

Briefing

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Editorial

It is not all doom and gloom, as market participants will have learned at the latest in Cannes, where the real estate industry gathered again in March to meet at MIPIM which celebrated with 29,318 participants a new record high, 12% more than in 2007, including an increase of participants from Germany by 22% to a total of 720. Credit crunch and market downturns were important conversation topics, but the industry is not paralysed by pessimism.



*Thomas Ziegler
Practice Group
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"Back to normal" was often heard as the order of the day, and more than a few considered the market correction of recent months as a rather healthy event. The German real estate market has not seen price drops anywhere near to what has happened in the UK, Ireland or Spain. We have spoken with Werner Altenschmidt of Kemper's about the situation in Germany (Interview, p. 9) and have learned that there continue to be good reasons to invest in the German real estate market.

We look forward to continue working with you.

With best wishes

Thomas Ziegler

Leases

Execution of modernisation works by purchaser prior to registration of transfer of title

By a recent decision (BGH VIII ZR 105/07 of 13 February 2008) the Federal Court of Justice (Bundesgerichtshof – BGH) has made life easier for purchasers of real estate: The court has confirmed that the purchaser is entitled to announce and carry out modernisation works in respect of the acquired property and building prior to registration of transfer of title, provided that it has been authorized accordingly by the seller of the property.

Pursuant to Section 554 para 2 German Civil Code (*Bürgerliches Gesetzbuch – BGB*) tenants must tolerate modernisation measures with the objective of an improvement of the leased premises, saving of water and energy or creation of additional living space. The landlord has to notify the tenants of the intended measures with 3 months notice (Section 554 para 3 BGB). Pursuant to legal



Gero Martin, Munich

practice Section 554 BGB only refers to – and tenants must only tolerate - modernisation measures initiated by the **landlord**. However, according to Section 566 BGB the purchaser of real estate becomes the new owner of the property - and as a consequence also the new landlord – by registration of transfer of title in the land register.

The BGH had to deal with the following case: prior to registration of the transfer of title in the land register a purchaser of real estate had already announced the execution of modernisation works. The purchaser referred to an authorisation granted by the owner and seller of the property that it would be entitled to issue and execute all declarations and statements in relation to the leases. One tenant objected to the announcement and execution of such works on the ground that without registration of the transfer of title in the land register the purchaser has not become the new landlord. As a consequence he would not be obliged to tolerate such measures in accordance with Section 554 BGB.

In a similar case the court had already decided that the seller of a property is entitled to empower the purchaser with the execution of **termination rights** regarding the leases (BGH XII ZR 119/96 of 10 December 1997). The BGH has now also taken sides with the purchaser in this scenario: Section 554 BGB does not only refer to modernisation works which are carried out by the landlord itself, but the landlord is also entitled to delegate its rights under Section 554 BGB to third parties, including the purchaser of the property. As a consequence the purchaser would be able to announce and carry out modernisation works at its own costs. However, in such a scenario the purchaser only exercises rights delegated by the current owner and landlord, so the latter remains liable for all loss and damages of the tenants occurring in the context of such measures. The tenants can still assert all claims – in particular claims for damages and rent reduction – against the current owner and landlord.

As a consequence the purchaser of real estate should ask the seller for a comprehensive delegation of all rights under the leases (subject to payment of the purchase price), in particular the rights to announce and execute modernisation works prior to registration of the transfer of title in the land register. The relevant authorisation should be part of the property acquisition agreement, but additionally the purchaser should be able to demand the submission of separate written PoA-documents so it must not present a copy of the purchase deed to the tenants. Until registration of transfer of title in the land register (or according to Section 566 para 2 BGB even until the tenants have been informed about such registration) the seller of real estate remains liable for all loss and damages of the tenants. Therefore, it should ask the purchaser for comprehensive indemnification with regard to all potential claims asserted by the tenants in the context of modernisation works carried out by the purchaser.

Payment of costs for midway reading of heating and water consumption in case of change of tenant



Gero Martin, Munich

Pursuant to a recent judgment of the Federal Court of Justice (Bundesgerichtshof – BGH, VIII ZR 19/07, of 14 November 2007) in case of a change of tenants the costs for reading and settlement of heating and water consumption and sewage are not covered by the German Regulation on Operating Costs (Betriebskostenverordnung - BetrKV). As a consequence, under the usual clauses that “the tenant shall bear all operating costs in accordance with the German Regulation on Operating Costs”, the landlord has to bear such expenses. A specific provision is necessary in the lease agreement if such costs are to be allocated to the tenant. The wording of such clause needs to be carefully drafted, especially if the provision qualifies as a general term and condition.

Under statutory law the landlord generally bears all charges, i.e. also all operating costs in respect to the lease object. However, the landlord can allocate such costs to the tenant by way of explicit agreement under the lease. Usually – in particular when general terms and conditions are used -, the parties agree that the tenant has to bear all operating costs listed in the Regulation on Operating Costs (Operating Costs Regulation).

Pursuant to Section 2 Operating Costs Regulation “operating costs” (which could be allocated to the tenants) include – amongst other things – the costs for water supply (no. 2), sewage (no. 3) and heating (no. 4), including reading expenses. However, the expenses for reading and settlement of consumption in case of a change of tenant are not specifically mentioned in the Operating Costs Regulation. Section 9 b of the German Regulation on Heating Costs (*Heizkostenverordnung*) states that in case of a change of tenant midway readings must be carried out, but it is not stipulated whether the costs for such reading shall be borne by the landlord or the tenant.

It has been debated very controversially in the past whether such costs can be regarded as “operating costs” under the Operating Costs Regulation and whether such costs shall be borne solely by the tenant, split between the former and the new tenant (or between the former tenant and the landlord in case of vacancy) or allocated to the tenant or the landlord depending on the reason for the change of tenant, e.g. such costs shall be borne by the landlord in case the tenant has terminated the lease legitimately without notice for good cause. Finally, it was also argued that such costs shall be allocated to all tenants within the yearly settlement of the total operating costs. The Federal Court of Justice has now closed this debate: the expenses for reading and settlement of consumption in case of change of tenants are not “operating costs” under the Operating Costs Regulation and therefore cannot be allocated to the tenant, unless there is a specific agreement in such respect.

The court refers to the legal definition of “operating costs” (*Betriebskosten*) in Section 556 para 1 German Civil Code and Section 1 para 1 Operating Costs Regulation, pursuant to which these are costs which – with respect to the utilisation of the premises - incur **continuously** and **periodically**. According to the BGH expenses for the **yearly** reading and settlement of heating/water consumption and sewage are incurred continuously and periodically (and therefore constitute “operating costs”), whereas the expenses for measurement and settlement of consumption in the case of a change of tenants are not incurred periodically, but only **once**, i.e. at the end of the lease, and therefore are not to be considered operating costs in the meaning of the statutory law.

As a consequence, it has to be explicitly agreed under the lease agreement if such costs are to be borne by the tenant. The simple reference to the “operating costs under the Operating Costs Regulation” – which is standard practice – is not sufficient in this respect, but it can be validly agreed on by way of separate explicit clause that the tenant shall bear the costs for reading and settlement of consumption costs in case of moving-out. If a standard form lease agreement – which qualifies as general terms and conditions – is used one should add wording that the tenant does not have to bear such costs in the event that the landlord is responsible (for negligence or intent) for the moving-out of the tenant, in particular if the tenant has terminated the lease legitimately without notice for good cause. Otherwise such a clause would unfairly prejudice the tenant and therefore be considered void.

Leases / Facility Management

Heat contracting as alternative to the modernisation of heating facilities

Often the landlord cannot charge all costs for the modernisation of the existing heating facilities to the tenants and in many cases the landlord must finance the respective works in advance. From the landlord’s point of view, it might be advantageous to transfer the heat supply to a specialist company (Heat Contracting). A recent ruling of the German Federal Court of Justice (VIII ZR 202/06 dated 27 June 2007) has confirmed that the landlord is entitled to unilaterally convert the heat supply to heat contracting at least if the lease agreement has been concluded after 1 March 1989.

In Germany there exists a significant need for the modernisation of heating



Christoph Müller,
Munich

facilities. Pursuant to information of the German Association of the Chimney Sweeping Trade dated 2006 more than 3.5m heating facilities are over 20 years old. The need for modernisation will intensify as a result of the specifications of the amended Energy Saving Ordinance which became effective in 2007 and which has introduced, inter alia, new limits and modernisation obligations for heating facilities which will come into effect as of 1 July 2008. In 2010 these limits and modernisation obligations will further increase.

One reason for the modernisation backlog is the existing legal situation pursuant to which the landlord can only finance the costs necessary for the modernisation of the heating facilities by increasing the net rent. According to Section 559 of the German Civil Code, upon completion of the modernisation works the landlord is only entitled to increase the rent on a one-off basis by at the most 11% of the modernisation costs for the respective flat. Consequently, the respective costs amortise at the earliest in the 10th year following such modernisation. In addition to that, the landlord must reduce the modernisation costs by a certain percentage of the repairing costs which are saved due to the modernisation. As a result, the landlord cannot charge all modernisation costs to the tenants and has to finance the respective costs in advance, whereas the savings in energy costs benefit the tenants only.

As an alternative to the modernisation of heating facilities the landlord can transfer the heating supply to a specialist company (*Contractor*). Such services are in particular offered by energy service providers, plant engineering and construction companies or by public utility companies. The contractor takes over the energy optimisation of the supply of the tenants with heating whereby different types of heat contracting exist, depending on the respective demands of the principal: The contractor can take over the operation of the existing heating facility, renew these facilities or connect the relevant premises to a local heating supply network.

The advantage of heat contracting for the landlord is that it does not need to finance the modernisation works in advance and that it is no longer responsible for the maintenance and repair of the facilities, for the purchasing of the energy and for possible failures in the heat supply. These obligations are assumed by the contractor. In principle the landlord can charge all costs for heat contracting to the tenants within the context of the settlement of operational costs to be borne by the tenants. In return, the tenants obtain a secure heat supply at lower or at consistent costs.

The allocation of costs for heat contracting to the tenants is unproblematic in the case of new lease agreements whereas the allocation in existing leases raises difficulties if the respective lease agreements do not provide for the conversion to heat contracting because the costs for maintenance and repair of heating facilities are part of both the net rent calculation of the landlord and the price calculation of the contractor. Consequently, the tenant would be charged twice with these costs. On these grounds the German Federal Court of Justice ruled in 2005 (*VIII ZR 54/04 dated 6 April 2005*) that the conversion of the heat supply to heat contracting in existing leases is subject to the prior approval of the tenant. Otherwise the structure of the rent would be changed to the disadvantage of the tenant. One way of overcoming this problem would be that the landlord reduces the rent by the calculated maintenance and repair costs for the heating facilities in return for the conversion to heat contracting.

Henceforward, the German Federal Court of Justice has ruled in a recent decision (*VIII ZR 202/06 dated 27 June 2007*) that the landlord is entitled to convert the heat supply in existing leases to heat from a district heating network (*District Heating*) without the prior approval of the tenant and with the rent amount agreed in the lease agreement if the respective lease agreements refer to Annex 3 to Section 27 of the 2nd Regulation on Calculation of Operational Costs (*Berechnungsverordnung - II. BV*) as amended in 1984. According to the court the conversion of the heating supply to district heating is no unilateral

change of the lease agreement because of its reference to II.BV. The relevant version of II.BV at the conclusion of the lease (1984) provided for the allocation of the costs for district heating to the tenants. The court also pointed out that the landlord is entitled to demand the agreed rent in full despite the conversion to district heating since the lease agreement did not provide for a rent reduction in such a case.

If these principles are transferred to heat contracting, the landlord is entitled to change unilaterally the heat supply to heat contracting with respect to all leases that are concluded under II.BV as amended in 1989 or the subsequent Regulation on Operational Costs (*Betriebskostenverordnung – BetrKV*), i.e. after 1 March 1989, because pursuant to this version the costs for “independent commercial supply of heat” can be charged to the tenant. It must be noted that the landlord has to observe the principle of cost effectiveness, i.e. the landlord must ensure that the cost-benefit ratio is adequate in relation to any measures or decisions which have an effect on the amount of operating costs to be paid by the tenants. Therefore, the landlord should examine carefully the market before completion of a heat contracting agreement and should solicit several bids from various providers. Otherwise, it might have to bear the (partial) costs for heat contracting itself if the contract that is entered into is inefficient.

For leases, which have been concluded before 1 March 1989 and which do not provide for the conversion of the heat supply to heat contracting, the conversion remains subject to the tenants’ prior approval. Currently, the German Federal Government is examining the legislative possibilities to facilitate the conversion to heat contracting in line with the implementation of its Climate Package dated 2007.

Property

Registration of civil law partnerships in the land register



Melanie Kersting,
Munich

In 2001 the Federal Court of Justice (Bundesgerichtshof - BGH) has ruled in a landmark decision that a civil law partnership under German law (Gesellschaft bürgerlichen Rechts – GbR) has legal capacity, i.e. it can be subject of rights and duties. Consequently a GbR is able to purchase real estate but there is an ongoing discussion as to whether a GbR is capable of being registered in the land register as the owner of real estate under its own name.

Since the decision of the BGH in 2001 it is universally accepted that the GbR in general has legal capacity and therefore is in the position to create own rights and obligations, nevertheless without being a legal entity, unless there are special opposing aspects. This includes the capacity to acquire real estate. It is questionable whether the capacity to be registered in the land register also co-ercively results from this.

The Higher Regional Court (*Oberlandesgericht – OLG*) Stuttgart is of the opinion that a GbR can be registered in the land register as the owner of a property if it has a distinctive name. The OLG Stuttgart stated that otherwise one of the statutory law requirements for the acquisition of real estate – agreement and registration in the land register – would not be fulfilled and that then a GbR would not be in the position to validly acquire real estate. Also, the Land Registration Code (*Grundbuchordnung - GBO*) and the related regulations did not conflict with the entry of a GbR in the land register.

However, the OLG Schleswig in October 2007 expressly rejected these reasons of OLG Stuttgart and ruled that a GbR is not capable of being registered as the owner of a property in the land register under its own name. The identity and the power of representation of a GbR could not be safely verified due to the fact that a GbR is not registered in the commercial register. A distinctive name was not sufficient in order to verify the identity of a GbR. Moreover it referred to earlier decisions of other courts (among others Higher Regional Court of Bavaria (*BayObLG*) - and OLG Celle), which had denied the capability of a GbR to be registered in the land register before. The inconsistency under the current laws, that a GbR can be owner of a property but cannot be registered as the owner of

the property under its own name in the land register, could only be resolved by the legislator.

From the codified law on land registration (in particular Section 15 of the Regulation on the Implementation of the Land Register Regulation (*Verordnung über die Durchführung der Grundbuchordnung* - GBV) it can be gathered that the legislator assumed that a GbR itself is not registered in the land register but that the partners of it are registered in their capacity as partners of the GbR. The concerns of OLG Schleswig that the identity and the power of representation of a GbR cannot be safely verified are not resolved by the requirement that the GbR needs a distinctive name. Since a GbR – unlike other companies and partnerships - is not registered in the commercial register, a third party is not in the position to easily assess whether the GbR in fact exists, whether there is only one GbR under this name and - most importantly - who the partners are and who validly represents the GbR. For registered companies third parties may rely on the legal relationships of these companies as registered in the commercial register, even if the entries may be incorrect (Section 15 of the German Commercial Code – *HGB*, so-called *Publizitätswirkung*). The *Publizitätswirkung* applies for the land register as well (Sections 891, 892 German Civil Code – *BGB*), i.e. a third party may rely on the actual existence of a right if this right is registered in the land register and it may as well rely on the assumption that no other rights than the ones registered in the land register do exist. This is for instance of importance in case of a transfer of real estate or of the granting of land charges. The *Publizitätswirkung* of the land register and the strictly formalized regulations of the codified law on land registration, which determine which entries are made in the land register in which way and which deeds are added to the files of the land registry, cannot be reconciled with the missing registration of the GbR in the commercial register. Legal capacity of the GbR is a necessary but not sufficient prerequisite for the capacity to be registered in the land register as the owner of real estate.

Indeed, in a decision in 2006 the BGH left the question open whether a GbR can be registered in the land register under its own name but it pointed at the missing publicity of the power of representation and of the existing partners of the GbR in relation to the question whether a GbR is in the position to be manager of a condominium owner's community and has referred to the above mentioned decision of the Higher Regional Court of Bavaria. Therefore, despite the contradicting decision of the OLG Stuttgart, it is safe to assume that the opinion that a GbR is capable of being registered as the owner of a property under its own name due to the above mentioned reasons will not become generally accepted. Consequently the legislator is demanded to resolve the inconsistency under the currently existing law.

Banking, Finance

Consent to the assignment and release of banking confidentiality in banks' general terms and conditions



Sandra Hofmann,
Munich

By giving warning notice to ING-Diba, Baden-Württembergische Bank, Volksbank Allgäu-West and Westdeutsche Immobilienbank the German Federal Association of Consumer Advice Centres (*Bundesverband der Verbraucherzentralen*) (vzbv) has initiated legal proceedings against five financial institutions because of the use of clauses, providing for the consumer to consent to the sale of credit debts and the transmission of his/her data, and for a release of the bank from its duty of confidentiality.

According to vzbv such clauses are illegal. They undermine the relationship of trust in the bank and pose enormous risks. Through such clauses banking confidentiality is *de facto* abolished, in that at the moment of the conclusion of the contract it is already no longer effective.

Thereby the presently raging battle between, on the one hand, consumer protectionists and on the other hand, financial institutions relating to the sale of loans through banks is being played out on a further battlefield. Whereas up until now in view of the banks' duty of confidentiality the effectiveness of the assignment of credit debt through a bank and the existence of corresponding

damage claims was in question, now the clauses which have been inserted by the banks as a result of this dispute and which authorise in advance such assignment and release the bank from its duty of confidentiality are object of this dispute.

The model assignment clause drafted by the Federal Association of German Banks (*Bundesverband deutscher Banken*) (BdB), which releases the bank from its duty of confidentiality, is as follows: "*The Bank may for the purposes of discharging its own capital or for the purposes of diversifying risk wholly or partially assign to a third party the economic risk of granting a loan; this can be carried out for example, via credit derivatives, disposals of loans or loan sub-participation, whereby loans – including eventual corresponding securities – in this context in particular may be assigned and pledged. Disposals of rights under this agreement are also admissible for refinancing purposes. The Bank may for this purpose pass on necessary information to the third party and to such other persons, which are to be involved in the handling of the transfer for technical or legal reasons, e.g. rating agencies or accountants. In this respect, the borrower releases the Bank from its duty of confidentiality. Furthermore, the Bank may convey in whole or in part the economic risk of the granting of the loan in anonymous form (e.g. within the scope of an asset-backed securities transaction) to a purchaser*".

If the legal assessment of the legitimacy of the content and the effectiveness of general terms and conditions is reduced to its kernel, the question is posed as to whether the counterparty to the user of the general terms and conditions has to take on an undue disadvantage so that ultimately, a balancing of interests has to take place, in which above all the fundamental legal ideas and the nature of the agreement are to be borne in mind (sec. 307 German Civil Code (BGB)). Thus, in case of doubt, undue disadvantage of the counterparty has to be assumed in case the provision is not conformable with the fundamental idea of the statutory provision from which it is deviating, or in case fundamental rights and duties which result from the nature of the agreement are restricted to an extent that the purpose of the agreement is jeopardized. Protection against the misuse of general terms and conditions has to be completed via a check of the inclusion of such terms, the priority of individual agreement and the regulation of protection against unexpected and ambiguous clauses.

The Federal Court of Justice (BGH) has decided in connection with the sale of loans that banking confidentiality and federal data protection law does not conflict with the effectiveness of the assignment of loans to third parties, because neither from banking confidentiality nor from federal data protection law result a contractual assignment prohibition (XI ZR 195/05 of 27 Feb 2007).

Indeed, in this decision the question under discussion has not been expressly commented upon, i.e. whether the assignment of loans and the release of the bank from its duty of confidentiality are permissible and effective. However, in the underlying case of the decision the assignment of loans in the case of refinancing was expressly permitted under the relevant general terms and conditions. The BGH took up this clause, without a word as to the assumed illegality of such a clause on the part of consumer protectionists but rather, on the contrary, referred to the clause in order to refute such suggested will of the parties to exclude an assignment. Moreover, in its decision BGH emphasised that according to fundamental statutory ideas (sec. 398 BGB) the assignability of a debt is the rule and the exclusion of the same is the exception, which cannot be merely implied, unless it is expressly agreed. This should exclude any possibility to argue on the grounds of the regulations which aim to protect against deviation from fundamental legal ideas. In other words, an agreed exclusion of assignment would be a deviation from basic statutory principles and not on the contrary their acceptance. Furthermore, also the argument of breach of the prohibition of unexpected terms and conditions should be excluded, because pure repetition of fundamental statutory ideas and decisions in the bank's general terms and conditions cannot be regarded as unexpected or unusual, but in case of contradiction to foregoing negotiations. On the contrary, basically there is nothing which indicates that the bank wants to exclude the assignability of its

claim and that the debtor has thought about such exclusion (Nobbe, ZIP 2008, p. 100).

Furthermore, the question arises as to the effectiveness of the clause in the general terms and conditions to the extent that it releases the bank from its confidentiality obligations.

Banking confidentiality applies as much to natural persons as to body corporates and is not statutorily regulated, however it is assumed by the law-maker (e.g. in sec. 9 I KWG, 32 BBankG, 30a AO) and jurisdiction and is stipulated in Nr. 2 par. 1 of the General Terms and Conditions of the German Banks (*AGB-Banken*). According to the prevailing opinion of jurisdiction the bank's duty of secrecy has evolved without express agreement within the banking agreement but as an independent component or independent collateral obligation of every banking agreement and one which exists upon completion of the business relationship (BGH, 12 May 1958, BGHZ 27, 241 ff., 246). Banking confidentiality obliges the bank to secrecy in respect of all customer-related matters and valuations, of which it has knowledge. Should the lender want to be freed from its secrecy obligations, it needs as a basic principle the consent of the borrower. From a practical standpoint it is a significant possibility to secure such consent in the general terms and conditions.

The BGH has at least (indirectly) in part via the above mentioned decision and the acceptance of the assignment clause answered the question of the effectiveness of such a clause, because the assignment of loan claims is at odds with banking confidentiality in its general range. As for the customer-related matters to be protected, the particulars of the relevant loan agreement actually belong alongside the existence of the credit relationship. Excluding the case, in which the bank further on takes charge of the assigned debts, it must in the case of the assignment of the loan necessarily reveal the existence of the loan agreement, the identity of the borrower and the amount of the loan. If in the opinion of BGH the agreement to assignability for refinancing purposes in a bank's general terms and conditions is permissible, then the assignment of the accompanying divulgence of customer data must also be allowed. Insofar it makes no difference whether the bank is indirectly freed from banking confidentiality to the extent accompanying assignment for refinancing purposes by admission of assignment for such purpose or the bank is insofar expressly freed from banking confidentiality in its general terms and conditions. As a consequence BGH might also approve terms and conditions which expressly free the bank from banking confidentiality to such extent.

Enforcement

Repayment of surplus payments of ancillary costs by official receiver to purchaser of real estate



Sandra Hofmann, Munich

According to a judgement of the German Federal Court of Justice (BGH) the official receiver (Zwangsvorwalter) is obliged to hand out to the purchaser any surplus of the advance payments made by the tenant for ancillary costs, in case the purchaser is obliged to settle the accounts in relation to ancillary payments and in case the forced administration continues beyond the award of the title in the property to the purchaser, but ends prior to termination of the lease agreement.

The decision of the BGH (IX ZR 156/06, 11 Oct. 2007) is based on a case in which the receiver had received payments for ancillary costs for the period prior to the compulsory auction of the property which partly did not accrue during this period and which he commingled with the income generated by the compulsory administration and paid out to the creditors. After termination of the lease, the purchaser of the property settled accounts in relation to the ancillary costs with the tenants also for the time period prior to the award of the title in the real estate, paid the resulting surplus payments to the tenants and demanded compensation from the receiver for the repayment to the tenants.

The BGH held the receiver liable for damages for the following reasons:

Upon the award of the title in the property by compulsory auction, the purchaser assumes all rights and obligations of the debtor, i.e. in case of letting of real estate in particular those arising under the existing lease agreements. Thus thenceforth the purchaser is entitled to any rental and ancillary payments. In case and insofar as the compulsory administration of the real estate continues also after this point of time, it will be continued for the account of the purchaser until the end of the compulsory administration (which is subject to a respective court resolution); as a consequence, the receiver continues to collect *inter alia* ancillary payments and forwards these to the purchaser. In case the lease agreement is terminated while the compulsory administration continues, the receiver is responsible for settlement of the ancillary payments and has to pay any surplus to the tenant. However, in case the compulsory administration terminates prior to maturity of the settlement of payments vis-à-vis the tenant, the receiver is not obliged to settle the payments and to pay any surplus to the tenants, but he is obliged to repay surplus ancillary payments (even for the time period prior to the award) to the purchaser, because and insofar as the purchaser is obliged to settle and repay surplus ancillary payments to the tenant after termination of the compulsory administration.

If the receiver is not able to fulfil this obligation, because he has paid out these surplus payments to the creditors, he is obliged to pay respective compensation to the purchaser.

Interview

„Jones Lang LaSalle takes over Kemper’s“



Werner Altenschmidt
Managing Director and
Partner
Kemper's Consulting
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... was the headline on 28 January 2008, five days after the announcement that the four years of cooperation between Cushman & Wakefield and the German real estate agent have come to an end. With a transaction volume of approx. EUR 1.85 bn in 2007, Kemper's is a leading real estate firm in Germany, with offices in 8 major cities. Thomas Ziegler has spoken with Werner Altenschmidt, managing director and partner consulting of Kemper's in Düsseldorf.

HKE: Werner, 2007 was a pretty busy year for the German real estate industry. How was your start in 2008?

WA: *After the decline in demand for real estate in the second half of 2007, the markets have levelled out in the first calendar quarter of 2008. Yields for most market segments are stable; supply and demand are more balanced. This increasingly results in a comeback of investors which have been reluctant because of compressed yields or which have been active elsewhere. This is confirmed by an increased interest in demand from these investors.*

HKE: What effect had the credit crunch on real estate business in Germany?

WA: *The credit crunch triggered by the sub-prime crisis in the USA did massively impact the European markets too, which caused finance investors with little equity backing to withdraw from the markets and the traditional property investors regain significance. The demand-driven price increases slow down and in a number of market segments a new trend becomes visible.*

HKE: This means ...

WA: *The markets are stabilising. Investors with a strong equity background prevail. All German investors which were reluctant at the beginning of the investment boom in Germany and had their investment focus – against the trend – rather abroad, are back again on the German market. After a healthy and optimised portfolio revision open funds return to the German market. Pension funds, insurers and specialised funds will be more strongly operating again on the market. In part, also the demand of closed funds will increase again, whereby they have higher expectations on investment returns because of their competition with other bank finance products.*

HKE: Are there any sectors in the German real estate market which have been neglected in recent years? Where do you see the highest growth potential for the years to come?

WA: For 2008 one can expect a rise of property developers and investor-developers, waiting for a liquidation of large real estate portfolios. Also the growing concentration in the retail sector, mergers for companies and consolidation in a number of sectors open respective opportunities. With respect to small and medium-sized volumes also private investors are back again. Turmoil on the stock-markets results in an increasing interest of this kind of investors in real estate investment.

HKE: Do you agree that investments from abroad have increased professionalism in the German real estate market? What has changed?

WA: Dealing with real estate has become more intensive because of foreign investors. Whereas formerly only rough analysis has been made and decisions were made pursuant to "gut-feeling", nowadays intensive due-diligence-processes are being carried out. External experts are sought for in order to scrutinise the property under commercial, legal and technical aspects, in order to produce an appraisal of the property as good as it can be. This increases the reliability of investment decisions.

HKE: Are there any other changes in the German real estate industry which are to be attributed to foreign investors?

WA: The rise of foreign investors on the German market results in an increased use of international standards for the appraisal of the property. Very often discounted-cash-flow analysis under observance of International Accounting Standards (IAS) and RICS Appraisal and Valuation Standards (Red Book) replaces the German regulation for appraisals (Wertermittlungsverordnung). The review of the development of a property over a certain period of time is more important than the review at a certain point in time which would neglect many aspects.

HKE: And the impact of property financing by foreign banks?

WA: Foreign banks exclusively rely on international standards. Insofar they have the same requirements on appraisals as foreign investors, in particular since foreign investments are very often financed by foreign banks.

HKE: Outside Germany a number of real estate markets have seen sharp price declines in recent months. What happened in Germany during that time? What development of purchase prices do you expect in the near future for Germany?

WA: In Germany the rise in yields we experienced in the last calendar quarter of 2007 has come to a halt. Prices for properties in prime locations have not substantially fallen since the beginning of the year. The same is true for shopping centres. After massive swaying, prices for retail warehouses (Fachmärkte) have consolidated on a medium level. On the purchaser side yield expectations have slightly risen because of the necessity to provide for higher equity portions. There are still two decisive arguments for Germany as the place to invest in. Firstly, the head start in yields compared to most important European neighbour countries; secondly, the significantly bigger selection of large cities and thus of appropriate properties. No other European country has a comparable degree of decentralisation. The variety of metropolises and first class middle towns is unique and a competitive edge on the investment market for top class real estate. The current market situation results in a flight into quality. Therefore, in 2008 prime retail properties in attractive metropolises and medium-sized towns will be among the properties most sought for in Germany.

HKE: Congratulations! Kemper's will become part of Jones Lang LaSalle. What bearings will this merger have on Kemper's?

WA: The merger is an advantage for both partners. Kemper's becomes part of an international association the significance of which increases under the signs of globalisation. Jones Lang LaSalle, so far in Germany a leader in all market segments except retail, jointly with Kemper's as the market leader in the retail sector is aligning in this segment. Thus it creates an ideal synergy for both companies.

HKE: Werner, many thanks for this conversation.

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