

SCIENTIFIC JOURNAL

**HIGHER ECONOMIC - SOCIAL SCHOOL IN
OSTROLEKA**

4/2019(35)

<http://www.sj-economics.com/>

Łomża, 2019

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PUBLISHER
HIGHER SCHOOL OF AGRIBUSINESS IN LOMZA
18-402 Łomża, ul. Studencka 19, tel./fax. +48 86 216 94 97
www.wsa.edu.pl



Punkty Informacji Europejskiej w Ostrołęce
Europe Direct



Publikacja wydana ze wsparciem
finansowym
Komisji Europejskiej w ramach projektu
Europe Direct

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HIGHER SCHOOL OF AGRIBUSINESS IN LOMZA
Łomża, 2019
ISSN 2391 - 9167

SCIENTIFIC JOURNAL – nr 4/2019(35)

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SOME ABNORMALITIES RELATED TO THE REAL ESTATE MARKET

Introduction

Transactions concluded as part of the real estate market, which is closely tied to business trading, are connected with a number of threats. The purpose of this study is to present selected abnormalities connected with the real estate market in the context of criminology, criminal law regulations, and civil law. The appearance of abusive clauses finding their way into agreements closing real estate deals will be addressed. Due to the fact that the real estate market is replete with transactions and irregularities associated with them, this study will only deal with those irregularities which, according to the author, are the most frequent and widespread.

Wiesław Plywaczewski indicates that scientific research pertaining to existing economic systems tend to focus on their purely economic aspects. Such research focuses predominantly on following the functioning of legal systems underlying economic systems. A noticeable phenomenon is the appearance of abnormalities and threats wherever economic factors are involved. Abnormalities appearing on the real estate market definitely follow the above-indicated pattern.

Organised criminal groups investing money in real estate

In the year 2008, one of the top-priority tasks of the Central Investigative Office and the Police Headquarters was to combat, detect, and reveal criminal activities related to organised criminal groups whose activity was based on introducing illegally obtained money into official circulation. Areas which are associated with the greatest risk of such money laundering have been identified. Due to their characteristic features, those areas are associated with the greatest risk of abnormalities appearing. The real estate market is a key problem area in this context. Recently, the real estate market has become somewhat stagnant as far as transactions are concerned while at the same time there have been more and more investments in real estate made by organised criminal groups in order to

launder ill-gotten money. Said market is particularly appealing due to low investment risk and the ease with which real estate thus acquired can be traded at a later date.

Ill-gotten money is used to finance the day-to-day activity of organised criminal groups or merging money from undisclosed sources with lawfully acquired money. Organised criminal groups make investments in, among other things, precious metals (mostly gold), works of art, and real estate. Some such money is used for bribing state officials. The crime regulated in the provision of art. 299 of the Penal Code (Dz.U. 1997.88.553 with amendments). This, in turn, is aimed at facilitating negotiations related to concluding agreements and contracts and purchasing consumer goods, including real estate (Hołyst 2004). The sheer scale of money laundering is difficult to determine due to a criterion which will be used in such research (Mazur 2014).

Unfavourable disposal and the property of others in the context of some ways of obtaining real estate under false pretences

Polish criminal law addresses fraud (classically understood) in Article 286§1 of the Criminal Code and distinguishes that definition from definitions of particular types of fraud established on the basis of their object or mode of influence indicated in Articles 297, 298, and 287§2 of the Criminal Code. It should be pointed out here that one of the oldest features of crime is its changeability. The pace of such changes keeps increasing and such changing realities cause various problems with crime classification. Crime may be complex but it may also be simple. This depends on the best way to disguise such criminal activities as legal ones.

One should take note of the fact that the media quite often describe the actual state of affairs which gave rise to doubts as to unfavourable disposal of the property of another in relation to legal definition of a crime; those are sometimes not related to contemporary economic situation but are instead the consequence of the last tragic war or random occurrences which are closely correlated to documents pertaining to title of ownership to real estate. Over the course of many years, records have been kept in land and mortgage registers of people (as owners of real estate such as tenement houses) about whom there are no current data and it is not even known whether or not they are alive because they had vanished without a trace. It is here that one abnormality manifests itself via people who have knowledge about whether or not the owner of such real estate is alive or dead and, in the latter case, if there are any heirs. Usually such people resort to using counterfeit documents to impersonate a given individual, most often before a notary, with a view to misleading the notary as to who the real owner of the real estate in question is. Claiming to be the owner of such real estate, they take steps aimed at granting the power of attorney to sell the real estate or to sell it themselves.

It is indisputably true that such activity meets the legal criteria of crime provided for in Article 270 of the Criminal Code; however, the criteria indicated therein form only a portion of such criminal activity which also includes elements such as reaping financial benefits. The current interpretation of the law does not make it impossible to consider such actions a crime in spite of the fact that the deceived party and the aggrieved party are not one and the same individual. In the case of such activities, attention should be paid first and foremost to the way in which they are performed as it is related to misleading. Such illegal disposal of property may be seen in the actions of the notary who makes the power of attorney under which sale is authorised into a notarial deed and in the sale contract itself. All such activity of a perpetrator making use of forged documents lead to illegal disposal of real estate after a notarial deed authorising particular steps is acquired. Regardless of the situation, such disposal resulted in the aggrieved party suffering property damage (by means of it being diminished) as a result of both another acquiring the power of attorney to sell the real estate in question and actually selling it. The fact that the real owner's property rights are put in jeopardy as a result of their real estate being put up for sale without them knowing is also indisputable (Górniok 2002).

Illegal transactions involving historic real estate

While discussing illegal transactions involving historic real estate one should also mention illegal trading in works of art as illegal trading in works of art includes illegal trading in historic immovables (Zalasińska 2010). Monuments, including monuments consisting of immovable property, are defined in Article 3(1) of the Act On The Protection Of Monuments And The Care Of Historical Monuments (Dz.U. 162.1568 with amendments). A monument of immovable property is defined as “property, a portion thereof, or a real estate complex” therein.

It should be pointed out here that neither the Act on the Protection of Monuments and the Care of Historical Monuments nor the Criminal Code contain a legally binding definition of illegal trading in works of art so the issue of illegal trading in monuments of immovable property is also not addressed. According to B. Gadecki, the market for illegal works of art may not be considered exactly the same as the market for works of art acquired exclusively via theft. If such a correlation were to be made, issues such as illegal appropriation would be ignored. One should bear in mind that the term “illegal” may be used when articles obtained in violation of the law are traded, i.e. when the rightful owner is illegally deprived of their possession of and control over them (Gadecki 2012). It is very difficult to give specific examples here due to the fact that law enforcement bodies rarely divulge information pertaining to such activity to the general public (Pływaczewski 2014).

Sham trading in real estate transactions

As far as real estate is concerned, the issue of sham trading, in spite of quite extensive legal regulations addressing it and in spite of opinions pertaining to it expressed in the legal doctrine and judicial decisions, is in some of its aspects still the subject of a debate. The same is true about real estate transactions.

It is to be pointed out that sham agreements, also referred to as simulated agreements, were a problem even in ancient Rome. Such agreements were concluded with a view to fulfilling other purposes not expressly indicated therein.

As part of our legal doctrine, we have developed two mutually exclusive theories pertaining to sham trading as part of transactions involving real estate. The first such theory is referred to as the theory of intention and concerns itself with assessing the actual intentions of the parties concluding a sham agreement, while the second theory concerns the safety of trading. Several middle-way theories have also emerged, including one emphasizing the role of the actual significance of the agreement as regards its external manifestation and the actual hidden content.

Issues related to sham agreements have not changed greatly until the present day. A core feature of a sham transaction is the willingness and consent of both parties as to the fact that the agreement concluded by and between them is sham. Interpreting the provisions of Article 83 of the Civil Code, it should be pointed out that an activity may not be considered sham if only one of the parties is aware of the actual state of affairs. What is more, the fact that an agreement is sham may not be easily noticeable by third parties. Also, the parties have to be aware that their agreement is sham when concluding it. The matter of subsequent secret agreements is not a part of the issue at hand.

Consequently, the problem of an agreement being sham consists, in its essence, of the parties actually concluding two agreements. The first one of them is official and formal and it is in it that the sham activity is described and the second one is informal - it is in that second agreement that actual consequences of the agreement between the parties are described.

Current legal regulations following from the Civil Code are mostly concerned with the theory of intention and may be associated with three principles. The first principle: an agreement concluded by and between certain parties, i.e. the official agreement between them, may not be changed as far as the legal state following from it is concerned. The second principle is related to a situation where legal consequences ensue as a result from a secret agreement according to its provisions which are consistent with the law in force. The last principle is related to arrangements made by the parties. The secret agreement contained in those (which is consistent with the intentions of the parties) is invalid in light of the law in force (Breyer 1976). The Court of Appeal in Gdańsk took an identical standpoint as regards sham agreements in its decision taken in 2011 (Wyrok Sądu Apelacyjnego w Gdańsku I Izba Cywilna z dnia 31 maja 2011 r., I

ACa 1477/10, Legalis nr 746835).

As far as real estate transactions are concerned, their sham character is usually associated with donations. A very widespread practice is concluding sham agreements for leasing arable land which, in practical terms, amount to agreements transferring the title of ownership (Kępiński 1969).

Abusive clauses in real estate transactions

A characteristic feature of the contemporary real estate market is the great number of transactions concluded as part of it. Another such feature is the patterns into which production, commerce, and services fall - this has led to the emergence of standard agreement templates. Such templates are sometimes also used for concluding real estate transactions in order to speed them up. Without diminishing their importance in any way, it should be pointed out that they are very often used with a view to convincing a party to conclude such an agreement in spite of it containing provisions unfavourable for them. This leads to the party acquiring rights and obligations in a way unfavourable for them. It is because of that that the wording of such agreement templates is reviewed:

- by means of an abstract verification - this consists in reviewing the template itself without relating it to any particular transaction,
- by means of an incidental verification - this takes into account a specific transaction concluded using a given template.

As far as substantive law considerations are concerned, all legal regulations contained in Article 385 of the Civil Code are subject to protection against illegal contractual provisions.

In the case of agreements for intermediation in real estate trading, illegal contractual provisions are described in Article 385³ of the Civil Code, wherein the regulation expressed by Article 385¹ of the Civil Code is further developed. In said regulation, there is a list of the most frequent abusive clauses related to trading in real estate. In spite of the fact that said list is quite extensive, it should be emphasized that it is not *numerus clausus* and, consequently, is not exhaustive (Jesionowska 2005). *Abusive clauses most often encountered in agreements related to trading in real estate and having an impact on the emergence of abnormalities include:*

- *a clause introducing ambiguity as to the price of the object of the agreement, e.g.: "Payment shall be made in PLN according to the average rate of exchange of USD announced by the National Bank of Poland on the day when a given payment is made with the proviso that if the average rate of USD exchange in effect is lower than as of the conclusion date of the agreement, the rate in effect as of the conclusion date of the agreement shall be used." Such a provision amounts to an infringement of Article 385§1 of the Civil Code.*
- *Clauses introducing inequality regarding the rights and obligations of the*

parties to an agreement if the relevant final agreement is not concluded, e.g.: "The Buyer may terminate the agreement at any time observing a period of notice of seven days and the Buyer shall then be obliged to pay accrued interest and the contractual penalty for terminating this agreement amounting to 10% of the price of the object of the agreement." Such a provision amounts to an infringement of Article 385³, points 12 and 17 of the Civil Code

- *clauses pertaining to a deadline to be met by the developer as regards the relevant investment, e.g.: "the deadline for performing the agreement shall be considered met if the contractor notifies the ordering party of its readiness to carry out acceptance not later than within 60 days after such a date." Such a provision amounts to an infringement of Article 385³, point 2 of the Civil Code*
- *clauses limiting the rights of the buyer under warranty for defects of the premises, e.g.: "Defects evident as of the moment of purchase may not be the subject of a complaint." Such a provision amounts to an infringement of Article 385³, point 2 of the Civil Code*

This was made specific on the basis of a report drawn up by the Consumer and Competition Protection Office – UOKiK (Chochowski 2008).

Summary

The large number of transactions involving real estate is beyond doubt the source of numerous abnormalities that occur. As part of steps aimed at combating such phenomena, the number of informational messages aimed at raising the level of awareness of parties to transactions involving real estate should be increased and the legislator should consider introducing additional relevant economic sanctions.

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WYBRANE PATOLOGIE ZWIĄZANE Z OBROTEM NA RYNKU NIERUCHOMOŚCI

Streszczenie

Rynek nieruchomości, związany ściśle z obrotem gospodarczym, niesie za sobą szereg zagrożeń, jakie wynikają z dokonywanych na nim transakcji. Istotną przyczyną licznych patologii, występujących na tym gruncie jest znacząca liczba dokonywanych transakcji. W niniejszym opracowaniu przedstawiono wybrane patologie na tym gruncie w zarysie aspektu kryminologicznego, regulacji w zakresie prawa karnego jak również kwestii wynikających z prawa cywilnego. Uwzględniona została problematyka związana z pojawianiem się klauzul abuzywnych mających swój wyraz w umowach finalizujących transakcje dokonywane na rynku nieruchomości. W związku z tym, że rynek nieruchomości to obszar których sytuuje mnogość transakcji i związanych z tym nieprawidłowości, przedstawiono tylko te, które zdaniem autora występują najczęściej i należą do najpowszechniej występujących form nieprawidłowości w tym obszarze.

Słowa kluczowe: nieruchomości, rynek, patologie, klauzule abuzywne, zabytki

Summary:

Transactions concluded as part of the real estate market, which is closely tied to business trading, are connected with a number of threats. An important reason for numerous pathologies occurring in this area is the significant number of transactions made. The purpose of this study is to present selected abnormalities connected with the real estate market in the context of criminology, criminal law regulations, and civil law. The appearance of abusive clauses finding their way into agreements closing real estate deals will be addressed. Due to the fact that the real estate market is

replete with transactions and irregularities associated with them, this study will only deal with those irregularities which, according to the author, are the most frequent and widespread.

Keywords: real estate, market, pathologies, abusive clauses, monuments

JEL Classification K1, K10, K11, K14, K19