

Transmission easement over the perpetual usufruct right

The right of perpetual usufruct is a right *in rem* which, pursuant to Article 232 of the Polish Civil Code, can be established over land owned by the Polish State Treasury or local government units. The concept of the transmission easement was introduced to Polish law by virtue of the Act on Amendments to the Civil Code and certain other Acts, dated 30 May 2008 (Journal of Laws No. 116, item 731).

Article 305¹ of the Civil Code stipulates that real estate may be encumbered with a right granted to an entrepreneur who intends to construct or which owns facilities referred to in Article 49§1 (transmission facilities). The holder of that right may use the encumbered property to a specified extent corresponding to the intended purpose of the facilities. Thus, the transmission easement is a burden of a sort which must be suffered by the encumbered property's owner.

When interpreted literally, the above provision only allows for a transmission easement to be established over real property. However, the structure of the transmission easement largely resembles that of land easements which are regulated by Articles 285-295 of the Civil Code. According to a long-standing stance taken by the Supreme Court in its rulings, a land easement may be established over both land and a perpetual usufruct right to land. In the judgement dated 29 May 1974, issued in case ref. No. II CZP 21/74 (OSNC/Supreme Court Case Law Collection. Civil Chamber/ 1975, No. 4, item 55), the Supreme Court opened the possibility of establishing the land easement referred to in Article 151 of the Civil Code over a perpetual usufruct right against a fee. The same standpoint was expressed in the statement of reasons for the Supreme Court's decision dated 15 October 2008 (case ref. No. I CSK 135/08, OSNC-ZD 2009, No. 3, item 62) where the Court explicitly stated that the structure of the land easement set forth in statutory regulations does not, in principle, rule out the possibility of establishing a limited right *in rem* on a perpetual usufruct right. Therefore, it might appear that nothing could get in the way of a transmission easement being created over the right of perpetual usufruct.

However, on 28 March 2015, the Supreme Court issued a decision in case ref. III CSK 174/13 wherein it held a substantially different view from the one prevailing in its prior rulings. In the statement of reasons, the Court held that the wording of Article 305¹, Article 296 and Article 285§1 of the Civil Code, all pieces of law addressing land easements and personal servitudes, suggests that easements are established over real property, that is a thing itself, rather than over a specific right to real property, that is a right established over that thing. Further, the Court indicated that the legislator has developed a rule whereby limited rights *in rem* are established over things (e.g. Article 252 of the Civil Code – right of use; Article 306§1 of the Civil Code – pledge; Article 65 item 1 of the Act on Land and Mortgage Register and Mortgages dated 6 July 1982 /the ALMRM/ – mortgage), while clearly listing situations where such rights may be established over rights (such possibility is provided for in Article 265 of the Civil Code – rights of use established over a right, Article 327 of the Civil Code – a pledge established over a right and Article 65 item 2 and Article 65 item 3 of the ALMRM – a mortgage established over a right). In conclusion, when discussing the possibility of creating a transmission easement over a perpetual usufruct right, the Supreme Court held that: "The idea behind a transmission easement is ensuring that an entrepreneur holds a stable title enabling them to use the facilities referred to in Article 49§1 of the Civil Code. In principle, a easement is intended to be created over real property rather than a perpetual usufruct right established over that real property. For this reason, an entrepreneur using transmission facilities has a claim against the real property owner for the establishment of

a transmission easement against a fee (Article 305¹§1 of the Civil Code) while the real property owner may demand compensation from the entrepreneur for the same (Article 305²§1 of the Civil Code)."

The Supreme Court's recent ruling is at variance with the body of judicial decisions prevailing to date and supported on numerous occasions in the doctrine. It remains unknown whether the view expressed in case ref. No. III CSK 174/13 will be reiterated in future Supreme Court's rulings or is a one-off occurrence. Some guidance as to how the matter will be eventually resolved may be provided by the draft amendments to the Civil Code, currently worked on by the Parliament, which allow for a transmission easement to be established over a perpetual usufruct right.

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