1-5 U 15/17 2 0 285/15 Landgericht Essen

Lliuya v RWE AG

30 November 2017

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The court points out that the defendant's legal arguments in the pleading of 27 November 2017 give no reason to deviate from the current legal assessment of the court, which was presented in detail at the oral hearing on 13 November 2017:

1. Concerns regarding the admissibility and conclusiveness of the claim for relief (main motion) specified in the oral proceedings do not exist according to the current factual and legal situation. In particular, the required interest in the legal proceeding is not missing since the amount in question is not of 33 cents but of approximately EUR 17.000,00, which is – measured by the alleged contribution share of the defendant – necessary according to the submission of the claimant to prevent possible impairments of his property.

2. Differently from what the defendant thinks, the current legal opinion of the court is not incompatible with the legal system - in particular with the provisions of the public pollution protection laws. The claimant is not seeking a restriction of the defendant's activities or even the closure of power plants that are operated for the purpose of providing services of general interest.

   Rather, the plaintiff requests with his main motion to determine the obligation for a partial refund of the expenses for the implemented protective measures in favor of his property. It is in accordance with the statutory systematic that also someone who acts lawfully must be liable for property impairments caused by him. This fundamental legal concept is also found in Sec. 14 phrase 2 of the German Federal Pollution Protection Law (‘BImSchG’) and Sec. 906 para. 2 phrase 2 of the German Civil Law Code (‘BGB’), which were cited by the defendants themselves. Why corresponding principles should not apply in the context of Sec. 1004 BGB and Sec. 1011 BGB is not apparent and does also not follow from the intention of the legislator or from the principles of teleological interpretation. In particular, in the present case, in contrast to the defendant's opinion, the civil protection of the claimant should not go further than the systematic of Sec. 14 phrase 2 BlmSchG and Sec. 906 (2) phrase 2 BGB requests. This is not a case of compensation under the aforementioned provisions.

3. Contrary to the opinion of the defendant, this case does not—unlike the *Mehltau* and *Wolläuse* decisions (BGH NJW-RR 2001, 1208; BGH NJW 1995, 2633 f.)—concern a case of causation of natural events by way of an omission in breach of a duty, because the claimant does not see the starting point of the chain of causation in an omission of the defendant but rather in the active (co-) causation of the flooding threat as a result of operating the power generation companies. In this regard, the focus is on the action of the defendant, which is presumed to have caused the alleged threat to the claimant’s property, and therefore on the active operation of the power plants by the subsidiaries controlled by the defendant. For the same reason, the *Kaltluftsee* decision (BGH NJW 1991, 1671 f.) cited by the defendant is not applicable here.

4. With regard to the question of time barring, the asserted claim (Sec. 194 (1) BGB) is relevant. The point is that the defendant, despite its emitting businesses, constantly refrains from taking protective measures, which at least reduce the flooding risk. In such a situation, a time barring does not seem to come into consideration here, since the condition impairing the property of the claimant is continuously maintained without the implementation of protective measures (see BGH MDR 2015, 1176 f.).

II. The motion to postpone or revoke the date for the delivery of the decision was to be dismissed. A revocation or postponement of the date for the delivery of the decision is not indicated.

First of all, it is likely that the legal considerations pointed out by the court in the oral hearing on 13 November 2017 were not entirely new for the defendant, because they had—at least in their essential core—already been presented by the claimant. At best, the assessment of the court might have been new for the defendant. This has been taken into account by granting a period to submit a further written pleading.

The court then dealt comprehensively with the legal remarks—which essentially consolidated the previous submissions—in the defendant's written pleading of 27 November 2017 and examined those and the citations quoted therein and included them in the careful deliberations prior to the approval of this order.

III. Evidence shall be obtained through expert opinions on the following allegations of the claimant:

1. As a result of the significant increase of the expansion and volume of water of the Palcacocha lagoon, there is a serious threat to the defendant's property, which lies beneath the glacier lagoon in the city of Huaraz in the region of Ancash in Peru, due to a flood and / or a mudslide;

2.

a. The CO2 emissions released by the defendant's power plants ascent into the atmosphere and due to physical laws result in a higher density of greenhouse gases throughout the entire earth atmosphere.

b. The compression of the greenhouse gas molecules results in a reduction of the global heat radiation and an increase in global temperature.

c. As a consequence of the caused, also local, increase in average temperatures, the melting of the Palcaraju glacier accelerates; the glacier loses size and retreats, the water volume of the Palcacocha lagoon increases to a level that can not be constrained by the natural moraines;

d. The defendant's co-causation share to the causal chain shown under a) to c) can be measured and calculated. It currently amounts to 0.47%. A possible deviating determination of the causation share shall be quantified accordingly by the expert.

IV. The claimant is ordered to pay an advance of EUR 20.000,00 to the Central Paying Authority of the Judiciary within one month.

V. The parties are requested to name appropriate experts—if possible from German-speaking countries—within one month to answer the aforementioned questions of evidence. In order to accelerate the procedure, a prior coordination of the parties would be desirable. The court assumes that, because of the different disciplines, different experts have to be appointed to answer the questions of evidence 1. and 2. The expert opinions on questions 1. and 2. should be obtained simultaneously.

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Unofficial translation by:

Maximilian Menz (LL.M.)

Anastasia Giadrossi (LL.M.)

Esmeralda Colombo (LL.M.)