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THE RIGHT TO EFFECTIVE REDRESS FROM A MUNICIPALITY FOR FAILURE TO PROVIDE SOCIAL HOUSING

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Abstract

Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms provides that every natural and legal person is entitled to the peaceful enjoyment of their possessions. No one shall be deprived of their possessions except in the public interest and subject to the conditions provided by law and the general principles of international law.

The primary purpose of these provisions is to protect property. By recognising that everyone has the right to the peaceful enjoyment of their possessions, Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms effectively guarantees the right to property, with deprivation of property permissible only under certain conditions.

These guarantees are not sufficiently implemented in national case law. Although municipalities are required to provide compensation (Article 18(3a) of the Act on the Protection of Tenants' Rights, Housing Resources of Municipalities and on Amendments to the Civil Code), the courts are too stringent in assessing the evidentiary requirements imposed on applicants. In the case of *Wyszyński v. Poland*, where the applicant was not awarded damages from the municipality for failing to provide social housing, the Court rightly noted that the domestic courts assumed that the applicant had failed to prove that the damage sustained was a normal consequence of the municipality's unlawful inactivity, even though two expert opinions were produced during the proceedings. In the case of *Broniowski v. Poland*, concerning property beyond the Bug River, it was clearly indicated that the taking of property without compensation in reasonable proportion to its value is generally considered disproportionate interference, and a total absence of compensation can only be justified in exceptional

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circumstances. It also appears essential, when assessing the existence of an adequate causal link, to rely on the knowledge and life experience of the adjudicating panel, applied appropriately to the circumstances of the case. The requirements as to the proof of damage should not be interpreted too strictly.

There is a need to liberalise evidentiary proceedings and make broader use of factual presumptions (Article 231 of the Code of Civil Procedure), as well as to limit the evidence required for substantiation, to ensure that the owner can effectively seek compensation from the municipality for failure to provide social housing.

Clear legislative intervention is necessary to address the defective court practices. It would be advisable to make an explicit procedural reference to the application of Article 322 of the Code of Civil Procedure in this category of cases, not only regarding the amount of damage but also concerning the fact that it occurred.

Keywords: ownership law, peaceful enjoyment of possessions, compensation, social housing, protection of tenants' rights, owner, municipality, effective protection, damage, remedy

INTRODUCTION

Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[1] provides that every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

This analysis employs dogmatic-formal and historical methods to reconstruct the main principles derived from the conventional right to the peaceful enjoyment of possessions. These principles are then compared with the interpretation of the concept of lost profits as presented in court decisions and legal doctrine, to demonstrate the main thesis that an overly strict interpretation of the concept of lost profits, when an owner seeks compensation from the municipality for failure to provide social housing, may lead to the violation of Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

Research on selected judicial decisions and European Court of Human Rights (ECtHR) judgments leads to the conclusion that, in such cases, there is a need to liberalise evidentiary proceedings and make broader use of the presumption of facts (Article 231 CCP), as well as to lend credibility to ensure that an owner can effectively seek compensation from the municipality for failure to provide social housing. *De lege ferenda*, to simplify evidentiary proceedings in such cases, it would even be advisable to reverse the burden of proof.

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[1] Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Paris on 20 March 1952, ETS No. 9; Garlicki, L., Hofmański, P., Wróbel, A., *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom 1. Komentarz do artykułów 1–18*, Warszawa, 2010, p. 329 et seq.

PEACEFUL ENJOYMENT OF POSSESSIONS AND THE LIMITS OF PERMISSIBLE INTERFERENCE: CONVENTIONAL AND CONSTITUTIONAL ASPECTS

The right to property is one of the most important rights in the European legal system. It is expressed on three levels: in Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, in Article 17 of the Charter of Fundamental Rights of the European Union, and in the national law of each Member State of the European Union.[2] According to Article 21(1) and (2) of the Constitution, the Republic of Poland shall protect ownership and the right of succession. Expropriation may be allowed solely for public purposes and for just compensation. Furthermore, pursuant to Article 64 of the Constitution, everyone shall have the right to ownership, other property rights, and the right to succession.

The Convention, which has a guarantee value, also sets the permissible limits of interference with property. In accordance with Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, any interference by public authorities with the enjoyment of possessions must be subject to the conditions provided by law. In particular, Article 1 second paragraph recognises that States have the right to control the use of property, making these rights conditional on exercising them through the application of 'laws'. Moreover, such interference must not only be lawful but also comply with the principle of proportionality. This concerns the so-called reasonable proportion of the means applied to the intended objective of any measure depriving a person of property.

As a result of the ECtHR case law, interference with ownership rights must not only constitute the implementation, both in fact and in principle, of a 'legitimate aim' in the 'general interest', but must also occur while maintaining a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the State, including measures designed to control the use of an individual's property. This requirement is expressed in the concept of 'a fair balance' which must be struck between the demands of the general interest of the community and the requirements for the protection of the fundamental rights of an individual.[3]

According to the ECtHR case law, it is necessary to determine whether the national legislator has struck 'a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.' This involves examining whether there is 'a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions.' To determine whether the taking of property maintains the required balance, it is necessary to assess whether it imposes

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[2] Tuora-Schwierskot, E., 'Prawo własności w prawie wspólnotowym a regulacje prawa krajowego', in: Stępień-Załucka, B. (ed.), *Konstytucyjne prawo własności – sposoby naruszenia i środki ochrony*, Warszawa, 2021, p. 1 et seq.

[3] ECtHR pilot judgment of 22 February 2005, *Hutten-Czapska v. Poland*, application no. 35014/97, https://hudoc.echr.coe.int/?i=001-68364 [accessed on 3 September 2024].

'a disproportionate burden'.[4] In making this assessment, the ECtHR considers the conditions for compensation for the loss.[5] In accordance with the established case law of the ECtHR, 'the taking of property without payment of an amount reasonably related to its value'[6] normally constitutes a disproportionate interference, and a total lack of compensation can be considered justified under Article 1 of the Protocol only in exceptional circumstances.[7] Furthermore, to meet the requirement of proportionality, compensation must be paid within a reasonable time.[8]

As indicated in the doctrine, the primary purpose of these provisions is to protect ownership. Recognition that everyone has the right to the peaceful enjoyment of possessions, in accordance with Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, essentially guarantees ownership rights, and deprivation of property is permissible only under specified conditions.[9] There are three rules derived from this regulation in the ECtHR case law. The first general rule expresses the principle of the peaceful enjoyment of property; the second, contained in the second sentence of the first paragraph, refers to expropriation and specifies the conditions for the taking of property; the third, expressed in the second paragraph, recognises the right of the Contracting State, *inter alia*, to regulate the use of property in accordance with the general interest. However, these rules are not distinct in the sense of being unconnected. The second and third rules are concerned with specific instances of interference with the right to the peaceful enjoyment of property and must therefore be construed in the light of the general principle enunciated in the first rule.[10]

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[4] ECtHR judgment of 21 February 1986, *James and others v. the United Kingdom* (CE:ECHR:1986:0221JUD000879379, paragraph 54). Importantly, Article 1 of the Protocol No. 1 to the European Convention of Human Rights does not provide for such compensation. Nevertheless, the ECtHR stated in its judgment that the lack of obligation to pay compensation would make the protection of the property rights be 'largely illusory and ineffective'. This way, the Court mitigated the omission in the text and stated that the necessity of compensation 'derives from an implicit condition in Article 1 of Protocol No. 1 read as a whole' (ECtHR judgment of 8 July 1986, *Lithgow and others v. the United Kingdom*, CE:ECHR:1986:0708JUD000900680, paragraph 109), https://hudoc.echr.coe.int/?i=001-57526 [accessed on 3 September 2024].

[5] ECtHR judgment of 21 February 1986, *James and others v. the United Kingdom*, op. cit.

[6] Article 1 of the Protocol to ECHR does not guarantee the right to full compensation, because the legitimate objectives of public interest may call for less than the reimbursement of the full market value. Moreover, the ECtHR grants a State a wide margin of appreciation in this domain (ECtHR judgment of 21 February 1986, *James and others v. the United Kingdom*, op. cit.

[7] ECtHR judgments of: 21 February 1986, *James and others v. the United Kingdom*, op. cit.; 9 December 1994, *Holy Monasteries v. Greece* (CE:ECHR:1994:1209JUD001309287, paragraph 71), https://hudoc.echr.coe.int/eng?i=001-57906 [accessed on 3 September 2024]; 23 November 2000, *The former King of Greece and others v. Greece* (CE:ECHR:2000:1123JUD002570194, paragraph 89), https://hudoc.echr.coe.int/eng?i=001-59051 [accessed on 3 September 2024].

[8] ECtHR judgment of 21 February 1997, *Guillemin v. France* (CE:ECHR:1997:0221JUD001963292, paragraph 24), https://hudoc.echr.coe.int/eng?i=001-58019 [accessed on 3 September 2024].

[9] Nowicki, M.A., 'Komentarz do art. 1 Protokołu nr 1 do Konwencji o ochronie praw człowieka i podstawowych wolności', in: *Wokół Konwencji Europejskiej, Komentarz do Europejskiej Konwencji Praw Człowieka*, 8th ed., 2021, Lex el., legal state as of 1 July 2021 [accessed on 6 February 2024].

[10] ECtHR judgment of 21 February 1986, *James and others v. the United Kingdom*, op. cit.; ECtHR judgment of 22 June 2004, *Broniowski v. Poland*, application no. 31443/96, paragraph 134, https://hudoc.echr.coe.int/eng?i=001-61828 [accessed on 3 September 2024]; Nowicki, M.A.,

It is also necessary to take into account that Article 31(3) of the Constitution of the Republic of Poland stipulates that any limitation upon the exercise of constitutional rights and freedoms may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health, public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights. In turn, Article 64 of the Constitution of the Republic of Poland protects the right to ownership, stating that everyone shall have the right to ownership, other property rights, and the right to succession. Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights, and the right of succession. The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right.

With regard to protecting tenants, Article 75 of the Constitution of the Republic of Poland stipulates that public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular by combating homelessness, promoting the development of low-income housing, and supporting activities aimed at the acquisition of a home by each person. The protection of tenants' rights shall be established by statute. In addition, in accordance with Article 76 of the Constitution of the Republic of Poland, public authorities shall protect consumers, customers, hirers, and lessees against activities threatening their health, privacy, and safety, as well as against dishonest market practices.

The Constitutional Tribunal's case law indicates that Article 64(1) and (2) of the Constitution lays down the principle of equal protection of property and other property rights for all. According to the Tribunal, 'other property rights' also include the right to rent residential premises and other rights relating to premises used to meet housing needs. Each of these rights, both of owners (landlords) and tenants, shall enjoy constitutional, though not identical, protection. There is usually a collision of these interests; however, treating this conflict simplistically by assuming that providing a certain degree of protection to one party must automatically reduce the protection of the other would be an oversimplification. The Constitutional Tribunal is fully aware of the difficulty in balancing the justified interests of owners and tenants and in finding the most appropriate solutions for these relations. This is especially true in the Polish context, where owners' rights were not respected for a long period, and the so-called public management of housing premises was in force for decades. This, along with other political and economic factors, led to a degradation of housing conditions unprecedented in Western European countries, the effects of which continue to impact not only owners but also tenants.[11]

'Broniowski przeciwko Polsce wyrok ETPC z dnia 22 czerwca 2004 r., skarga nr 31443/96', in: Nowicki, M.A., *Nowy Europejski Trybunał Praw Człowieka. Wybór orzeczeń 1999–2004*, Zakamycze, 2005, p. 1224.

[11] Constitutional Tribunal judgment of 19 April 2005, (K 4/05) https://ipo.trybunal.gov.pl/ipo/Sprawa?sprawa=3858&dokument=355 [accessed on 3 September 2024]; Constitutional Tribunal judgments of 12 January 2000 (P 11/98) https://ipo.trybunal.gov.pl/ipo/Sprawa?sprawa=2849&dokument=535 [accessed on 3 September 2024]; and 10 October 2000, (P 8/99), https://ipo.trybunal.gov.pl/ipo/Sprawa?sprawa=2841&dokument=1155 [accessed on 3 September 2024].

As the Constitutional Tribunal has held, it is the responsibility of the legislator to strive to harmoniously shape the legal position of owners and tenants so that it is possible to achieve the desired complementarity of these relations, rather than a relationship characterised by inevitable antagonism. The fees for the use of premises, including rents, are particular exponents of these relations. They should ensure that landlords cover the costs of maintaining and renovating buildings, as well as provide a return on capital (depreciation) and a fair profit, as statutory provisions cannot nullify one of the basic rights of ownership, which is to derive benefits from property.[12] At the same time, according to the Constitutional Tribunal, it is also necessary to take into account the justified interest of a tenant (lodger) and to create real mechanisms for their protection against the abuse of law by landlords. It is essential to build instruments that will support tenants who are in more difficult financial and life situations. This should not, as has occurred in the past, be done primarily at the expense of landlords, but should instead rely mainly on the deployment of special public funds.[13] One of such basic conditions for achieving the necessary balance between the protection of owners' rights and ensuring a secure situation for tenants in difficult circumstances is appropriate compensation.

ANALYSIS OF THE NATIONAL AND ECTHR CASE LAW

The ECtHR and Constitutional Tribunal case law imply the need to strike a 'fair balance' between the needs of the general interest of the community and the requirements for the protection of fundamental rights of individuals. At the national level, when resolving compensation disputes concerning damage caused by the failure to provide social housing to an evicted tenant, courts generally do not question the municipality's liability for damages. However, issues related to the award of compensation are problematic, mainly in the procedural aspect, i.e., proving the fact of sustaining damage. In accordance with Article 14(1) and (6) of the Act on the Protection of Tenants, Housing Resources of Municipalities, and on the Amendments to the Civil Code,[14] in the judgment ordering the vacation of premises, the court shall decide on the right to conclude a social housing lease

[12] Constitutional Tribunal judgment of 19 April 2005, (K 4/05).

[13] Constitutional Tribunal judgments of: 19 April 2005, (K 4/05); 12 January 2000 (P 11/98); and 10 October 2000, (P 8/99). In the judgment of 12 January 2000 P11/98, the Constitutional Tribunal assessed the situation in the light of the Convention and stated that the questioned system of rents regulation violated Article 1 of Protocol No. 1. The Constitutional Tribunal, also in the judgment of 19 April 2005, indicated many serious flaws of the system in force and noted that Act of 2001 in its current version 'does not provide for a satisfying and coherent mechanism balancing landlords' and tenants' interests'. In this area, the Constitutional Tribunal reminded the authorities that there was an urgent need to introduce provisions under which, after dozens of years of subsidising the State's housing policy, landlords would be able to earn 'a decent profit' from their property, and emphasised that the right to generate profit is one of the basic elements of ownership rights. However, the authorities have not taken any steps to adopt those suggestions up to now.

[14] Act of 21 June 2001 on the Protection of the Rights of Tenants, Housing Resources of Municipalities, and on the Amendments to the Civil Code, Journal of Laws 2002, No. 71,

agreement or on the lack of such a right in relation to the person subject to that order. The obligation to provide social housing rests with the municipality where the premises in question are located. When ruling on the right to conclude a social housing lease agreement, the court shall order the suspension of the execution of the decision to vacate the premises until the municipality submits an offer of a social housing lease agreement.

According to Article 18(1) and (2) of the Act, persons occupying premises without legal title are obliged to pay compensation every month until they vacate the premises. This means that, if the court rules to suspend the execution of the order to vacate the premises until the municipality provides social housing, the persons without legal title to the premises shall pay compensation covering the rent or other fees for the use of the premises that they would be obliged to pay if occupying premises from the stock of housing of the municipality under a social housing lease agreement. In this way, the legislator seeks to protect the rights of owners and ensure protection against eviction onto the street. However, the municipality is obliged to cover the difference between the compensation referred to in paragraph 3 and the compensation paid by the tenant. Under Article 18(5) of the Act, if the municipality fails to provide social premises to a person entitled to conclude a social housing agreement based on a court judgment, the owner has the right to claim compensation from the municipality in accordance with Article 417 of the Civil Code (Article 18(3a) of the Act). The owner's claim for compensation against the municipality provided for in Article 18(5) of the Act shall cover compensation for damage in full.[15]

Courts classify this type of claim as compensation based on Article 417 § 1 of the Civil Code. According to Article 417 § 1 CC, the State Treasury, a local government unit, or another legal person exercising authority by virtue of law shall be liable for damage caused by an unlawful act or inactivity in the exercise of public authority. Pursuant to this provision, the municipality is obliged to pay compensation only if the owner proves that they suffered damage as a result of the occupation of their premises by tenants who did not have legal title.[16]

As the Supreme Court indicated in the resolution of 7 April 2006, the claim of the owner of premises against the municipality referred to in Article 18(4) [currently Article 18(5)] of the Act of […] 2001 […] is a claim for damages. Pursuant to this provision, the municipality is obliged to pay compensation only if the owner proves that they suffered damage as a result of the occupation of their premises by a tenant without legal title. This type of damage involves lost profits due to the owner's inability to use their premises. The Supreme Court held in two resolutions: of 21 January 2011, III CZP 120/10,[17] and of 21 January 2011, III CZP 116/10,[18] that

item 733; Krzekotowska, K., Malinowska-Wójcik, M., *Ochrona praw lokatorów i mieszkaniowy zasób gminy. Komentarz*, 2nd ed., Lex 2021, commentary to Article 18 [accessed on 7 February 2024].

15 Krzekotowska, K., Malinowska-Wójcik, M., *Ochrona praw*…, op. cit.

16 Thus in the Supreme Court resolution of 7 April 2006, III CZP 21/06, Biul. SN 2006/4.

17 The Supreme Court resolution of 21 January 2011, III CZP 120/10, LEX No. 685563.

18 The Supreme Court resolution of 21 January 2011, III CZP 116/10, LEX No. 685372.

the municipality may be liable to the owner of premises under Article 417 CC for damage caused by failure to provide temporary social housing.

Furthermore, in the resolution of 13 December 2011, III CZP 48/11, the Supreme Court judged that 'the municipality shall be liable to the owner of housing premises under Article 417 § 1 CC for damage occurring in the period when Article 1046 § 4 CCP was in force in the wording adopted by the Act of 2 July 2004 amending the Act: Code of Civil Procedure and some other acts (…) as a result of failure to indicate, at the request of a bailiff, a temporary social housing for a debtor who is obliged to vacate, empty, and hand over the premises.'[19] The Supreme Court found that eviction from residential premises without offering the evicted person any housing is inhuman and cannot be permitted by law. For this reason, Article 1046 § 1 CCP provides for an obligation to provide the evicted debtor with temporary accommodation.[20]

It is also worth noting that the Constitutional Tribunal indicated in its judgment of 8 April 2010, P 1/08,[21] that as a result of an eviction judgment with the right to lease social housing, trilateral relationships are created between the owner of the premises, the evicted persons, and the municipality obliged to provide social premises. Persons entitled to lease social accommodation should be provided with it without delay. Moreover, premises subject to vacancy pursuant to an eviction judgment shall perform the function of premises leased by the former tenants under the social housing agreement until the municipality fulfils the obligation imposed by the court. Consequently, to enable the premises' function referred to by the Constitutional Tribunal to be performed for the former tenant waiting for social accommodation, the amount of compensation determined in Article 18(3a) of the Act was adjusted to correspond to the amount of rent for a social housing lease. However, the obligation to cover the difference between the fees established by the owner and the amount of social rent rests on the municipality that is obliged to provide social housing premises.[22]

On the other hand, the doctrine indicates that the principle of civil liability of the municipality should not be derived from Article 18 of the Act but from the general principles of the Civil Code, i.e. Article 417 § 1 and Article 363 § 2 CC. The municipality's failure to provide replacement accommodation constitutes an improper exercise of public authority, resulting in damage to the creditor of the lessee (owner of the premises). Thus, compensation for damage should cover the losses incurred and lost profits. In practice, it is possible to claim compensation equal to the rent that could have been collected from the premises that were not vacated from the date of

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[19] The Supreme Court resolution of 13 December 2011, III CZP 48/11, LEX No. 1070592.

[20] The Supreme Court judgments of: 12 September 2003, I CK 51/02, MoP 2007/16, item 901; and 5 August 2004, III CK 332/03, MoP 2007/16, item 901, as well as the Supreme Court judgments of: 26 March 2003, II CKN 1374/00, LEX No. 78829, and 28 April 2005, III CK 367/04, Biul. SN 2005/7, item 14.

[21] The Constitutional Tribunal judgment of 8 April 2010, P 1/08, Journal of Laws, item 488.

[22] Krzekotowska, K., Malinowska-Wójcik, M., *Ochrona praw*…, op. cit., commentary to Article 18.

the submission of an application for the provision of temporary accommodation to the municipality until the date of the actual eviction.[23]

It is also worth pointing out that the ECtHR has already examined this remedy in the context of general measures adopted at the national level regarding persons affected by the systemic problem identified in the ECtHR pilot judgment in the case of *Hutten-Czapska v. Poland*[24] and the judgment in the case of the *Association of Real Property Owners in Łódź and others v. Poland*.[25] Based on these cases concerning the systems of monitoring the levels of rent, the Court noted that the new rules in Article 18(5) of the Act of 2001, extending the scope of civil liability of municipalities for failure to provide protected tenants with social accommodation, enabled owners of premises to recover compensation for losses incurred on account thereof.

In the case of *Wyszyński v. Poland*, the Court found that allowing the tenant to remain in the applicant's apartment for more than four and a half years after the eviction order must be considered an interference with the applicant's property rights.[26] The Court held that the interference in question was, nevertheless, in accordance with national law and pursued a legitimate objective, namely the protection of the public interest and the need to counter evictions 'onto the street'. Although the Court does not question the existence of a clear provision in the Act of 2001 providing for the right to compensation if the municipality fails to provide an entitled person with social accommodation, the claim based on that provision requires that all conditions of eligibility for compensation be fulfilled.

The ECtHR also judged similarly in other similar cases: *Wasiewska v. Poland*,[27] *Strzelecka v. Poland*,[28] and *Kołpaczewska v. Poland*.[29] The Court found the applications to be inadmissible because the applicants failed to exhaust the more effective domestic remedies available to them, namely an appellate measure clearly provided for in Article 18(5) of the Act of 2001. Moreover, in accordance with the Court's case law, a claim lodged against an individual cannot be treated as a remedy against an act issued by the State. Bearing in mind that applicants are required to use 'any procedural means that might prevent a breach of the Convention', the Court stated

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[23] Ibidem; Dziczek, R., 'Komentarz do ustawy o ochronie praw lokatorów, mieszkaniowym zasobie gminy i zmianie Kodeksu cywilnego', in: Dziczek, R., *Ochrona praw lokatorów. Dodatki mieszkaniowe. Komentarz. Wzory pozwów*, LEX 2020, commentary to Article 18.

[24] ECtHR judgment of 22 February 2005, *Hutten-Czapska v. Poland*, op. cit.

[25] Ibidem.

[26] ECtHR judgment of 24 March 2022, *Wyszyński v. Poland*, application no. 66/12, https://hudoc.echr.coe.int/eng?i=001-216357 [accessed on 3 September 2024].

[27] ECtHR decision of 2 December 2014, *Wasiewska v. Poland* (dec.), decision no. 9873/11, https://hudoc.echr.coe.int/eng?i=001-150572 [accessed on 3 September 2024].

[28] ECtHR decision of 2 December 2014, *Strzelecka v. Poland* (dec.), no. 14217/10, paragraph 44, https://hudoc.echr.coe.int/eng?i=001-150561 [accessed on 3 September 2024].

[29] ECtHR decision of 6 December 2016, *Kołpaczewska v. Poland* (dec.), no. 10872/11, https://hudoc.echr.coe.int/eng?i=001-170488 [accessed on 3 September 2024]. In the case, the applicant stated that she was not a lawyer herself and she acted upon the advice she had received from the municipality. The Court held that even if the applicant had been incorrectly informed by the municipality, the District Court, in its judgment of 9 September 2010, drew her attention to the fact that she was entitled to seek compensation pursuant to Article 18(5) of the Act of 2001 directly from the municipality. However, the applicant did not use this appellate measure and lodged her application directly to the Court.

that the applications were inadmissible for failure to exhaust domestic remedies in accordance with Article 35(1) and (4) of the Convention.

Therefore, what is of crucial importance in such cases is not the lack of an appropriate remedy but rather the failure to provide appropriate damages during the compensation proceedings. By guaranteeing such compensation, the State ensures that a 'fair balance' is struck between the demands of the general interest of the community and the requirements of the protection of an individual's fundamental rights.[30]

COMPENSATION FOR THE LANDLORD FROM THE MUNICIPALITY FOR FAILURE TO PROVIDE SOCIAL HOUSING

The issue of fair compensation for the landlord for failure to provide social housing to an evicted tenant is an important issue, as confirmed by the current Strasbourg Court case law.[31]

In national law, Article 361 § 2 CC lays down the principle of full compensation for property damage, both in terms of loss and lost profits.[32] Loss (*damnum emergens*) includes a decrease in assets or an increase in liabilities of the aggrieved party, i.e., actual damage to the property they own at the time of the event for which responsibility was assigned to a given entity. In turn, lost profit (*lucrum cessans*) covers that part of the property of the aggrieved party that did not increase their assets or decrease their liabilities, and this effect would have occurred if the causative event for which responsibility was assigned to a given entity had not taken place.[33]

It is assumed in the doctrine that the occurrence and amount of damage should be determined using the differential method, which requires assessing damage as the difference between the actual state of the aggrieved party's property at the time it is determined and a hypothetical state that would exist if the causative

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[30] ECtHR judgment of 22 February 2005, *Hutten-Czapska v. Poland*, op. cit.

[31] ECtHR judgment of 24 March 2022, *Wyszyński v. Poland*, op. cit.

[32] Czachórski, W., 'Ustalenie wysokości odszkodowania według przepisów kodeksu zobowiązań', *Nowe Prawo*, 1958, No. 4, p. 54, and No. 5, p. 24; Czachórski, W., *Zobowiązania. Zarys wykładu*, Warszawa, 1974, p. 71 et seq.; Ohanowicz, A., *Zobowiązania. Zarys według kodeksu cywilnego. Część ogólna*, Warszawa–Poznań, 1965, p. 74 et seq.; Szpunar, A., 'Zakres obowiązku naprawienia szkody', *Państwo i Prawo*, 1960, No. 1, p. 20; Szpunar, A., *Ustalenie odszkodowania w prawie cywilnym*, Warszawa, 1973, p. 218 et seq.; Szpunar, A., 'Rozważania nad odszkodowaniem i karą', *Państwo i Prawo*, 1974, No. 6; Winiarz, J., *Ustalenie wysokości odszkodowania*, Warszawa, 1962; Dąbrowa, J., 'Odpowiednie ograniczenie rozmiarów obowiązku naprawienia szkody na tle kodeksu cywilnego', *Państwo i Prawo*, 1968, No. 1, p. 91 et seq.

[33] Czachórski, W., *Prawo zobowiązań w zarysie*, Warszawa, 1968, p. 118; Radwański, Z., Olejniczak, A., *Zobowiązania – część ogólna*, Warszawa, 2012, nb 233; Szpunar, A., 'Ustalenie odszkodowania według przepisów kodeksu cywilnego', *Nowe Prawo*, 1965, No. 4, p. 334 et seq.; Kaliński, M., *Szkoda na mieniu i jej naprawienie*, Warszawa, 2014, p. 188 et seq., Nesterowicz, M., in: Nowicka, A. (ed.), *Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu*, Poznań, 2005, p. 189 et seq., Kaliński, M., in: Olejniczak, A. (ed.), *System Prawa Prywatnego. Tom 6. Prawo zobowiązań – część ogólna*, Warszawa, 2009, p. 11.

event had not occurred.[34] Its characteristic feature consists of taking into account all consequences of a given event for the aggrieved party's property, i.e., not only direct effects on particular assets but also further consequences for all assets constituting the aggrieved party's property. In turn, the determination of damage in the form of *lucrum cessans* requires demonstrating a high degree of probability of the loss of benefits in the given case.[35]

As indicated in the doctrine, it is difficult to demonstrate this kind of damage and its amount. Such damage is always hypothetical in nature and cannot be fully verified. However, the aggrieved party must demonstrate it with such high probability that, in the light of life experience, it is justified to assume that the loss of profit really occurred.[36] To determine the occurrence of damage and its amount, the actual state of the property after the causative event is compared with the hypothetical state, i.e., the state that would exist if the causative event had not occurred. In other words, the state of property before and after the harmful event is examined to detect the difference in the state of property (the so-called 'differential method').[37] Although the determination of damage in the form of lost profit is hypothetical in nature, the aggrieved party must demonstrate it with such high probability that it would justify, in the light of life experience, the assumption that the loss of profits actually occurred.[38]

Thus, in light of the national case law, it can be concluded that courts require that the loss of profit should be proved at a high level of probability, i.e., one that appears to be a natural consequence of an ordinary cause-and-effect relationship and not a result of extraordinary measures or coincidences,[39] but is almost certain. As the Supreme Court points out, damage in the form of *lucrum cessans* is always hypothetical in nature. What determines such damage is a high level of probability, bordering on certainty, of obtaining specific profits if the event causing the damage had not occurred. This distinguishes the obligation to compensate for damage in the form of lost profit from so-called potential damage, which consists in the loss of opportunity to obtain certain revenues. In other words, a claim for lost profits may be accepted only if the aggrieved party demonstrates, to a degree bordering

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[34] Cf. Kaliński, M., in: Olejniczak, A. (ed.), *System Prawa Prywatnego…*, op. cit., p. 82 et seq.; Duży, A., 'Dyferencyjna metoda ustalania wysokości szkody', *Państwo i Prawo*, 1993, No. 10, pp. 55–59; Jastrzębski, J., 'Dyferencyjna metoda ustalania szkody w sprawach reprywatyzacyjnych – krytyczne uwagi na tle orzecznictwa Sądu Najwyższego', *Przegląd Sądowy*, 2016, No. 3, pp. 7–17.

[35] Olejniczak, A., Kidyba, A. (eds), *Kodeks cywilny. Komentarz. Tom III. Zobowiązania – część ogólna, Komentarz do art. 361*, 2nd ed., LEX 2014, Appellate Court's judgment of 15 July 2015, I ACa 483/15; Koch, A., *Metodologiczne zagadnienia związku przyczynowego w prawie cywilnym*, Poznań, 1975, p. 48 et seq.

[36] Fuchs, B., 'Komentarz do art. 361 k.c.', in: Fras, M., Habdas, M. (eds), *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna (art. 353–534)*, Warszawa, 2018, Lex [accessed on 7 February 2024].

[37] Fuchs, B., 'Komentarz do art. 361 k.c.', in: Fras, M., Habdas, M. (eds), *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna (art. 353–534)*, Lex version, [accessed on 7 February 2024].

[38] Cf. Supreme Court judgment of 3 October 1979, II CR 304/79, OSNCP 1980, No. 9, item 164, with a gloss by Szpunar, A., *Państwo i Prawo*, 1981, No. 11–12, p. 142.

[39] Judgment of the Appellate Court in Gdańsk of 24 March 2021, V ACa 628/20, LEX No. 3280637.

on certainty, that they would have obtained those profits if the event that gave rise to the obligation to pay compensation had not occurred.[40]

In another judgment, the Supreme Court also refers to the demonstration of profits to an extent 'bordering on certainty so that, assessing the matter reasonably, one can state that the applicant would almost certainly gain profits within the meaning of Article 361 § 1 CC if the event for which the perpetrator of the damage is responsible had not occurred.'[41]

As indicated above, based on the interpretation of the provisions concerning compensation for damage, a court may find it difficult to recognise the fact of suffering damage and to prove its amount. In the Strasbourg Court case law, cases of this type, including their procedural aspects, are considered in the context of respect for the guarantees resulting from Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. This issue was the subject of the ECtHR pilot judgment in the case of *Hutten-Czapska v. Poland*.[42] The Court found that both the case of *Broniowski* and the case of the applicant, Hutten-Czapska, revealed the existence of a shortcoming in the Polish legal order as a consequence of which a whole class of individuals have been or are still denied the peaceful enjoyment of their possessions. This led to the statement that 'the deficiencies in national law and practice (…) may give rise to numerous subsequent well-founded applications.' Moreover, in both cases, the violation of law has originated in a systemic problem connected with the malfunctioning of domestic legislation and practice, caused by the State's failure to resolve the problem. The fact is that the applicant could not regain her property or obtain a decent rent for many years, not because of a defective judgment or decision but because of defective legislation.[43]

In the case of *Wyszyński v. Poland*,[44] in which the applicant did not obtain compensation from the municipality for failure to provide social housing based on the national law, the Court rightly pointed out that the courts had assumed that the applicant failed to prove that the damage he had suffered was a normal consequence of the municipality's unlawful inactivity regardless of the fact that two expert opinions were obtained in the course of the proceeding in this case. The opinions outlined how

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[40] Supreme Court judgment of 22 March 2019, IV CNP 43/17, LEX No. 2639461; Supreme Court judgment of 29 April 2015, V CSK 453/14, LEX No. 1675447; Supreme Court judgment of 23 October 2014, I CSK 609/13, OSNC 2015/10, item 122; Supreme Court judgment of 21 June 2011, I CSK 598/10, LEX No. 863906; Supreme Court judgment of 26 January 2005, V CK 426/04, LEX No. 147221; Supreme Court judgment of 10 April 1997, II CKN 92/97, LEX No. 1227958. Banaszczyk, Z., in: Pietrzykowski, K. (ed.), *Kodeks cywilny. Tom I. Komentarz do art. 1–449[10]*, Warszawa, 2011, Article 361, nb 2–3; Dybowski, T., in: Radwański, Z. (ed.), *System prawa cywilnego. Tom III. Część 1. Prawo zobowiązań – część ogólna*, Wrocław–Warszawa, 1981, p. 255; Kaliński, M., *Szkoda na mieniu…*, op. cit., p. 373 et seq.; Koch, A., *Związek przyczynowy jako podstawa odpowiedzialności odszkodowawczej w prawie cywilnym*, Warszawa, 1975, p. 166 et seq.

[41] Supreme Court judgment of 19 June 2008, V CSK 19/08, unpublished.

[42] ECtHR pilot judgment of 22 February 2005, *Hutten-Czapska v. Poland*, op. cit., ECtHR decision of 8 March 2011, *The Association of Real Property Owners in Łódź and others v. Poland* (dec.), application no. 3485/02, paragraphs 70 and 72, ECHR 2011, https://hudoc.echr.coe.int/eng?i=001-104329 [accessed on 3 September 2024].

[43] ECtHR pilot judgment of 22 February 2005, *Hutten-Czapska v. Poland*, op. cit.

[44] ECtHR judgment of 24 March 2022, *Wyszyński v. Poland*, op. cit.

much rent the applicant might expect if he rented out the flat on the open market. The first opinion took into account the state of the flat as it stood at the time, while the calculations in the second opinion were based on the assumption that the flat would be renovated in due course; the applicant had made clear his intention to renovate the flat before renting it out. The court held that on the basis of the provision relied on by the applicant, compensation could only be awarded if the applicant could prove that all relevant conditions had been met, that is, the existence of a damage, its exact amount, and the existence of a causal link between the event in question and the damage incurred. The court further considered that the applicant failed to prove that he would have managed to find a new tenant from whom he would receive a rental income, even if the tenant had moved out. The court underlined that the flat was in need of renovation and, in any event, it would not be rented out immediately after the tenant left it. The applicant lodged a cassation appeal against the unfavourable judgment of the district court. He relied, among other things, on the fact that in other sets of proceedings against the Municipality of Poznań, with the same factual circumstances, the courts had in the past ruled in favour of the applicants.

Although the Court pointed out that it is in the first place for the national authorities, and notably the courts, to interpret domestic law, it held that the requirements that the Polish courts expected the applicant to have met, namely to prove that he would renovate the flat and rent it, were in fact very difficult to fulfil and that their imposition amounted to an excessive burden, which in consequence led to the dismissal of his compensation claim. Thus, the Court was right to recognise that the requirements imposed on the applicant by domestic courts in the course of the proceedings for compensation essentially deprived the applicant of the right to be redressed for the damage he had suffered. There was no 'fair balance' struck between the means employed and the aims sought to be realised. The foregoing considerations were sufficient to enable the Court to conclude that there has been a violation of Article 1 Protocol No. 1 to the Convention.

In the case *Broniowski v. Poland*, concerning the property beyond the Bug River, the Court clearly stated that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportional interference, and a total lack of compensation can be justified only in exceptional circumstances.[45] In the application to the Court, Broniowski alleged that the Polish State failed to react to, and to resolve through legislative measures, the problem of the insufficient amount of real property to satisfy the housing needs of the former owners of property beyond the Bug River and it introduced laws that made it almost impossible for them to obtain real property from the State. He also claimed that by abandonment

[45] ECtHR judgment of 22 June 2004, *Broniowski v. Poland*, application no. 31443/96, https://hudoc.echr.coe.int/eng?i=001-61828 [accessed on 3 September 2024]. In the case *Broniowski v. Poland*, which concerned the issue of compliance of the statutory regime concerning a big number of people (circa 80,000) with the Convention, the Grand Chamber held for the first time that there was a systemic violation and defined it as a situation, where 'the facts of the case disclose the existence, within the Polish legal order, of a shortcoming as a consequence of which a whole class of individuals have been or are still denied the peaceful enjoyment of their possessions [in accordance with the Convention]' and where 'the deficiencies in national law and practice identified in the applicant's individual case may give rise to numerous subsequent well-founded applications.'

of sale of real property and hindering participation in tenders, the authorities practically prevented him from upholding his claim (Article 1 Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms). However, due to the fact that Broniowski's family had received a mere 2% of the compensation due under the legislation as applicable before the entry into force of the Protocol No. 1, the Court found no cogent reason why such an insignificant amount should *per se* deprive him of possibility of obtaining at least a proportion of his entitlement on an equal basis with other former Bug River residents.

The above analysis of the judgments implies that the requirements for demonstrating damage cannot be interpreted too strictly. As the Supreme Court pointed out in the judgment of 12 March 2013, III PK 64/12,[46] it cannot be required that the amount of the presumed profit be demonstrated with certainty (which is impossible) or with a probability bordering on certainty. The distribution of the burden of proof is related to the degree of risk that the event providing profit will not occur. In typical and repetitive situations in which the expected profits usually materialise, the risk of failing to obtain them is small; therefore, the burden of proof on the person claiming compensation cannot be too rigorous. All factual and legal circumstances should be assessed, and if necessary, the court should use the option provided for in Article 322 of the Code of Civil Procedure.[47]

DE LEGE FERENDA CONCLUSIONS

The above analysis of the national courts' judgments indicates that courts are too rigorous in their interpretation of the concept of lost profits in cases concerning landlords' claims for compensation from municipalities for their failure to provide social housing. This practice results in a violation of Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

The research on selected court judgments also proves that the courts did not present comprehensive justification for dismissing claims due to failure to demonstrate the fact of damage and its amount. The courts also required that the landlords claiming compensation from the municipalities demonstrate the loss of profit with a level of probability bordering on certainty, which is a challenging task and usually resulted in the dismissal of the claim.

Therefore, it would be advisable to lower the evidentiary requirements for landlords in demonstrating the loss of *lucrum cessans*. Such liberalisation may include the possibility of wider use of factual presumptions (Article 231 CCP) or lending credibility by courts within the assumed hypothetical factual state. *De lege ferenda*, to simplify the evidentiary proceedings in such cases, it would be advisable to reverse the burden of proof to ensure effective protection of the owners' rights in accordance with Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. In this particular case, derogation from

[46] Supreme Court judgment of 12 March 2013, III PK 64/12, LEX No. 1360271.
[47] Ibidem.

the general principle of *onus probandi* would mean that under Article 243 of the Code of Civil Procedure, the observance of the detailed provisions concerning evidentiary proceedings is not necessary whenever statute provides for substantiation instead of proof. Thus, the municipality, when questioning the fact of damage, would be obliged to prove that the damage is overstated or that it did not occur.

In order to overcome the defective practice of the courts, clear legislative intervention is necessary. It would also be appropriate to make an explicit procedural reference to the application of Article 322 CCP, pursuant to which, in cases concerning compensation for damage, income, return of unjust enrichment, or benefit under a life annuity contract, if a court finds that precise proof of the amount of the claim is not possible, extremely difficult, or obviously pointless, it may award an appropriate sum in accordance with its assessment based on the analysis of all circumstances of the case.

A narrow interpretation of this provision still prevails in case law, as it is considered that in cases concerning compensation, the principle is that the plaintiff is obliged to demonstrate the damage suffered and its amount (Article 6 of the Civil Code). Only when the damage is demonstrated, but proving its exact amount is impossible or too difficult, can Article 322 CCP be applicable.[48] *De lege ferenda*, it would be advisable to broaden the scope of this provision and apply it in cases concerning the demonstration of the fact of damage suffered, not just the amount.

The recommendations made are further strengthened by the arguments derived from the ECtHR judgment in the case of *Wyszyński v. Poland*, where the courts assessed evidentiary requirements too strictly and refrained from utilising possibilities arising from, for example, factual presumptions, principles of life experience, or the application of Article 322 CCP, as well as drawing logical conclusions from expert opinions.

Moreover, it would be advisable to abandon the excessively rigorous interpretation and expectations of courts regarding the demonstration of damage by applicants, including the expectation that the damage must be shown as a normal consequence of the municipality's inactivity to an extent bordering on certainty.[49] As a result,

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[48] Traditionally, the requirement for the application of this provision in a case concerning compensation for damage is the occurrence of damage; Supreme Court ruling of 23 May 1980, III CRN 51/80, LEX No. 8237; Supreme Court judgment of 12 October 2007, V CSK 261/07, LEX No. 497671.

[49] The courts argued that the applicant did not prove that he could have rented out the apartment to another person and make a profit from it, but also failed to prove when the apartment would have been ready for lease as it was necessary to consider that it required renovation. Therefore, even though the courts recognised that the municipality's failure to provide social housing to a tenant constitutes an omission that can be grounds for compensatory liability, they assessed the normal consequences of the damage too rigorously. The District Court found that the applicant did not prove that, if the municipality had provided social housing, he would have received rent for his apartment, as he failed to prove that he would have rented it out. Furthermore, the court stated that even if it were assumed that the apartment would have been renovated and leased, the applicant did not indicate the date from which he would have received a rent. The damage claimed might have occurred only after the completion of renovation works. The ECtHR found that the requirements that the District Court expected the applicant to have met, as formulated in the judgment of this court, namely to prove that he would renovate the flat, how long the renovation works would take and that he would rent the flat after renovation were in fact very difficult to fulfil and that their imposition amounted to an excessive burden,

although the national provisions in force allow for awarding compensation in the event of a municipality's failure to provide social housing, court practice imposes excessively stringent evidentiary requirements.[50] Refusal to award compensation in cases where the municipality's inactivity is demonstrated constitutes a violation of Article 1 of Protocol No. 1. Regardless of the interference with the right of ownership, the applicants cannot receive adequate compensation for the period during which tenants continue to occupy premises despite the eviction order. Therefore, in such cases, there is a discrepancy between the scope of evidentiary requirements expected by national courts and the guarantee of effective judicial protection.

To sum up, courts attach too much importance to procedures, forgetting that a civil proceeding is not an end in itself but is aimed at materialising and exercising substantive rights. The above-presented cases concerning compensation clearly show that they may involve violations of ownership rights or the peaceful enjoyment of possessions.[51] The system of civil procedure law cannot be perceived and applied in isolation from constitutional and conventional principles. It must not be forgotten that the aim of a civil proceeding is to adjudicate while maintaining respect for human rights guarantees.[52]

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which, in consequence, led to the arbitrary dismissal of the applicant's compensation claim. ECtHR judgment of 24 March 2022, *Wyszyński v. Poland*, op. cit.

[50] As to the amount of damage, the Court notes that in the course of the national proceeding two expert opinions were produced. They specified the amount of damage that the applicant could expect before and after the renovation of the apartment. In spite of this fact, the District Court held that the applicant did not prove whether and from what time he would have been able to obtain the rent that the expert calculated for the lease after renovation. However, the justification of the District Court judgment did not explain on what grounds the court refused to award compensation corresponding to the lower amount calculated for the lease of the apartment before renovation. ECtHR judgment of 24 March 2022, *Wyszyński v. Poland*, op. cit.

[51] Vollkommer, M., 'Einleitung', in: *Zöller. Kommentar zur Zivilproezessordnung*, 29th ed., Köln, 2010, p. 19.

[52] Łazarska, A., *Rzetelny proces cywilny*, Warszawa, 2012, p. 374 et seq.

Fuchs, B., 'Komentarz do art. 361 k.c.', in: Fras, M., Habdas, M. (eds), *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna (art. 353–534)*, Warszawa, 2018.

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