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SUPPLEMENTAL CLAIM IN TERMS OF CONSERVATIVE MEASURES

Introduction

Co-ownership causes numerous disputes in trading. It is a particular type of ownership, featured by the fact that it indivisibly appertains to several entities with regard to the same property. The indicated right is characterised by the unity of the object of ownership, the multiplicity of entities and the indivisibility of the right itself. It means that the same thing at the same time is owned by several people whose entitlements display the same content. Each co-owner shall be entitled to a share in co-ownership determined by a fraction within a fractional co-ownership ratio. A share in co-ownership is not an independent subjective right but constitutes a part of the joint right of ownership vested in several persons [Ignatowicz and Stefaniuk 2009, 658, 675]. The indicated fraction determines the scope of rights of an owner in both internal and external relations. The provisions governing the share volume or the manner in which it is calculated are *iuris cogentis* in nature and cannot be modified by the parties [Dadańska 2007, 111]. The volume of the share in co-ownership results from a legal event constituting the basis for the establishment of co-ownership, or from the Act. The share of a co-owner in the sense of volume is defined as a ‘fractional part’ in the sense of description as an ‘ideal’ part of the joint right. The shared co-ownership, due to the multiplicity of entities on the owner’s side, poses many difficulties in practice. A conflict of interests exists in the internal relationship between co-owners primarily within the management of the joint asset, the use thereof, as well as in the area of the dissolution of co-ownership. In each case, the volume of the shares is decisive. As long as the co-ownership has not been dissolved, the

use and disposal of the joint asset requires the consent of all or a majority of the co-owners [Gniewek 2006, 135-36]. In the statutory variant, the consent of all co-owners is required for the action exceeding the scope of ordinary management (Art. 199 of the Civil Code¹). The consent of the majority of co-owners is required for action exceeding the scope of ordinary management (Art. 201 CC). The co-owners majority is calculated according to the volume of shares. However, each co-owner can freely dispose of his or her share without the consent of the other co-owners (Art. 198 CC). The share disposition includes its disposal, liability, non-assertion, disposition upon death. As far as the use of an asset is concerned, each co-owner is entitled to co-own the common asset and to use thereof to the extent that is compatible with the co-ownership and use of the asset by the remaining co-owners (Art. 206 CC). It arises from the essence of co-ownership in fractions that each co-owner has an indivisible right to the entire asset. The exclusive right to a specific, physically separated part of the asset appertains to none of them. Thus, each co-owner can own the entire asset and use the whole thereof [Witczak and Kawalko 2012, 103]. Benefits and other income from the common property shall accrue to co-owners in respect of the share volume. In the same proportion, co-owners bear expenses and the asset-related costs (Art. 207 CC). Furthermore, at the stage of dissolution of co-ownership the legal significance of the share in co-ownership looms out, the settlement of the parties takes place according to the value of respective shares (Art. 212 CC). It also bears noting that, from the perspective of external relations, each co-owner can perform all actions and assert all claims which aim at preserving the joint right (Art. 209 CC) [Gniewek 2006, 136].

Both the case law and the related literature do not uniformly address the question whether the claim for remuneration for non-contractual use of a property asserted by one of the property's co-owners (Art. 224, para. 2 CC; Art. 225 CC) is the action aiming at preserving the joint right as referred to in Art. 209 CC. The practical significance of the above mentioned controversy is primarily expressed by means of determining the consequences and whether the objection of any of the co-owners results in the negation of a conservative measure feasibility. It neither is entirely clear whether conservative

¹ Act of 23 April 1964, the Civil Code, Journal of Laws of 2019, item 1145 as amended [henceforth cited as: CC].

measures may be undertaken against the co-owner of the same real estate or a joint asset.

The aim of this study is to illustrate the conservative measure-related concerns under Art. 209 CC. It primarily seeks to indicate the properties that distinguish conservative measures from all actions undertaken by the jointly entitled and, consequently, to consider the question whether filing a supplemental claim by a co-owner is a conservative measure.

1. Conservative measures

Pursuant to Art. 209 CC, each co-owner may execute all actions and assert all claims which are aimed at preserving the joint right. The above mentioned actions are referred to in the literature as ‘conservative measures’. They are assumed to display two basic features: firstly, their aim is to protect the right against any possible hazards. Secondly, the indicated protection concerns the joint right and is undertaken in the interest of all co-owners [Cisek and Górska 2013a, 362]. Therefore, it includes any measures which are to prevent the loss or depletion of the property right itself or its object, i.e. an asset [Księżak 2013, 1088]. As the Supreme Court has stated in one of its rulings, the essence of conservative measures lies in the protection of the joint right. The measures aimed at preserving the joint right may be factual in nature (e.g. the right of self-defence, permitted self-help), legal action (e.g. reaching a settlement), and above all a procedural action (instigating a recovery, negatory action, filing an application for the declaration of usucaption). While explaining the essence of a conservative measure, it should be noted that when a claim is filed, it may only be exercised in its entirety, and thus indivisibly. Conservative measures can be executed by each co-owner individually, independently of others or in agreement with other co-owners. Independent performance of conservative measures by a co-owner is permitted to the extent that is compatible with the benefit and interest of all co-owners. For this reason a co-owner’s action to retain only his or her share in the co-ownership² shall not be regarded as a conservative measure.

² Judgment of the Supreme Court of 30 October 2013, II CSK 673/12, Legalis no. 848115. See an approving gloss on this matter: Gniewek 2014, 971-81.

A co-owner who undertakes a conservative measure is not a legal representative of the other co-owners but acts on his or her own behalf, although the action is performed in the common interest of all co-owners [Cisek and Górska 2013a, 362]. On the claimant's side, there is no joint participation of all co-owners in such a situation, and the ones who participate in the court procedure act on the grounds of the subrogation principle – the right of substitution, which is based on the construct of indirect substitution [Krzyskowska 2018a, thesis 3].

In the doctrine and in the case-law there is a lack of uniformity in respect of the qualification of conservative measures. According to some representatives, conservative measures do not fall within the concept of management since they do not serve the purpose of asset management but constitute a method of a joint right protection [Gniewek 2013b, 701; Krzyskowska 2018b, thesis 1]. Such a possibility of qualifying conservative measures was also indicated by the Supreme Court in the Decree of 15 October 2015.³ Conservative measures regard the protection of the joint right, so they are not related to the management of the joint asset but they constitute actions exercised as a follow-up or preventive protection of the joint right. Bearing in mind such a purpose of the regulation contained in Art. 209 CC, it should be stated that it does not account for a special regulation of the management operations concerning a joint asset but independently addresses the issues concerning actions undertaken by each co-owner as well as asserting claims aimed at the protection of the joint right. A different view has also been voiced and according to it conservative measures constitute a kind of a common asset management. They may acquire the ordinary management-based action [Skowrońska-Bocian 2008a, 670; Rudnicki, Rudnicka, and Rudnicki 2016, thesis 1; Wojdył 2019, thesis 1] as well as the one that exceeds ordinary management [Filipiak 2009a, 98; Szadkowski 2016, 913; Wolak 2018, 10]. The proponents of the aforementioned view stress that certain actions concerning a joint asset, under ordinary conditions exercised within the framework of and in compliance with the general management principles, may be executed by each co-owner in the event of a special need or threat. Therefore, the normative meaning of Art. 209 CC is that in cases requiring actions aimed at preserving the joint right, each co-owner is permitted to undertake the afore-

³ Judgment of the Supreme Court of 15 October 2008, ICSK 118/08, Legalis no. 150553.

said measures without any observance of the provisions arising from Art. 199 and Art. 201 CC [Szadkowski 2016, 913; Uliasz 2004, 76].

Referring to the controversial issue as to whether conservative measures are actions falling within the scope of the joint property management, it should be accepted that conservative measures constitute a method of the joint right protection and are not included in the concept of management. Therefore, pursuant to the provisions described in the wording of Art. 209 CC, the legislator allows that, as a matter of urgency, in order to prevent damage to the common property, each of the co-owners is entitled to undertake them [Krzyskowska 2018b, thesis 3].

The practical significance of the above mentioned controversy is primarily expressed by means of determining the consequences evoked by the objection of one⁴ or a majority of co-owners⁵ against a conservative measure intended or undertaken by one co-owner. It has been assumed in the case-law and in compliance with some of the doctrine's views that the objection of other co-owners, or even only one of them, deprives a given co-owner of his or her competence to independently undertake his or her conservative measures.

However, according to a different opinion, the content of the standard in Art. 209 CC contradicts the position that some co-owners may oppose the contrastive actions undertaken by other co-owners. It has been submitted in the argumentation, which should be viewed as logical and resulting from a correct interpretation, that Art. 209 CC does not provide for the right of particular co-owners to object to an independent claim filed by one of them [Karnicka-Kawczyńska and Kawczyński 2000, 54; Księżak 2013, 1089; Wołak 2018, 13]. It has also been indicated that preserving the joint right is not the same concept as representing the remaining co-owners. The purpose of undertaking conservative measures is to protect the joint right and not to pur-

⁴ The Supreme Court assumed that the objection of even one co-owner excludes the competence of the others to undertake independent conservative measures in the form of a claim payment of the lease payment and issuing a joint asset, the resolution of the Supreme Court (7) of 14 June 1966, III CO 20/65, *Legalis* no. 46325.

⁵ Pursuant to the view voiced by the Supreme Court, the objection of the co-owners representing the majority of shares to an action intended by any of the other co-owners excludes the possibility to qualify it as a conservative measure.

sue the interests of the other co-owners, who do not necessarily have to be interested in protecting joint assets and, in particular, bearing the costs of maintaining a joint property and the movables. In such a situation, it cannot be concluded that a co-owner's objection could undermine the measures instigated in order to protect a joint asset [Krziskowska 2019, 19]. When the filed claim is by its nature intended to protect the joint right, the objection of any co-owner cannot be effective [Księżak 2013, 1090; Gniewek 2013b, 703]. Another matter, however, is to determine whether a given action is really a conservative one, and to establish the possible liability for damages caused to other co-owners in connection with the improper performance observed within the limits of the authorisation provided under Art. 209 CC [Księżak 2013, 1090].

In the aforementioned context, it is worth noting that under Art. 209 CC, one of the co-owners may file the claims listed in the provision not only against third parties, but also against co-owners, whereby the proceedings at law remain appropriate. The participation of further co-owners in the court procedure is not necessary.⁶ In this respect, the view is correct that the content of Art. 209 CC from the point of view of the subject matter provides for all actions and filing of all claims without limitation as to their type. From the functional point of view, it indicates the purpose for which an action is to be taken or a claim is to be asserted, i.e. to preserve a joint right, and from the subjective side, it indicates who may carry out such action or assert such a claim, indicating each of the co-owners. The lack of a definition of an individual whom a given action or claim may be directed against means that it may be undertaken against any person who violates a joint right, and thus against another co-owner [Krziskowska 2019, 17].⁷

⁶ Judgment of the Supreme Court of 25 June 1971, III CRN 137/71, Legalis no. 15515.

⁷ The practical meaning of this provision is illustrated by the example indicated by the author, where it happens quite often that some of the co-owners refuse to bear the costs of maintenance of a shared property and report that they do not use it, and specifically, they do not use the infrastructure located on it in the form of common lighting of a housing estate or building, hot water meters, waste bins located most often at the entrance to the common area or in staircases, refusing to pay them in part. The remaining co-owners, when threatened with termination of the contract by the management or supply of utilities, are forced to bear the indicated costs for their neighbours. In addition, if damage or destruction has already occurred, they must bear the costs of repair or purchase the missing parts. In such

2. Supplemental claims

Legally substantive protection of ownership is a system of claims to which an owner is entitled in the case of violation of his or her rights. The basic claims included in the aforementioned protection appertaining to an owner are recovery and negatory claims (Art. 222 and Art. 223 CC). They are applicable in the case of a permanent trespass on someone else's property. Such an offence may consist in either complete deprivation of an owner of his or her power over an asset or repeated violations of an owner's rights without depriving him or her of the power over an asset. The property right is also protected by supplemental claims (Art. 224-225 CC), the claim for settling the costs incurred by an owner on behalf of an asset (Art. 226 CC), and a claim for the purchase of land (Art. 231 CC). The functions of property rights protection may also be fulfilled by claims proffered in a suit, e.g. a declaratory action (Art. 189 of the Code of Civil Procedure⁸). However, in this case a legally substantive premise for such an action is that the claimant demonstrates a legal interest in determining the existence of a given right. Furthermore, there is a means of protecting the ownership of a real estate by bringing an action to determine the content of the land register with the actual legal state (Art. 10 of the Act on Land and Mortgage Register and on Mortgage⁹). Among the means of protection applicable indirectly to protect the ownership right one should also mention the provisions on demarcation proceedings, which are conducted when the land boundaries have become disputed, therefore in this sense they serve to protect the ownership

a situation, bringing an action against the unpaid co-owners, i.e. the actual shared property maintenance cost, should be treated as the performance of a legal action aimed at protecting the joint right.

⁸ Act of 17 November 1964, the Code of Civil Procedure, Journal of Laws of 2019, item 1460 as amended.

⁹ Act on Land and Mortgage Register and Mortgage of 6 July 1982, Journal of Laws of 2019, item 2204 as amended. According to the said provision, in the case of discrepancies between the legal status of a real estate disclosed in the Land Register and the actual legal status, a person whose right is not entered or is incorrectly entered or is affected by the entry of a non-existent encumbrance or restriction, may demand that the discrepancy be removed.

(Art. 29-37 of the Act on Geodetic and Cartographic Law¹⁰) [Gniewek 2006, 115-16; Filipiak 2009b, 115; Cisek and Górská 2013b, 377; Zbiegień-Turzyńska 2013a, 1115-116; Wolak 2018, 19].

Supplemental claims, otherwise known as settlement claims [Skowrońska-Bocian 2008b, 705; Ignatowicz and Stefaniuk 2009, 168] are provided for in Art. 224-225 CC. They include: a claim for the payment of remuneration for non-contractual use of assets, a claim for the return of benefits or their equivalent, as well as a claim for the compensation for damage caused by wear, deterioration or a loss of assets. The aforementioned claims, as their name suggests, are supplemental to a recovery claim and serve to compensate for the damage caused by the fact that an owner has lost control over an asset. The purpose and function of supplemental claims is therefore to provide an owner with adequate protection in case of his or her loss of power over an asset [Zbiegień-Turzyńska 2013b, 1126]. As the Supreme Court stated in one of its rulings¹¹ supplemental claims are linked to a recovery claim through a common origin and partly common premises. The reason for the indicated nomenclature is not only the tradition derived from the Roman law, which assumes that an object of a recovery claim is the return of an asset *cum omni causa*, but also linking the aforementioned claims with a recovery action. An unlawful deprivation of an owner of the right to possess an asset constitutes common grounds of supplemental claims and a recovery action. Their common prerequisites are: the claimant's entitlement to own an asset and the defendant's right to possess thereof. A recovery claim protects an owner in case of his or her deprivation of actual power over an asset. It allows him or her to restore the power over an asset in accordance with the content of ownership – but he or she is no longer allowed to compensate for the diminished value of an asset or for other violated interests of an owner.

The view that an owner with a debt recovery claim is entitled to supplemental claims has been recognised in the doctrine. However, supplemental claims are inapplicable in case of property infringement, which would justify the institution of a negatory action [Gniewek 2013a, 901; Zbiegień-Turzyńska 2013b, 1127; Wolak 2018, 20]. The thesis that supplemental claims spe-

¹⁰ Act on Geodetic and Cartographic Law of 17 May 1989, Journal of Laws of 2020, item 276 as amended.

¹¹ Decision of the Supreme Court of 15 April 2011, III CZP 7/11, Legalis no. 309831.

cified in Art. 224-225 CC are connected with the fact that the defendant exercises his or her right to possess an asset should be regarded as convincing. Therefore, in order to ‘complement’ a negatory action, only the common rules of civil law concerning unjust enrichment (if there is such enrichment) and liability for damages (most often delictual) shall be applied [Gniewek 2013a, 901]. Moreover, there is a different view according to which an owner entitled to supplemental claims filing is the one who has not been deprived of the property possession but whose property has been violated in such a way due to which a negatory claim appertains to him or her. This view was expressed in cases of remuneration for the use of an asset by an easement holder [Trzaskowski 2003, 139; Jędrejek 2006, 163-65; Orlicki 2016, 947]. The Supreme Court’s position on the indicated issue is inconsistent. Apart from the rulings accepting the view that the claims stipulated in Art. 224 and Art. 225 CC complement not only the debt recovery claim but also the negatory claims, there are also judgments in which the aforementioned possibility is denied.¹²

Supplemental claims are usually asserted together with a debt recovery or a negatory claim. The relationship between the claims in question is not indivisible. Thus, there are no formal obstacles to a separate supplemental claims filing. An owner of an asset can therefore only demand the release or remuneration for using thereof, without laying any debt recovery claim. In addition, supplemental claims, contrary to a debt recovery claim and negatory claims, may be traded independently. An owner may, for example, sell the claim for remuneration for the use of an asset or the return of the benefits regarding a certain period of time to a third party without transferring the ownership of a given asset [Zbiegień-Turzyńska 2013b, 1128; Filipiak 2009c, 124]. It is also assumed in the case law that a claim for remuneration for the use of assets is of a bonded nature and gets an independent existence when it arises, regardless of the claims protecting the property (Art. 222, para. 1 and 2 CC); therefore, it may be individually asserted, independently of a debt recovery

¹² Cf. Resolution of the Supreme Court of 17 June 2005, III CZP 29/05, *Legalis* no. 68980; resolution of the Supreme Court of 24 July 2013, III CZP 36/13, *Legalis* no. 703854; judgment of the Supreme Court in Warsaw of 27 November 2019, I ACa 96/19, *Legalis* no. 2272167; judgment of the Supreme Court of 9 March 2007, II CSK 457/06, *Legalis* no. 174234; resolution of 15 April 2011, III CZP 7/11, *Legalis* no. 309831.

or a negatory claim and is an independent object of trading. Thus, the loss of ownership over an asset does not result in the loss of the possibility to claim remuneration for using thereof during the period in which an owner was entitled to this right. It is prejudged by the argument that one of supplemental claims is the possibility to claim compensation for the loss of an asset, which may only be claimed if neither the ownership right nor the debt recovery claim is considered.¹³ Additionally, supplemental claims differ from a debt recovery claim in the length of a period of limitation. According to Art. 229 CC, supplemental claims shall be subject to a limitation period of one year from the date of return of an asset.

The regulation of supplemental claims is relatively binding in nature. It therefore provides for the possibility to differently stipulate the rules for settling the accounts between an owner and a holder of an asset under the contractual arrangements [Skowrońska-Bocian 2008b, 705]. Both in the doctrine and the judicature,¹⁴ there is no doubt that Art. 224 CC can be applied to non-contractual relations when an asset is found in the possession of a person who is not its owner. However, the indicated provisions do not preclude the interested parties themselves from settling accounts differently and thus are inapplicable if the parties have decided to establish mutual relations.

In contrast to recovery and negatory claims, supplemental claims are not objective in nature. The rules of settlement and liability under the non-contractual use of someone else's property depend on a subjective factor, which is good or bad faith. Accordingly, the legislature shall differentiate its decisions with regard to all supplemental claims. A *bona fide* possessor¹⁵ is treated differently than a bad faith holder.¹⁶ The legislator also provides for an

¹³ Resolution of the Supreme Court of 24 July 2013, III CZP 36/13, Legalis no. 703854.

¹⁴ Judgment of the Supreme Court of 28 November 1974, III CRN 287/74, Legalis no. 18426.

¹⁵ The *bona fide* owner alone is not obliged to pay for the use of a property and is not responsible for its wear and tear or its deterioration or loss. He or she acquires ownership of the benefits that have been detached from the asset at the time of its possession, and retains the civil benefits received if they have become due at that time (Art. 224, para. 1 CC).

¹⁶ The situation for a bad faith holder is difficult because, the obligations of the bad faith holder towards the owner are the same as those of the *bona fide* holder himself from the moment he learns of action for an asset delivery brought against him. However, the bad faith holder himself is also obliged to return the value of the benefits which he has not received due to poor resource management and is responsible for the deterioration and loss of the

intermediate state when, although the holder acts in good faith, he or she is aware of a debt recovery action instituted against him or her.¹⁷

According to a generally accepted *bona fide* view, there is such a possessor who due to justified circumstances believes that he or she is provided with the right actually exercised by him or her. It is pointed out that good faith is excluded not only by a positive message regarding the lack of entitlement but also by no message caused by negligence. A holder in bad faith, in turn, is the one who knows or should know on the basis of the accompanying circumstances that the right of authorship does not appertain to him or her. The presumption of good faith should also be borne in mind.¹⁸ An authoritative moment to assess the issue of the possessor's good faith is the state observed at the moment of his or her entering into the possession of an asset.

The basic claim included in the category of supplemental claims is the claim for the payment of remuneration for non-contractual use of assets. An appropriate criterion for settling the remuneration for using a property should be the amount payable by a possessor to an owner in the normal course of affairs if his or her possession was governed by the law. When it comes to the use of someone else's agricultural property, as a rule, the most reliable are the rates of an average ground rent in a given area.¹⁹ The amount of remuneration due to an owner for a non-contractual use of an asset is determined by the market rates for using an asset under certain conditions and the time length during which an asset is possessed by an addressee of a claim. However, the aforementioned remuneration is not divided into periodic benefits and cannot be vindicated for the future, such as alimony or a pension, as the

asset, unless the property would have deteriorated or would have been lost even if it had been in the possession of the rightful owner (Art. 225 CC).

¹⁷ However, from the time when the holder has knowledge in good faith of an action for delivery of the assets, he or she shall be liable to pay compensation for the use thereof and shall be responsible for their wear, deterioration or loss, unless the deterioration or loss occurred without his fault. He or she is obliged to return the benefits he or she has not used up since the above mentioned time, as well as to pay the value of those he has used up (Art. 224, para. 2 CC).

¹⁸ If the Act makes legal effects dependent on bad or good faith, good faith is presumed (Art. 7 CC). This presumption is touching, and the burden of proof of the holder's bad faith lies with the owner of the property (cf. Art. 6 CC).

¹⁹ Judgment of the Supreme Court of 23 May 1975, II CR 208/75, Legalis no. 18786.

periodic payment is not provided for by legislation but is a one-off payment for the entire period of the non-lawful use of an asset by its holder.²⁰ A claim for remuneration for using an asset and the amount of such remuneration do not depend on whether any damage has been suffered or benefit has been received by its owner. The amount of the remuneration payable to the owner is determined by market rates for using a given type of an asset and the time of possession by the holder.²¹

Moreover, supplemental claims include a claim for a refund of benefits or an equivalent payment thereof. As it has been assumed in the case law, the value of used-up benefits to be paid by an asset's owner pursuant to Art. 224, para. 2 and Art. 225 CC is calculated according to the prices existing in particular economic periods of using the asset.²²

The last form of supplemental claims is a claim for compensation for damage caused by wear, deterioration or a loss of a property. As it has been indicated in the case-law, a claim for remuneration for using an asset covers the regular wear and tear of an asset resulting from the correct use thereof, whereas the compensation for the use of an asset (deterioration) covers only wear and tear which goes beyond the consequences of its correct exploitation. Otherwise, one has to assume that an asset's holder in bad faith shall be obliged to pay twice, through which an asset's owner would be unjustifiably enriched.²³

3. Supplemental claims in terms of conservative measures

The following examples of conservative measures are indicated in the judicature: bringing a debt recovery action, which aims at regaining the lost power over an asset by co-owners and at the same time prevents the loss of

²⁰ Cf. Supreme Court (7) of 10 July 1984, III CZP 20/84, Legalis no. 24287; judgment of the Supreme Court of 7 April 2000, IV CKN 5/00, Legalis no. 92689; judgment of the Supreme Court of 6 October 2006, V CSK 192/06, Legalis no. 177288.

²¹ Judgment of the Administrative Court in Warsaw of 2 December 2008, IACa 135/08, Legalis no. 468033.

²² Judgment of the Supreme Court of 5 June 1984, III CRN 101/84, Legalis no. 24241.

²³ Judgment of the Supreme Court of 26 February 1969, II CR 13/69, Legalis no. 13865.

the right of ownership as a result of prescription,²⁴ negatory claim, application for demarcation of the real estate for prescription,²⁵ bringing an action pursuant to Art. 10 of the Act on Land and Mortgage Registers and on Mortgage in order to determine the content of the land register with the actual legal state,²⁶ request to evict a tenant from a given apartment.²⁷ In legal literature, the following examples are provided: selling an asset because of a risk of quick deterioration, dismantling a building with a threat of collapse [Filipiak 2009a, 98]. However, viewing a co-owner's claim to regain the entire fee due from the lease rent, remuneration for the use of an asset, return of the benefit equivalent, compensation and a claim for adjudging it in its entirety in the interest of him or her is debatable. According to the view voiced by the Supreme Court,²⁸ a conservative measure is basically the assertion of the entire rental claim by the co-owner who manages the shared asset. It has been rightly pointed out that a feature of conservative actions is that the asserted claim can only be executed in its entirety, and thus indivisibly. It has been stressed thereby that the indicated feature works well in case of a petitory or possessory claim. Doubts arise, however, in connection with the enforcement of liability claims with a divisible performance, in particular a financial one. This includes, for example, claims for payment of rent, tenancy, remuneration for the use of an asset without a legal basis, or financial compensation for damage or destruction of a shared property. Pursuant to Art. 379, para. 1 CC, claims can be divided into as many parts as there are creditors or debtors. It leads to a conclusion that claims with a pecuniary benefit may be vindicated divisibly, thereby not as part of a conservative action [Warciański 2013,

²⁴ Resolution of the Supreme Court (7) of 15 September 1960, I CO 16/60, Legalis no. 1079573.

²⁵ Judgment of the Supreme Court of 30 March 1962, 3 CR 237/62, Legalis no. 213787.

²⁶ Judgment of the Supreme Court of 7 April 2006, III CSK 114/05, Legalis no. 81414.

²⁷ Decision of the Supreme Court in Poznań of 17 August 1973, III Cr 1366/73, Legalis no. 46324.

²⁸ Cf. resolution of the Supreme Court (7) of 14 June 1965, III CO 20/65, Legalis, no. 46325. With reference to the aforementioned resolution, the Court of Appeal in Warsaw expressed the opinion that the active legitimacy resulting from Art. 209 CC also applies to claims for the payment of remuneration for non-contractual use of assets. The co-owner appearing in the indicated case acts in fact in the interest of all co-owners; judgment of the Administrative Court in Warsaw of 20 March 2015, I A Ca 1545/13, Legalis no. 1271478.

142]. As far as pecuniary claims are concerned, the problem of their assessment from the point of view of Art. 209 CC is very complicated. The analysis of the jurisprudence of the Supreme Court as regards the recognition of a claim filing for damages as a conservative action does not give a clear answer, either. According to one of the standpoints of the Supreme Court, a real estate's owner who manages the property, may, pursuant to Art. 209 CC, lay a claim for the entire pecuniary compensation for the damage caused by an illicit act, consisting in cutting down trees growing on the premises of a real estate, to be adjudged for his or her own benefit. In the opinion of the Supreme Court, the goal of a claim for damage repair consisting in a demand to restore the previous state of affairs is, from an economic point of view, a similar goal to that of a negatory claim; since the object of co-ownership still exists and the compensation granted can and should result in such development of a property that would lead to the removal or minimising the damage caused, the pursuit of such compensation is a conservative action covered by the standard of Art. 209 CC.²⁹ The Supreme Court expressed a different view, considering that vindicating claims for damages – in this case related to physical defects of a common property – cannot be classified as conservative actions within the meaning of Art. 209 CC.³⁰ In turn, the justification of the Supreme Court's resolution indicated that the co-owner of a real estate may seek compensation from the municipality in the full amount for the damage resulting from the failure to provide the entitled tenant with social premises. The Supreme Court stressed that withholding the execution of the eviction verdict until the social premises are provided by the municipality prevents the owners of the premises from exercising their ownership rights and generates tangible damage to them in the form of depriving them of the possibility to obtain income from rent receivables. Co-owners are not able to take action to restore their full sovereignty over an asset, so the only way to protect the joint right is to pursue claims for damages that are functionally similar to a rent claim.³¹ On the other hand, in another judgment, the Supreme Court assumed that asserting a claim for damages resulting from unjustified termination by the lessee of a lease agreement concluded for a fi-

²⁹ Judgment of the Supreme Court of 9 June 1998, II CKN 792/97, *Legalis* no. 42991.

³⁰ Judgment of the Supreme Court of 15 October 2008, I CSK 118/08, *Legalis* no. 150533.

³¹ Resolution of the Supreme Court of 3 December 2014, III CZP 92/14, *Legalis* no. 1163222.

xed period of time and covering the lost profits does not constitute a conservative action, and thus the claimant, as one of the lessors, is not entitled to vindicate a claim for damages in the entire amount pursuant to Art. 209 CC.³²

The case law does not uniformly resolve the issue of pursuing supplemental claims as conservative actions, including in particular laying the claim for remuneration for a non-contractual use of a real estate by one of the co-owners of the real estate (Art. 224, para. 2 CC; Art. 225 CC). In accordance with the first consideration, the claim for remuneration for non-contractual use of a real estate, which is a civil benefit from a property, is not aimed at preserving the joint right, but is a manifestation of exercising the subjective right [Uliasz 2004, 89; Panek 2020, 7]. The civil benefits³³ from a common property shall accrue to co-owners according to the volume of their shares (Art. 207 CC), which means that each co-owner is entitled to collect them and to pursue them in court proceedings. In the case of a multiplicity of creditors and divisibility of the benefit, the claim is divided into as many independent parts as there are creditors (Art. 379, para. 1 CC). Therefore, the claim in question cannot be regarded as a joint claim and qualified as a conservative action. As a consequence, a co-owner is not entitled to independently claim the remuneration in the part falling to another co-owner.³⁴ Asserting a claim for remuneration for using an asset and returning a benefit equivalent (Art. 224, para. 2 CC; Art. 225 CC) does not belong to conservative measures within the meaning of Art. 209 CC, as its aim is not to protect the law against a possible infringement and it is not aimed at preserving the joint right of ownership of assets. A remuneration claim for the use of an asset is of a bonded nature and obtains an independent existence when it arises, regardless of the claims protecting the property (Art. 222, para. 1 and 2 CC); it can be pursued independently of a debt collection or a negatory claim and is an independent

³² Judgment of the Supreme Court of 10 February 2017, V CSK 270/16, *Legalis* no. 1640605.

³³ Benefits in the meaning referred to in Art. 207 CC mean both natural benefits (Art. 53, para. 1 CC) and collected revenue on the basis of a legal relationship established with third parties – civil benefits (Art. 53, para. 2 CC), i.e. in particular the rental fee and the lease payment, whereas other income includes any revenue not constituting natural benefits, such as building demolition debris. Cf. Supreme Court decision of 26 March 2009, I CNP 121/08, *Legalis* no. 255275.

³⁴ Judgment of the Administrative Court in Poznań of 27 March 2014, IACa 80/14, *Legalis* no. 895209.

object of trading. The loss of ownership of an asset does not cause the loss of the possibility to claim remuneration for using an asset during the period in which its owner was entitled to the indicated right.³⁵ According to the second view, it has been found that the conservative actions involve the recovery of debts, constituting one of the items of assets brought about by a joint property. Although in such a case the action taken does not directly concern the right of ownership of the joint property, it also seeks to preserve the joint right.³⁶ The aforementioned stance underpins the view that a rental or tenancy receivable, like any other income that is provided by the shared property, is a component of a certain economic entity and is a joint receivable attributable to all co-owners, and the amounts in respect of which are included in a pool of joined income.

The lack of a uniform standpoint in the judicature on the issue of vindicating supplemental claims as conservative actions constituted the Supreme Court's resolution, which answered a legal question presented by the Court of Appeal in Warsaw. The content of the question concerned the fact whether the claim to regain remuneration for non-contractual use of a real estate asserted by one of the real property's co-owners is a measure aimed at preserving the joint right referred to in Art. 209 CC. When adopting the resolution, the Supreme Court took the position that a claim for remuneration for non-contractual use of an asset that brings tangible material benefits, is not aimed at preserving and protecting the common right of co-owners, as well as does not affect the integrity and the whole substance of an asset. Art. 209 CC provides for actions aimed at preserving the status quo of a joint property. Consequently, a co-owner's claim for remuneration for non-contractual use of a real estate, which is the object of co-ownership, by third parties, is not an act aimed at preserving the co-owners' joint right, even if the co-owners' intention was to use the money obtained from the execution of the indicated claim to improve the shared asset in terms of quality or quantity, and thus to increase the value of the shared right. Such investments do not fall under the premise of preserving the joint right. Individual rights of respective co-owners to use the benefits (according to the size of their shares), in the form of

³⁵ Judgment of the Supreme Court of 23 October 2014, ICSK 728/13, *Legalis* no. 1182670.

³⁶ Resolution of the Supreme Court of 6 June 2012, II CZP 25/12, *Legalis* no. 473613.

remuneration for non-contractual use of an asset by third parties, are autonomous and independent of other co-owners.³⁷

Final provisions

Summing up, it should be noted that the qualification of particular measures and the determination whether a given measure may be classified as a conservative measure falling within the limits of the content of Art. 209 CC pose the majority of problems and divergences in the views of both the representatives of the doctrine and the judicature. It results in questioning the right to sue respective co-owners of the joint property, applying for the award of the said claims in the full amount, i.e. the non-contractual use of the entire property, and consequently, the remuneration payable to another co-owner in the scope of his or her share in the joint right.

Finally, it should be pointed out that the essence of a conservative measure is the protection of the joint right, i.e. protecting the interests of all co-owners so that a claim can only be qualified as a conservative measure if, by its very nature, the claim may be filed in its entirety, thus indivisibly. It distinguishes a conservative measure from other actions instituted against the joint right. In this respect, the view expressed by the Supreme Court³⁸ that the claim asserted by one of the co-owners of a real estate for the non-contractual use of the indicated real estate is not an act aimed at preserving the joint right within the meaning of Art. 209 CC is worthy of approval.

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³⁷ Resolution of the Supreme Court of 15 November 2018, III CZP 50/18, Legalis no. 184649.

³⁸ *Ibid.*

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Supplemental Claim in Terms of Conservative Measures

Summary

The article elaborates upon the issue of conservative measures, Art. 209 CC, which stipulates that each co-owner may perform any actions and assert any claims aimed at preserving the joint right. Both the case law and the literature do not uniformly address the issue of whether the claim for remuneration for non-contractual use

of a property filed by one of the co-owners (Art. 224, para. 2 CC; Art. 225 CC) is an action seeking the preservation of the joint right referred to in Art. 209 CC. The author agrees with the standpoints that the claims for remuneration for non-contractual use of someone else's property are not aimed at preserving and protecting the joint right.

Key words: co-ownership, conservative measures, a supplemental claim, a non-contractual use of a property

Dochodzenie roszczeń uzupełniających jako czynności zachowawczych

Streszczenie

W artykule została omówiona problematyka czynności zachowawczych, art. 209 k.c., który stanowi, że każdy ze współwłaścicieli może wykonywać wszelkie czynności i dochodzić wszelkich roszczeń, które zmierzają do zachowania wspólnego prawa. W orzecznictwie i w piśmiennictwie nie jest jednolicie rozstrzygana kwestia tego, czy dochodzenie przez jednego ze współwłaścicieli nieruchomości roszczenia o wynagrodzenie za bezumowne korzystanie z tej nieruchomości (art. 224 § 2 k.c.; art. 225 k.c.) jest czynnością zmierzającą do zachowania wspólnego prawa, o którym mowa w art. 209 k.c. Autorka przychyliła się do stanowisk, że roszczenia o wynagrodzenie za bezumowne korzystanie z cudzej rzeczy nie zmierza do zachowania i ochrony wspólnego prawa.

Słowa kluczowe: współwłasność, czynności zachowawcze, roszczenie zachowawcze, bezumowne korzystanie z nieruchomości

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