

# Claim for alteration to easement or the way easement is exercised

Owners of properties over which land easements or transmission rights of way have been established and owners of benefitted properties and of transmission facilities must be aware of the fact that under certain circumstances the nature of easement/right of way and the way it is exercised may change.

One way to change it is for the owner of the benefitted property (or transmission facilities) and the owner of the burdened property to enter into an agreement. This follows from Article 248.1 of the Civil Code which stipulates that a limited right in property may be altered by an agreement between the benefitted party and the owner of the burdened property; and where the right is entered in the Land and Mortgage Register – by a relevant entry in that Register. If the parties cannot reach agreement, they may opt to refer the matter to a court for resolution. In court, when a material business reason arises in connection with the burdened property, it is possible to effect a change in the way an easement is exercised by asserting a claim under Article 291 of the Civil Code (or – in case of a transmission right of way – under Article 291 in conjunction with Article 305<sup>4</sup> of the Civil Code).<sup>[1]</sup> “A material business reason” is an unspecified term which becomes concrete only in a given factual context. However, it can be concluded that an existing easement may be altered provided there is an objectively valid reason. It is not sufficient for the burdened property owner to be personally convinced that there is a reason or for the need to be personal in nature. Pursuant to Article 291 of the Civil Code, a division of property does not constitute a material business reason. In the event of a division, the owner is entitled to a different claim, one which follows from Article 290.3 of the Civil Code.<sup>[2]</sup> Given that it is only the owner of the burdened property who may lodge a claim seeking to alter an easement/transmission right of way or the way it is exercised, any changes arising from enforcing the claim will limit the rights

of the benefitted property owner rather than accommodate the greater needs of the benefitted property.<sup>[3]</sup> There is no requirement for the material business reason to be extraordinary in nature, previously unknown to the parties or unforeseeable. On the contrary, in such contexts the reasons are usually related to ordinary events which significantly affect the situation of the burdened property owner and interfere with their most beneficial use of the land.<sup>[4]</sup> Examples of ordinary events include a change in the intended use of property resulting from adoption of a land-use plan.<sup>[5]</sup>

However, the court does not rule in favour of an action seeking change in an easement or the way it is exercised every time a material business reason arises. It will not rule so if a requested change will cause a disproportionate injury to the benefitted property. When deliberating on that matter, the court should consider the socio-economic purpose of the benefitted property and the extent to which its usefulness improves as a result of establishing the easement/right of way. On the other hand, the court must weigh the benefits accruing to the owner of the benefitted property against the scale of new, serious business needs of the burdened property owner.<sup>[6]</sup> Only when the comparison suggests that the injury to the benefitted property is disproportionate, the action should be dismissed.

One must also note that a change in the easement or the way it is exercised will most certainly entail costs on the part of the owner of the burdened property, which are often sizeable given that changes normally require a compensation to be paid. According

to the policy pursued in judicial decisions, the amount of compensation is not linked to the improved usefulness of the burdened property. A compensation is intended to be a reward in lieu for the owner of the benefitted property. When determining the amount of compensation, the court examines the type and extent of injury, i.e. the degree of inconvenience suffered by the owner of the benefitted property as a result of the altered easement or a change in the way it is exercised. Depending on the factual status, the amount of compensation may be determined on the basis of the annual value of injury; such a calculation is to be made by a court-appointed appraiser where relevant expertise is required. As a rule, the court should award a compensation in the form of a one-off monetary payment which may be disbursed in instalments provided the amount is considerable and the owner of the burdened property cannot afford a one-off payment. A compensation awarded for a change in the way a transmission right of way is exercised may take into account the cost of carrying out the change. However, as the owner of the benefitted property may become unjustly enriched by that, the value of the improvement, for instance the cost of new parts replacing partially worn out parts, needs to be deducted from the costs (resolution of the Supreme Court of 2 June 2010, III CZP 36/2010, LexisNexis No. 2273458, OSNC 2010, No. 12, item 163, with glosses by: G. Matusik, *Rej.* 2011, No. 1, p. 115, and M. Warcinski, *PS* 2011, Nos. 7-8, p. 166).<sup>[7]</sup> Law commentators suggest that it is often very difficult to precisely determine the amount of due compensation. Therefore, courts may employ a rule whereby they award “an appropriate amount” determined upon their assessment and consideration of all facts of the case (Article 322 of the Code of Civil Procedure).<sup>[8]</sup>

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<sup>[1]</sup> Cf. Balwicka-Szczyrba Malgorzata, *Sasiedztwo nieruchomości. Komentarz [Property contiguity. Commentary]*, WK2014

<sup>[2]</sup> Ciszewski Jerzy (ed.), *Kodeks cywilny. Komentarz [Civil code. Commentary]*, 2nd edition, LexisNexis 2014; Gudowski Jacek (ed.), *Kodeks cywilny. Komentarz. Księga druga. Własność i inne prawa rzeczowe [Civil code. Commentary. Book two. Property right and other rights in rem]*, LexisNexis 2013

<sup>[3]</sup> Cf. Balwicka-Szczyrba Malgorzata, *Sasiedztwo nieruchomości. Komentarz [Property contiguity. Commentary]*, WK2014

<sup>[4]</sup> Piotr Zamroch, *Roszczenia właścicieli nieruchomości zajętych na potrzeby urządzeń przesyłowych [Claims of owners of properties taken for the needs of transmission facilities]*, *Nowa energia* – nr 4/2012

<sup>[5]</sup> *Ibid.*

<sup>[6]</sup> Gniewek Edward, *Kodeks cywilny. Księga druga. Własność i inne prawa rzeczowe. Komentarz [Civil code. Book two. Property right and other rights in rem]*, Zakamycze 2001

<sup>[7]</sup> Gudowski Jacek (red.), *Kodeks cywilny. Komentarz. Księga druga. Własność i inne prawa rzeczowe [Civil code. Commentary. Book two. Property right and other rights in rem]*, LexisNexis 2013

<sup>[8]</sup> Gniewek Edward, *Kodeks cywilny. Księga druga. Własność i inne prawa rzeczowe. Komentarz [Civil code. Book two. Property right and other rights in rem]*, Zakamycze 2001