

AN OPINION OF COURT EXPERT IN MATTERS OF PROPERTY MANAGEMENT – SELECTED ISSUES

*MICHAŁ WDOWIAK

*Academy of Law and Diplomacy, ul. Śląska 35/37,
81-310 Gdynia, Poland
email: ^apiastowska5@gazeta.pl*

Abstract: In Poland, the court cannot establish an expert in the field of domestic law. The expert is preparing an opinion on behalf of the court, requiring special knowledge. If the court does not specify the task of an expert correctly, he can express unauthorized conclusions, as the settlement of case, but the court cannot accept it. In practice of the judiciary, it happens that the court instructs the expert preparation of an opinion relating to the content of legal relationship of joint ownership of residential real estate, but he is acting in wrong way. The article is undertaking issues: the content of thesis of evidence, tasks of a court expert, the subject of common property, the division of common property, entities entitled to determine the content of legal relationship of residential real estate ownership.

Key words: expert, opinion, thesis, evidence, management, property

1 Introduction

In Poland, the court cannot establish an expert in the field of domestic law¹. The expert is preparing an opinion on behalf of the court, requiring special knowledge². If the court does not specify the task of an expert correctly, he can express conclusions, as the settlement of case, but the court cannot accept it³.

In practice of the judiciary, it happens that the court instructs an expert preparation of opinion relating to the content of legal relationship of joint ownership of residential real estate, e.g. part of the common property (article 3 paragraph 2 OP)⁴, terms of participation in the cost of property management and carry out of the repair: roof, chimneys, facade, balconies, staircase or elevator⁵.

Questions arise: how the court has to formulate the thesis of evidence? how an expert should proceed to the preparation of opinion? whether an expert has a permission specifying the content of constitutional rights and obligations of individuals, especially the content of property rights and the scope of its implementation?

In order to answer these questions to be clarified: the purpose and tasks of an expert in drawing up the opinion of property management; the concept of common property; who can and how to specify the content of legal relationship of joint ownership of residential real estate; who can investigate the circumstances, whether the content of legal relationship does not oppose its essence and the rules of social coexistence.

2 The purpose and subject of an opinion of court expert in matters of property management

The court in cases that require special knowledge after hearing the proposals of parties, as to the number of experts and their choice may invite one or more experts to the preparation of the

opinion (article 278 § 1 CCP)⁶. The court may order to present a case file for an expert (article 284 CCP). An opinion should contain a descriptive part - indication of expert, his specialization, court order and its scope (thesis of evidence)⁷, description of the subject matter on which the expert has delivered an opinion, description of method and way of conducting study and the conclusions and the justification (article 285 § 1 CCP)⁸.

The subject of opinion is to explain the "causes and consequences specific events or other issues in the light of status of knowledge in a particular branch of science or the principles of life experience in the field of human activity"⁹. The expert may collect in procedural way information and explanations from the parties, which help him to express a position, but this information may not create facts¹⁰.

The question is about the ability to collect information and clarification by the expert in out-of-process way? The question that must be answered affirmative, but information collected in this mode also cannot create new facts. The rules of civil procedure do not prohibit expert collect information and explanation from the parties, do not impose on the parties an absolute obligation to participate in the activities of expert¹¹. The expert does not set the facts of case, but explains the circumstances of case in light of the special knowledge, taking into account harvested information¹².

The expert should not estimate the rest of evidence, in this regard, his opinion as any other means of evidence is subject to the assessment of court (article 233 paragraph 1 and 2 CCP), in recognition of "positive or negative values of the reasoning contained in the opinion and the justification, why the opinion has convinced or not the court"¹³. In the opinion further assessment is made from the point of view of the logical formulation of policy proposals, the sources of knowledge and degree of confidence in the knowledge of expert, in terms of expertise, integrity and consistency with the possibility to miss obvious errors or mistakes (e.g. accounts) contained in the opinion¹⁴. The conclusions of opinion must be categorical and firm¹⁵. If the court has doubts as to the opinion of expert or the parties have raised the allegations, the expert can to comment on them in the mode of oral explanations to the written opinion (article 286 CCP), or additional opinion (article 158 paragraph 1 point 2 of the CCP). The expert cannot mention on their own observations of facts, which arrangement is made by the court. This person should be heard as a witness, while the activities of expert should be entrusted to another person¹⁶.

3 Collecting information about the status of real estate

By the status of real estate it should be understood: land use, legal status, technical data, including size, nature and degree of urbanization of locality, in which property is situated (article 4 pct. 17 ERE)¹⁷.

¹ Broniewicz, W. *Postępowanie cywilne w zarysie*. IV. issue. Warszawa: Wydawnictwo Prawnicze PWN, 1995. 188 p.; Resich, Z., Jodłowski, J. *Kodeks postępowania cywilnego. Komentarz*. I. issue. Warszawa: Wydawnictwo Prawnicze, 1969. 443 p.; Siedlecki, W., Świeboda, Z. *Postępowanie cywilne. Zarys wykładu*. I. issue. Warszawa: Wydawnictwo Prawnicze, 1998. 239 p.

² By special knowledge to be understood "messages from the various areas of science, technology, art, crafts, trade or economic turnover". Siedlecki, W., Świeboda, Z. *Postępowanie cywilne. Zarys wykładu*. I. issue. Warszawa: Wydawnictwo Prawnicze, 1998. 239 p.

³ Resich, Z., Jodłowski, J. *Kodeks postępowania cywilnego. Komentarz*. I. issue. Warszawa: Wydawnictwo Prawnicze, 1969. 444 p.

⁴ The Act of 24.06.94 on ownership of premises (consolidated text: O.J. of 2000, No 80, item 903, with further amendments), hereinafter referred to as OP.

⁵ judgement Court of Appeal in Warsaw 3.11.10, VI ACa 307/10, LEX No 794140; decision Supreme Court 7.04.00, IV CKN 8/00, LEX No 52677; judgement Supreme Court 3.11.10, V CSK 139/10, LEX No 738135; decision Court of Appeal in Poznań 22.07.09, I ACa 286/09, LEX No 756557.

⁶ The Act of 17.11.64, the code of civil procedure (O.J. of 1964, No 43, item 296, with further amendments), hereinafter referred to as CCP.

⁷ Siedlecki, W., Świeboda, Z. *Postępowanie cywilne. Zarys wykładu*. I. issue. Warszawa: Wydawnictwo Prawnicze, 1998. 241 p.

⁸ Jodłowski, J., Piasecki, K. *Kodeks postępowania cywilnego z komentarzem*. I. issue. Warszawa: Wydawnictwo Prawnicze, 466 p.

⁹ Jodłowski, J., Resich, Z., Lapiere, J., Misiuk-Jodłowska, T. *Postępowanie cywilne*. I. issue. Warszawa: Wydawnictwo Prawnicze PWN, 1996. 341 p.

¹⁰ judgement Court of Appeal in Katowice 10.01.08, V ACa 816/07, LEX No 398729.

¹¹ *Ibidem*.

¹² resolution Supreme Court 11.07.69, I CR 140/69, LEX No 1001.

¹³ Resich, Z., Jodłowski, J. *Kodeks postępowania cywilnego. Komentarz*. I. issue. Warszawa: Wydawnictwo Prawnicze, 1969. 445 p.

¹⁴ *Ibidem*.

¹⁵ Jodłowski, J., Piasecki, K. *Kodeks postępowania cywilnego z komentarzem*. I. issue. Warszawa: Wydawnictwo Prawnicze, 467 p.

¹⁶ judgement Supreme Court z 8.11.76, I CR 374/76, LEX No 2109.

¹⁷ The Act of 21.08.97, on economy of real estate (O.J. of 1997, No 115, item 741 with further amendments.), hereinafter referred to as ERE.

The expert uses all the necessary and available data about real estate, in particular contained in: property registers, cadastral, land records, notarial acts of extracting the individual flats and the contract for management of common property - where on the basis of principle of autonomy of will expressed in article 353¹ CC¹⁸ - specified the subject of common property.

The expert collects information about the condition of components of building: usable area, surface, volume, number of storeys – underground, aboveground, condition assessment-foundations and isolation, walls of cellars, external walls and facades, interior walls, ceilings, roof, inner and outer staircase, floors, boiler room and heat exchangers, windows, doors, installation of water, electricity and gas, lightning protection, sanitary, chimney pipe (smoke, exhaust, ventilation), fences and small architecture. Therefore, the description shall be made of all the structural elements of common property, which are functionally connected to each other, but do not make the legal settlement.

4 The subject of the common property

The common property consists of land and parts of building and equipment, which does not serve only for owners of the separated flats (article 3 paragraph 2 OP)¹⁹. Common property is not separated flats or other premises, which appease housing or useable needs of their owners. In the building can be highlighted structural elements, which cannot be the subject of separated property, therefore, they are common property. The relationship of component parts of complex things determines the objective assessment of economic importance existing between functional and physical connection. If they are functionally and physically related, and create the economic integrity, they are the components of complex things, even if it could be technically dismantled²⁰. The common property are structural elements and operational building, which the functional relationship with all elements of the building has an integral nature, as the organized economic integrity. The necessary elements are indispensable for using by the all owners of flats. It is compulsory joint ownership, which contain e.g. stairway, external walls, and roof²¹.

The common property are also elements, which the functional relationship with all elements of building also has an integral nature, they are not of the nature of the necessary equipment, but most of all it is distinguished their usable asset because of using other flats. They can also be components of the separated flats (article 2 paragraph 4 OP), depending on the status of real estate²². Walls, ceilings and floors, as structural elements-functionally and physically connected- determine the scope of separated flats and are the subject of the joint ownership of building²³. The particular elements of usable equipment in flats such as: floor panels, suspended ceiling, paneling are usable outlay of the owners of separated flats or tenants and their property.

The separated property is an independent flat or premises for other purposes (article 2 paragraph 1 OP). As independent flat²⁴ is considered the room or group of rooms intended for permanent residency for people, separated by supporting walls in a building, which serve for satisfying housing needs (article 2

paragraph 2 OP). To the creation of separate flat property it is necessary to make the entry at the land register (article 7 paragraph 2 OP). The establishment of separate flat property occurs on the date of submitting an application for founding a land register for it²⁵. Entry application to the land register is constitutive, exerts retroactive results from the date of submission of application²⁶. Disclosure of ownership in the land register is acting the creation of a separated flat property²⁷. With flat can be also connected other premises, even though they were not directly connected or were laid down in the border of plan construction outside the building, where the ownership of separated flat was created (article 2 paragraph 4 OP)²⁸.

The ownership of separated flat is the main law, which is connected with a share in the common property²⁹, as the dependent law, and its function to the main law is servient. For the component parts of real estate are also considered the rights connected with the main law (article 50 CC)³⁰. In judiciary and writing expressed the view that the common property is also foundations and interior technical installations³¹. Owners have also obligations to participate in the cost of real estate management (article 13 paragraph 1 OP).

5 Protection of property rights. Determination of the content of the legal relationship of joint ownership

The right of ownership shall be protected and may be limited only by the legislator in the act and only in such scope, which does not violate the essence of ownership (article 64 paragraph 2 and 3 CRP)³². Property right may also be restricted by the entities to which it is entitled and may be burden another obligation or property rights by agreement, however, similarly the limitation cannot to violate the essence of ownership.

The joint owners can decide in the agreement on the basis of principle of autonomy of will (article 6 OP connected with article 353¹ CC) the way of possessing of common property, while co-possessing and co-using can be acted in the way not disturbing the subjective right of joint ownership of individual owners³³. None of the joint owners shall not be entitled to a part of common property, and "joint owner can do only so much, how much does not disturb similar use by other owners"³⁴. The owner of premises may not acquire the common property by acquisitive prescription, because enlargement or reduction of the common property can occur only by the interaction of all owners on the terms set out in article 5 and 32a OP³⁵.

6 Dissolution of the legal relationship of join ownership

The dissolution of relationship of joint ownership can take place only in the mode as specified in article 4 paragraph 3 and article 5 OP and auxiliary applied article 210-218 CC. The dissolution of joint ownership can be made by division, judgment, revocation or abolition of joint ownership (article 210-212 CC)³⁶. The exception are situations, when the division would be contrary to the provisions of act or socio-economic purpose of thing or entail significant change things or a significant reduction of its value (article 211 CC).

¹⁸ The Act of 23.04.64, the civil code (OJ of 1964, No 16, item 93 with further amendments.), hereinafter referred to as the CC.

¹⁹ In further the regulation of 24.10.1934 on ownership of premises (O.J. of 1934, No 94, item 848 with further amendments) in article 1 paragraph 2 determined the concept of the common property as: "ground, yard, garden, exterior walls, structural walls and walls separating premises, roofs, chimneys and any equipment used for all owners of premises or certain groups of owners, as attics, basements, stairwells, hallways, gate, shared toilet, shared bathrooms, laundries, drying rooms, lifts, sewer, water supply equipment, central heating, lighting etc."

²⁰ judgement Supreme Court 28.06.02 r. I CK 5/02, LEX No 56604.

²¹ The „necessary equipment" are the entrance door to the building. Puch. P. *Czy drzwi wejściowe do lokalu mieszkalnego stanowią część nieruchomości wspólnej?* Doradca prawny w zarządzaniu nieruchomościami, 2009, No 2, 7 p.

²² resolution Supreme Court 3.10.03, III CZP 65/03, LEX No 80876.

²³ Gola, A., Suhecki, J. *Najem i własność lokali, Przepisy i komentarz*. I. issue. Warszawa: Wydawnictwo Prawnicze, 2000, 243 p.

²⁴ Starosta decides about independence of premises in the form of certificate (article 2 paragraph 3 OP).

²⁵ judgement Supreme Court 26.01.81, III CRN 283/80, LEX No 10111.

²⁶ resolution Supreme Court 21.05.02, III CZP 29/02, LEX No 53268.

²⁷ judgement Supreme Court 7.01.04 r. III CK 186/02, LEX No 599540.

²⁸ The apartment with belonging premises are marked on the drawing, the associated spaces located outside the building - on the identification report (article 2 paragraph 5 OP)

²⁹ judgement Supreme Court 7.01.04, III CK 186/02, LEX no 599540.

³⁰ decision Supreme Court 24.11.10, II CSK 267/10, LEX no 738095.

³¹ judgement Supreme Administrative Court 6.01.06, II OSK 858/06, LEX No 319169; judgement Court of Appeal in Wrocław 15.07.09, I ACa 592/09, LEX No 521998; Also. Bończak-Kucharczyk, E. *Własność lokali i wspólnota mieszkaniowa. Komentarz*. I. issue, Warszawa: Wolters Kluwer business, 2010, 93 p.

³² The Constitution of the Republic of Poland of 2.04.97 (O.J. of 1997, No 78, item 483 with further amendments.), hereinafter referred to as CRP.

³³ resolution Supreme Court 19.06.07, III CZP 59/07, LEX No 270441.

³⁴ Ignatowicz, J. *Prawo rzeczowe*. VII. issue. Warszawa: Wydawnictwo Prawnicze PWN, 1997, 137 p.

³⁵ decision Supreme Court 19.11.10, IV CSK 437/2009, LEX No 585880.

³⁶ decision Supreme Court 7.05.2008, III CSK 664/07, LEX No 424311.

It cannot be required the division of joint ownership of residential real estate as long as it has been lasting the ownership of separated flats (article 3 paragraph 1 sentence 2 OP). This prohibition applies to the necessary equipment, without which it would be impossible the functioning of separate flats, does not apply to such parts of the common property as: cellar or attic³⁷. The court may settle down the division of joint ownership, if it is possible to divide a building in the way of physical division³⁸. It is not possible, when for example, there is one entrance to a building³⁹. The joint owners can divide up a ground real estate developed of a building, if it is greater than the surface of plot construction (article 5 paragraph 1 OP).

7 Conclusions

The opinion could not be the base of determining the of legal nature of common property, the court should independently make interpretation⁴⁰.

The appointment of expert for determination of the content of law is meaningless and it is a privilege reserved for the court⁴¹. The expert in his conclusions contained in the opinion does not have the power to determine the rights and obligations of owners – to specify what parts of the common property, for example: balcony or individual chimney pipe is connected with the right of ownership of separated flat. Only the legislator can specify the concept of common property in the sources of universally binding law. At the same time, the owners of separated flats have entitlement to formulate their rights and obligations by agreement, which is describing the subject of common property.

If the expert - is going beyond the thesis of evidence next to the conclusion expressed on the basis of special knowledge - gives suggestions as to the legal nature of each part of common property, the court should to omit it⁴², because in this area the opinion has character of the private document (article 245 CCP). In the case of a dispute only the court has the power to make findings of fact, which are the basis for the settlement of case, to verify, that the content of legal relationship joint ownership does not object to the properties (nature) of this relationship and the principles of social conduct.

Literature:

1. Bończak-Kucharczyk, E. *Własność lokali i wspólnota mieszkaniowa. Komentarz*. I. issue, Warszawa: Wolters Kluwer business, 2010. 93 p. ISBN 978-264-0283-8.
2. Broniewicz, W. *Postępowanie cywilne w zarysie*. IV. issue. Warszawa: Wydawnictwo Prawnicze PWN, 1995. 188 p. ISBN-83-86702-20-6.
3. Decision Court of Appeal in Poznań 22.07.09, I ACa 286/09, LEX No 756557.
4. Decision Supreme Court 7.04.00, IV CKN 8/00, LEX No 52677.
5. Decision Supreme Court 16.09.03, IV CK 461/01, LEX No 523591.
6. Decision Supreme Court 7.05.08, III CSK 664/07, LEX No 424311.
7. Decision Supreme Court 19.11.10, IV CSK 437/2009, LEX No 585880.
8. Decision Supreme Court 24.11.10, II CSK 267/10, LEX No 738095.

9. Gola, A., Suchecki, J. *Najem i własność lokali, Przepisy i komentarz*. I. issue. Warszawa: Wydawnictwo Prawnicze, 2000, 243 p. ISBN 83-219-1067-X.
10. Ignatowicz, J. *Prawo rzeczowe*. VII. issue. Warszawa: Wydawnictwo Prawnicze PWN, 1997, 137 p. ISBN 83-86702-52-0.
11. Jodłowski, J., Piasecki, K. *Kodeks postępowania cywilnego z komentarzem*. I. issue. Warszawa: Wydawnictwo Prawnicze, 1989. 466-467 p. ISBN 83-219-0243-X.
12. Jodłowski, J., Resich, Z., Lapiere, J., Misiuk-Jodłowska, T. *Postępowanie cywilne*. I. issue. Warszawa: Wydawnictwo Prawnicze PWN, 1996, 341 p. ISBN 83-86702-04-4.
13. Judgement Court of Appeal in Katowice 10.01.08, V ACa 816/07, LEX No 398729.
14. Judgement Court of Appeal in Warsaw 3.11.10, VI ACa 307/10, LEX No 794140.
15. Judgement Court of Appeal in Wrocław 15.07.09, I ACa 592/09, LEX No 521998.
16. Judgement Supreme Administrative Court 6.01.06, II OSK 858/06, LEX No 319169.
17. Judgement Supreme Court z 8.11.76, I CR 374/76, LEX No 2109.
18. Judgement Supreme Court 26.01.81, III CRN 283/80, LEX No 1011.
19. Judgement Supreme Court 28.06.02, I CK 5/02, LEX No 56604.
20. Judgement Supreme Court 7.01.04 r. III CK 186/02, LEX No 599540.
21. Judgement Supreme Court 3.02.10, II PK 192/09 LEX, No 584735.
22. Judgement Supreme Court 25.05.10, I PK 192/09, LEX No 585693.
23. Judgement Supreme Court 3.11.10, V CSK 139/10, LEX No 738135.
24. Puch, P. *Czy drzwi wejściowe do lokalu mieszkalnego stanowią część nieruchomości wspólnej?* Doradca prawny w zarządzaniu nieruchomościami, 2009, No 2, 7 p. ISSN: 1895-9784.
25. Puch, P. *W jaki sposób można przeprowadzić podział wspólnoty mieszkaniowej.* Doradca prawny w zarządzaniu nieruchomościami, 2009, No 8, 9 p. ISSN: 1895-9784.
26. Resich, Z., Jodłowski, J. *Kodeks postępowania cywilnego. Komentarz*. I. issue. Warszawa: Wydawnictwo Prawnicze, 1969, 443-445 p. No ISBN number.
27. Resolution Supreme Court 11.07.69, I CR 140/69, LEX No 1001.
28. Resolution Supreme Court 21.05.02, III CZP 29/02, LEX No 53268.
29. Resolution Supreme Court 3.10.03, III CZP 65/03, LEX No 80876.
30. Resolution Supreme Court 14.07.06, III CZP 53/06, LEX No 188829.
31. Resolution Supreme Court 19.06.07, III CZP 59/07, LEX No 270441.
32. Siedlecki, W., Świeboda, Z. *Postępowanie cywilne. Zarys wykładu*. I. issue. Warszawa: Wydawnictwo Prawnicze, 1998. 239-241 p. ISBN-83-87558-32-X.
33. The Act of 23.04.64, the civil code (OJ of 1964, No 16, item 93 with further amendments).
34. The Act of 17.11.64, the code of civil procedure (O.J. of 1964, No 43, item 296, with further amendments).
35. The Act of 24.06.94, on ownership of premises (consolidated text: O.J. of 2000, No 80, item 903, with further amendments).
36. The Act of 21.08.97, on economy of real estate (O.J. of 1997, No 115, item 741 with further amendments).
37. The Constitution of the Republic of Poland of 2.04.97, (O.J. of 1997, No 78, item 483 with further amendments).
38. The Regulation of 24.10.1934, on ownership of premises (O.J. of 1934, No 94, item 848 with further amendments).

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³⁷ resolution Supreme Court 3.10.2003, III CZP 65/03, LEX No 80876.

³⁸ resolution Supreme Court 14.07.06, III CZP 53/06, LEX No 188829.

³⁹ For the physical division of common property must address "practical considerations, expressing in purposefulness, both from the point of view of legitimate interests of joint owners and socio-economic interest". decision Supreme Court 7.05.08, III CSK 664/07, LEX 424311; Vertical division of building is allowed, if followed, along with land and if the line of division passes through the wall, which is dividing the building for regular and independent parts. Puch, P. *W jaki sposób można przeprowadzić podział wspólnoty mieszkaniowej.* Doradca prawny w zarządzaniu nieruchomościami, 2009, No 8, 9 p.

⁴⁰ decision Supreme Court 16.09.03, IV CK 461/01, LEX No 523591.

⁴¹ judgement Supreme Court 25.05.10, I PK 192/09, LEX No 585693.

⁴² judgement Supreme Court 3.02.10, II PK 192/09 LEX, No 584735.