WARSZAWSKI PARTNERS

reprivatisation

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Contents

The reprivatisation process is not even halfway home

An interview with Krzysztof Wiktor, partner and co-head of the Reprivatisation Practice at Wardyński & Partners, about problems with reprivatisation in Poland

Reprivatisation has featured strongly in the media for years. There has been a lot of controversy about some of the properties restored to former owners.

Krzysztof Wiktor: Reprivatisation is one element of the process of straightening up things in Poland following the change in the legal and economic system that began in 1989. We must remember that under the communist system, many people suffered great physical harm, but many were also stripped of their property. Reprivatisation under the Polish model is possible only when property was taken in violation of the law in force at that time. There is no blanket restitution or compensation. The reason this model is followed is that there is no reprivatisation act.

Obviously, reprivatisation stirs great emotions, as does anything that upsets the existing order. If there is an apartment building inhabited by people since the post-war period who were assigned to live there against the wishes of the rightful owner, it is understandable that they will be upset by the risk of losing their homes. The task of the state and its administrative and judicial authorities is to try to balance these interests. On one hand, something was taken from someone which ought to be returned, but on the other hand injury to one party should not be redressed by causing new injuries to others.

Does a person who lives in an apartment building as an assigned tenant or as the descendant of such a tenant have the possibility of obtaining title to the unit through prescription, by staying there all those years? The Supreme Court of Poland has ruled that the State Treasury may obtain title by prescription even in the case of property that was taken unlawfully.

No. The assigned tenants always rented those flats from the city. A tenant never has the rights of an owner, and in this case is not an independent occupier. An independent occupier is someone who is not the owner but holds the property as if that person were the owner. A tenant is always a dependent occupier, and dependent holding of property does not lead to title through prescription.

Persons living in a reprivatised apartment building do find themselves in a difficult situation. The lease they entered into earlier with the city remains in force, but the economic by private owners, the rent is usually raised to market levels.

There are regulations protecting tenants. While market rent is the rule, rent cannot be raised from one day to the next. Rent may not be raised more than a statutory amount without justification, and termination of a lease must be made for cause, or without cause only upon three years' notice. Currently the maximum by which an owner can raise the rent without special justification is 3% of the "reconstruction" value of the unit. This amount depends on the location of the building and the cost of construction of the building. If the owner wants to raise the rent by a greater amount, it must be justified, for example by the high cost of replacing the roof. The tenant may then appeal to the court, and the court will decide if the raise is justified or not. And in Warsaw the reconstruction value is gradually approaching the market rent. As a result, disputes about how much the rent can be raised are gradually disappearing.

terms of the lease change. When the property is owned by the municipality, the rents are set by the city and are typically below market. After the building is regained

Why are inhabited buildings being returned at all, instead of returning substitute property?

I will respond using the example of Warsaw. The City of Warsaw does not want to award substitute property. It takes the view that the only option is to return the same property in whatever its current condition is. The Decree on Ownership and Usufruct of Land in Warsaw of 26 October 1945—or the Warsaw Decree as it is commonly known—provided for the possibility of awarding substitute property if the original property could not be returned. Many times we and other law firms have requested, in controversial instances—for example residential buildings with tenants, or schoolyards and playing fields—that the city enter into negotiations on awarding of substitute real estate. That would simultaneously release the property from claims, satisfy the claims of the former owners, and defuse the social conflict.

But the city does not do so—for a very simple reason. If it awarded substitute property, the city would suffer a loss because the property could have been sold to raise income. The city does not have any income from an apartment building inhabited by tenants as public housing—most often, maintaining a building with tenants is just a bother. That is why the city prefers to return buildings with tenants than to talk to the owners about awarding them substitute property.

The situation with paying damages is similar. Instead of returning property in kind, the city could pay the former owners compensation. But for the city, that is non-negotiable. And in order to obtain an award of judicial damages for lost property, it is necessary to show that it was irretrievably lost: in other words, first that the property was taken unlawfully and second that under current law it cannot be regained, for example because it was sold to a third party. But if return of the property in kind is possible, the former owner cannot refuse to accept the property and seek damages in court instead.

The great majority of our clients would be satisfied with financial compensation, even if it were below the market value. For example, a decision could be issued refusing to return an apartment building but offering substitute property. I am confident that most people would agree to that. The social atmosphere surrounding reprivatisation is not entirely healthy. The former owners are mostly not to blame—although there are some black

sheep—but mostly it is the fault of the policies of the state and local authorities.

Even worse, the city sometimes returns property in kind while at the same time assuring that the owners can do nothing with the regained property. This applies mainly to educational facilities, such as schoolyards and playing fields. We always try to negotiate with the city to see if substitute property or damages can be provided instead of returning playing fields. The former owners do not want to start a war with the local community. But we have our back against the wall. The city returns the property, but at the same adopts a "micro" zoning plan providing that the property may be used only for educational purposes. This opens up new conflicts, because the former owners want to use the property, but with their hands tied all they can do is put up fence around it, and the media report on how greedy they are.

But the state budget does have funds earmarked for reprivatisation claims. The city should weigh the interests of the various groups and reach a compromise, but unfortunately there is often no desire to negotiate from the other side. There is a lack of decisiveness or a desire to reach agreement. For years we have been calming the atmosphere, persuading our clients to pursue their claims in a manner that will not stir social conflicts and cause further injury.

We have such an example now in the centre of Warsaw. There is a preschool standing on land that is to be returned. At our encouragement, the client voluntarily gave up a portion of the land so that the preschool could retain part of its playground. But the consent of the city is required to lay out a new access road to the regained portion, and negotiating something like that is a difficult proposition.

What percentage of claims are asserted by the actual heirs of the former owners, and what percentage by people who have bought out their claims?

In our practice about 90% are the actual heirs of the former owners. People who have bought their claims are the clear minority. And of those, a tiny percentage are the claims traders reported on by the media, who buy claims on speculation.

Was a lot of real estate taken by the state in violation of the law at that time?

In Warsaw it is estimated that the figure is about 90%. The only land really taken in accordance with the law was land designated for public use immediately after the war, for example for widening of ul. Marszałkowska on the western side or for construction of rail lines. No such public uses were provided for the vast majority of land in Warsaw, and therefore there was no basis to refuse to return the property to the former owners. As a consequence, privatisation in Warsaw is a ticking time-bomb, significantly hindering the development of the city.

But that is specific to Warsaw. Nationalisation of agricultural land, woodlands and pre-war industry was generally conducted in compliance with the law in force at that time. In other cities, there were no nationalisation decrees and properties retained their private character. They were seized in some instances, but under a pretext such as the need for renovation or because the property was abandoned.

There is also a huge issue with defective expropriations, but it is only now exploding with full force. Before the Second World War there was a procedure for expropriation for just compensation, as there is now. But after

the war property was expropriated with practically no compensation or very low compensation. Properties were taken for various purposes, which were often never realised or only partially, years later. It happens now that persons whose property was condemned under expropriation decisions are demanding restitution or compensation for huge sites now occupied by residential developments or sports facilities. These were not public purposes, which means that the expropriation was often conducted in gross violation of the law. The rights of these people were ignored as parties to the proceedings, or decisions were issued against dead people. Many residential developments in Warsaw districts such as Ursynów, Bielany and Białołęka were built on expropriated land. On top of that, there is the problem of the unclear title to land after expropriation in favour of housing cooperatives, which often to this day do not hold legal title to the land. If the heirs of expropriated owners (typically farmers) can prove that the expropriation decisions were defective, then we will see restitution for example of portions of those developments which are not yet built up with blocks of flats.

There are numerous problems that are only now starting to pile up. We are perhaps no longer at the beginning of the road, but we are certainly not halfway home yet. And there is no natural solution in sight. Even if someone dies, another person takes his place. Meanwhile, people are more and more aware of their rights and attempt to enforce them.

Why exactly has no privatisation act been adopted? Would it be so complicated that there would not be the political will to adopt it?

In my view, the political will has not been there and is still lacking. Such an act would include a dozen or so articles, the first of which would provide that whatever can be returned to the people should be returned, and for what cannot be returned the state budget should pay compensation in instalments equal to, for example, 50% of the value. But such an act would create a charge against the state budget, so that Poland would immediately exceed the permissible budget deficit under EU regulations. Then it would be necessary to cut public expenditures elsewhere, and there is no social or political consensus to do that.

Since 1990 there have been a dozen or more proposals for such an act. Only one was ever adopted by the Parliament, but it was vetoed by President Aleksander Kwaśniewski. It provided for compensation of 50%.

Politicians of all stripes are satisfied with the status quo of creeping privatisation. Annually several dozen or a few hundred properties around the country are returned and the courts award about PLN 100 million in damages for defective nationalisation. The process is stretched out over many years and the funds for damages are guaranteed in the state budget, and so it could go on like that indefinitely.

Politicians are also aware that not all injured owners or their heirs will pursues their claims, because they think they will not succeed, or they do not know about them, or the claimants are scattered around the world and cannot be organised. Besides, not all claims prove to be valid. Even when the claims are valid, many years may pass before the administrative authorities return the properties or the courts enter judgment. Meanwhile, the State Treasury does not have to pay the claims.

In my view, this creeping reprivatisation is heading toward a certain degree of satisfaction among the political community across the spectrum, but the local authorities are less happy about it because they are struggling with restitution claims, and certainly there is massive resistance from social activists involved in protecting the rights of tenants and owners of allotment gardens. Obviously the least satisfied are the former owners, who are often elderly and would rather regain less if they can do so quickly.

A reprivatisation act would also free up dormant capital. Nothing can be done with real estate to which claims have been asserted. For example, the city does not restore these properties. It is typically only when the property is returned to the owners that it begins to generate income. The property is then restored and renovated to a higher standard, creating jobs for lots of people. The same is true for awards of compensation. This is money that can drive the economy, as it is invested by the recipients, where previously it just lay in the account of the state budget. This is a practically invisible element of the economy and deserves attention. One can only speculate today what effect it would have had for the development of the country if reprivatisation had been conducted quickly in the 1990s. First, the problem would be solved, and second, there would be more private capital in Poland which could be used for investment and creation of jobs. Now this capital is frozen in the Agricultural Property Agency, the communal resources of the cities, and other institutions of the State Treasury. State capital is rarely put to work. Most often it just sits there. On top of that there is reprivatisation risk, which is the first thing any investor must examine when seeking to buy land in Poland for a factory or a residential development. Unresolved ownership issues reduce the investment attractiveness of Poland.

A reprivatisation act would therefore be desirable, but in reality it is not feasible within the next few years. It is a mythical creature that looms sometimes during election campaigns. For now what is left for former owners is to pursue their rights on their own.

Interview conducted by Justyna Zandberg-Malec

Prescription—an enemy of reprivatisation

Leszek Zatyka

Regaining land becomes more difficult as the State Treasury may take measures to claim title by prescription.

Former owners of properties in Poland expropriated or nationalised on the basis of various regulations enacted following the Second World War (such as the Agricultural Reform Decree, the Act on Assumption of State Ownership of Fundamental Branches of the National Economy and the Decree on Assumption of State Ownership of Certain Forests) may be able to regain the properties taken from them, but only if they were taken in violation of the regulations in force at the time.

The odds of positive completion of the reprivatisation process for people who have not yet taken steps to enforce their claims decrease over time when the State Treasury (or local governmental unit) has held possession of the property for many years.

Under the Civil Code, an independent occupier of real estate of which it is not the owner may obtain title to the property through "prescription" (comparable to adverse possession in common-law jurisdictions) if it holds possession of the property for an uninterrupted period of 20 years in good faith or 30 years in bad faith.

For a number of years, the prevailing view in the case law of the Supreme Court of Poland was that the State Treasury could not obtain title by prescription to real estate which it came into possession of through the exercise of public authority. This position gave the former owners an opportunity to regain their property.

This changed in 2007, when the full membership of the Supreme Court issued a resolution, with the force of a rule of law binding on all panels of the court, in which the court admitted the possibility that the State Treasury could obtain title by prescription to real estate even if it entered into possession of the property in the exercise of public authority. In other words, the state could acquire title to property which it took possession of unlawfully—in violation of the regulations in force at the time.

But the resolution also signalled a line of defence against acquisition of title by prescription, namely tolling of the prescription period if the owner could not effectively seek to regain the property. The period required for prescription would not run during the tolling period.

The conception of tolling of the prescription period is linked with the notion of *force majeure,* which was presumed to exist during the communist era due to the laws then in force as well as the practice of application of the laws, which effectively prevented pursuit of claims to regain property through the civil courts, state administration or the administrative courts. But the courts do not presume that rights could not be enforced.

This must be shown by submitting appropriate evidence in the form of documents or testimony. This issue is determined on a case-by-case basis.

Without tolling of the prescription period, it would not be possible at all to regain real estate taken by the state during the 1940s, 1950s or 1960s because the period required for the state to acquire title by prescription would already have run.

The courts have adopted different times when the tolling ended and the prescription period began to run again—typically either 1985 or 1989, in which case the State Treasury may obtain title by prescription in either 2015 or 2019.

But the state may obtain title by prescription at that time only when the former owners or their heirs have remained passive. If they have taken legal measures to attempt to regain the property, they could effectively interrupt the prescription period, after which it would begin to run again from the beginning.

Actions interrupting the running of the prescription period are measures taken before the court or other authority appointed to hear cases or enforce claims of the given type, or an arbitration court, with the immediate aim of enforcing, determining, satisfying or securing the claim. Such measure could be, for example, filing of a statement of claim or a summons to attempt to reach a settlement with respect to a claim for delivery of possession of real estate, or in the case of real estate taken under the Agricultural Reform Decree, an application to the province governor for a determination that the property in question was not covered by the decree.

If the real estate cannot be returned in kind, the former owners may still be able to seek compensation from the State Treasury. However, a right to compensation is not available in all legal situations or with respect to all instances of expropriation or nationalisation. Typically it is necessary to commence additional proceedings before a claim for compensation will arise. Claims for compensation are subject to the statute of limitations and thus require that a number of steps be taken to secure the claim against becoming time-barred.

The only hope for persons who are unable to effectively pursue a claim for restitution or compensation through these means is eventual passage of a reprivatisation act which would satisfy their claims to at least a minimal degree.

Considering that the State Treasury is taking steps to gain title to real estate through prescription and prevent former owners from satisfying their claims, it should not be expected that any reprivatisation act will be passed in the near future—if ever—because it would not be in the financial interest of the state to pay compensation voluntarily when the claims of former owners are becoming barred through the state's acquisition of title by prescription.

But paying compensation would be in the interests of the rule of law.

How many parties to a reprivatisation proceeding?

Dr Magdalena Niziołek

Are the owners of units in Warsaw buildings or the perpetual usufructuaries always parties to cases under the Warsaw Decree or the Agricultural Reform Decree? There are new trends in rulings from the administrative courts.

Determining who are the proper parties is a common issue arises in cases under the Decree on Ownership and Usufruct of Land in Warsaw of 26 October 1945 (aka the Warsaw Decree), the Agricultural Reform Decree of 6 September 1944 and nationalisation acts.

The position is well-established in the case law of the administrative courts that in a proceeding for establishment of the right to perpetual usufruct for the legal successors of the former owner of the land under the Warsaw Decree, the parties are the persons holding certain property rights. They are the person(s) asserting the claim under the Warsaw Decree or their heirs (the applicants), the owner of the land, the perpetual usufructuaries of the land, and in the case of developed land, also the owners of the units which hold proportional shares in the perpetual usufruct of the land (Supreme Administrative Court judgment of 8 February 2007, Case No. I OSK 1110/06).

A similar position is taken by the administrative courts in proceedings under §5 of the Regulation of the Minister of Agriculture and Agricultural Reform of 1 March 1945 on Execution of the Agricultural Reform Decree. The parties to such proceedings are the former owners of the real estate or their heirs, and the current owners and perpetual usufructuaries (judgment of Province Administrative Court in Warsaw of 11 June 2013, Case No. I SA/Wa 129/13).

This means that in some proceedings (particularly under the Agricultural Reform Decree), there are a huge number of persons, sometimes hundreds, with certain rights to the real estate, who should be regarded as parties to the proceedings under the case law cited above. This sometimes paralyses reprivatisation proceedings because conducting proceedings with the participation of dozens or even hundreds of parties who should be served with official documents at the addresses where they reside may simply not be feasible.

This problem has recently been recognised by the administrative courts. In judgments issued under the Warsaw Decree (of 25 April 2013, Case No. I SA/Wa 951/13, and 7 October 2013, Case No. I SA/Wa 1695/12, neither of which is legally final yet), the Province Administrative Court in Warsaw took an interesting line of reasoning and concluded that the right of a holder of a property right to real estate to be a party to a review proceeding under the Warsaw Decree should be tied to the impact on the property right that would be exerted by the result of the

proceeding seeking to invalidate the decision issued under the decree. As the court aptly pointed out in Case No. I SA/Wa 951/13:

"There is no provision of substantive law giving rise to a legal interest … of owners of units in the examination of the legality of the ruling which refused to award the right of temporary ownership. … It should therefore be asked what the legal consequences of a potential finding of the invalidity of the decision issued under the decree would be for the owners of the units whose rights are protected by the warranty of public reliance on the land and mortgage register, and how this could affect the substance of their rights to the independent unit and the related share in the land. … The rights of persons who acquired premises are unassailable and protected by the warranty of public reliance on the land and mortgage register. In practice, the involvement of the owners of units in a review proceeding serves no purpose. Moreover, the distinction between owners of units who acquired them up to 1990 on the basis of a decision (preceding a notarial deed) and those who acquired them without a decision preceding a notarial deed is moot. Decisions on sale of units did not give rise to any property law consequences. … The perpetual usufructuaries and owners of units are protected by the warranty of reliance on the land and mortgage register. … In this context, the hypothetical conduct of proceedings to invalidate the decision designating the unit for sale cannot result in depriving the owners of the units of the rights to the real estate, because the notarial deed concluded as a result of such decision is unassailable."

In Case No. I SA/Wa 1695/12, the court stated:

"A legal interest also cannot be derived from the fact that the owners of the units make up the homeowners' association. The fact that the proceeding under the decree may finally lead to establishment of a right of perpetual usufruct to the shares not connected with the sold units will only result in a new person entering the homeowners' association in place of the commune. However, the owners of the units, as joint perpetual usufructuaries, have no influence over the commune's disposal of its share."

The court thus concluded that "even a finding of the invalidity of the decision under the decree will not deprive the perpetual usufructuaries and owners of residential units of their property rights. … Therefore the parties to the extraordinary proceeding should be only the persons (or their legal successors) to whom the decision was directed, that is, the heirs of the former owners of the real estate."

The Province Administrative Court in Warsaw took a similar position in a case under the Agricultural Reform Decree (judgment of 28 February 2014, Case No. I SA/Wa 1588/13):

"The court did not find a violation of Administrative Procedure Code Art. 28 by the supervisory authority through unjustifiably overlooking in the proceeding all persons holding property rights to the real estate. This is primarily because the rights of such persons, protected by the warranty of public reliance on the land and mortgage register, were not infringed in any manner by the ruling on review issued concerning the ruling on assumption of real estate for the purposes of agricultural reform. In consequence, it must be accepted that there is no provision of substantive law from which a legal interest on the part of such owners (or perpetual

usufructuaries) entitling them to participate in the proceeding as a party may be derived. And permitting all of the current owners (or perpetual usufructuaries) of real estate to participate in a review proceeding on the forfeiture of real estate pursuant to the Agricultural Reform Decree must also raise doubts under Art. 2 of the Polish Constitution. Conducting proceedings with all owners of land, who have no connection with the case, and the consequent necessity to determine in each instance the current legal status of such properties will in many situations postpone for many years the ability to obtain redress of injury caused to the original owners of the real estate unlawfully taken over by the state. In extreme instances, the ability to bring the review proceedings to a close under such conditions would be purely illusory (in light of changes in ownership occurring during the course of the proceedings, approvals, the need to wait while inheritance proceedings are conducted, and so on)."

An analogous position was taken by the same court in the judgment of 12 March 2014 (Case No. I SA/Wa 1821/13).

They say that one robin does not make a spring, but these few new rulings by the Province Administrative Court in Warsaw, although not yet legally final, do give hope to the former owners of real estate and their legal successors that they will finally be able to bring to a close the cases they have been conducting with years of delay because of the difficulty in identifying who must be a party to the proceedings.

Delay in delivering possession of Warsaw Decree properties

Radosław Wiśniewski

Obtaining legal title to real estate covered by the Warsaw Decree should open the way to return of possession to the rightful owners. But the current holders often seek to stay the enforcement and postpone delivery of possession.

After pursuing many long civil and administrative proceedings, when the pre-war owners or their heirs finally obtain legal title to the property taken from them, it might seem that return of the property is assured—it's just a matter of time.

But the current holders of the real estate—some of whom have been in possession for many years—often do not accept that they have to turn over possession to the rightful owners or perpetual usufructuaries. Typically they do not agree to turn over possession voluntarily. The rightful owners or perpetual usufructuaries then must file a claim for delivery of possession. After the court

examines the legal title of the plaintiff and confirms that the defendant does not have title, the court should uphold the claim. Such proceedings are based on a review of the documents submitted to the court and are quite straightforward. The case could be wrapped up at the first hearing.

To head that off, the current holders of real estate sometimes commence other proceedings concerning the real estate covered by the Decree on Ownership and Usufruct of Land in Warsaw of 26 October 1945 (known as the Warsaw Decree) so that they can raise them in the pending proceeding seeking possession as involving a preliminary issue that would be controlling in the pending proceeding. Theoretically this could allow them to stay the pending proceeding and postpone the issuance of the order to deliver possession of the property.

The proceedings most often commenced which could provide grounds for staying the proceeding seeking delivery of possession of real estate covered by the Warsaw Decree are:

- Proceedings seeking a declaration that the real estate has been acquired by the holder through prescription under Civil Code Art. 172
- Proceedings under Civil Code Art. 231 seeking transfer of the property because a building has been built on land belonging to another person with a value significantly exceeding the value of the occupied plot.

Is every proceeding controlling and grounds for stay of enforcement?

According to legal commentators, an issue raised in one case will be regarded as preliminary and controlling in another pending proceeding if the pending proceeding cannot be resolved without first resolving the issue in the other case. In other words, the decision on the preliminary issue would be the basis for deciding the pending proceeding. But not every proceeding involving Warsaw Decree property for which delivery of possession is already being sought presents a preliminary and controlling issue. And even if it did, that does not necessarily mean that the court hearing the petition for a stay must issue the stay.

Art. 177 §1(1) of the Civil Procedure Code provides only for the possibility of staying a proceeding when there is "dependency" between the two cases. The decision to stay the enforcement when there is a preliminary issue is therefore optional. This does not mean that the decision on whether or not to issue the stay is left to the court's complete discretion, but it requires the court to consider all of the circumstances of the case and issue a decision in the specific situation. As the Supreme Court of Poland has held, "Civil Procedure Code Art. 177 §1(1) expressly provides that the court 'may' stay the proceeding. Therefore even if the ruling in the case depends on the ruling that may be issued in another case, the court must evaluate whether to stay the proceeding" (judgment of 24 February 2006, Case No. II CSK 141/05, Lex No. 201027). Consequently, the court should stay the proceeding seeking delivery of possession of Warsaw Decree property because a preliminary issue has been raised in another case only if the totality of the circumstances speak in favour of the stay.

Stay of proceedings for delivery of possession of Warsaw Decree properties in practice

The first application for a stay of the enforcement proceeding will typically be granted. Although in most cases other proceedings commenced while an enforcement proceeding seeking delivery of

possession of Warsaw Decree property is already pending are groundless and initiated only in order to seek a stay and delay the issuance of a judgment, in practice the courts do not find a basis for denying the first application for a stay.

The situation is different in the case of subsequent applications for a stay when further proceedings concerning the same property are commenced.

Assuming that the first application for a stay is justified by the filing of a case seeking a finding that the current occupier of the real estate has obtained title through prescription, it is clear that the court ruling in the second case will determine whether the possession was independent, and if so whether it was in good faith or bad faith. Therefore the result of the enforcement proceeding would depend on the result of the prescription proceeding, particularly if the occupier of the real estate alleged new facts in the prescription case. Then the court before which the enforcement case is pending will stay the proceeding until the relevant findings can be made on the preliminary issues.

But if the claim for a finding of acquisition of title by prescription is denied, and in the ruling ending the prescription proceeding the court finds that the possession was not independent and was in bad faith, a second application for a stay—this time supported by the filing of a new proceeding seeking transfer of title to the real estate under Civil Code Art. 231—should be denied. Given that in the prescription case it was found that the possession was not independent—which is also a fundamental condition for a claim under Civil Code Art. 231—another stay would be pointless and intended only to delay the proceeding seeking delivery of possession, and the only link would be that the same property was involved in both cases. But this type of connection is insufficient to find a dependence between the new proceeding and the enforcement proceeding.

The same argumentation could be followed if the order of the proceedings filed by the current occupier of the real estate were reversed. A second application for a stay of the enforcement proceeding should also be denied in that case. To rule otherwise would result in groundless postponing of a ruling on the merits of the enforcement case, and thus the socially harmful delay in rendering justice in the case brought by the rightful owner of the property as a result of the filing of clearly groundless proceedings involving the same property.

Damages for Warsaw real estate before the Constitutional Tribunal

Elżbieta Żywno

The Constitutional Tribunal takes a second look at the constitutionality of Art. 215(2) of the Real Estate Administration Act.

By order dated 18 January 2013, the Province Administrative Court in Warsaw submitted a legal question to Poland's Constitutional Tribunal to determine whether Art. 215(2) of the Real Estate Administration Act of 21 August 1997 is consistent with Art. 2, 32(1) and 64(2) of the Polish Constitution, insofar as the act makes the right to seek damages conditional on the former owner of real estate or the owner's legal successors having been deprived of the actual ability to control the property after 5 April 1958.

This is the second time that Art. 215(2) of the Real Estate Administration Act has come up for constitutional review. This provision enables compensation to be obtained for a single-family home in Warsaw which was taken over by the State Treasury if ownership passed to the state after 5 April 1958, or for a plot of land which could have been used for single-family residential construction before entry into force of the Warsaw Decree (the Decree on Ownership and Usufruct of Land in Warsaw of 26 October 1945), if the prior owners or their legal successors were deprived of the actual ability to control the land after 5 April 1958. Under the Real Estate Administration Act, as compensation the prior owners or their legal successors may receive perpetual usufruct of a plot for construction of a single-family house.

The first time the Constitutional Tribunal examined this provision, it held that the provision is unconstitutional insofar as it prevents obtaining compensation for real estate other than single-family houses if they passed to the ownership of the state after 5 April 1958, and insofar as it prevents obtaining compensation for plots that could have been used for construction other than a single-family house which the previous owner lost actual control of after 5 April 1958. The tribunal found that the excessive limitation on the right to compensation was an unwarranted interference with protection of property rights.

However, the tribunal did not indicate a date by which new regulations should be adopted repealing the unconstitutional regulations. Therefore, this provision continues to be applied as it was before and provides a basis for compensation to be awarded only to a limited set of persons deprived of their ownership rights to Warsaw land under the Warsaw Decree of 1945.

Nor did the Constitutional Tribunal examine at that time the condition making the award of damages dependent on a single-family house being taken over or actual control over a plot being lost after 5 April 1958. This issue is raised in the question recently submitted to the tribunal by the Province Administrative Court in Warsaw.

There is no rationale for maintaining the cut-off date of 5 April 1958 as a condition for the ability to obtain compensation. Art. 215 of the Real Estate Administration Act differentiates the legal situation of former owners of property in Warsaw. Persons who were allowed to continue using their property after 5 April 1958 are treated better than those who lost their property earlier, before the cut-off date. Differentiating the legal situation of former owners based on an arbitrary date raises constitutional doubts under the principles of equal protection of the law and citizens' confidence in the state.

Given that no reprivatisation act has been adopted in Poland, if the Constitutional Tribunal rules that Art. 215(2) of the Real Estate Administration Act is unconstitutional it would be hugely important for former owners of Warsaw real estate. The change in the regulations would benefit mainly the group of former owners (or their heirs) who failed to file applications to award them temporary ownership under Art. 7 of the Warsaw Decree, as well as those who could not obtain compensation because they were deprived of the actual control of their property on or before 5 April 1958.

Currently, the authority required to conduct proceedings and pay compensation is the Mayor of Warsaw, acting as the executive of the county performing tasks of the governmental administration. As of the beginning of 2013, there were about 3,500 compensation cases pending, and the claims would exceed the city's ability to pay them. Therefore the Parliament passed an act enabling the City of Warsaw to obtain a special-purpose subsidy of PLN 200 million annually in 2014–2016 from the Reprivatisation Fund to be used to pay such compensation claims.

Reprivatisation cases and petitions to the Court of Justice of the European Union

Agata Górska

The European Court of Human Rights is not the only international institution worth resorting to in reprivatisation cases.

After or even during the reprivatisation process in Poland it is possible to apply to international authorities with a petition or legal

question if doubts about the process or the resolution is unsatisfactory. But this is rarely done in practice. So far, petitions have been filed in a few instances with the European Court of Human Rights in Strasbourg.

Apart from a Strasbourg petition, there are other international institutions before which the rulings of Polish courts may be questioned. If there a decision by a national court that could violate EU law, it is possible to apply to the Court of Justice of the European Union in Luxembourg.

The court in Luxembourg interprets EU law to assure that it is applied uniformly across all member states, and decides disputes between member states and EU institutions. It also hears petitions filed by individuals and legal persons if national regulations affect them immediately and individually. Courts of the member states may also seek an interpretation on a specific issue of EU law by submitting a reference for a preliminary ruling to the European Court of Justice.

So far no individual petitions have been filed with the court in Luxembourg in a Polish reprivatisation case, but in July 2013 the Supreme Administrative Court sought a preliminary ruling in a case involving compensation for property to the east which was lost when Poland's borders were shifted westward as a result of the Second World War. Brothers Henryk T. (a citizen of Poland) and Jan T. (a citizen of Finland) applied in 2004 for compensation for property that had belonged to their grandmother in former Polish territory of what is now Ukraine. The province governor in Poland denied compensation to Jan because he was not a Polish citizen. On appeal, the Minister of Treasury upheld the decision. The brothers challenged this ruling before the Province Administrative Court in Warsaw, with a request that if necessary the court should seek an interpretation of Art. 18 of the Treaty on the Functioning of the European Union from the ECJ. The court denied the petition, holding that the Polish regulations governing compensation for lost eastern lands are exclusively national law and are not covered by the treaty. The brothers sought review of this judgment by filing a cassation appeal with the Supreme Administrative Court. The case was joined by the Helsinki Foundation for Human Rights. The court had doubts whether the national regulations excluding heirs without Polish citizenship from seeking compensation for property lost outside the current borders of Poland are consistent with TFEU Art. 18, which prohibits discrimination on the grounds of nationality. The court stayed the proceeding and filed a reference for a preliminary ruling with the ECJ.

A preliminary ruling is binding on the court in the specific case, and the court must follow the interpretation by the ECJ when applying the legal rule in question. As a rule, the interpretation of EU law is effective *ex tunc* (retroactively), but as an exception the ECJ may limit the application of the interpretation in time. Such rulings are not effective against all persons (*erga omnes*), but the national courts should nonetheless treat them as guidelines for application of EU law.

Henryk and Jan's case is the first case involving reprivatisation in Poland that has been taken up by the European Court of Justice. It may open the way to further cases if it can be shown that there is a direct or indirect violation of EU law which would justify seeking relief from the court in Luxembourg involving reprivatisation matters in Poland.

Reprivatisation claims of pre-war companies

Przemysław Szymczyk

Due to numerous irregularities committed during nationalisation proceedings, pre-war companies can now seek the return of assets taken from them unlawfully, or payment of compensation.

One of the most important bases for nationalisation of the assets of pre-war companies was the Act on Assumption of State Ownership of Fundamental Branches of the National Economy of 3 January 1946. Nationalisation under that act may be regarded as effective only if the relevant administrative proceeding was begun by 31 March 1947 (if begun later, the nationalisation is considered ineffective). Such proceedings ended in issuance of two decisions: the first involving assumption of ownership of the specific enterprise, and the second approving the protocol of delivery and acceptance specifying the assets which were taken over. Thus as a rule nationalisation did not involve the liquidation of the company itself and deletion from the commercial register, but only the assumption by the state of the assets belonging to the company, referred to in the act generally as the "enterprise."

Under Art. 7 of the act, the owner of the enterprise (i.e. the company) was supposed to receive compensation from the State Treasury within one year after the owner was notified of the determination of the amount of compensation payable to the owner. But the executive regulations for carrying out this aspect of the act were never adopted, which in practice prevented payment of compensation.

This does not mean that the right to proper compensation became time-barred. According to the resolution of the Supreme Court of Poland of 31 March 2011 (Case No. III CZP 112/10), Art. 160 (1), (2), (3) and (6) of the Administrative Procedure Code (repealed as of 1 September 2004) continue to apply to claims for redress of loss caused by a final administrative decision issued prior to 1 September 2004 held to be invalid or issued in violation of Art. 156 §1 of the code after that date. Art. 160 of the code provided that anyone who suffered a loss as a result of issuance of a defective administrative decision (including more specifically a nationalisation decision) has a claim for damages for the actual loss suffered. Such claim becomes time-barred 3 years from the date when the decision holding the nationalisation decision to be invalid (or issued unlawfully) becomes final. However, such damages do not cover lost benefits resulting from the issuance of the defective decision.

Thus, as a condition for demanding restitution of seized assets or payment of due compensation, it must first be found under Administrative Procedure Code Art. 156 that the decision by the relevant minister on passage of the enterprise to the ownership of the State Treasury was invalid or issued unlawfully (judgment of Province Administrative Court in Poznań of 4 February 2004, Case No. II SA/Po 3076/01). During nationalisation proceedings, gross violations of substantive, procedural and systemic law were often committed, which now makes it much easier to have such decisions invalidated.

In these cases, only the company, and not its shareholders, has standing to commence proceedings to invalidate nationalisation decisions and then to demand return of the assets or payment of compensation. For this purpose, it is crucial that the company have the relevant authorities in place who can represent the company in the invalidation and reprivatisation proceedings. This role may be performed in particular by surviving members of the management board. If there are none, the court should appoint a custodian for the company, under Civil Code Art. 42, upon application of any person with standing to do so, and the custodian will then convene a meeting of the shareholders for the purpose of appointing the authorities of the company. If this is not possible, the custodian should conduct the liquidation of the company. One of the elements of liquidation will then be to collect all receivables held by the company, which in turn means completing the reprivatisation proceedings seeking the return of the improperly nationalised assets or obtaining the relevant compensation.

Reactivation measures and the related pursuit of reprivatisation claims should not present major problems in the case of limited-liability companies, or in the case of joint-stock companies if they had registered shares and the former shareholders can be identified. Certain complications arise, however, in the case of bearer shares. In that case, appointment of the authorities of the company and pursuit of any claims is possible only on the basis of shares which were duly registered pursuant to the Decree of 3 February 1947 on Registration and Redemption of Certain Bearer Instruments Issued before 1 September 1939. If a bearer share was not registered by the strict deadline of 31 March 1949, it ceased to be of force and cannot now serve as the basis for reactivation of the company and thus for pursuit of claims for return of assets or payment of compensation. Such a share is valuable only as a collector's item.

Apart from claims under the industrial nationalisation act discussed above, companies often also hold claims under the Warsaw Decree (the Decree on Ownership and Usufruct of Land in Warsaw of 26 October 1945), if they were owners of real estate taken on the basis of that decree. As in the case of industrial nationalisation, in Warsaw Decree claims it is also necessary first to obtaining invalidation of the nationalisation decision, which in that case was a ruling by the executive committee of the Warsaw National Council refusing to award the right of temporary ownership (now known as perpetual usufruct) of the land at the site. Once the decision has been invalidated, claims may be asserted to establish perpetual usufruct of the land, or if perpetual usufruct is again refused, the company will have a claim for payment of

due compensation for the nationalised property.

A third source of potential claims by pre-war companies is the Agricultural Reform Decree of 6 September 1944. While Art. 2 of the decree provided that property nationalised under the decree (including mores specifically property owned or jointly owned by legal persons) passed to the ownership of the State Treasury in its entirety without any compensation, the frequent violation of law accompanying the issuance of nationalisation decisions now provides grounds for invalidation of the decisions, which in turn enables claims to be asserted for return of the property or payment of due compensation.

As the foregoing analysis demonstrates, pre-war companies hold a number of reprivatisation claims related to assets which were unlawfully nationalised. Even if it is not possible to return the assets themselves because of intervening irreversible legal consequences, there are grounds for seeking the payment of compensation. For that to be possible, it is first necessary to obtain a finding that the nationalisation decision was invalid or issued in violation of law. In theory, this should not be a problem in many instances because of the frequent and serious violations committed during nationalisation proceedings.

Restitution of allotment gardens

Barbara Majewska

The new Family Allotment Gardens Act permits the restitution of land occupied by allotment gardens to the heirs of the rightful owners, but it will not be an easy process.

The new Family Allotment Gardens Act of 13 December 2013 entered into force on 19 January 2014. The new act was adopted because the Constitutional Tribunal held in the judgment of 11 July 2012 (Case No. K 8/10) that four articles of the previous act (of 8 July 2005) were unconstitutional. Among the articles which were set aside was one concerning enforcement of reprivatisation claims to allotment gardens which provided that they could be satisfied only by payment of compensation or assigning of substitute real estate by their owners, i.e. the State Treasury or the relevant territorial governmental unit.

Because so many provisions of the act were held unconstitutional that it could cause a gap in the law and the act might not be capable of repair, the tribunal postponed the loss of force of these provisions for 18 months following publication of the judgment in the Journal of Laws. This gave

legislators time to draft a new law reconciling the interests of current owners of land being used as allotment gardens and their users and the interests of the legal successors of the former owners of the land who were unlawfully deprived of their property by the state.

The result of this work is the new act, which unlike the previous act provides for the possibility of returning land used for allotment gardens in realisation of a just claim of a third party. Under the 2005 act, return of the property in kind was excluded, and the legal successors of the former owners could expect only compensation or substitute property.

Liquidation or return

The new act eliminates the previous restrictions and opens the way to return of real estate occupied by allotment gardens to the legal successors of the former owners. Return of the property is to be conducted through liquidation of the family allotment garden, which is understood as transfer or extinguishment of the rights to the property or part of the property held by the gardening association and delivery of possession of the property by the gardening association (Art. 2(11) of the new act).

Liquidator and its obligations

As a rule, the liquidation of allotment gardens is to be done by a liquidator which is the owner of the real estate where the allotment garden undergoing liquidation is located or the entity which acquired ownership of the real estate as a result of expropriation. In most cases, liquidation of a family allotment garden is tied to an obligation to recreate the garden. Recreation of the allotment garden is the duty of the liquidator and consists of concluding with the gardening association an agreement giving it legal title to real estate no smaller than the area of the liquidated garden, at a location suited to the needs and functioning of the new garden and corresponding to the legal title which the association held to the real estate occupied by the liquidated garden, establishing a new garden and recreating fixtures and buildings of a type corresponding to the fixtures and buildings of the liquidated garden (Art. 21). In practice, this means offering the gardening association substitute real estate and opening a new garden there with fixtures and buildings recreating those at the site of the liquidated garden.

Liquidation of garden in connection with realisation of claims of a third party and return of expropriated real estate

A specific liquidation procedure is liquidation of all or part of an allotment garden in connection with realisation of claims of third parties (Art. 25(1) of the new act), including legal successors of the former owners of the real estate who were stripped of their ownership under the Warsaw Decree (the Decree on Ownership and Usufruct of Land in Warsaw of 26 October 1945) or other nationalisation acts.

In the case of liquidation due to claims by third parties, the entity required to take the relevant liquidation measures is the State Treasury or the territorial governmental unit, respectively, which was the owner of the real estate at the date of establishment of legal title to the plot in favour of the gardening association or on the date when the garden became a permanent garden within the meaning of the Employee Allotment Gardens Act of 6 May 1981 (Art. 25 of the new act).

In this situation, given the exceptional nature of reprivatisation claims, the purpose of

which is to redress loss caused by unlawful acts of administrative authorities, neither the State Treasury nor the relevant territorial governmental unit is required to create a family allotment garden in another place. They are however required to pay the gardeners compensation, which should cover the value of the lost assets owned by the gardeners, i.e. their plantings and the lost right to the plot. The act also imposes on the liquidator an obligation to pay compensation to the gardening association for the assets owned by it which are not subject to recreation, thus securing the rights of the gardening association and the gardeners themselves. The compensation is to be determined through an administrative decision. Depending on the entity required to pay the compensation, this decision is to be issued by the executive authority of the county or other territorial governmental unit.

But delivery of possession of land occupied by allotment gardens to the rightful owner under this procedure may not be done until the State Treasury or territorial governmental unit has addressed the foregoing issues connected with payment of compensation. Until then, the gardening association is not required to turn over possession of the property. If compensation has not been paid, the rightful owner will not be able to assert an effective claim for eviction but may only seek damages from the State Treasury or territorial governmental unit.

The act also provides for liquidation of all or part of an allotment garden in connection with the return of expropriated real estate pursuant to the Real Estate Administration Act of 21 August 1997. In that situation, unlike when there is a claim by a third party, the obligation to recreate the garden and pay compensation to the gardeners and the gardening association rests on the entity which was the owner of the property before issuance of the decision to return the property. The compensation may cover only the plantings, fixtures and structures built in compliance with the law. The conditions and the persons entitled to compensation are specified in the decision on return of the property.

Restitution is not so simple

The specific procedure referred to in Art. 25 of the new act for seeking return of real estate occupied by allotment gardens will mainly apply to sites in Warsaw, as Warsaw land is particularly subject to reprivatisation claims by former owners whose land was unlawfully taken under the Warsaw Decree of 1945.

From the perspective of persons seeking to regain their property, the possibility of return of land occupied by allotment gardens is a positive development, because return of real estate to the right owners would represent the most complete form of redressing their loss and would also allow them to regain many properties located in attractive urban locations which previously they could only dream of obtaining.

Nonetheless, the method for return of the property raises numerous questions and may present many problems in practice. Although the solutions adopted in the new act were also intended to satisfy the rightful claims of the legal successors of the former owners, in reality they address only the relations and accounts between the owner/liquidator and the gardening association and gardeners, leaving aside the heirs of the former owners. Despite the existence of just and confirmed claims for return of the property to the former owners, the act deprives them of the ability to

bring about the actual return of the property, because this depends on fulfilment by the State Treasury or the territorial governmental unit of its obligation to pay compensation to the gardening association and the gardeners. Compensation will be paid pursuant to an administrative decision, and the parties to that procedure will be the owner/liquidator and the gardening association and gardeners. It appears that the legal successors of the former owners will be excluded from that procedure and have no influence on how it is conducted. This may lead to situations where an heir holding a decision entitling the heir to return of the property will not be able to regain the property because of issues involving payment of compensation between the liquidator and the gardening association and gardeners.

There are further doubts surrounding the situation of the legal successors of the former owner who receive land which contains plantings made by the prior users—thus receiving more than they had a right to receive. In that situation, the heirs will probably have to face claims to cover the cost incurred by the State Treasury or territorial governmental unit when it previously covered the outlays by the gardeners and the gardening association.

Another unresolved issue appears to be the problem of restitution of a plot located within an allotment garden without access to a public road or with difficult access. In that case it would be necessary to establish an easement for a necessary road, imposing further steps on the way to regaining the property. The ability to develop such a plot surrounded by an allotment garden is another question mark.

It should become clearer within the near future whether the new Family Allotment Gardens Act will serve as an effective tool to overcome the consequences of the immortal Warsaw Decree.

Contact

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