

East German Property Claims: A Practitioner's Guide

By David J. Rowland, Esq.

Good evening Ladies and Gentlemen. Thank you for inviting me here. I'd like to start tonight's talk with a short anecdote because I feel it is indicative of some of the misunderstanding surrounding the claims process and why I wanted to give this talk tonight.

I received a call last week from a potential client in California. She told me that she was a journalist and that she was thinking about writing an article about the German claims program. She told me that she had heard that only about 300 properties had been given back so far and at this rate it would take until the end of the next century before all of the claims were settled.

She also told me that she had been unable to have her own claims put through, although she was now using her fourth lawyer, and that she didn't think that Germany was serious about resolving the claims.

When I asked her about the specifics of her case, I found out that she had never applied for a certificate of inheritance, one of the most basic necessities in such a case, and I explained to her that because she had not proven her right of inheritance, that this was most probably the reason why she had not been able to have her claims advanced.

The point is that I think there is a lot of misunderstanding as to the claims process. I think some people feel that it is some kind of Kafkaesque nightmare, rather than a rational process. This is one of the reasons for the talk tonight, in order to cover the basics of the claims process and to give you the benefit of some of my experiences as a practitioner in this area and to give you some tools to help you work within the German claims system. In addition, my own personal view is that Germany is doing much to restore property and compensate Nazi victims and I believe that this is commendable.

Having heard this journalist's views of what she believed the claims figures to be, I also did some checking as to the actual figures on claims filed and resolved. There have been approximately 2,500,000 claims filed, approx. 2,000,000 of these are for the return of real estate. In 1991, only one per cent of these claims were decided, in 1992 the figure rose to 13 percent and in 1993, 32 percent of the claims were decided. Obviously, this shows that the claims process is gathering steam and number of decided cases is climbing steadily. There are now approx. 4090 caseworkers working on the claims, 382 of which are lawyers. This is about 500 real estate cases per caseworker. Undoubtedly, the number of decided cases would be even higher if it were not for the 382 lawyers involved. These figures are probably somewhat inflated because these also include the properties under public administration as decided cases.

Having reviewed the figures, you should now have an idea that properties are being restored and that a good deal of effort is being spent on returning properties and therefore I would now like to review the basics of the claims process in order that you have an understanding of what is necessary in order to obtain the return of property.

BASICS OF THE CLAIMS PROCESS

FILING OF CLAIMS

1. In September of 1990 Germany passed a law called the Claims Law or Vermoögensgesetz which permitted claims to be filed for property lost in the former territory of East Germany. This law and the subsequent amendments to it is the law under which claims are filed for property lost from the years 1933 until the reunification of Germany in 1990. Under the Claims Law, deadlines were imposed for filing property claims, with the final deadline for filing real estate claims being December 31, 1992.

2. A prerequisite for filing a claim for the return of real estate is that it be made with sufficient particularity. This means it must contain the original owners name, show a chain of inheritance to the claimant, and contain an address or legal description of the property. A priority number is also assigned to the claim at the time when it is filed.

a. Failure to specify a claim with sufficient particularity can lead to its being dismissed. For example if you filed a claim and said that you are an heir to property in Berlin, you most likely will receive a notification asking you to specify the address of the property you are claiming in Berlin within a certain time frame of perhaps four weeks. If you fail to specify your claim within this time period, it is likely that your claim will be dismissed for lack of sufficient particularity.

b. Failure to obtain a certificate of inheritance and show a chain of inheritance to the claimant can also lead to loss of the claim or inaction on your case. For example the claims office may also write to you and ask you to present an certificate of Inheritance (Erbschein) to prove your inheritance rights. If you do not have an Erbschein, you should apply for one and inform the claims office that you have made such an application. The claims office will then wait until it receives the Erbschein. If you do not respond to the claims office and do not apply for an Erbschein the claims office normally will not do any further work on your case until one is obtained and presented to the claims office.

2. The deadline for filing claims was December 31, 1992. Claims filed after that deadline can and will be set aside as being too late.

a. Sometimes the situation arises where one heir files a timely claim on behalf of all of the heirs. In this situation, all heirs can join in the claim after the filing deadline.

b. Where one heir files a claim only on his own behalf, and the other heirs do not file on time, a different situation arises. Although the other heirs are not included in the claim, when the property is given back they can have their inheritance share registered in the land registry. This then has the effect as if they had been included in the claim.

c. In no case may an heir assume more than his/her lawful share of the inheritance. Thus, claimants who filed claims, but did not include their co-heirs receive no greater share than if their co-heirs also filed claims. In fact, the failure of some heirs to file may slow the proceedings because a Nachlasspfleger (trustee in absence) may have to be appointed. I have

literally had some cases where clients have told me they are the only heir, only to later find out that they have a brother or sister living in some other part of the world. The client then tells me that they intended to give their brother or sister their share when they get back the property. Obviously, this creates major problems, since had we known of the existence of the brother or sister from the outset, we would have included them in the original claim and not had to change everything later

d. Where no heirs have survived, the Jewish Conference on Material Claims against Germany has been designated as the rightful claimant in the Claims Law for unclaimed property. Therefore, the Jewish Conference has filed for many properties that have not been claimed and for many properties which have been claimed.

In the case where no claimant filed a timely claim for real property, but the Jewish Conference did file a claim, it is still possible for the claimant to obtain back the property by working with the Jewish Conference. Normally the Jewish Conference charges a fee or a percentage of the return for having filed a timely claim.

INHERITANCE

I like to think of the claims process as being divided between inheritance and the claims law. When we get a new case, the first thing we do after seeing if the claim is properly specified is to review the inheritance situation, make sure we have all of the heirs and apply for an Erbschein.

a. Obtaining an Erbschein and having your inheritance rights recognized is absolutely critical to the claims process. Usually a claims office will not work on a claim until it receives an Erbschein proving that the claimants are the rightful heirs to the property. Failure to obtain an Erbschein, or failure to apply for one, will seriously set back your claim.

b. Although it is not necessary to find all of the heirs to apply for an Erbschein, it is best to find everyone, since they can assist in providing the documents which are necessary for the application. These include birth certificates, death certificates, Wills (which need to be translated into German), marriage certificates and other important documents. Often many of these documents must be applied for in Germany at public records offices call Standesamte.

After all the documents are obtained they are sent with a questionnaire to the nearest German Consulate or Embassy. There a consular official, usually trained as a German lawyer, prepares an application for a certificate of inheritance, reciting all of the pertinent facts which effect the inheritance and applying the relevant inheritance law. This can sometimes be quite complicated when questions of conflicts of law arise. For example, we had one case where the original owner was born in Poland, lived in Germany and died in the United States as a Polish citizen. Research proved that Polish law applied, however at the relevant time, Poland applied either Polish, Austrian, Russian, or German law depending on the part of Poland where the decedent originally lived. Other problems arise where a Joint Will is found to be on file in Germany and was subsequently purportedly revoked by a new Will. These scenarios involve complex

questions of conflicts of law and inheritance law which must be unraveled before an Erbschein will be issued by the German court.

After the application for the Erbschein is prepared by the consular official, a meeting is set up with one of the heirs, during which the application is read to the heir and the heir gives an affidavit that the information contained in the application is true and correct. In the absence of documentary evidence, the affidavit of the applicant suffices to prove facts not otherwise stated in documents, provided that a good faith effort has been made to find the original documents. For example, we must often prove the birth of clients in Poland, however we no longer have the Polish birth certificate. In this case, we apply to the Polish Consulate for the records and they initiate a search in Poland. If no records of the birth can be found, which is often the case, the affidavit is accepted.

After the application/affidavit is signed and notarized, it is then sent with all supporting documents to a German probate court (Nachlassgericht) in the district where the property is located or the owner lived. There the application is filed and is worked on by a Nachlasspfleger or probate case worker before being presented to a Judge for a final decision. It is necessary to remember that the language of the court is German so that all documents such as Wills must be translated into German by a certified translator.

Once the application is filed with the German probate court, it generally takes between six months to a year for the Erbschein to be issued. During this period, it is common that the Judge will have questions regarding the application, which will have to be answered. For example, it is very common that persons changed or Americanized their names when they came to America, but did not do so formally, thus raising questions as to whether they are the same individual as noted in their German or Polish birth certificate. Often questions regarding such changes in name must be resolved by sending corroborating documentation such as a later issued passport which shows the use of the new name together with the correct date of birth.

CONSEQUENCES OF OBTAINING ERBSCHIN

A. Once the Erbschein is obtained it opens the door to having the case worked on and is the key to obtaining a hopefully positive decision. When the claim is filed a priority number is assigned based upon the time of filing. Thus the earlier a claim is filed, the lower a claim number it has, and the earlier it is assigned to a case worker and worked on. However, a claim can also be advanced in rank if it falls within the prerequisites of a priority case. These are:

1. Fully prepared case which is ripe for a decision. There must be only one claimant (or group of heirs), all necessary documentation must be available and must be presented to the Claims Office, all heirs must be included in the claim, and a certificate of inheritance (Erbschein) must have been issued which is also valid for real property in the former territory of East Germany. Certified copies of all contracts of sale of the property and a certified copy of the land registry (Grundbuch) where the property is listed must also be presented.

2. City Planning areas specially zoned for development can also lead to the claim being given a priority.
3. Cases where the claimants have reached a settlement among themselves and where all relevant documentation is available are also given a priority.
4. Clear cases where the claim is not justified are given a priority because they are dismissed
5. Hardship cases, where the claimant is very old or where it is deemed that there is special social need to decide the case quickly are given a priority.
6. Investment Plan Cases are given a priority. Here the applicant must show that he/she will invest in the property create jobs and/or housing.
7. Otherwise cases are decided in order of their claim number

NECESSITY OF PERFORMING RESEARCH

A. If the claimant has a low claim number or fits within the requirements of a priority case, a caseworker will be assigned to the case. The caseworker has the job of preparing the case for a decision and making a recommendation as to how the claims office should decide the case. The claims office has an Amtspflicht or duty to do all of the research necessary to decide the case. However, if the claimant does the research himself and presents the case worker with certified copies of the land records and relevant contracts of sale, this can lead to a speedier resolution of the case, because it makes the work easier for the case worker and also eliminates the excuse that the relevant documents cannot be found.

Real estate research is generally done in two phases. First, the researcher goes to an office called a Katasteramt where he gives the address of the property. The office then copies the legal map of the property. From this document, the boundaries of the property can be ascertained and the volume and page number of the land registry where the property is registered is also given. With this information and a power of attorney from the claimant, the researcher then goes to the land registry (Grundbuchamt) and obtains the land records, which are listed by volume and page. These records contain the names of all past and present owners of the property in addition to all recorded mortgages and other burdens on the property. When obtaining the land records, it is always important to obtain both the old and the new land registry records, since otherwise you will not have a complete record of the ownership history of the property. Normally contracts of sale of the property are also recorded and kept with the land records so that copies of these documents should also be obtained when the researcher obtains the land registry for the property.

The land registry and contracts of sale contain an enormous amount of valuable information regarding the property. Normally contracts of sale where property was sold under duress contain information and evidence that prove the sale by duress. For example if the contract refers to the Jewish seller and Aryan buyer and the proceeds of the sale are to be placed in a closed account, you must likely have a very good case of sale by duress. The amount of the sale and date of the

sale are also important. Sales at or near the 1935 tax assessed value or Einheitswert of the property indicate a clear case of sale by duress. The Claims law also presumes that sales by Jewish sellers from 1933 to 1945 are sales by duress unless the buyer proves that a fair market price was paid for the property. For sales after September 15, 1935, this presumption can only be overturned if it is proven that the sale would have taken place anyway in the absence of Nazi oppression or that a fair price was paid and that the seller actually received the proceeds of the sale. This places a very high burden of proof on the buyer, which can only rarely be overcome.

Therefore, research contains a great deal of information regarding the property which when properly analyzed will give an indication of how the case will be decided by the claims office. The presentation of this information by the claimant to the claims office will save valuable time and help to move the claim forward to a decision.

This should also give you an idea of the difficulties involved in bringing a case forward to the point where all of the necessary documentation is available, since it literally entails going back through historical records kept not less than fifty years ago and sometimes much further. I have worked on some cases where it is necessary to obtain an old Will, land records and documents extending back into the 19th century and written in the old German style. In order to interpret these documents it is then necessary to find someone who can read old German. Given these difficulties, and the necessity of thoroughly reviewing this material, I find it quite good that such a large number of claims have already been decided.

B. I have generally found caseworkers (Sachbearbeiter) to be extremely helpful. If they are given the necessary material (certified copies of the land registry, Grundbuch, certified copies of contracts, Erbscheins), and if you meet with them to discuss the case, there is an added element of personal contact and this helps in terms of bringing a human factor into the claim. My experience is that case workers believe very strongly in the work they are doing, want to see justice done and work hard to achieve a just determination. If you help them by preparing your case so that all they have to do is check off the fact that all documentation has been presented and the case is therefore ripe for a decision, you will be rewarded with a speedy decision and the case worker and claims office will also be happy because they can close one more file.

C. On the other hand, if you do not understand the basics of the claims process and vent frustration at the slow pace at which cases are decided or take a belligerent or obstructionist position, your reward will most likely be that you will have to wait a very long time. Much can be achieved by cooperation and persuasion, little can be achieved by venting frustration. Claimants who just file a claim and then do nothing will not have much success or will have to wait a very long time for a decision.

RESTITUTION VERSES MONETARY COMPENSATION

A. The claims law permits the claimant to choose either to have monetary damages paid or to obtain the return of the real property. Generally, claimants seek to have the real estate restored, mainly because the fair market value of the property is usually many times more than monetary damages. The law as to the amount of monetary damages, which will be paid, has not yet been passed, however it most likely will be between 10 to 20% of the fair market value of the property. Articles have recently appeared in German newspapers as to whether this is fair under

constitutional concepts of equal treatment under the laws, however the reality is that if monetary compensation was to equal the fair market value of returned property, the burden of paying such a high compensation would be prohibitive. For this reason, claimants who are unable to obtain the return of their former real estate will have to be satisfied that they are able to obtain some monetary compensation.

In the case where the Claimant seeks restitution of the real property, this may be denied and damages awarded for several reasons. These include:

1. Property bombed and new structure built.
2. Public use of the structure.
3. Large investment in the structure.
4. Sale to a bona fide purchaser who had no knowledge of the prior discriminatory sale or who did not obtain the property in a tainted manner.
5. Environmentally damaged properties (excuse might be found not to give it back).
6. Investment Plan.

B. In the above cases, damages are paid instead of restitution except for where an investment plan is put on the property. The Investment Law permits investment in claimed and unclaimed properties for investment purposes where jobs are created and economically beneficial structures are to be built. In such cases, the claimant cannot obtain the return of the property, but is entitled to the fair market value of the property. The claimant may also make his own competing investment plan in order to obtain the return of the property, however this is difficult because it requires the claimant to invest his/her own capital and create a plan for the development of the property. For this reason, such investment plans are often made in cooperation with developers and investment partners.

Cases where property is not returned occur frequently. Real estate was often badly damaged during the war and city areas were redrawn and rebuilt during the East German period. Frequently whole blocks were bulldozed and new housing structures were built replacing the old structures. German property law also protects rights of persons who purchased or were given permission to use real estate during the East German period, thus making the return of such properties more difficult and recognizing the human hardship the displacement of such people would cause.

THE MECHANICS OF RETURNING PROPERTY

A. In cases where it is decided that property should be returned, the claims office first issues a proposed-decision (Vorbescheid) which gives the claimants two to four weeks to make objections to the proposed decision. If no objections are made, a final decision is issued and becomes binding approximately one month from its date of receipt by the claimants. During this

one month period an administrative appeal (Widerspruch) can be made. In most cases involving real estate, the property will have mortgages, which have been placed on the property during either the East German period or prior to it. The Claims Law calls for an amortization of these mortgages during the DDR period so that, to a great extent, they are written down by the time the property is returned. The decision of the claims office includes the calculation of this mortgage write-off and also includes whatever amounts are left to be paid off. The final amount to be paid off or Ablösebetrag, must be paid prior to the return of the property. This sum must be paid into a local court, and the original payment receipt must be presented to the Claims Office. Upon receipt of this evidence of payment and with the running of the 30-day period, the decision becomes final and binding (provided there is no appeal) and the Claims Office applies for the change in ownership in the land registry.

B. Other amounts which should also be repaid are damages paid under prior claims programs (LAG damages) and Hauszinssteuer, which are non-discriminatory loans made by the German government after WW I. These are not mortgages on the property, but are personal debts which should be repaid after the property is given back.

FINDING BUYERS AND THE SALE OF THE PROPERTY

Selling returned real estate for its true market value can often be as difficult as obtaining the return of the property and there are different kinds of contracts to fit different circumstances. A seller who does not wish to wait for the return of the property can sell the claim. This can be done on a 100% risk to the buyer, in which case the sale is at a deep discount, or it can be made with some money down and then contingent upon a positive decision returning the property. Properties which have been returned may also be sold in a straight sale of the ownership to the buyer and my view is that this is the way to obtain the best prices because there is virtually no risk with respect to title.

Unlike American real estate sales, where a contract of sale is first entered into by the parties and a closing follows a few months later during which title passes, real estate in Germany is sold through the services of a Notar. The Notar draws up the contract of sale, acts as a escrow agent and fulfills many of the functions of a title company. Under the German system, a meeting of the parties takes place before the Notar, during which the contract is read, and the parties have an opportunity to pose questions to the Notar regarding the procedures under which the contract is carried out and to discuss and reformulate the language contained in the contract. The parties may appear in person or by a person to whom they have granted a power of attorney to act for them (usually their attorney). Once the contract is agreed to before the Notar, the parties indicate their agreement by signing the contract and a downpayment is usually paid by the buyer.

After the contract is signed, the Notar has the duty of seeing that the necessary permissions necessary for the transfer of the property are applied for and obtained, including the payment of property transfer taxes, the pay-off of mortgages, the municipal authorities declaration that it will not exercise its statutory right of first refusal, and the registration of the contract into the land records to insure the priority of the contract

Once all of the necessary permissions and certificates have been obtained, the Notar notifies the buyer that the balance of the purchase price is due and the buyer has a certain amount of time to pay the purchase price to the Notar. Usually this is done through a mortgage from the buyer's bank, which is authorized under the terms of the contract of sale. Only after the Notar obtains the purchase price from the buyer, does the Notar apply to the land registry to register title in the name of the buyer. Sales of real estate in Germany are therefore somewhat indefinite in terms of the time it takes for the equivalent of an American closing. Often this will take place within three to four months of the date of signing the contract, however it can also take years if the required permissions are not obtained in a timely fashion.

When selling real estate in Germany it is also important to realize that such sales are often tax driven. Because of tax breaks given by the German government to buyers who buy and renovate buildings, you are most likely to get the best price from a German buyer looking to buy an unrenovated building as a tax shelter. Often this decision is not made until the end of the year so that good prices can be obtained at that time. It is also my experience that there is a two-tier market, especially in the major cities such as Berlin, Leipzig and Dresden. That is, there are many professional buyers who will make quick offer and will then flip the property to another buyer who will pay more for tax reasons. Obviously, if you are selling a property, you or your broker should try to seek out the tax driven buyer in order to obtain the best price

.Many of the basic elements of selling real estate in the U.S. also apply in Germany. If you want the best price you have to hold on to the property and see how high the buyers are willing to go. It is better to begin with a high price which you feel is more than you can realistically achieve in order to let the buyers bargain you down. Buyers frequently get annoyed when the asking price is too low and they find themselves in a bidding war whose outcome may be uncertain for them. They would rather pay a higher asking price, knowing that they have a deal, rather than spend a lot of time and money evaluating a property only to find that it is lost to another bidder because the price was set too low at the beginning.

SUMMARY

In summation, I would like to encourage real estate claimants not to become frustrated with the claims process but to take the time to do all of the steps necessary to put the claim forward. These include filing the claim in a fully specified manner, obtaining an Erbschein, doing necessary research, and by visiting with the claims office caseworker to go over the claim and establish personal contact. By following these basic steps, much can be done to obtain a positive decision. In addition, when complications do arise, we advise that competent legal counsel should be consulted.