

# Expert Liability under Austrian Law

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# Introduction – an Example

- Flat to be sold in public auction
- Appraisal to be performed by Expert
- Lady opens door in dressing gown
- Expert leaves after short inspection and performs valuation on the basis of a plan
- Plan is wrong (97 m<sup>2</sup> instead of 61)
- Valuation is wrong
- Lawyer relies on appraisal, buys flat in public auction and pays for 97 m<sup>2</sup> instead of 61
- Lawyer sues expert
- Is the Expert liable or not?

# Contents

- Liability - General
- Prerequisites for Liability
- Due and Reasonable Diligence
- Default
- Expert
- Limitation of Liability

# Liability - General

- Contractual Liability
  - Liability for a certain success
  - Liability for best efforts only
- Liability for Tort
  - Liability for breach of a protective law
  - Liability for violation of a protected right

# Prerequisites

- 1. Damage  
(Is there a damage?)
- 2. Breach of Law  
(Is the Expert in breach of a contractual or legal obligation?)
- 3. Causality  
(Was the damage causally determined by the breach?)
- 4. Default  
(Did the Expert apply the due and reasonable diligence?)

# Due diligence - General

- How had a prudent and diligent Expert performed his duties?
- Sec 1297 ABGB: legal assumption that anybody is able to apply the due and reasonable diligence in his/her professional affairs, the contrary is to be proved by the Expert
- Sec 1298 ABGB (for contractual liability only): Expert has to prove that he/she is not in default

# Due diligence - Expert

- Sec 1299 ABGB: legal assumption that Expert could not only apply the (general) diligence as described in Sec 1297 ABGB but the diligence of a prudent and diligent Expert
- This legal assumption is not subject to counter-evidence
- Sec 1300 ABGB: Reduction of liability (only for consciously negligent conduct) if advice did not fall within the scope of profession or was not given against consideration

# Default

- Negligence: Default that can happen also to a prudent and diligent Expert from time to time
- Gross negligence: striking carelessness
- Intent: Acts on purpose and consciously negligent conduct

# Expert

- Any person that has a profession requiring special skills
- No additional formal requirement (e.g. not only court appointed and/or approved experts)
- Against consideration
- OGH 13 June 2000, 1 Ob 79/00z

# Limitation of liability

- Limit liability only to clients and expressly named third parties, if any
- Limit liability to gross negligence and intent
- Add disclaimers to Expert opinion
- Provide for a cap (but caps are void in case of gross negligence or intent)
- Provide for insurance coverage

# Act on the Appraisal of Real Estate

- Relevant: fair market value
- Valuation method to be identified by Expert unless otherwise instructed by client
- Opinion has to be given "*state-of-the-art*"

# Act on the Appraisal of Real Estate

- Contents of the Expert Opinion:
  - Client
  - Purpose of appraisal
  - Due date of appraisal
  - Date of Examination
  - Documents used
  - Report on findings
  - Valuation Method(s) applied
  - Results
  - Explanation

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