

REMUNERATION FOR ESTABLISHING THE NECESSARY PASSAGE EASEMENT IN THE LIGHT OF JUDICIAL DECISIONS

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ABSTRACT

Judicial practice abounds in numerous disputes arising from the provisions concerning land easements. It can be stated that there are many interesting legal issues in both doctrine and judicature that would certainly require separate and detailed studies. First of all, the issue of remuneration due to the owner of servient land is widely discussed. The regulations do not indicate criteria leading to determining the amount of remuneration, which raises many doubts in practice. The presented article is devoted to discussing the method of determining the amount of remuneration for establishing a necessary passage easement. Its purpose is to present various proposals for ancillary criteria which should be taken into account when calculating the remuneration due to the owner of the property.

Key words: property law, civil law, real estate, remuneration, necessary passage, expert witness, land easement

INTRODUCTION

Passage easement (the right of passage) is defined by the Act as the easement of a necessary passage. In accordance with Article 145 § 1 (Civil Code 1964 abbreviated: CC), if the property does not have adequate access to the public road or to the farm buildings belonging to the property, the owner may require owners of the neighboring lands to establish necessary passage easement. This provision does not indicate the criteria according to which the amount of remuneration provided for in it should be determined in addition, in Article 145 § 1 of CC (1964) the legislator did not order, as they did in the case of the transmission easement – Article 305² § 1 of CC (1964) – that the reward for establishing a necessary easement should be relevant. They

used the word remuneration without the adjective “relevant”. Use of the adjective “relevant” in Article 305² § 1 of CC (1964) means that the remuneration provided for in this provision should be determined on a case-by-case basis and adapted to the circumstances relevant to the case (Decision of the Supreme Court 2013).

In practice, the issue of determining the amount of remuneration is often left to the will of the parties who contractually establish passage easement, usually guided by the market value of a given law, with a view to increasing the usability of the dominant estate, and the impairment of the servient estate. Within the freedom to conclude contracts, the parties may also establish free-of-charge passage easement.

In contrast, the establishment of a necessary passage easement by court always takes place

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against payment. The court-law emphasizes that in proceedings to establish the necessary passage easement, remuneration for the owner of the servient property is ordered *ex officio* (Order of the Supreme Court 2000, Order of the Supreme Court 2012). This means that the court is obliged to decide on the amount and method of payment of remuneration in the order issued, even if the request for payment of such remuneration was not made by the parties, unless the entitled party has waived their right to remuneration. Therefore, in a situation when the entitled person has not waived this remuneration and does not agree to determine its amount as proposed by the obligated person, the court is obliged to carry out – also when exercising the right provided for in Article 232 second sentence of the Code of Civil Procedure (1964) [abbreviated: CCP] (consolidated text of the Journal of Laws of the Republic of Poland of 2019, item 1460). All evidence useful for correct determination of the extent of the benefit (Order of the Supreme Court 2008, Order of the Supreme Court 2012, Balwicka-Szczyrba, p. 36). Legal assessment of the omission of this obligation can be made in two areas.

First of all, the owner of the servient estate has the right to appeal against such a decision alleging a violation of substantive law – Article 145 § 1 of CC. (1964) The failure in making arrangements regarding the amount of remuneration by the court of first instance in the case for establishing a necessary passage easement means failure to recognize the substance of the case justifying reversing the order by the court of second instance and passing the case for re-examination (Order of the Supreme Court 2012).

However, in a situation where the right holder does not decide to appeal or overlooks such a possibility, they are not yet deprived of a claim for payment of remuneration for setting a necessary passage easement. They then have still the option of bringing an action for payment of remuneration in a procedural manner (Rudnicki 2011, p. 84).

MATERIALS AND METHODS

The nature of the topic required the dogmatic and legal method. The most adequate research techniques and tools took the form of examining source documents – provisions of national law and analysis of court rulings. All the content presented in this study is a compatible theoretical and empirical conglomerate. This arrangement allows for an objective presentation of the essence of considerations not only in the perspective of the analysis of sources of law, subject literature, but also court cases for establishing the necessary passage easement.

NATURE OF REMUNERATION

It should be emphasized that there is a divergent stance in the doctrine as to whether the obligation to pay remuneration is a real obligation or an obligation relationship that is not related to a legal situation. Rudnicki (2012, p. 120) stated that remuneration for the establishment of a necessary easement is not compensation, but as the equivalent of encumbrance of real estate, it is a price and real bond, the source of which is the establishment of a limited property right. Ciepła (2018), justifying this view, further emphasizes that the remuneration is not conditioned by either the increase in the usability of the dominant property or the damage suffered by the owner.

However, the trend in literature according to which it is assumed that from the moment the easement is established, a bond relationship regarding the payment of remuneration is established seems to be more convincing (Warcziński 2010, p. 59, Karaszewski 2014, pp. 85–99, Skowrońska-Bocian and Warcziński, p. 513, Matusik 2020, p. 56). It is difficult not to share these reservations, because, as Karaszewski (2014, p. 95) stated, the obligation to pay remuneration does not pass on the buyer of the dominant property (the law being its correlate has no *erga omnes* efficiency characteristics), the parties to the contract may shape the content of this obligation on general principles provided for in Article 353¹ of CC (1964) The contract for the establishment of the necessary

passage easement consists of two layers: substantive which consists in the establishment of easement, and obligatory that determines the remuneration for this easement. Janiszewska (2015, p. 143) also emphasized that there is no specific subject to legal and material relationship for every authorized and obliged person. Therefore, if the debt transfer is not transferred or the debt is not taken over, the obligation to pay once aroused, would bind the parties irrespective of whether the dominant or servient estate was sold. Meeting periodic benefits could, therefore, be provided in isolation from the use (or removal of the inconvenience of using) of the property encumbered with the necessary passage easement.

SCOPE OF REMUNERATION

The content of the provision of Article 145 of CC (1964) is not a foregone conclusion on the nature of the obligation, which results in the obligation to pay remuneration to the owner of the servient property. It should be noted that it is indicated that the establishment of an easement occurs “for remuneration” and not “for compensation”. Hence, it can be assumed that the will of the legislator was not only to compensate the damage that occurs in the property of the owner of the property encumbered as a result of the establishment of the passage easement. The concept of remuneration is broader and more flexible. It is equivalent to enduring someone else’s pedestrian or vehicle passage through the property. On the one hand, it should take into account the benefit that the dominant real estate enjoys and the inconvenience that the establishment of easement results for the servient property. The remuneration may not, however, serve unjust enrichment at the expense of the owner of the real estate. It should be proportional to the degree of interference with the content of the ownership right (Order of the Supreme Court 2016, Order of the Supreme Court 2012, Order of the Supreme Court 2010, Order of the Supreme Court 2012, Order of the Supreme Court 2018).

Remuneration is also due if the owner of the servient property has not suffered any damage

in connection with the establishment of an easement (Order of the Supreme Court 2000). In the event of damage, this fact must be taken into account when determining the amount or type of remuneration due. However, it should be noted that according to the rule of Article 6 of CC (1964) the owner who claims damage caused as a result of burdening their property by the passage easement has to deliver evidence (Gołba 2016, p. 120). The remuneration for establishing the necessary passage easement in the form of a monetary benefit may be valorized in accordance with Article 358¹ § 2 of CC (1964) (Skowrońska-Bocian and Warciński 2018, p. 444).

COMPONENTS OF REMUNERATION AND THE METHOD FOR DETERMINING THE AMOUNT OF REMUNERATION

There is also no doubt that the amount of remuneration due to the owner of the property and the criterion on the basis of which it should be determined is verified by means of evidence from an expert opinion. As previously stated, the court which has failed to consider this evidence runs the risk of being charged with violating Article 232 second sentence of the CCP (1964) in connection with Article 278 § 1 of CCP (1964).

According to the decisions by the Supreme Court, the opinion of an expert is intended to facilitate the court’s discernment and understanding of the field (matter being resolved) that requires special information. In this sense, the expert is the court’s assistant, however, they present their own position on the issue on which the court decides. The expert maintains independence as to the substantive content of the opinion, which ensures the correct role of this opinion in court proceedings (Decision of the Supreme Court 1997, Ereciński 2016, p. 423). The Supreme Court clearly stated that the Dispute is settled by a court, not an expert; the expert is only a court’s assistant, providing the court with specific scientific, technical and other information, which the court may not have (Decision of the Supreme Court 1935, Gudowski 1998, p. 520). Whether and in what field

they are necessary to settle the case, the court assesses each time against the background of the circumstances of the case (Decision of the Supreme Court 2017).

First of all, it is necessary to answer the question in what field the court should consult an expert. It is rightly argued in the case-law that undoubtedly determining the amount of remuneration pursuant to Article 145 § 1 of CC (1964) for the established necessary passage easement requires proof in the form of a report prepared by an expert (Order of the Supreme Court 2012). However, the Supreme Court (Order 2019) assumed that in some cases it may be useful and sufficient enough to obtain other evidence, including evidence from expert opinions of other specialties, to correctly determine the amount of this remuneration. It should be noted, however, that the presented position was issued in the case in which the servient real estate was located in an agricultural area. In this case, it is difficult not to share the view that this circumstance may support the recognition of the opinion of an agricultural expert as adequate evidence for the purposes of determining the amount of remuneration due to the owners of the servient property.

The provision of Article 145 of CC (1964) does not specify criteria for determining the indicated remuneration. Various criteria have been proposed in the literature and case-law to determine the components and amount of remuneration for establishing the necessary easement. The considerations already made show that the remuneration should be determined individually and should be adapted to the circumstances relevant to the given case. When determining the form of remuneration, it should be considered whether the legal status shaped by the establishment of the easement is permanent or temporary. It should also be borne in mind that when forecasting the long-term perspective of the functioning of the passage easement, the sum of remuneration for establishing the passage should not exceed the value of the servient property (Order of the Supreme Court 2013).

The case-law draws attention to the fact that the result of the assessment of the real purpose of the real estate to be encumbered with the necessary passage

easement should take into account the impact of this qualification on the amount of remuneration for the establishment of the passage easement due under Article 145 § 1 of CC (1964) (Order of the Supreme Court 2018)

In its decision (2016), the Supreme Court stated that in addition to any compensation for lost profits, damage to property (understood as *damnum emergens* and *lucrum cessans*), and the inconvenience caused to the owner of the servient property, the payment for the establishment of the easement itself understood as the price is due to the property owner. It is sometimes argued that it is the greater, the more benefits the owner of the dominant property has obtained as a result, and it is also emphasized that it should take into account the easement applicant's fault contributing to the need to establish the passage easement.

This ruling met both approval and criticism of the doctrine. The view that the reduction of income from the servient real estate, understood as lost benefits, should be reflected in the amount of remuneration is shared by Kocon (1977, p. 72) and Matusik (2020, p. 53).

Karaszewski takes a different view (2014, pp. 85–99), though the argument that such a procedure would result in unjust enrichment of the owner of the servient land is not convincing. According to the author, the sale of the real estate (including the sale of a plot of land to a neighbor), if it is made at market price, also includes to some extent the value of the expected benefits (the greater the benefits expected from a given property, the greater its attractiveness on the market).

It is noteworthy that the view expressed by Rudnicki (2001, p. 842) saying, that when determining remuneration, one should take into account: a particular increase in the value of real estate due to access to a public road or farm buildings, a decrease in the value of the servient property, expenses for necessary adaptations, as well as market prices of public road access obtained from obligatory sources. Rudnicki (2011, p. 74) also argued for the fact that when determining the amount of remuneration by analogy, one can use Article 13 of the Act on Inheritance and

Donation Tax of 28 July 1983 (consolidated text published in the Journal of Laws of the Republic of Poland of 2019, item 1813) by calculating the value of recurring benefits to determine the tax base for inheritance and donation tax. This view was shared by Ciepła (2018), which, referring to the aforementioned provision, stated that it is necessary to take the annual depletion value multiplied by the number of years if this easement is established for a definite period of up to 10 years, or multiplied by 10 if the easement is established for different time duration or for an indefinite period.

In addition, the issue of admissibility of adjusting (reducing) the amount of remuneration from the point of view of Article 5 of CC (1964) still requires further consideration. Article 5 of CC (1964) applies, in principle, when there is a need to protect the other party to a legal relationship, its legitimate interest, which deserves such protection, and if the interest threatened with the exercise of subjective right cannot be secured otherwise, and if there is no other legal mechanisms to ensure this protection. The obligation to pay remuneration resulting from the Act should be assessed as obligatory during court proceedings, which means that its exclusion can only take place if the owner renounces this remuneration. The remuneration here is the equivalent, as a rule, of money, of those lost or limited rights of the property owner that they could have exercised in respect of the property if easement had not been established. The right to such an equivalent is therefore the subjective right of the owner of the servient property and cannot be eliminated by the application of Article 5 of CC (1964). As indicated in the decisions of the Supreme Court, the richness of everyday life does not allow to exclude a situation in which it would be necessary to reduce the amount of remuneration pursuant to Article 5 of CC (1964). This could only occur in exceptional circumstances (Order of the Supreme Court 2018).

FORMS OF REMUNERATION

The provisions of Article 145 of CC (1964) do not specify the form of remuneration they provide, in particular they do not specify whether the remuneration is in the form of a one-time or periodic benefit. The periodic payment would lead to the situation that the easement would not be equivalent to burdening part of the property with easements, but in fact the source of income of the participant, as it would soon exceed the market value of this part of the plot. The remuneration for establishing the necessary passage is not compensation, but an equivalent benefit fulfilling the function of price and is due for the establishment of the easement alone (Order of the Supreme Court Order 2015). The remuneration for the easement may be in the form of periodic benefits, but it cannot include the period prior to the establishment of the easement. Therefore, if the legislator intended to introduce only one-time remuneration, it would undoubtedly have to find expression in the content of Article 145 of CC (1964) This means that the correct reasoning must be that which, in the absence of a definition of the form of remuneration, draws a conclusion on the admissibility of remuneration also in the form of periodic benefit (Order of the Supreme Court 2014, Order of the Supreme Court 1969).

CONCLUSION

The issue of establishing a necessary passage easement often raises neighbors' disputes on two levels – the course of the land easement and the amount of remuneration due to the owner of the servient property. Lack of agreement between the parties is the reason for initiating court proceedings, under which the question of the amount and method of determining the amount of remuneration for establishing the passage easement becomes the subject of legal considerations of common courts and the Supreme Court. It should be recognized that the legislator deliberately does not specify criteria for determining remuneration in order to make its

amount adapt to the circumstances relevant to a given case. Therefore, when deciding on the problem with which criteria to determine this amount, it is indicated that the interpretation of the term “remuneration” from Article 145 § 1 of CC. (1964) has a broader meaning range than compensation. Therefore, according to the author, when determining the amount of remuneration, one should take into account: the actual purpose of the servient property, the specific increase in the value of the dominant property, the reduction in the value of the servient property and also the losses incurred by the owner of the servient property, e.g. in the form of loss of benefits, lost crops, multiple of the rent for the occupied strip of land, provided that evidence of this damage is demonstrated in court proceedings in accordance with the rule provided for in Article 6 of CC(1964).

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