Case 98
REICHSGERICHT (SIXTH CIVIL DIVISION) 30 NOVEMBER 1922
RGZ 105, 406

Facts

The parties, both German nationals, met in Moscow in 1920. The plaintiff lent the defendant, a former prisoner of war, 30,000 Soviet rubles in return for two promissory notes dated 16 and 17 May 1920, whereby the defendant undertook to pay the plaintiff M5000 and M2500 within two months of his return to Germany. When the plaintiff claimed M7500 the defendant contended and the plaintiff admitted that at the time when the loan was made the equivalent of 30,000 Soviet rubles was only 300 M.

The District Court found that at the time when the loan was made, the parties assumed that a Soviet ruble was equivalent to 25 pf and that neither party was aware at the time that the value of the ruble was much lower. Accordingly it gave judgment for the plaintiff, which was upheld by the Court of Appeal. On further appeal the judgment of the Court of Appeal was quashed for the following reasons.

Reasons

The approach of the Court of Appeal is open to doubt as to whether the defendant may claim to annul his two promissory notes on the ground of mistake . . . had in fact sought to avoid them, his attempt was ineffective in law seeing that according to his own pleadings he had not been in error in respect of the substance of his own declaration and had not intended to make a declaration different from that which he had made; instead his error concerned the value of the Soviet ruble and therefore constituted a motive for his declaration.

The appellant rightly objects that this view cannot be sustained in law . . . The loan was made in Soviet rubles; therefore, according to para 607 s 1 BGB it must as a rule be repaid in the same currency. By a special agreement, embodied in the promissory notes, the defendant undertook however to repay M7500 . In making this agreement . . . the parties assumed that in Germany a Soviet ruble was worth 25 pf. Consequently the declaration of the defendant that he intended to owe the plaintiff M7500 in lieu of the original sum of money lent represents a manifestation of intent, clearly apparent to the plaintiff, that he proposed to convert the money lent into German currency at this rate of exchange. It is true that this intention, which was directly influenced by the mistaken belief that the ruble was worth not 1 pf but 15 pf determined the decision of the defendant. However, it did not refer to those circumstances which preceded his declaration forming part of the transaction and did not merely represent subjective considerations. Instead, this intention was part of the declaration itself and was communicated to the other party in the course of the negotiations for a contract. It was not necessary to incorporate it in the documents or to make an express oral statement. The intention to apply the rule of conversion, assumed to be correct, was expressed as such in the declarations exchanged in connection with the special agreement . . .

Accordingly, the mistake was not one of motive, which is irrelevant in law, but constituted a mistake concerning the basis of the legal transaction. It must be regarded as a mistake affecting the declaration which may be annulled in accordance with para 119 s 1 BGB.

Case 99
REICHSGERICHT (FIFTH CIVIL DIVISION) 28 NOVEMBER 1923
RGZ 107, 78

Facts

The plaintiff is the owner of land entered on the land register of the former German District Court in Luderitzbucht (former German South-West Africa). The defendant has been, since 1913, the holder of a mortgage of this property for M13,000 which was noted on the land register. The debt fell due on 1 April 1920. The plaintiff paid to the defendant by bank transfer the sum of M18,980 in discharge of the principle obligation and of overdue interest. The plaintiff therefore asks that the defendant be condemned to hand over the document representing the mortgage and to agree that the entry in the land register be expunged. The defendant refused to comply on the ground that the debt must be paid either in the hard currency which was formerly in force in what was then the German Protectorate of South-West Africa or moneys of corresponding value. The Landgericht Berlin gave judgment for the plaintiff, which was upheld on appeal by the Kammergericht. On the defendant's second appeal the judgment below was reversed for the following reasons.

Reasons

'. . . In this case it was necessary to determine the question as to whether according to this (ie, German) law the defendant as holder of the mortgage can demand a revaluation of his claim which is secured by a mortgage, having regard to the extensive devaluation of the German paper currency.

It is true that in the present case the defendant did not expressly raise in the courts below the question of revalorisation. But in his reply to the claim he stated already that the could not be expected to accept payment in depreciated German paper currency since this would mean that he would have to renounce a considerable part of the value of his claim. The defendant added: it would be pure mockery if the owners of the land in South-West Africa were entitled to satisfy their mortgage creditors in almost worthless German paper currency and to reserve for themselves the accrued value resulting from the change of political circumstances. He has indicated clearly thereby that he regarded himself as entitled according to the law in force at present, to demand payment of a larger sum than the nominal value of his claim, if payment were made in paper currency. The court was bound, accordingly, to examine this demand in the light of all relevant legal considerations . . .

It cannot be . . . assumed that the depreciation of the currency was so insignificant when the mortgage fell due (on 1 August 1920) as to exclude from the outset the legal possibility of a revalorisation of the claim. The cost of living index had at that time already increased ten fold . . . The purchasing power had therefore already diminished considerably on 1 April 1920. It will be for the Court of Appeal to determine first of all, whether the factual conditions for a revalorisation of mortgage debts . . . were present at that time . . .

If the Court of Appeal should reach the conclusion that the factual conditions for a revalorisation of the claim were not present in the spring of 1920 and that the

defendant defaulted in his duty to accept payment by refusing to accept the proffered amount in paper money, it will then have to examine whether the defendant has thereby lost the right to demand the revalorisation of his claim, having regard to the subsequent, very severe depreciation of the German currency [references].

The legal possibility of a revalorisation of mortgage debts is to be recognised according to present German law, especially according to para 242 BGB. In the case of mortgage debts in particular it must be taken into account that normally the debtor has received a corresponding compensation having regard to the much increased value of the land—at least when paper money is made the unit of account . . .

It is irrelevant, as the plaintiff emphasises, whether it was recognised in legal theory and practice as early as 1920 that it was admissible to revalorise mortgage or whether this realisation only prevailed later on under the influence of constantly growing depreciation of money. Incorrect legal notions in the year 1920 can no longer be decisive today.

According to para 242 BGB it must be considered what good faith (*Treu und Glauben*) requires, having regard to current practice. A fair consideration of the interests of both parties is called for. It follows that no general principles can be established requiring the revalorisation of every mortgage claim as such, nor that they must all be revalorised to the same extent . . . Instead, it will be necessary to take into account not only the increase in the value of the land—measured according to paper marks—which will be the principal factor, but also the other circumstances of the case, such . . . the economic strength of the debtor, whether agricultural, industrial or urban land is involved. Also the charges, especially of a public character which burden the land must be taken into account; in the case of land let on tenancies the reduction of income as a result of measures for the protection of tenants also deserve consideration.

The provisions of German currency law do not preclude a revalorisation. It is true that the Law modifying the Banking Act of 1 June 1909 [references] declares that the notes of the *Reichsbank* are legal tender [references] . . . But all these provisions rested at the time of their promulgation . . . on the justified assumption that the notes . . . had a value equal to hard money . . . The legislator, in enacting these provisions, had not envisaged the possibility of a considerable depreciation of the value of paper currency, let alone of the extent . . . that has occurred increasingly. After the paper mark had collapsed, a conflict arose between these currency provisions, on the one hand, and the various other statutory provisions on the other hand, designed to prevent a debtor from discharging his obligations in a manner inconsistent with the requirements of good faith and common practice. The principal provision to this effect is para 242 BGB which applies to all legal relationships. In such a conflict the latter provision must take precedence over the provisions dealing with currency because, as has been shows, at the time of their promulgation the possibility had not been envisaged of a collapse of the currency to such an extent, as a result of which the consequences of the currency legislation are no longer compatible with the principles of good faith and with equity. Consequently rigid adherence to the currency legislation in this case was not foreseen. In fact legislation by the Reich in recent times has shown increasingly that the principle 'mark equals mark' is no longer maintained without some exceptions. The reason is that, faced with requirements of commercial life and the effect of the changed economic conditions, it is no longer possible to adhere to the currency legislation in so far as it placed the paper mark on an equal footing with the gold mark

. . . [references]. The great number of these adjusting provisions [references] indicates clearly that they were not intended to establish special regulations, deviating from the general law, to govern special situations. Thus it cannot be concluded therefrom that in other cases revalorisation is inadmissible. On the contrary, these regulations show clearly that the legislator has undermined the principle that the paper mark can be used at its nominal value to pay off a debt effectively. The principle had to be abandoned in face of the actual economic conditions. The practice of the Reichsgericht has moved in the same direction to an ever-increasing extent [references].

It is true that the above-mentioned decisions of the Civil Divisions of the *Reichsgericht* deal with claims arising from bilateral contracts while the present case involves a loan secured by a mortgage. However, following the observations made above, there can be no serious doubt in holding that according to para 242 BGB the admissibility of revalorisation of contractual claims, recognised by these decisions, extends also to loans secured by mortgages. In the case of loans, too, their nature presupposes an equivalence between performance and counter-performance; here too, the substance is to be preserved for the creditor . . . In the case of loans of money, too, the debtor is bound (usually it is also the intention of the parties) not only to repay the same amount of money, but also to repay it in money of the same value. When the parties stipulate that the repayment is to be made in their national currency, they do so in the belief that this currency constitutes a firm and constant standard, within the limits of some normal variations. Accordingly the principle that the recipient of a loan of money must return an equivalent amount has been breached by currency legislation . . . For the legislator, in conferring on legal tender a nominal value, has indicated that, at least in normal economic conditions, a payment by means of legal tender is to be treated as payment of the 'same value.' But this principle must be disregarded for the reasons given above, if as a result of an especially heavy depreciation of legal tender, not foreseen at the time when the currency legislation was passed, it would lead to results which can no longer be reconciled with para 242 BGB. It will be necessary to determine in each case in accordance with the principle of good faith what degree of monetary depreciation is necessary before a creditor's claim must be revalorised.

The conclusion that revalorisation is permissible can also be reached by way of the supplementary interpretation of the contract, if the court examines what the parties, acting according to the precept of god faith (para 157 BGB), would have agreed in view of the purpose of the contract as a whole, if they had foreseen the possibility of an especially severe depreciation of money . . . The provisions of the currency legislation do not prohibit an agreement by which the effect of the statutory value of paper money is excluded by the parties and that this can be done tacitly.

In view of these considerations it can be stated affirmatively that a revalorisation of a loan secured by a mortgage is legally admissible having regard to the heavy depreciation of German paper money.