity is only reluctantly interpreted as waiver of rights, where the existence and content of these rights is in no way disputed or questionable.

The outcome might be different if Lester, when he began to pay a lower

⁵⁹ Somewhat similar cases are discussed by Karlgren 11 ff.

⁶⁰ See Telaranta 165 ff.: 'Being silent may as earlier stated only be considered as a declaration of will, if the requirements concerning consciousness of declaration and contractual will have been fulfilled. As for the subjective requirement it is necessary that the party is conscious of the fact that he, being silent, gives the other party legally relevant information . . . he is aware of the fact that the information is equivalent to legal regulation, normally an approval' (my own translation from the Finnish).

⁶¹ See the Finnish report to case 20 above.

rent than that agreed upon, clearly informed the landlord about his position (i.e. that the rent was, in his view, ambiguous or too high) and the landlord did not protest. In that case Lester's conduct might be understood as an offer – perhaps to avoid litigation regarding the reduction of rent (this is possible) – and Mark's failure to protest could be accepted as an approval. But in order to predict the possible outcome of the case in a Finnish court one would need more information about the circumstances, e.g. the relationship existing between Mark and Lester, whether they were in continuous contact with each other, etc.

Editors' comparative observations

This case gave rise to considerable differences both in result and analysis. While all legal systems under consideration possess mechanisms for the protection of the reasonable reliance of a debtor in situations similar to the present one, only a few of them would be prepared to hold that Lester may defeat the claim for the arrears by Mark. At the same time, however, it is generally agreed that sitting on one's rights as such, i.e. mere inactivity on the part of the creditor, does not lead to a loss of right.

(i) The most generous approach is the one adopted in the West Nordic countries, in Sweden and in the Netherlands. Here it is accepted that a right may cease to exist, should the creditor not take action within a reasonable time after he has received a performance which is in some ways defective. The decision must be based on an overall evaluation of all the circumstances of the case. The length of time during which the creditor remained inactive is a very important factor but it is not decisive on its own. The West Nordic countries, in this context, apply the doctrine of laches, Dutch law resorts to the notion of good faith.

(ii) German law would come to the same result on the basis of its doctrine of *Verwirkung*. Mark's sudden demand for the outstanding amount, after having accepted, on no less than thirty-six subsequent occasions, a sum amounting to nine-tenths of the rent originally agreed upon, is seen to constitute an abuse of right in the specific form of *venire contra factum proprium*. The doctrinal home of the doctrine of *Verwirkung* (which is of practical significance in cases where the statutory prescription periods are insufficiently short) is the good faith clause of § 242 BGB.

(iii) Some legal systems have, under the influence of German law, accepted the notion of *Verwirkung* but apply it more restrictively. This is true, particularly, of Greek and Spanish law. Both legal systems do not regard the time that has passed as long enough to accept a loss of Mark's

right to claim the full rent, even for the past. Belgian law is similar in that it would also turn to its notion of good faith in its more specific form of the prohibition of *venire contra factum proprium*. Belgian judges (particularly those in lower courts) might well consider the lessor's demand, in the present case, to be abusive.

(iv) Both Spanish and Belgian law would also ask whether the landlord may have tacitly waived his right to receive the rent originally agreed upon. The notion of a tacit (or implicit) waiver is also the focal point in the Austrian and Italian analyses. It is widely held (though not necessarily in Belgian law) that there are insufficient indications, in the present case, to accept a waiver.

(v) English and Scots law both rely on the idea of a representation of intention by the landlord which would (coupled with other factors, notably, reliance) effectively prevent the landlord from claiming this contract rate at least until he gave reasonable notice to the tenant to return to it. The idea is expressed in English law by the doctrine of equitable promissory estoppel and in Scots law by the common law doctrine of personal bar. On the facts of case 22, neither of these doctrines help the tenant as there is no representation by the landlord.

(vi) Interestingly, while Irish law has accepted English law's doctrine of promissory estoppel, recent judicial developments have added a further and distinct doctrine based on a person's 'legitimate expectations' which does not include any element of injurious reliance. This doctrine may well apply to a situation like the one in case 22.

(vii) The approach of French law is most restrictive in that a waiver of right would have to be based on an agreement between the parties. However, Lester may, in the present case, be able to prevent Mark from claiming all arrears at once. Italian law, too, possesses rules enabling the courts to grant the lessee extra time to pay the arrears, in order to avoid hardship.