

Recent Ruling of the Austrian Supreme Court on Strict Liability of Real Estate Developers for Immissions

Investing in real estate projects and developing properties can be a complex undertaking that can pose significant challenges for investors and developers, all of which should be carefully assessed beforehand. Compensation claims for damage caused to adjacent buildings and properties during the course of construction works is one of the potential challenges they face.

In general, Austrian tort law stipulates that compensation claims for damages are granted only if the tortfeasor caused the damage either intentionally or at least negligently. For the contractual liability of the tortfeasor, slight negligence is sufficient. However, for any tortious liability for damages, which can occur during the course of the development of real estate properties or building construction on adjacent properties, the law requires in general gross negligence. This means that developers typically cannot be held liable under tort law, as they do not perform the construction works themselves. Thus, the question of negligence in most cases does not even arise.

Nevertheless, the Austrian Supreme Court recently ruled in decision 3 Ob 114/18p that property owners can under certain circumstances be held liable for damage caused by construction works to an adjacent property independent of fault even if the construction works were approved by the authorities.

In the case at hand, the property owner commissioned a construction company to demolish buildings. The building authority issued the respective permit for demolition. Demolition was carried out by a contractor which, however, used defective machines, consequently causing considerable dust to be generated over an extended period of time. A neighbour claimed compensation for damages as a result of the dust, in order to cover the costs of cleaning and maintenance.

The Austrian Supreme Court granted the compensation claim not on the basis of general Austrian tort law, which would require at least gross negligence, but on the basis of an analogy to general compensation claims permitted under Section 364a of the Austrian Civil Code. This provision stipulates that a claim for compensation can be made on the basis of damage caused usually by immissions, such as wastewater, smoke, gas, heat, noise, vibration, etc. Such a compensation claim is granted independently of

CHSHCEE NEWSLETTER AUSTRIA



**SPECIAL ISSUE
on Real Estate**

**VISIT US 12-15 March 2019
Palais des Festivals, Cannes, Stand R7.E2**

fault and has to be borne by the property owner.

The fact that the demolition was officially approved by building authorities and that they were performed by a professional contractor does not hold the property owner harmless from liability. According to the Austrian Supreme Court, the compensation claim must be granted in cases where the building permit creates an impression that the permitted measures are safe and within the limits of the law and that it de facto prevents neighbours from taking any kind of defensive measures.

As a result, the neighbour has a right to compensation from the property owner for damage typically caused by construction works. Of course, the property owner has a right of recourse against the

contractor. However, given the risk that the contractor potentially has poor creditworthiness, the property owner might suffer a loss if the damage claims exceed the financial capabilities of the contractor.

Thus, in the course of investing in real estate projects and developing properties, property owners should always bear this liability in mind and, despite having obtained an official building permit and having commissioned a professional contractor to carry out the works, property owners should regularly assess the possibility that damage will occur on or to adjacent properties.

Author:

Filip Ballok, Associate
CHSH Vienna

For more information

Mag. Mark Krenn
Partner in Austria
Head of CHSH CEE Real Estate Practice
mark.krenn@chsh.com
Tel: +43 1 514 35 591

Media owner and publisher: **Cerha Hempel Spiegelfeld Hlawati Rechtsanwälte GmbH**, Parkring 2, A-1010 Vienna | Tel: +43 1 514 350 Fax: +43 1 514 35 35 | email: office@chsh.com | Although this newsletter was created with the greatest of care, we nevertheless do not accept any responsibility whatsoever for its content being correct, complete or up to date. | **Visit us at www.chsh.com** | CHSH Austria Belarus Bulgaria Czech Republic Hungary Romania Slovak Republic

CHSH

Cerha Hempel Spiegelfeld Hlawati
Rechtsanwälte GmbH