

Fraud in a restitution matter¹

Supreme Court 22.1.2014, 15 Os 133/13t

The actual course of events and concrete manifestation of their success are the decisive factors in the question of whether damages occurred, whereby the question whether a loss of assets would have been incurred in another form had the offense not been committed is irrelevant.

Ruling of the Provincial Court

A Provincial Court as a Court of Lay Assessors [constituting two civilian lay assessors and a presiding judge; *comm. by the translator*] found the defendant guilty of serious fraud pursuant to Secs. 146, 147 (3) of the Penal Code for the reason that the defendant, as authorized representative of his mother Dr. Helene T., deceived both bodies of the Arbitration Panel for *In Rem* Restitution and of the Federal Ministry for the Economy, Family and Youth. This deception was manifested in the defendant's fraudulent representation that his mother, Dr. Helene T. was the sole daughter of the spouses Rosa and Helmut H., despite the existence of a second daughter of these spouses. As a result, the bodies of the Federal Ministry for the Economy, Family and Youth instructed the *Bundesimmobiliengesellschaft* ("Federal Real Estate Company") as owner to transfer free of charge one twelfth of the mentioned real estate to Dr. Helene T.

According to the findings of the court of first instance [the Provincial Court for Criminal Matters; *comm. by the translator*] the share of the real estate transferred to the defendant's mother would have been reduced by one half, i.e. instead of one twelfth she would have received only one twenty-fourth, had the defendant not deceived the bodies of the Arbitration Panel by providing false information regarding the existence of another eligible claimant, i.e. his aunt. By committing this offense the *Bundesimmobiliengesellschaft* incurred damages of around 550,000 Euros. The defendant therefore acted with the intent of unjust enrichment.

Decision of the Supreme Court

The defendant appealed this sentence at the Supreme Court, which dismissed his appeal for nullity. The objections lodged were unsuccessful, including the objection that the property would in any case have had to be transferred to the entitled claimants, in this case the heirs of the grandparents of Lothar F. As highlighted by the Supreme Court, the actual course of events and concrete manifestation of their success are the decisive factors in the question of whether damages occurred, whereby the question whether a loss of assets would have been incurred in another form had the offense not been committed is irrelevant.

In addition, as the Supreme Court emphasized, the defendant would have nothing to gain from an assumption that the damage had been incurred by his aunt, as in this case the established fact that he also wanted to unjustly enrich himself prevents the admission of mitigating factors [so called offenses subject to private prosecution, which are only prosecuted at the request of the injured party; *comm. by the translator*] which may have rendered this a matter to be pursued under private law pursuant to Sec. 166 (1) and 2 of the Penal Code.

¹ This is an English translation of the original German announcement published by the Austrian Supreme Court, URL: <http://www.ogh.gv.at/de/entscheidungen/weitere/betrug-in-einem-restitutionsfall>. Translation: Sarah Fink, General Settlement Fund for Victims of National Socialism.