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## **RISK RELATED TO INVESTING IN ENCUMBERED REAL ESTATE**

### **Summary**

*The aim of the paper is to underline the risks associated with investing in the so called encumbered real properties, that is the risk involved in purchase of a real property with tenants, easement of passage or transmission, a latent legal defect, being a historical property, property at a bailiff's auction, or divested by a debtor.*

**Key words:** *investing, encumbered property, investment risk*

### **Introduction**

Investing on the real estate market is a process involving allocation of capital in real properties to gain present or future financial benefits<sup>1</sup>. However, there is a risk associated with this investment, an investment in the so called encumbered real properties can be such an example.

The term of the encumbered real property is defined in one of the sentences of the Supreme Court, and pursuant to it, *an encumbrance of a real property is establishing the right which restricts the ownership right*<sup>2</sup>. From the above definition it results that a real property owner cannot dispose of his/her real property to the full extent, in connection with the fact that another person can submit claims interfering with the ownership right.

The aim of the paper is to underline the risk connected with investing in the so called encumbered real properties, that is the risk involved in

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<sup>1</sup> E. Kucharska-Stasiak, *Nieruchomość w gospodarce rynkowej*, Warszawa 2006, p. 192; E. P. Kozłowski, *Ekonomiczne podstawy rynku nieruchomości* [in:] *Nieruchomości w Polsce. Pośrednictwo i zarządzanie. Kompendium*, W. J. Brzeski, D. Cichoń, K. Jurek, B. Rogatko (eds.), Warszawa-Kraków 2007, p. 298.

<sup>2</sup> Resolution of the Supreme Court of 29 April 2008, III CZP 15/08.

purchase of a real property: with tenants, an easement of passage or transmission, a latent legal defect, being a historical property, at a bailiff action, or divested by a debtor.

### **1. A purchase of a real property with tenants**

The basic act prior to purchase of a real property is to verify its legal status, that is checking the mortgage and land register to establish the owner of the real property (the second section of the land and mortgage register), checking the third section for entries concerning rights, claims and restrictions with regard to disposing of the real property (an easement, life estate, initiating enforcement proceedings) and to obtain a certificate of no registration of residence of third parties from a municipal office. It is not applicable to transactions made at bailiff auctions. A bailiff is not obliged to notify about registration of third parties at the real property and for his/her own safety a buyer of a real property should check this fact prior to a purchase of a real property.

The land and mortgage registers are maintained to establish a legal status of a real property<sup>3</sup>. Their management belongs to jurisdiction of the regional courts. They may be also kept to establish a legal status of cooperative member's ownership right to residential premises or other intended use premises, and to establish the right to a single-family house in the housing co-operative. The land and mortgage registers are maintained separately for land properties, buildings on land in usufruct and self-contained premises and for cooperative member's ownership right to residential premises or the right to a single-family house in the housing cooperative. A notary public is obliged *ex officio* to send an excerpt from a notarized deed containing an application for an entry in the land and mortgage register with the documents being the basis of the entry within three days from the date of drawing up the act to the competent court for maintaining the land and mortgage register<sup>4</sup>. The scope of the information in the land and mortgage register is following:

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<sup>3</sup> Z. Bojar, *Księgi wieczyste* [in:] *Informacje w wycenie nieruchomości*, A. Hopfer (ed.) Warszawa 2005, p. 67; A. Małkowska, *Systemy informacji o nieruchomościach* [in:] *Prace z zakresu gospodarki nieruchomościami*, Scientific Journal no 687, Kraków 2005, p. 120; *Gospodarka nieruchomościami*, R. Żróbek (ed.) Olsztyn 2000, p. 49.

<sup>4</sup> Z. Bojar, *Księgi wieczyste* [in:] *Informacje w wycenie nieruchomości*, A. Hopfer (ed.) Warszawa 2005, p. 67.

The first section contains the following information:

- a current number of a real property,
- data which specify location of the real property, a place, a commune or a town, a name of a quarter, a street and an ordinal number,
- a record file number of the land and mortgage register under which here is a cadastral map extract and a land register excerpt or an excerpt from the land use change register,
- data which specify an economic character of the real property, that is e.g. arable land, an orchard, a forest, a developed or undeveloped plot, residential premises, a land plot in perpetual usufruct,
- a land area expressed in the metric units,
- a state while creating the land and mortgage register, consolidations and separations,
- specifying the property rights connected with ownership of the real property entered,
- a ratio share of the owner in the joint ownership of the real property,
- rectification of inconsistencies of excerpts with the data from the land and building register.

The second section includes the following information:

- specifying the owner, co-owner, a perpetual usufruct user, a perpetual usufruct co-user and a number of shares and a kind of co-ownership,
- current numbers of the real property,
- the purchase basis– the basis of the entry into the land and mortgage register (a notarized deed, confirmation of acquisition of the inheritance, a statement of acquisitive prescription of a real property, a decision of a province governor or commune board).

The third section includes the following information:

- any limited property rights encumbering the real property, namely: use, an easement, a lien, cooperative member's ownership right to residential premises, cooperative member's right to business premises, the right to a single-family house in the housing cooperative, excluding the mortgage,
- specifying personal and contractual rights, namely: tenancy, lease, a right of buy-back or a pre-emptive right, a life estate right),

- claims – transfer of ownership or perpetual usufruct, resulting from a decision of the board or a way of use from the real property by co-owners, excluding the right to the dissolution of co-ownership.

The fourth section includes the following information:

- a mortgage amount (in Arabic numerals and in words),
- a type and the date of payment of the debt secured by a mortgage,
- amounts of a capped mortgage established simultaneously with the ordinary mortgage for securing costs and incidental dues are entered separately under the ordinary mortgage amount,
- data about priority , if it was regulated in a special way and claims related to the mortgages,
- data about entering the mortgage securing claims of the mortgage bank into the register of securities for mortgage bonds.

Checking the legal status of a real property is the basic act prior to concluding a purchase and sale agreement. When a buyer purchases a real property with tenants residing permanently in it, he/she is exposed to problems connected with disposing of his/her ownership. The buyer purchasing the real property with tenants should realize that as an owner of the real property he/she is not entitled to evict them. In spite of a relatively simple procedure of the eviction, majority of the tenants are protected what is provided by the Act on protection of the rights of tenants, municipal residential resources and on amending the Civil Code<sup>5</sup>. Pursuant to this act a commune is obliged to provide a person who received an eviction order with a right to social housing, with alternative accommodation (art. 14. pt. 4 sub-point 1)<sup>6</sup>. It also orders to stay the eviction until a commune submits an offer of concluding an agreement of social housing tenancy (art. 14. pt. 4 sub-point 6). The special protection covers pregnant women, children under 13 years of age, pensioners and disabled pensioners, the unemployed and the disabled (art. 14. pt. 4 sub-point 1– 6). In relation to those persons the court cannot order the

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<sup>5</sup>Act of 21 June 2001 *on the protection of the rights of tenants, municipal residential resources and on amending the Civil Code*, Journal of laws no 71, item 733, i.e. of 8 September 2016, Journal of laws 2016 item 1610.

<sup>6</sup> Act of 21 June 2001 *on protection of the rights of tenants, municipal residential resources and on amending the Civil Code*, Journal of laws no 71, item 733, i.e. of 8 Sep 2016, Journal of laws 2016 item 1610, article 14 point 4 par 1.

eviction without the right to the alternative accommodation. The evictions are not enforced in the winter period, that is between 1 November and 31 March (art.16), regardless of the fact that the alternative accommodation was awarded by the court. The technical conditions which social housing must be met (art. 2. pt. 1 sub–point 5) and time that a commune needs to find the alternative accommodation often prolong a period of handing over the real premise property to the owner.

Amendments to the Penal Code act introduce protection for the tenants harassed by the so called cleaners of tenement house who are hired by real property owners to get rid of unwanted tenants who often have a legal title to the residential premises (a rent agreement)<sup>7</sup>. Use of unacceptable methods to force tenants to leave the premises, such as e.g. cutting off the utilities, locking entrance doors to a building, or disassembly of rails, is punishable by imprisonment to 3 years (art. 191 of the Penal Code).

Investment in the premise property inhabited by third parties can be a result of a deliberate action of a seller. In event of a deliberate concealment of the premise property occupation by third parties, one can talk about the so called deceit which is defined in art. 86 of the Civil Code.

A purchaser of a real property inhabited by tenants is exposed to additional costs. Before the eviction time the existing tenants can devastate the premises, and unfortunately, the real property owner is obliged to maintain it, including performance of running repairs, maintenance, and pursuant to the act on ownership of premises and the construction law to maintain premises in the technical condition which does not endanger safety of the persons residing in it.

## **2. A purchase of a real property with the easement of passage**

At the moment of making a decision about a purchase of a real property an important issue is existence or a necessity of establishing the right of easement which can be established by a court decision, a court settlement, a legal act, positive prescription or an administrative decision. The establishment of the easement in consequence of the legal act takes

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<sup>7</sup>Act of 6 June 1997 the Penal Code, Journal of laws no 88, item 553, i.e. of 5 July 2016, Journal of laws 2016 item 1237, article 191.

place by concluding an agreement in a form of a notarized deed. Failure to meet the condition of drawing up an agreement in a form of the notarized deed results in invalidity of the legal act. The easement is formed when a statement of easement establishment is made, and an obligatory entry into the land and mortgage register is not needed for its formation. When the establishment of the easement of access is made by a court decision, the owner of the real property is not obliged to submit a statement of intent in the form of a notarized deed. However, this decision should contain a detailed description of the content of the easement established and a geodetic map with a course of the easement marked.<sup>8</sup>

In order to obtain the easement right by positive prescription, someone else's real property must be used in fact and for a long-term, and this use consists in implementing land easement right in relation to fixed equipment located on the property, although its existence must be visible and it must be of artificial origin (it cannot be creation of nature). Pursuant to art. 292 of the Civil Code<sup>9</sup> an owner-like possessor may obtain the right of access by positive prescription only then when he/she made durable and visible equipment. The land easement can be acquired by positive prescription only in event of use of durable and visible equipment.

Acquiring the easement by administrative proceedings is defined by art.120 of the Real Property Management Act, pursuant to which an administrative decision about the establishment of the easement is issued by a district head. If there is a need to prevent danger, damage occurrence or inconveniences, which may arise for owners or perpetual users of the adjacent real properties in the consequence of expropriation or a development of the expropriated real property different from existing one, in the expropriation decision necessary easements are established, and an obligation of building and maintaining proper equipment precluding these events or circumstances. A person applying for expropriation is responsible for building and maintaining proper equipment<sup>10</sup>.

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<sup>8</sup> *Civil Code Vol I. Komentarz*, M. Gutowski (ed.) Warszawa 2016.

<sup>9</sup> Act of 23 April 1964 the Civil Code, Journal of laws no 16, item 93, i.e. of 9 February 2017, Journal of laws of 2017 item 459, article 292.

<sup>10</sup> Act of 15 October 2008 *amending the law on real estate management*, Journal of laws no 220, item 1412, article 120.

The establishment of the access easement is a traditional institution of the neighborhood right or the affirmative easement, based on use of a neighboring real property by making passage, crossing on it or a drive in case of farms. This easement can be established against the will of the owner of the dominant estate. In fact it is a limitation of a right of the owner of the encumbered real property to exercise the ownership right<sup>11</sup>. The basis of applying for establishing the access easement is lack of access to a public road. Determining the access should be preceded by an opinion of a chartered surveyor, enabling to evaluate making a road considering the real needs of the dominant real property and land topography, although it must be made with the minimum burden for the servient tenement. The land easement should be executed in such a way that use of the encumbered real property is hindered as little as possible. In case of drawing up an agreement, the administrative decision or a court decision about establishing the access easement you must reckon with incurring costs of compensation for a benefit of the real property owner on which the road course is determined. The compensation may be determined as a one time or periodic payment, although it can be also compensation in kind, namely in a form of crops proceeds. The owner of the encumbered property may waive this compensation, although this is a very rare situation ( e.g. in case of a family). If the easement loses significance by acquiring the access to a public road by the surface holder, the easement can be abolished<sup>12</sup>.

When a real property encumbered with the easement of passage is purchased, an investor should be aware that he/she is purchasing a real property with an encumbrance and striking off the established easement cannot be made. The easement of passage can limit the investor in a scope of the planned investment.

### **3. A real property encumbered with the transmission easement**

The transmission easement defined in art. 3051 of the Civil Code is that an entrepreneur can use the encumbered property in the defined range, in accordance with intended use of facilities for supplying and

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<sup>11</sup> *Civil Code Vol I. Komentarz*, M. Gutowski (ed.) Warszawa 2016.

<sup>12</sup> B. Baran, *Prawo cywilne dla zarządców nieruchomości* Issue 2, Warszawa 2012, p. 8.

discharging liquids, vapor, gas and electric power<sup>13</sup>. It means that the easement is established for the benefit of the entrepreneur, whereas the entrepreneur does not have to be an owner of the facilities, although he/she can hold a legal title to these facilities<sup>14</sup>. The transmission easement takes place by concluding an agreement in a form of a notarized deed between the parties, namely the real property owner and the entrepreneur of the dominant tenement network. When the owner of the enterprise to which the transmission facility belongs, changes, then the easement right passes to the new owner, likewise in the situation when the buyer of the facilities changes, the transmission easement period lasts for the entire period of operating of the enterprise, whereas at the moment of liquidation of the enterprise the easement expires automatically. When the transmission facilities are sold to another entrepreneur, there is no expiration of the easement. Irrespective of the transmission easement expiration time the entrepreneur is obliged to remove the facilities from the real property and leave it in the non-deteriorated condition. When there is a conflict between the parties and the owner does not agree to establish the easement, then the entrepreneur for whom it is necessary and justified to establish this type of easement is entitled to request for establishing the transmission easement for appropriate consideration. When the entrepreneur does not agree to sign the agreement, the owner is also entitled to make a request to the entrepreneur for establishing the transmission easement for appropriate consideration. When the owner of the real property refuses to conclude the transmission easement agreement, provisions of the Real Property Management Act are applicable additionally. Art. 124 of this act provides that *a district head performing a task in a scope of the government administration, may limit, by a decision, a manner of use of a real property by granting permission for installing on the real property: drain tile lines, cables and equipment for piping or distributing liquids, vapor, gases and electric power and installations of public communications and signaling, and including– other underground, ground and over–ground structures and equipment necessary for those cables and this equipment*

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<sup>13</sup> See among others: R. Golat, *Posiadanie służebności-istota i skutki prawne*, *Nieruchomości* 2015, no 10; S. Gurgul, *Ustanowienie służebności przesyłu a postępowanie wywłaszczeniowe z art. 124*, *GospNierU, Nieruchomości* 2017, no 1.

<sup>14</sup> Act of 23 April 1964 the Civil Code, *Journal of laws* no 16, item 93, i.e. of 9 February 2017, *Journal of laws* of 2017 item 459 article 3051 par. 1.



*to be used, if an owner or a perpetual usufruct user of the real property does not agree to it*<sup>15</sup>. This limitation takes place according to the local plan, and in case of its lack, in accordance with a decision on establishing location of the public purpose investment<sup>16</sup>.

A purchase of the real property encumbered with the transmission easement entails limitation in development of the real property and it constitutes an impediment to an access to the property.

#### **4. A real property with a latent legal defect**

Checking a legal status of the real property on basis of the entries in the land and mortgage register and the land and building register (cadastre) is an indispensable obligation of a purchaser of the real property. Pursuant to art.1 para. 1 of the land and mortgage registers and mortgage the entries regulate its legal status and they are maintained to establish the legal status of the real property<sup>17</sup>. The entries of a constitutive (law-making) character entered in the land and mortgage register are an exception from this rule.

There may be discrepancies between the entries disclosed in the land and mortgage register and the actual state of affairs and they are caused by invalidity of the agreement concluded earlier, finding the will, omission of the eligible or miscarriage of justice or an error of a notary public. In such cases protection acts under art.5 of the act on land and mortgage registers and mortgage. In event of the discrepancies between the legal status disclosed in the land and mortgage register and the actual state of affairs, the contents of the land and mortgage register resolves in favor of the one who acquired ownership or other rights in property by a legal act with an authorized person according to the content of the land and mortgage register (the principle of public credibility of land and mortgage registers).

The following rights are not subject to the protection by invoking the principle of public credibility of land and mortgage registers: the life

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<sup>15</sup>Act of 15 October 2008 *amending the law on real estate management*, Journal of laws no 220, item 1412, article 124.

<sup>16</sup> Act of 15 October 2008 *on amending the law on real estate management*, Journal of laws no 220, item 1412, article 124.

<sup>17</sup>Act of 6 July 1982 *on land and mortgage registers and on mortgage*, Journal of laws no 19, item 147, i.e. of 11 May 2017, Journal of laws 2017 item 1007, article 1.

estate right, the right of easement which was established by a decision of the competent government administration authority, the right of easement of access, transmission or the easement established in connection with shifting the boundaries while erecting a building or other facilities (art. 7 of the act on land and mortgage registers and mortgage), even when these rights have not been shown in the land and mortgage register, and would be established, the acquired real property will be encumbered with them. In other cases, the discrepancies disclosed between the entries in the land and mortgage register and the actual state of affairs, will be resolved in favor for the one who acquired the ownership right or other property right, from the authorized person according to the contents of the land and mortgage register. This principle is one of the exception from the principle that nobody can acquire rights from a person unauthorized to dispose of them. It is also important that the surety will not include disposals for the benefit of the purchaser who acts in bad faith.

The land and building register mentioned earlier provides a set of information on lands, buildings and owners and persons managing these lands and buildings for the whole country<sup>18</sup>. Its range covers the whole territory of the Republic of Poland and it is the basis of the national land information system of which aim is to collect and provide information for the needs of:

- spatial development,
- a tax assessment and other regulatory liabilities,
- designation of the property in the land and mortgage register,
- public statistics,
- land management (real properties),
- protection of financial interests of the parties of trading in real estate<sup>19</sup>.

The data of the land and building register which concern the substantive rights and rights *in personam* are acquired from the national geodetic and cartographic resources (the substantive data) and from the land and mortgage registers and other documents (the subject data). The land and building register constitutes one cohesive information system which is adapted to the administrative division of the country. The

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<sup>18</sup> *Gospodarka nieruchomościami*, R. Żróbek (ed.), Olsztyn 2000, p. 54.

<sup>19</sup> *Gospodarka nieruchomościami*, R. Żróbek (ed.), Olsztyn 2000, p. 54.

organization of this system commences at a commune level (a cadastral unit) for which the land and building register is maintained as the whole. A smaller division unit in this system is a cadastral precinct for which a land and building survey is established and maintained. In the cadastral surveys the information which characterizes both a subject, that is an owner, a perpetual usufruct user, an owner-like possessor, and an object, thus the smallest division unit in the organization structure of this system, is collected. The information in the cadastral surveys is collected in a graphic and descriptive form, being completion of information presented in the cadastral maps.<sup>20</sup> A range of the information included in the cadastral system is presented in table 1.

**Table 1. A range of the data in the land and building register**

<b>Data on the subject</b>	<ul style="list-style-type: none"><li>• Designation of the subject:<ul style="list-style-type: none"><li>– the surname and forenames,</li><li>– the parents' names,</li><li>– the permanent residence address</li><li>– the identifier in compliance with PESEL system</li><li>– legal persons and:<ul style="list-style-type: none"><li>– the full and abbreviated names,</li><li>– the seat,</li><li>– the identifier in compliance with REGON register,</li><li>– the register number of business entities</li></ul></li></ul></li><li>• The register item number</li><li>• A type of the co-ownership or the perpetual usufruct sharing</li><li>• The share in the co-ownership or the perpetual usufruct sharing.</li><li>• The registration group number.</li></ul>
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<sup>20</sup> *Gospodarka nieruchomościami*, R. Żróbek (ed.), Olsztyn 2000, p. 60.

*Risk Related to Investing in Encumbered Real Estate*

<b>Data on the land plot</b>	<ul style="list-style-type: none"> <li>• the date of the last verification of data,</li> <li>• the identifier of the plot</li> <li>• the identifier of the registration unit,</li> <li>• the registration number of the holder,</li> <li>• the description of the plot location,</li> <li>• the number of the statistical region and census area,</li> <li>• land value,</li> <li>• cadastral surface area,</li> <li>• a numerical description of the boundaries,</li> <li>• agricultural areas with a division into the land classes,</li> <li>• the designation of the land and mortgage register or another document specifying ownership,</li> <li>• the designation of the farm (forestry),</li> <li>• the number of the entry into the register of historical monuments.</li> </ul>
<b>Data on the building</b>	<ul style="list-style-type: none"> <li>• the date of the last verification of data,</li> <li>• identifiers of the building,</li> <li>• the actual number of the plot on which the building is erected,</li> <li>• the ordinal number in the address index,</li> <li>• the number of the register unit from the land register or the building register,</li> <li>• the number and the date of the entry into the register of historical monuments,</li> <li>• the designation of the basic function of the building according to the code list,</li> <li>• the building value, if known,</li> <li>• the year of the construction completion or the last modernization,</li> <li>• the gross covered area,</li> <li>• the number of the over-ground floors,</li> <li>• the code of the structural-building characteristic,</li> <li>• the code of the building services,</li> <li>• a number of the residential premises,</li> <li>• a number of the premises for other purposes,</li> <li>• a number of garages.</li> </ul>
<b>Data on the premises</b>	<ul style="list-style-type: none"> <li>• the numbers of premises being separate ownership within the buildings,</li> <li>• the function of the premises,</li> <li>• the usable area,</li> <li>• the information on the owner when the premise is a separate property from the building part of the building</li> </ul>

Source: *Gospodarka nieruchomościami*, R. Żróbek (ed.), Olsztyn 2000, p. 60.

To sum up in case of lands the land and building register includes the information on their location, boundaries, areas, land usage types, and their pedological classes, designations of the land and mortgage register or sets of documents, if they were established for the real property which includes the land<sup>21</sup>.

<sup>21</sup>Act of 17 May 1989 *on Geodetic and cartographic law*, Journal of laws no 30 item 163, i.e. of 13 October 2017, Journal of laws 2017 item 2101, article 20 point 1, 2 par 3, 4.

In case of the buildings it is the information on their location, intended use, usage functions and general technical data, whereas in case of the premises – their location, usage functions and their usable area, including the information on the entry of the real property into the register of historical monuments and the real property value.

At the moment of purchasing the property with a latent legal defect a buyer is protected by surety. The surety definition was regulated by the provisions in the Civil Code. From art. 556, it results that a seller is liable to a buyer, if an object sold has a physical or legal defect (surety)<sup>22</sup>. While art. 556(3) of the Civil Code specifies in detail a scope of surety *a seller is liable to a buyer, if an object sold is the property of a third party, or it is encumbered with a right of a third party, and also if a restriction on use or disposing of the object results from a decision or a ruling of a competent authority, in case of the right sale the seller is also responsible for the existence of the right (a legal defect)*<sup>23</sup>. Surety protects, first of all, the buyer when another person is an owner of the acquired real property. It is particularly important while purchasing a real property when the principle of credibility of land and mortgage registers does not work, because the real property owner may demand to return the subject of the agreement at any time. In this situation withdrawal from the purchase and sale agreement of the real property encumbered with the legal defect is the most sensible solution. Surety can be also used when the real property is encumbered with rights *in rem*, that is the easement of access establishing for benefit of the adjacent real property, encumbered with the easement of transmission in a form of an underground gas pipeline, the right of tenancy, life estate or lease, and the seller did not disclose this fact to the buyer. In all cases an investor is entitled to use protection that is guaranteed by surety.

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<sup>22</sup> Act of 23 April 1964 the Civil Code, Journal of laws no 16, item 93, i.e. of 9 February 2017, Journal of laws 2017 item 459, article 556.

<sup>23</sup> Act of 23 April 1964 the Civil Code, Journal of laws no 16, item 93, i.e. of 9 February 2017, Journal of laws 2017 item 459, article 556(3).

## **5. A purchase of a real property being a historical building**

The concept of a historical monument is defined by art. 3 para. 1 of the Act on the protection of monuments and of the guardianship of monuments into force<sup>24</sup>. Pursuant to art. 7 of this act forms of protection of historical monuments are :

- entry into the register of historical monuments<sup>25</sup>;
- entry into the List of Heritage Treasures;
- awarding historic monument status;
- establishing a cultural park;
- establishing protection in the local spatial development plan or a decision on determining location of a public purpose investments, a decision on land development, a decision on permission for implementation of a road investment, a decision on determining location of a railway line or a decision on permission for performance of an investment in the scope of a public use airport<sup>26</sup>.

One of the basic forms of protection of historical monuments is an entry into the register of historical monuments made based on the decision issued by the province monument conservator. Following such a decision and at request of the monument conservator the real property is entered into the land and mortgage register<sup>27</sup>. A purchaser of such a real property should check if there are any re-privatization claims of former owners in relation to this real property. Checking consists in examining the land and mortgage registers and old mortgage registers quiet often established before 1918, where the entries could be made in Russian or German language, what may impeded their examination.

Conducting construction works on the historical site requires to obtain an approval of the province monument conservator prior to

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<sup>24</sup> Act of 23 July 2003 *on the protection of monuments and of the guardianship of monuments into force*, Journal of laws No 162, item 1568, i.e. of 10 September 2014, Journal of laws 2014 item 1446 article 3.

<sup>25</sup> A. Solka, A. Kasprzyk, *Konsekwencje wpisu do rejestru zabytków dla procedury sprzedaży nieruchomości*, *Nieruchomości* 2016, no 7.

<sup>26</sup> Act of 23 July 2003 *on the protection of monuments and of the guardianship of monuments into force* Journal of laws No 162, item 1568, i.e. of 10 September 2014, Journal of laws of 2014 item 1446 article 7.

<sup>27</sup> M. Bielecki, *Inwestycje budowlane na „zabytkowych” nieruchomościach*, *Nieruchomości* 2008, no 2.

obtaining a decision on building permit. An obstacle in the historical real property development may be adoption (in case of lack) or a change in the existing spatial development plan, what will make the implementation of the investment enterprise impossible. Then, an investor will not obtain building permit, because the competent authority dealing with the request may consider that the investment plans are not compatible with the spatial development plan and will refuse to issue the permit.

#### **6. Sale of a real property by a debtor and the fraudulent conveyance claim**

Before a purchase of a real property one should check in the land and mortgage register if there has been established the mortgage on the real property to secure debts. An aim of establishing the mortgage is to claim the marked dues resulting from the specific legal relationship (e.g. a payment order) and it does not matter who is the owner of the real property to claim debts. Art. 65 pt. 1 of the act on land and mortgage registers and mortgage says that *in order to secure the marked debts resulting from the specific legal relationship a real property can be charged with the right by virtue of which a creditor may seek satisfaction from the real property regardless of ownership and with priority over personal creditors of the real property owner (the mortgage)*<sup>28</sup>.

The fraudulent conveyance claim provides protection against unreliable behavior of the debtor. It includes protection of mortgagees against getting rid of wealth by the debtor not only in a form of transactions by value (a sale) but gratuitous transactions as well (a donation to a family member). The premise to the assumption of the fraudulent conveyance claim is a conviction that the debtor got rid of or diminished radically his/her assets by what he/she has become insolvent or more insolvent than he/she was before, he/she acted with awareness of mortgagee's detriment, and the third person who gained the benefit acted in bad faith (he/she was aware of the fact that the debtor got rid of the property not to repay the debt and as a result of the contested acts of the debtor she/she gained a material benefit). The essence of the claim is that

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<sup>28</sup> Act of 6 July 1982 *on land and mortgage registers and on mortgage*, Journal of laws no 19, item 147, i.e. of 11 May 2017, Journal of laws of 2017 item 1007, article 65 point 1.

the court considers the transaction made by the debtor as ineffective in relation to the mortgagee<sup>29</sup>.

The agreement concluded by the debtor with the buyer is valid, but the mortgagee may seek satisfaction by debt enforcement proceedings from the property no longer being owned by the debtor. The recognition of the fraudulent conveyance claim by the court enables to seek the obligations of the debtor from the property purchaser, although the new property owner does not have any obligations to the complainant.

### **7. A purchase of a real property by a bailiff's action**

A purchase of a real property by a bailiff's auction takes place as a result of enforcement against a real property. It is one of the ways to obtain financial means providing enforcement of payments. A court bailiff proceeds to sell a seized real property by posting a public notice which includes:

- an object of the auction indicating the address of location of the real property, intended use of property, it indicates personal data of the debtor, it gives a number of the land and mortgage register or designations of a set of documents with an indication of the court foreseen for the specific real property,
- the hour and the place of the auction,
- the estimated value of the real property and the starting price,
- the amount of the bid security deposition which the persons who want to enter the auction should provide within the prescribed period, the bid security may be also lodged in a savings books, provided that it contains consent of the book's owner to pay out the entire savings included on basis of the final court decision on loss of the bid security,
- the information on the date and the hours at which you can view the real property personally with getting acquainted with the case files in the scope of the enforcement proceedings,
- the information that claims of third parties do not constitute an obstacle to the auction, and in the situation of adjudgement of the real property to the buyer, they are without reservations, because the third

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<sup>29</sup> *Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna Vol. III*, A, K. Osajda (ed.) Warszawa 2017.



parties may file an action for release of the real property and obtain a court decision in this scope which may defer the enforcement,

- information on all encumbrances on the real property, that is life estate, easement or use when they are not disclosed in the land and mortgage register and were not reported three days before the determined date of the auction, they will not have any legal validity, and at the same time they lose their legal validity when the court decision about adjudgement of ownership to the new buyer becomes final.

A person who decides to participate in the auction must pay the bid security in the amount of one tenth of the real property value for which the real property was estimated. When the person who obtains the highest amount from adjudication and wins the auction, the security bid is withheld, and it is returned to other participants. The court makes the adjudication final and calls the bidder within 14 days from the moment of receipt of the demand for payment of the auctioned price after deducting the bid security which was provided in cash. The bidder pays the remaining amount to the indicated deposit account of the court. At a request of the buyer the court may agree to a longer term of payment of the purchase price, although this term cannot exceed 30 days. When the buyer does not meet the deadlines of the price payment, he/she must reckon with loss of the bid security which is assigned to cover the costs connected with the enforcement from the real estate. In the auction the debtor himself/herself, persons related to him/her ( that is a spouse, children, parents,, siblings) a bailiff, the persons who took part in another auction and did not meet conditions of the previous auction, cannot take part in the auction, the persons who are representatives of offices provided that they present authorization of a state authority cannot take part either. Bidding is made orally, the bid price increment cannot be lower than one percent of the starting price and at least one person must take part in bidding in order for the auction to be held. At each increment the offered price ceases to have effect if another person outbids it about a next increment. The bailiff closes the bidding after the third announcement and he is obliged to inform the present at the bidding about it, after completing the bidding the bailiff mentions the forename and the surname of the bidder, he gives the bid amount, designation of the real property and the bidding date. The decision is served to the creditor, the debtor, the new owner of the real property, the property

manager, including all the persons who challenged faults connected with the price adjudication while bidding.

When there are some faults while bidding the court may refuse the adjudication. Offenses which may have a significant impact on the bidding result, can be the reason. Failure to serve notice of the auction within due time can be an example. When the court decision includes a refusal of the bidding adjudication, the bailiff resumes the entire procedure at a request of the creditor. The person who negotiated the highest price and also fulfilled all conditions of the bidding obtains the ownership right to the real property. When the decision becomes final, the court issues a decision on adjudication of ownership, what results in transfer of ownership to the buyer and it is a legal title to be entered into the land register and the land and mortgage register. The decision in force also acts as an enforcement title and it enables to put the purchaser in possession of the real property. When all rights to the real property are transferred, all costs lie with the purchaser, but also benefits connected with possession of the right to the real property are transferred on him/her.

Although the entire procedure of sale of a real property at the bailiff's auction is regulated by applicable legal provisions, an investor is not always able to establish all legal details of the real property disposed in the bailiff's procedure, which become an impediment in disposal of the real property later. The bailiff himself may not exercise due diligence when he takes over the real property and he can commit procedural errors. Then, the entire procedure of the sale of the real property by auction must be postponed. An investor making a decision about a purchase of the real property at the bailiff's auction should get really acquainted with legal documentation concerning the real property bidden and evaluate if the transaction is advantageous for him/her. Otherwise he/she can e.g. buy a real property with tenants, an encumbrance with life real estate or an easement. A purchase of land non-developed properties at an auction poses a high risk. In this case, you should, first of all, establish a land use class in the spatial development plan, if utility connections are possible, what can be built on the specific plot, or if building permit can be obtained.

## Conclusions

Investing in so called encumbered properties poses a risk. When the real property encumbered with the easement of passage is bought, an investor should be aware that the established easement cannot be struck off. A purchase of the real property encumbered with the easement of transmission entails some restrictions in developing the property and it constitutes an impediment to access to it. In turn performing construction works in a historical building requires an approval of the monument conservator of the province.

The investors show interest in the encumbered real properties because these properties can be bought at bailiff's auctions at a much lower price than the free market price. At the first bidding the starting price is the three fourth of the market price of the real property. In the second increment the market price is reduced to two third of the market price, what is a lucrative opportunity to purchase the real property for the investor.

An object of trading on the real property market should be solely and exclusively the properties that are transparent in terms of the legal status (ownership rights). Trading of non-transparent real properties can result in infringement of ownership rights of third parties. In the event of investing in the encumbered real properties knowledge about sources of the information about real properties is very useful, among it includes obligatory sources of which functioning is governed by legal, play an important role.<sup>30</sup> Their example are, among others, the land and mortgage registers.

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