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District Court Essen

-2- District Court Essen, 45117 Essen

Rechtsanwälte Günther & Partner

Mittelweg 150

20148 Hamburg

15 December, 2016

Page 1 of 1

File number
2 O 285/15
Please state when replying

Case officer
Ms. Siepmann
Telephone
0201/803-2012
Available:
Monday out of office
Tuesday – Friday: 7:30 – 16:00

Your file number: 14/0354Z/R/rv

Dear ladies and gentlemen,

In the lawsuit

Lliuya v RWE AG,

an advance transcript of the decision is transmitted via fax for information purposes.

Sincerely,

Siepmann

Judicial officer

- automatically generated and valid without signature -

Address
Zweigertstr. 52
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Transcript

2 O 285/15

Pronounced on 15 December, 2016

Siepmann, judicial officer, as clerk of the registry

District Court Essen

IN THE NAME OF THE PEOPLE

Decision

In the case

of Mr. Saúl Ananías Luciano xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx Departamento de Ancash, Provincia de Huaraz, Peru,

claimant,

Attorney of record: Attorneys Günter & Partner, Mittelweg 150, 20148 Hamburg

against

the RWE AG, represented by the chairman Mr. Peter Terium, Opernplatz 1, 45128 Essen,

defendant,

Attorney of record: Attorneys Freshfields pp., Feldmühleplatz 1, 40545 Düsseldorf,

the 2nd Civil Chamber of the District Court Essen,

upon the oral proceedings of 24 November, 2016,

through the Presiding District Judge Krüger, the District Judge Dr. Bender, and the District Judge Sommer,

finds:

The claim is dismissed.

The claimant bears the costs of the proceedings.

The judgement may be enforced provisionally by way of security equal to 110% of the enforceable sum.

Facts of the Case

The claimant is the co-owner of a residence in the city of Huaraz in the Ancash region of Peru. He purchased the property from his parents per a notarized purchase contract on 9 May, 2014. Huaraz is located in the foothills of the Andes, in the region of the highest and northernmost range of the Andes, the Cordillera Blanca. There, at an altitude of 4,562 m, below the Palcaraju Glacier and at the foot of the peaks Nevado Palcaraju (6,274 m) and Nevado Pucaranra (6,156 m), lies Lake Palcacocha.

The lake is staunched by a natural moraine. Meltwater from the overlying glacier and precipitation accumulate in the lake, which can only drain naturally to a limited extent. At the end of the 1930s, the lake's water volume amounted to between 10 and 12 million m³.

In the region pertinent to the claim, earthquakes and landslides occur occasionally, which have in the past been the cause of glacial outbreaks. In 1941, due to an earthquake, an avalanche barreled down into the lake. The resulting flood wave caused the moraine dam to break and subsequently flooded a large part of the city of Huaraz.

Since then, various preventative measures have been taken, including artificial drains and dams. A reoccurrence of a such catastrophe was to be prevented, and the water volume of the lake was to be lowered on a permanent basis.

Prohibiting settlement in the area endangered by flooding was discussed, but these plans were blocked by opposition from the local public.

In 2009, the water volume had increased to 17.3 million m³.

In the following years, further measures were taken to reduce the water level. In February 2016, however, the water volume was again measured at 17.4 million m³.

In all likelihood, in the case of a flood wave, the house of the claimant would also be flooded.

The defendant is the parent company of various subsidiaries, which conduct business in the area of energy production.

The claimant asserts that the water level has, despite the previous measures, again reached a dangerous status, and the lake poses a flood risk. He argues that the defendant has contributed to this state to a degree of 0.47 per cent, proportional to its share of worldwide greenhouse gas emissions. According to the claimant, anthropogenic climate change is the main cause of glacial melting the Peruvian Andes. The specific causal contribution of the defendant to climate change is considered to be calculable and measureable according to scientific models. The claimant is of the opinion that causation in the legal sense exists between the flood risk and the defendant's greenhouse gas emissions.

The claimant has, firstly, motioned that it be determined that the defendant is to proportionally bear the costs for adequate preventative measures to protect the property of the claimant against a glacial flood from Lake Palcacocha. With the writ of 11 July, 2016, delivered on 20 July, 2016, the claimant amended the principal motion and added to it two alternative motions. With the writ of 29 September, 2016, delivered on 8 November, 2016, he added to it a further, the third, alternative motion.

Hence, the claimant motions that

> it be determined that the defendant is obligated to bear the costs for adequate preventative measures to protect the property of the claimant against a glacial flood

from Lake Palcacocha, proportionally to its contribution to the damage (share of global greenhouse gas emissions), which is to be determined by the court pursuant to § 287 Code of Civil Procedure.

Alternatively, the claimant motions that

the defendant be ordered to take adequate measures to ensure that the water volume of Lake Palcacocha is reduced to an extent proportional to the defendant's contribution to the damage, which is to be determined by the court pursuant to § 287 Code of Civil Procedure,

and further alternatively that

the defendant be ordered to pay 17,000 euros to the association of local authorities Waraq as its contribution toward preventative measures adequate for the protection of the claimant's property,

and finally further alternatively that

the defendant be ordered to pay 6,384 euros to the claimant.

The defendant motions that

the claim be dismissed.

The defendant contests the admissibility of the claim. It also asserts that no causal link exists between its actions and a supposed flood risk from the glacial lake. The defendant is of the opinion that it is not a disturber/tortfeasor. It asserts that there is no legal basis for liability for general, ubiquitous environmental pollution. The defendant raises the objection of limitation.

Grounds for the Decision

The claim is partially inadmissible and partially unfounded.

I.

The principal motion of the claimant is inadmissable. The declaratory motion is not sufficiently precise.

According to § 263 paragraph 2 no. 2 Code of Civil Procedure [Zivilpozessordnung, ZPO], the written claim must contain, in addition to the object and grounds for the claim asserted, a specified and precise motion. Thereby the object of dispute is delineated, and the preconditions for enforcement, as may become necessary, are established. In application of this standard, a statement of claim is sufficiently specified if it concretely identifies the claim asserted, thereby delineates the scope of the court's authority (§ 308 Code of Civil Procedure), clarifies content and scope of the material legal effect that the desired decision is to take (§ 322 Code of Civil Procedure), does not by way of avoidable imprecision allow to shift blame for the claimant's potential loss onto the defendant, and finally gives reason to expect an enforcement of the decision without a continuation of the case in the enforcement proceedings (BGH NJW 99, 954 with further references). The statement of claim principally must concretely specify an impairment to be removed or to be omitted to the degree that the specificity necessary for enforcement in ensured (BGH NJW 2013 1807). The declaratory motion, also, is subject to the requirement of specificity; the statement of claim must specifically identify the determinant legal relationship, as the scope of legal pendency and

effect must be defined (cf. Zöller/Greger, l.c., § 256 rec. 15). Insofar as an obligation to remove an impairment is to be determined, the specificity of the declaratory motion shall be subject to similar requirements as in the case of a claim for performance (Higher Regional Court Brandenburg, decision of 11 May, 2011, file no. 4 U 140/10).

With his motion, the claimant calls upon the court to estimate the defendant's contribution to the impairment, pursuant to § 287 Code of Civil Procedure. This norm, however, is not applicable to the determination of grounds for liability relating to a claim, but is to facilitate ascertaining the specific extent of damages.

Contrary to the claimant's assertion, the norm is not applicable to the present case to determine the extent of the impairment by the defendant itself, but at the most to the estimation of the costs of removing the supposed threat of flooding – if the present case were a claim for performance. As the claimant has elected to assert a declaratory claim, an estimation under § 287 Code of Civil Procedure is, on the whole, obsolete. If the claimant is of the opinion that the quantification of the impairment is to be performed by experts and is thus estimable by the court, it is unclear why he did not himself specifically denote the contribution to the impairment by the defendant in his statement of claim.

The first alternative motion is inadmissible on the same grounds.

The second alternative motion is also inadmissible. This motion, too, lacks an adequate degree of specificity.

The already abovementioned requirements as to the specificity of the motion are not met. According to § 253 para. 2 no. 2 Code of Civil Procedure, the object of dispute is delineated, and simultaneously the prerequisite for the potentially necessary enforcement is established. Based on this alternative motion, however, enforceability in the case of a compulsory enforcement is not established.

The statement of claim does not clarify, in case it was ordered by the court, whom the sum would be payable to.

An association of local authorities Waraq does not exist; this is apparently rather a merely informal translation of the Spanish name of this association of local authorities. The actual name and legal personality of this institution are not discernible. Thus, the defendant, in case the court so ordered, would not be able to fulfil its performance obligation due to the recipient not being clearly identifiable. The title as a whole would not be enforceable.

II.

The third alternative motion is admissible, yet unfounded. The claimant is not entitled to payment from the defendant on the basis of §§ 683, 670, 677, and §§ 684, 812 para. 1 German Civil Code.

In principle, an owner, who has removed an impairment of his own property, can claim reparation for the expenditures made toward the removal of the impairment from the disturber, who is actually obligated to do so by § 1004 para. 1 sentence 1 German Civil Code. As the owner has carried out the disturber's responsibility, he is entitled – or insofar as the requirements for agency without specific authorization cannot be established – to reparation, because the disturber, while avoiding expenditures of his own, would otherwise have been relieved of his removal obligation and therefore been wrongfully enriched (§§ 812 para. 1 sentence 1 alternatively 2, 818 para. 2 German Civil Code) (BGH NJW 2005 1366 with further references). This is consistent with the established case law of the German Federal Court (e.g.: BGHZ 98, 235; BGHZ 60, 235; BGH NJW 2004, 603, 604).

But the question whether an impairment of the claimant's property in the form of a flood hazard actually exists is moot and must not be determined.

The defendant is not a disturber. A 'disturber by conduct' is one who has caused an impairment by way of his direct or indirect actions or his omissions (BGH NJW 07 432). A 'disturber in fact' is the owner, proprietor or the holder of the authority to dispose of an object that is the source of an impairment, if the impairment can at least be indirectly ascribed to his intent (BGH NJW 05 1366).

The defendant is not a disturber due to the absence of adequate and equivalent causation of the impairment. The claimant's assertions, according to which the defendant's contribution to climate change through its greenhouse gas emissions is sufficient to affirm causation, are in fact not sufficient to establish legal causality.

Initially, according to the principle of 'conditio sine qua non', any action or inaction is causal which, had it not occurred, would result in the effect in question being undone. In cases of multiple actions by different actors, none of the respective actions could hypothetically not occur without the effect being undone (BGH NJW 1990 2882). Co-causation only exists if the hypothetical omission of merely one of the causes would already undo the damage (Higher District Court Düsseldorf, NJW 1998, 3720).

The pollutants, which are emitted by the defendant, are merely a fraction of innumerable other pollutants, which a multitude of major and minor emitters are emitting and have emitted. Every living person is, to some extent, an emitter. In the case of cumulative causation, only the coaction of all emitters could cause the supposed flood hazard. The past and future greenhouse gas emissions by the defendant would have to be hypothetically undone, and the supposed flood hazard being eliminated as a result. This is not the case. Even the emissions of the defendant, as a major greenhouse gas emitter, are not so significant in the light of the millions and billions of emitters worldwide that anthropogenic climate change and therefore the supposed flood risk of the glacial lake would not occur if the defendant's particular emissions were not to exist.

The expert opinions submitted by the claimant side are not conclusive in this regard. The opinion given by the expert Dr. Huggel merely states that a portion of anthropogenic climate change has likely caused the melting of the glaciers and thereby the increase in the water level of the glacial lake. The expert Prof. Dr. Latif elaborates that all greenhouse gas emissions contribute to glacial melting, which causes the impairment that is the object of dispute. From a scientific perspective, every emission may be a cause for the state of the climate as it presents itself today, but this assessment has no bearing on the question of legal attribution to individual emitters.

As in the case of the 'forest damage decisions' (Waldschadensurteile) of the German Federal Court, which is cited by both parties, in the present case, the emission contributions of the defendant are also indistinguishably merged with those of all other emitters. Thus it is a case of so-called cumulative emissions. With such a myriad of causational contributions, it is impossible to attribute specific damages and impairments to their individual causers (cf. so-called 'Waldschadensurteil', German Federal Court, decision of 10 December, 1987, file no. III ZR 220/86, see also German Constitutional Court NJW 1998, 3264). An individual causal relationship of this type further necessitates a claim under § 1004 German Civil Code.

Contrary to the claimant's view, the principles of the 'forest damage decision' are also applicable to the present case. In the former, the problem of causation lies particularly in that it is unclear whether specific emissions, contingent on wind direction and air pressure, indeed led to a specific damage to a specific forest. By contrast, every single emission of

greenhouse gases is to contribute to climate change. Thus, with regard to climate change, the causal relationship is putatively more firmly settled. However, with climate change, the chain of causation is incomparably more complex, multipolar, and therefore more unclear, while also being scientifically disputed. When innumerable major and minor emitters release greenhouse gases, which merge indistinguishably with each other, alter each other, and finally, through highly complex natural processes, induce a change in the climate, it is impossible to identify anything resembling a linear chain of causation from one particular source of emission to one particular damage (cf. Chatzinerantzis, NJOZ 2010, 594).

The defendant is further not a ‘disturber by conduct’, as it has also not caused the impairment to an adequate degree. The theory of adequate causation restricts the principle of ‘condition sine qua non’ in order to prevent entirely improbable causal processes from triggering liability. Thus, the event in question must have substantially increased the general likelihood of an effect of the same sort as the one that occurred (cf. BGH NJW 72, 195). Irrespective of the fact that equivalent causation is negated in the context of cumulative damages, the contribution of individual greenhouse gas emitters to climate change is so small that any single emitter, even a major one such as the defendant, does not substantially increase the effects of climate change.

For the aforementioned reasons, it is a moot point that the construction measure described by the claimant would, even according to the claimant’s own assertions, likely not be suited to withstand a flood wave due to an outbreak of the glacial lake. The defendant, as an alleged disturber, is naturally not obligated to finance measures that are inadequate for removing the impairment.

The claimant would furthermore only be entitled to prorated financing of the construction measure, as joint and several liability is presently to be negated. On the same grounds, the illegitimate principal and alternative motions are also unfounded.

In absence of a claim by claimant, no decision was to be made with regard to the objection of limitation. Further basis for claims on the part of the claimant is not evident.

The decision regarding the legal costs follows from § 91 German Civil Code, the decision regarding provisional enforceability from § 709 German Civil Code.

The value in dispute in this lawsuit is determined as follows: Until 20 July, 2015, the value in dispute amounts to 21,000 euros. From 21 July, 2015 to 11 November, 2016, the value in dispute amounts to 21,000 euros also, as the alternative motions pursued the same intent, and the lawsuit therefore maintained the same object of dispute. From 12 November, 2016 onward, the value in dispute amounts to 27,348 euros due to the third alternative motion.

Krüger Dr. Bender Sommer