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REVIEW OF COURT PRACTICE IN DISPUTES ON RECLAMATION OF A SHARE IN COMMON JOINT PROPERTY

Abstract

The article examines the current court practice in cases involving the application of civil sanctions in the form of reclamation of part of property by one of the co-owners in common joint ownership. The author analyzes the grounds for vindication of property and the types of property that may be reclaimed by way of vindication.

Based on the study of the arguments contained in the judgments of the Supreme Court, the author notes that certain legal positions are controversial and inconsistent with the provisions of civil and family law. Taking into account the author's arguments, the author determines the appropriate and effective ways to protect the rights of co-owners in case of alienation of common property by one spouse without the consent of the other spouse.

Key Words: *vindication, reclamation, part of the land plot, ideal share, joint ownership, spouses, sanction*

Introduction

In Roman law, a vindication action was a type of action in rem that was filed to protect a property right or other real right against any person who encroached on a real right by unlawfully taking possession of a thing. Vindication was aimed at protecting the owner's right against a person who illegally retains his or her property. The term "vindication" is derived from rei vindicatio (vim dicere to announce the use of force). Vindication is the reclamation of a thing by a non-possessing owner from a possessing party.¹

In Ukrainian law, this method of protection is regulated by Articles 387-390 of the Civil Code of Ukraine (hereinafter referred

to as the CC), but is not called "vindication", instead the terminology "reclamation of property from someone else's illegal possession" is used².

This method of protecting property rights is quite common in court practice and contains a large number of legal positions. This review focuses only on examples of vindication of such objects as a part of a land plot and an ideal share in a jointly owned common property.

In Ukraine, property may belong to persons under the right of joint partial ownership or under the right of joint common ownership. The property of two or more persons with the determination of the shares of each of them in

¹ Rym'ske pravo: pidruch. (Roman law: a textbook) Za red. O.A. Pidopryhory, Ye.O. Kharytonova, 2-e vyd. K.: Yurinkom Inter, 2009. P. 333

² Tsyvilnyi kodeks Ukrainy [Civil Code of Ukraine], adopted January 16, 2003. <http://zakon1.rada.gov.ua/laws/show/435-15>.

the right of ownership is joint partial ownership (art.356 of CC); the joint property of two or more persons without determining the shares of each of them in the right of ownership is joint common ownership (art. of 368 CC). Pursuant to Article 355 of the CC joint ownership is considered partial, if the contract or law does not establish joint common ownership of the property.

According to art. 60 of Family Code of Ukraine, property acquired by the spouses

during the marriage belongs to the wife and husband on the right of joint common ownership³. In the case of division of property that is subject to the right of joint common property, the shares of property of the wife and husband are equal, unless otherwise provided by agreement between them or a marriage agreement.

In this review, we will analyze the peculiarities of protecting the right of joint common ownership by vindication of shares.

I. Peculiarities of vindication of certain types of objects (parts, shares)

Article 387 of the Civil Code stipulates that the owner has the right to reclaim his property from a person who has illegally, without an appropriate legal basis, taken possession of it⁴. This article does not specify the types or characteristics of property that may or may not be reclaimed in a vindication action. However, Article 389 of the Civil Code already states that money and bearer securities in paper form cannot be reclaimed from a bona fide purchaser. This provision establishes the principle that things that are not individually identifiable, i.e., things defined by generic characteristics, *cannot be reclaimed* in a vindication action (Article 184 of the Civil Code). For a long period of time, this approach was established in the case law of general jurisdiction courts. However, over the past few years, the court practice has changed the view of the subject matter of vindication, expanding it.

Thus, in case No. 362/2707/19, the subject of consideration was a claim for reclamation of ½ of the ideal share of the disputed house and land plot, which belonged to the spouses on the right of common joint ownership and subsequently alienated to a third party without the consent of the other spouse. Resolving the dispute, the Supreme Court found that the consequence of satisfying the claim would be the entry of records on the state registration of the plaintiff's ownership of 1/2 of

the disputed house and 1/2 of the land plot, and the ownership of 1/2 of these residential house and land plot for PERSON_4.⁵

The following problems can be identified in this case: 1) at the time of recognition of the property as family patrimony⁶, it had already been alienated to a third party in whose name the ownership was registered; 2) not all the property was subject to reclamation by a court decision, but only a part of it, which at the time of going to court had not been allocated in kind; 3) in case of alienation of family patrimony under a contract without the consent of the other spouse, such a contract may be declared invalid by the court, which should result in restitution of everything received by the parties under such a contract; 4) vindication cannot be applied in this case, since the property alienated under the agreement was all the property transferred by the will of one of the spouses, who at the time of the agreement considered himself or herself the owner of the property - and vindication can only be applied in the case of alienation of property without the will of the owner, provided that there is no contractual relationship between the alienator and the acquirer.

As a basis for justifying the change in views on vindication, the Supreme Court noted that in its decision of November 14, 2018 in case No. 183/1617/16, the Grand Chamber of the

³ Simeinyi kodeks Ukrainy [Family code of Ukraine], adopted January 10, 2002. <https://zakon.rada.gov.ua/laws/show/2947-14#n314>

⁴ Tsyvilnyi kodeks Ukrainy [Civil Code of Ukraine], adopted January 16, 2003.

⁵ Postanova Velykoi palaty Verkhovnoho Sudu [Resolution of the Grand Chamber of the Supreme Court] u spravi No. 362/2707/19 (20.06.2023), accessed March 30, 2025. Yedynyi derzhavnyi reistr sudovykh rishen. <https://reyestr.court.gov.ua/Review/111908321>

⁶ In some civil law jurisdictions, for joint property of the spouses is referred to as family patrimony.

Supreme Court found that the purpose of a vindication claim is to ensure that the owner takes possession of the property of which he or she was unlawfully deprived. In the case of deprivation of the owner of possession of real estate, the said introduction consists in making a record of state registration of the owner's ownership of real estate (the principle of registration confirmation of ownership of real estate)". We can agree with such arguments, but with certain reservations. In this case, there was an expression of will by 1 of the co-owners, so there are no grounds for vindication. However, one of the spouses may challenge such an agreement on the grounds of lack of consent to its alienation or may demand that the value of a part of the property be taken into account when dividing the family patrimony. There are no grounds for vindication of such property under either family or civil law. In this case, only the entire agreement as a whole can be challenged and invalidated, not a part of it (i.e., an agreement cannot be invalidated as to a part of the object). The introduction into the owner's

possession may be the purpose not only of a vindication claim, but also of other remedies that result in the return of property to the owner (restitution and unjustified enrichment). Therefore, in this case, the co-owners had to take possession of the disputed property, but not on the basis of a vindication claim, but restitution.

However, despite the contrary well-established legal positions, the Supreme Court found that "*The allocation of a share from property in common joint ownership is provided for in Article 364, and the division of property in common joint ownership is regulated by Article 367 of the Civil Code of Ukraine. The above is possible after reclaiming 1/2 of the disputed real estate in favor of the plaintiff*"⁷. In fact, this means that as a result of the vindication of a part of the unallocated property, the plaintiff will acquire the right to allocate it, and thus will be able to register a part of the disputed property. However, it should be borne in mind that not all property can be divisible and therefore be spun off. Therefore, this position may not always be realized in practice.

II. Explanation of controversy of court position

The controversy of the position under study is confirmed by the view of the legal nature of joint ownership established in science and judicial practice: co-owners have the right to a share in the right of ownership of property, but not to the share in the property itself. In fact, this approach was also reflected in court practice before the adoption of the controversial legal position. Thus, in the decision of the Supreme Court of January 16, 2020 in case No. 661/2576/16-ц it is noted: it is impossible to reclaim a share from joint joint ownership, since common joint ownership applies to all property, so the court's conclusion on the reclamation of the property as a whole is correct).⁸

The existence of two dissenting opinions of judges in this case also indicates that this legal position is not indisputable. Thus, in the dissenting opinion of the Supreme Court Judge I.V. Tkach it is rightly noted: "However, a share

in the right of joint ownership is not a part of a material object and is not a right to a part of a material object, and, therefore, is not an actual possession of a part of a material object. Thus, a share of real estate in joint ownership cannot be the object of vindication. Reclamation of a part of property acquired by spouses during marriage is possible after it acquires the status of a separate material object, which is ensured by dividing such property in accordance with Article 367 of the Civil Code of Ukraine.⁹ In the joint dissenting opinion to the said Resolution the judges of the Supreme Court very accurately note that in this case it will be impossible to establish which part of the house should be transferred to the plaintiff in kind and which part should be left to the defendant, and therefore there will be obstacles to enforcement. In their opinion, the arguments for deviating from the established case law are not sufficiently

⁷ Ibid

⁸ Постанова Великої палати Верховного Суду [Resolution of the Grand Chamber of the Supreme Court] у справі No. 661/2576/16-ц (16.12.2020), accessed March 30, 2025. Yedynyi derzhavnyi reistr sudovykh rishen. <https://reyestr.court.gov.ua/Review/93834720>

⁹ Okrema dumka suddi Velykoi palaty Verkhovnoho Sudu Tkacha I.V. [Separate opinion of Judge of the Grand Chamber of the Supreme Court Tkach I.V]. у справі No. 362/2707/19, accessed March 30, 2025. Yedynyi derzhavnyi reistr sudovykh rishen. <https://reyestr.court.gov.ua/Review/112896759>

substantiated and do not indicate that the established and unchanged long-standing case law is wrong¹⁰. At the same time, the Supreme Court judges did not address the issue of the impossibility of reclaiming an unallocated share of a land plot. According to Art. 79⁽¹⁾ of the Land Code of Ukraine, a land plot may be an object of civil rights only from the moment of its formation (except for cases of sublease, servitude in respect of parts of land plots) and state registration of ownership of it¹¹. Therefore, it is impossible to reclaim a part of a land plot, i.e. a non-existent object.

In addition, the judges overlooked the peculiarities of protecting the right to common joint property of spouses. In particular, this case did not take into account the peculiarities of choosing effective ways to protect the rights of co-owners in joint joint ownership. Thus, in deciding on the effectiveness of the method of protecting the violated right by filing a claim for invalidation of the contract, the Grand Chamber of the Supreme Court found that filing a claim by a party to the contract or another person (interested party) for invalidation of the contract is an effective way to protect the violated right in the event that if such a claim is filed in order to return to one of the spouses whose rights have been violated property rights and/or a share in the marital property, including by recognizing the rights to a share, and/or simultaneously allocating a share in the procedure for dividing the marital property or establishing the procedure for using this property, etc. At the same time, the good faith of the acquirer under such an agreement is subject to establishment¹² (see the decision of the Grand Chamber of the Supreme Court of June 29, 2021 in case No. 916/2813/18 (paragraph 8.67)).

If a party to the agreement or another person (interested party) wants to receive the equivalent value of the property that was alienated without its consent, it has the right to file a claim for compensation in the amount of the share of the alienated joint property, which

is an effective way of protection without invalidating the transaction and applying restitution.¹³

Based on the foregoing, we can conclude that it is more correct, in our opinion, to focus not on the possibility of vindication of part of the property, but on choosing an appropriate and effective way to protect property rights. This may include, in particular, a demand for division of the family patrimony and recovery of compensation for part of the property alienated without the consent of the other spouse, rather than vindication. Therefore, in accordance with Article 16(2) of the Civil Code, the court had to replace the remedy with an effective and appropriate one, rather than satisfy the claim for reclamation of part of the property, which is impossible.

Therefore, this legal position requires careful study and revision, taking into account the norms of civil and family law.

The concept of expanded vindication laid down in court decisions will lead to complications in their implementation and application of sanctions provided for by the court decision, and ultimately will not lead to effective protection of the rights of co-owners.

In addition, the legal positions studied in this case law review do not comply with the established legislative provisions. Thus, by satisfying claims for reclamation of an unallocated part of a land plot or ideal shares of other real estate, a new object of civil rights is actually created on the basis of a court decision. Pursuant to Article 3280 of the Civil Code of Ukraine, property rights are acquired on the grounds not prohibited by law, in particular, from transactions, and pursuant to Article 11 of the CC, a court decision may be one of the grounds for the emergence of civil legal relations. However, the reclamation of property by way of vindication does not create a new object of civil rights, and ownership is not acquired over a new object, since the purpose of vindication is to reclaim the property belonging

¹⁰ Okrema dumka suddiv Velykoi palaty Verkhovnoho Sudu [Separate opinion of the judges of the Grand Chamber of the Supreme Court] Tkachuka O. S., Vlasova Y. L., Hrytsiva M. I., Prokopenka O. B. u spravi No. 362/2707/19, accessed 30.03.2025. Yedynyi derzhavnyi reiestr sudovykh rishen. <https://reyestr.court.gov.ua/Review/112803216>.

¹¹ Zemelnyi kodeks Ukrainy [Land Code of Ukraine], October 25, 2001. <https://zakon.rada.gov.ua/laws/show/2768-14#Text>

¹² Postanova Velykoi Palaty Verkhovnoho Sudu [Resolution of the Grand Chamber of the Supreme Court] u spravi No. 916/2813/18 (29.06.2021), accessed 30.03.2025. Yedynyi derzhavnyi reiestr sudovykh rishen. <https://reyestr.court.gov.ua/Review/98531899>

¹³ Postanova Velykoi Palaty Verkhovnoho Sudu [Resolution of the Grand Chamber of the Supreme Court] u spravi No. 125/2157/19 (22.09.2022), accessed 30.03.2025. Yedynyi derzhavnyi reiestr sudovykh rishen. <https://reyestr.court.gov.ua/Review/107706743>

to the owner that is in someone else's illegal possession. At the same time, the vindication claim reclaims the property that has fallen out of the owner's possession. The court decisions under study reclaim property that does not actually exist (a land plot that is not allocated in kind and does not have a cadastral number at the time of the decision or an ideal share that is an unallocated part of the joint property). Accordingly, in this case, such court decisions actually create new objects of civil rights. However, this does not comply with the provisions of Chapter 24 of the Civil Code, which provides for the possibility of creating property and unfinished construction objects

exclusively by a person, which in this case cannot be a court, since it is not vested with such powers under the Law of Ukraine "On the Judiciary" and the Civil Procedure Code and is not a party to civil relations in these cases, but is a judicial authority that administers justice in civil cases regarding legal relations between the plaintiff and the defendant.

Therefore, in our opinion, the legal positions under study contain controversial interpretations and application of the provisions of the Civil Code, as well as other acts of civil and procedural legislation, which requires a more thorough study and regulation of the objects of vindication at the legislative level.

Conclusion

Despite the centuries-long history of vindication, the grounds for its application and the objects of vindication are constantly updated, depending on changes in scientific views on the basic concepts of civil law, such as possession, things, property, property rights, etc. However, such changes do not always have a positive impact on the protection of property rights, as in some cases the enforcement of a

court decision is complicated by the lack of a clear mechanism of legal regulation in the field of vindication.

The expansion of the scope of vindication in court practice leads to constant changes in established legal positions, which negatively affects the unity of court practice and complicates their implementation.

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ОГЛЯД СУДОВОЇ ПРАКТИКИ РОЗГЛЯДУ СПОРІВ ПРО ВИТРЕБУВАННЯ ЧАСТКИ У СПІЛЬНІЙ СУМІСНІЙ ВЛАСНОСТІ

Анотація

У статті досліджується актуальна судова практика у справах про застосування цивільно-правових санкцій у формі витребування частини майна одним з співвласників у спільній сумісній власності. Досліджуються підстави для віндикації майна та види майна що можуть бути витребувані в порядку віндикації.

На підставі дослідження аргументів, наведених у судових рішеннях Верховного Суду відзначається спірність окремих правових позицій та їх невідповідність нормам цивільного та сімейного законодавства. З врахуванням аргументації автора визначаються належні та ефективні способи захисту прав співвласників у випадку відчуження спільного майна одним з подружжя без згоди другого.

Ключові слова: *віндикація, витребування, частина земельної ділянки, ідеальна частка, право спільної власності, подружжя, санкція*

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