Acquisitive prescription of utility easement as a defence instrument used by transmission companies against a negatory action – selected issues

The owner of a property taken for the needs of technical infrastructure is entitled to bring a negatory claim, as one of several alternative claims, against the infrastructure owner (Art. 222.2 of the Civil Code). A negatory claim is a claim aimed to redress the legal situation infringed upon and cause the cessation of the violation that is addressed to the infrastructure owner as the person who violates ownership otherwise than by depriving the owner of actual control of the thing. In the event of violation of the ownership right to the property involving the installation of third-party infrastructure (e.g. transmission facilities[1]) in the property, the property owner may file a negatory claim for total removal of the infrastructure from the property, transfer of the infrastructure to another place on the property resulting in less nuisance or remodelling of the infrastructure in a manner reducing nuisance related thereto, for instance by placing the infrastructure underground. However, requesting redress of the legal situation by way of a negatory claim requires declaration of the unlawfulness of the transmission company's conduct, with a proviso that the imputation of unlawfulness refers to the time of encroaching on the owner's rights[2].

Transmission companies frequently defend themselves against claims by property owners on the grounds of acquisitive prescription of utility easement, or easement corresponding to transmission easement, by the company. Acquisitive prescription is a legal concept where the holder (of the property) becomes the person endowed with the right in question after a specified time elapsed, as defined in the applicable law. Therefore - by operation of the law - the long-standing actual status is harmonised with the legal status, and it is confirmed in a judicial decision[3]. Acquisitive prescription of land easement (and utility easement, under Art. 305^1 of the Civil Code) is established if it consists in the use of a permanent and visible facility (Art. 292 of the Civil Code). Accordingly, acquisitive prescription of transmission infrastructure located, for instance, underground and, therefore, invisible, can raise serious doubts, and in such circumstances acquisitive prescription can be completely ruled out. Easement may be acquired through acquisitive prescription if the infrastructure holder has used it continuously for a period of 20 years in good faith (without knowing of the lack of legal right to do so) or 30 years in bad faith (knowing of the lack of legal right to do so). The holder's good or bad faith is determined by the time of gaining possession; subsequent changes to the holder's awareness have no bearing on this determination and, consequently, on the length of the period required for acquisitive prescription to take place[4]. It is possible to include the time during which the property was held by a predecessor in the acquisitive prescription period if the applicant (i.e. the transmission company) and the predecessor have used a third-party property within the limits of easement. State-owned companies were legal predecessors of today's transmission companies, and these predecessors had built technical infrastructure before the political transformation in Poland. It is presumed that up until 31 January 1989 when uniform state ownership had been effective in the civil law, the State Treasury was the only party allowed to keep state ownership; therefore, the State Treasury was the beneficiary of actions taken by state-owned companies, which resulted in the acquisition of the rights as a result of acquisitive prescription[5]. Up until that date, acquisitive prescription of the property by a state-owned company for its own benefit was not possible. There have been differing judicial decisions as to whether the period of holding a real property within the limits of easement by a state-owned company (legal predecessor of a transmission company) which occurred before 1989 can be included into the acquisitive prescription period entitling the holder to claim acquisitive prescription. If the court were to recognise this possibility, due to the lapse of time, it would practically mean, in most cases, declaration of acquisitive prescription, even if the legal predecessor is found to have acted in bad faith. However, it is frequently the case the courts consider transmission companies to be acting in good faith, which is implicit under Art. 7 of the Civil Code (bad faith must be demonstrated in a lawsuit). There is also a view that if transmission companied had built transmission facilities based on administrative decisions allowing the construction and concerning the routing of the facilities, they acquired the easement in good faith as part of the use of a third-party property in a manner consistent with the terms of the easement[6].

As explained above, in many cases raising the objection of acquisitive prescription by the transmission company is an effective process strategy which results in property owners losing the case and being required to cover the costs of court proceedings, including court fees, legal expenses and costs of expert opinions requested by the court. Therefore, it is advisable to analyse carefully the factual state and consider possible legal risks before initiating a court action to enforce a negatory claim.

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[1] *Facilities used for supplying or discharging liquids, steam, gas, electricity and similar facilities are not component parts of the real property if they are part of an enterprise, under Art. 49.1 of the Civil Code.*

[2] *cf. the statement of reasons for the Supreme Court's decisions of: 30 January 2009, II CSK 461/08, non-published; 29 April 2009, II CSK 560/08, non-published*

[3] *cf. the Supreme Court's decision of 25 June 2003, III CZP 35/03, LEX No. 83981*

[4] *ibid.*

[5] *cf. e.g. the Supreme Court's resolution of 22 October 2009, III CZP 70/09, OSNC 2010, No. 5, item 64 and the Supreme Court's decision of 20 January 1993, II CRN 146/92, non-published*

[6] *cf. e.g. the Supreme Court's decision of 14 November 2012, II CSK 120/12, non-published, as well as the Supreme Court's decision of 8 January 2009 I CSK 265/08, of 5 July 2012 IV CSK 606/11, of 14 November 2012 II CSK 120/12, of 9 January 2014 V CSK 87/13, of 4 June 2014 II CSK 520/13, of 4 July 2014 II CSK 551/13, OSNC 2015/6/72*