

Case 100

OBERLANDESGERICHT BREMEN 18 MARCH 1952
 NJW 1953, 1393

Facts

The defendant by a contract dated 22 May 1950 let to the plaintiff a sports hall for the period from 30 May 1950 until and including 6 June 1950 for the express purpose of staging a guest performance of the play 'Two Hours for You' featuring Marika Röck in accordance with the annexed programme. The rent was to be 15 per cent of the gross profit but not less than DM1500, which were to be paid and were paid at the time when the contract was concluded. The guest performance could not take place since Mrs Röck had suffered an injury. The plaintiff demanded the return of DM1500, which had been paid when the contract was concluded and 5 per cent interest.

The Court of Appeal of Bremen gave judgment for the plaintiff for the following reasons.

Reasons

The claim is justified in view of para 323 ss 1 and 3 in conjunction with paras 812 ff BGB. The district court proceeded correctly from the principle that—leaving aside the special rule embodied in paras 552 BGB—the tenant need not pay rent, if circumstances for which neither party is responsible render impossible the contractual use of the object which has been let: para 323 s 1 BGB. According to a constant practice of the *Reichsgericht* [reference] the general principles of para 275, 323 BGB can also be applied in the law relating to tenancies.

In order that para 323 s 1 can apply, the performance due by the defendant must have become impossible. The obligation of a landlord of commercial premises may be of very different kinds. A shop, for instance, can be let for carrying out all kinds of businesses, or for a strictly defined branch of business. To the extent that the use of the rented premises is limited, the danger increases that the performance of the contract may become impossible because the contract does not permit a switch to another use. The question as to whether the obligation of the landlord has become impossible must therefore depend on the respective purpose of the contract.

In the case decided by the *Reichsgericht* [references] the plaintiff had let a shop for the exploitation by a certain sales outlet in return for a rent geared to the turnover, with provision for a minimum rental. The *Reichsgericht* held that it was a purpose of the contract that this sale outlet should operate in the rented premises. The tenant was only permitted to use the premises for running this sales outlet, while on his part the landlord was only bound to make the premises available for running this sales outlet. This followed from the manner in which the rent was fixed. In the decision of the *Reichsgericht* relied on by the district court [references], the content of the contract led to the conclusion, on the other hand, that the tenant was completely free as to the use of the premises and was not precluded from employing them for purposes other than a multiple store. The right of the tenant to sublet and to alter and extend the premises, to assign his contractual rights and the landlord's own statement all supported it. Consequently it is necessary to ascertain the purpose of the contract in each individ-

ual case, what type of use of the rented premises was agreed on and whether the obligation of the landlord so found became impossible to perform as a result of subsequent circumstances. If the subsequent circumstances do not impede the use of the premises as envisaged by the contract, the claim would have to be rejected clearly for the reason that the prerequisites for applying para 323 BGB are absent. In finding that the appearance of Mrs Marika Röck at the first performance was not included in the contract, the District Court should have dismissed the claim on the ground that the contractual use had not become impossible, and it would have been unnecessary to consider the special provisions of para 552 BGB.

Contrary to the opinion of the District Court the substance and the purpose of the contract in issue lead to the conclusion that the appearance of Mrs Röck at the guest performance was part of the contract . . .

If, therefore, the guest performance of 'Two Hours for You' with the appearance of Marika Röck had become part of the contract, the performance owed by the defendant according to the lease to the effect that the sports hall was to be made available for producing the said guest performance has become impossible as a result of the illness of Mrs Marika Röck. Thus the prerequisites exist for applying para 323 s 1 BGB . . .

Case 101

BUNDESGERICHTSHOF (FIRST CIVIL DIVISION) 16 JANUARY 1953
 MDR 1953, 282

Facts

The defendant in West Berlin, who had been doing business with the plaintiff for some time, ordered from the latter 600 drill hammers by a letter dated 31 May 1948. In it the defendant stated 'delivery as quickly as possible' 'we will fetch it ourselves by long distance lorry' and 'payment through our office in West Germany.' As the plaintiff knew, the drill hammers had been ordered from the defendant by the office for Foreign Trade of the Eastern Zone of Germany and were intended for the mines in that zone. The order reached the plaintiff only on 18 April 1948, since it had first to be passed by the authorities in the Eastern Zone.

In the meantime the so-called 'Berlin Blockade' had begun, which lasted from 24 June 1948 until 21 May 1949. The plaintiff, replying on the order, manufactured first 200 hammers and, by an invoice dated 30 November 1948, invited the defendant to take delivery. Subsequently he produced 74 more hammers and prepared the remaining 326 hammers up to a semi-finished state. The defendant did not fetch the hammers and did not pay for them either.

The plaintiff sued for payment of the order. The Court of Appeal gave judgment for the plaintiff against delivery of the hammers. The defendant's second appeal was rejected for the following reasons.

Reasons

The Court of Appeal was correct in holding that the purpose of the contract for the production and sale in dispute, namely to forward the drill hammers to the Eastern