Ownership Claim

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The paper analyses the objective of an ownership claim – "to declare ownership rights." According to the literal meaning of law, the claim can be brought by the present owner, still, in the court practice and in legal science this provision is interpreted broader, including a reference to the former owner. Due to this reason the borderline between an ownership and a restitution claim is lost, although in essence they are different.
The paper examines borrowings from the German and Swiss law and attempts to construct the so-called "claim on rectification of a land register record" in the Latvian law. Lately the court practice has gradually abandoned this idea by giving preference to protection of the acquirer in good faith, which excludes rectification of a land register record during the trial of an ownership claim. The legal science has also moved into this direction by proposing the respective amendments in the Civil Law.
The paper analyses a competition of claims. It is concluded that mostly such competition is only ephemeral. Claims on protection of possession, on execution of a contract and on unjust enrichment are independent claims. Each of them has different aims, and these claims cannot achieve the result that would be ensured by the ownership claim.

Keywords: *Actio in rem, rei vindicatio, restitution, Publiciana in rem actio, negatoria actio,* rectification of a land register record, acquisition in good faith, *condictio sine causa*.

Contents

Introduction

Ownership claim cannot establish ownership rights that are not owned by the plaintiff when the action is brought to the court. According to Articles 1044-1066 of the Civil Law, it is not possible to raise ownership claim and in the same proceedings invalidate a transaction or transactions, and renew ownership rights. In legal science and case law, there has been a dominating view that in ownership action a person rather restores earlier ownership rights than protects the existing ones. Upon such circumstances ownership action shall end up with restitution of earlier rights instead of establishment or protection of existing rights.

The aim of this publication is to demonstrate that this idea, which is based on a wide interpretation of the Civil Law norms, has come to a deadlock.

The latest tendencies of literature and case law are gradually waiving this understanding and allocateing a greater meaning to the principle of public credibility and stability of civil law.

1 Objective of the ownership claim

According to Article 1044 of the Civil Law of Latvia (CL) the objective of the ownership claim is *"declaration of ownership rights and in connection therewith, granting of possession."* Ownership claim may be the so-called declaration claim where the claimant is a person who possesses rights, but the respondent – a person who denies, infringes these rights[1]; or the execution claim where the claimant is a person who denies the rights of the respondent, but the respondent – a person who regards these rights as his/her own[2]. If, similarly to *rei vindicatio* described in the Roman law, both parties are equally categorical in claiming that the disputed property is owned by the respective claimant or respondent[3], such trial shall be qualified as a declaration claim according to V. Bukovsky. If, however, only the claimant states that the property is owned by him/her, but the respondent, without denying the claimant's ownership rights, still refuses to return the property *"on the basis of some property right or such personal right as the claimant must recognise"* (Article 1061 of the CL), such trial shall be qualified as an execution claim according to V. Bukovsky. In both abovementioned cases the claim is grounded on the claimant's assumption that the ownership rights, whose declaration is requested before the court, had existed already at the moment when the claim was brought.

According to the idea of law, within the framework of the ownership claim it is not possible to establish such ownership rights, which, at the moment when the action was brought, were not owned by the claimant, respectively – the ownership claim is not possible as the so-called constitutive or transformation claim, i.e., a claim which is aimed towards transformation of the legal relationship. In case of a constitutive claim it is exactly the court's judgment that is the legal fact on the basis of which legal relations are established [4] – the existing rights of the claimant are transformed into totally different rights during the trial. [5]

2 *Actio in rem* character of the ownership claim

If a claimant alleges that he/she has acquired the property through delivery or inheritance from another person, then he/she must also prove that his/her predecessor was the owner of it (Section 2 of Article 1060 of the CL). This is a type of proof which is called *probatio diabolica*[6] due to its complexity, and the modern legal systems, except the CL of Latvia, have mostly abandoned it exactly due to this reason.

In practice there are also admitted proofs of ownership rights that do not comply with the provision under Section 2 of Article 1060 of the CL[7].

According to the sense of the CL, it is not possible to bring an ownership action and within the same proceedings claim invalidation of a deed or deeds and renew the ownership rights by introducing amendments to the land register records about the owner of the disputed property, because in such circumstances the claimant will turn out to be a former owner instead of the actual owner, and the subject matter of the claim will not be a declaration of ownership rights but rather their establishment or restitution (the problem of a "formal" and "true" owner or "the problem of two owners"[8]).

Hitherto this issue has not left a remarkable influence upon development of the ownership claim. However, in the latest practice the question about delivery and prescription has become topical as being two mutually connected types to acquire property.[9]

By transforming the ownership action into the proceedings resulting into restoring of earlier ownership rights instead of protecting the present ones, the ownership action shall end then with restitution of the rights of earlier existence, instead of establishment and protection of the existing ones.[10] In the modern legal systems there are different conditions and borderlines for application of restitution. Mostly the law permits the court's discretion[11], the chance of restitution is not always available. In such claim the respondent acts as a contractor to the deed (Civil Code of France [12] (hereinafter CCF) Articles 1304-1314; BGB[13] §§ 116-144; Italian Civil Code [14] (hereinafter ICC) Articles 1425-1440) or a person who has directly gained benefit out of such deed although he/she has not participated in its concluding (§ 143, Section 4, BGB; ICC Article 1441). It is a personal action. The Civil Code of the Netherlands[15] (hereinafter CCN), which separately regulates restitution in case of performance not due (CCN Articles 6, 4, 203-211) and unjust enrichment (CCN Articles 6, 4, 2012), provides that unjustly transferred property may be reclaimed from the recipient (CCN Articles 6, 4, 203), thus – as a personal action.

By joining the ownership claim of *actio in rem* character with the restitution claim having the character of a personal claim, the Latvian law created a system with no parallels in any of the existing legal systems. In practice, the outcome of an ownership action has become unpredictable. It can lead both to establishment and protection of the existing rights and to restitution of the rights of an earlier existence.

3 Claim on rectification of a land register record or "rectification claim"

There is a view that the rights of an owner recorded in land registers do not only depend on the record in the land register, but also on the activities of owner's legal predecessors.[16]

According to this view, "*the true owner may simultaneously claim both invalidation of the mentioned alienation agreement and rectification of the wrong record of the property.*"[17]

To substantiate this view, the quoted authors refer to several rulings by the court.[18] They explain that "*the mentioned claim is similarly understood also in the Swiss Civil Code ((Grundbuchberichtigungsklage), see Article 975[19]) and in the German law ((Grundbuchberichtigungsanspruch, see Article 894).*"[20] In the court practice the "rectification claim" is regarded as a type of the ownership claim.[21]

The CL does not provide a claim "to rectify a land register record". Likewise, the norms on ownership claim do not provide that by filing such claim there are grounds to invalidate the deed whereof the ownership rights of the defendant arise. They also do not envisage a chance to "renew", "construct", "rectify" or in any other way amend those legal relations which existed at the moment when the claim was brought. If the court, having referred to these norms, has constituted the rights which had not existed when the claim was brought, it has acted against both the provisions arising literally from the law and contrary to the idea of the law.

This contrast between the literal meaning of the law and its interpretation is noteworthy at least as a bright illustration of the "judge-made law" development in Latvia.

According to the doctrine on the "judge-made law" or further development of law *contra legem*, an obligatory pre-condition which justifies such activities is that the existing regulation is either unfair or unreasonable.[22] The court may prevent injustice, as a result of which the owner has lost his/her rights and may renew such rights despite the fact that these ownership rights cannot be proved.

References to "rectification" of records appear in the court judgments in the light of the theory by A. Grūtups and E. Kalniņš (SKC-32/2002[23]). Alongside with "rectification" one can come across a number of judgments, where by reference to various infringements of law various persons, including subjects of public law, have raised claims in the interests of "former owners" to renew ownership rights and with satisfaction of such claims the courts have ruled on rectification of a number of land register records with respect to the persons who could not know about defects in the ownership rights of their legal predecessors. The reason for such behaviour could be both the mistake on adopting decision on denationalisation[24], privatisation[25], also infringement of the joint ownership rights (the so-called cases of mansards)[26], also inner defects of any deed or even a lawfully enforced judgment revoked later as unlawful[27]. During this period of time an idea was developed that a record in a land register was not a fact of public credibility to be taken into account by any future acquirers of the immovable property, but rather a presumption which could be disproved by indicating any fact that was in conflict with it.[28] The attempt to seek similarity in the question about the three different legal systems of "rectification claims" has turned out to be methodologically erroneous and practically unenforceable. This proposal is methodologically wrong because not only the preconditions are different in the legal system into which this borrowing is transposed, namely, in Latvia, but also in the countries wherefrom they were intended to be borrowed. The German law is based on the principle of abstraction.[29] In Latvia one can trace elements of both causality[30] and – partially – those of abstraction.[31] In Switzerland the delivery system is based on the principle of causality.[32] Besides, neither the German nor the Swiss law provides that "rectification" of such record could be possible against the will of the person whose rights would be infringed through such "rectification".

4 Ownership claim and the good faith of an acquirer

Almost 10 years after the idea about the "rectification claim" appeared,[33] a radical turn took place in the meaning of the objective of an ownership claim. "Rectification claim" gradually lost its attraction. The court started to turn its attention to the good faith of an acquirer as well as to the fact that actually the CL did not exclude the transfer of ownership rights in the circumstances when the alienator

had alienated the property to several acquirers simultaneously. Such conclusion was probably first made in the case SKC-5/2002[34]. Thus, after lingering attempts for a better solution, the court practice returned to the earlier acknowledgment expressed already back in 1914, namely, the rights of an acquirer are in no way influenced by the activities of a seller.[35]

During the period from 2002–2005, the judgments adopted almost at the same time contained acknowledgements both about unchangeability of the acquired ownership rights and about "rectification" of the existing record. One can see intensive attempts to justify the necessity for "rectification" of a record by the attitude of the acquirer against the deeds concluded earlier. The courts departed from the strictly observed provision in the pre-war literature and judicial practice that the sole criterion to dispute the good faith of an acquirer of the immovable property may be the defects that could be learned from the record in the land register.[36]

In the cases when the court had doubts about the good faith of the acquirer, it ruled that it was possible to rectify the record (SKC-435/2001[37]; SKC-91/2002[38]; SKC-301/2003[39]). Inconsistency characteristic to this period in applying the principle of good faith of the acquirer is also proved by the fact that in numerous cases the court has come to a totally opposite acknowledgment – that the immovable property may be reclaimed even if the acquirer was acting in good faith (SKC-47/2005[40]; SKC-31/2003[41]; SKC-180/2003[42]; SKC-531/2003[43]; SKC-625/2005[44]).[45]

A proposal made by E.Kalniņš, one of the co-authors of the "rectification claim" theory, could be regarded as a turning point in the attitude towards the "rectification claim", namely, to introduce amendments in the CL that would make ownership rights of the acquirer in good faith irrevocable[46] in order to eliminate the mess largely caused exactly due to the unsuccessful interpretation of the existing law in the manner of the "rectification claim".

5 Claim to grant possession, *Publiciana in rem actio, rei vindicatio, negatoria (prohibitoria) actio*

The additional objective under Article 1044 of the CL – "to grant possession" – is interpreted, however, very narrowly both in the court practice and legal science by understanding "declaration of possession" as renewing of physical power over the property.[47]

Mostly an ownership claim is connected with renewal of ownership rights and only rarely – with renewal of possession.

In disputes where the subject matter is an immovable property recorded in the land register, possession over the property has no practical meaning. After the alienated property is recorded in the name of an acquirer in the land register, the alienator has no right to vindication (ownership) claim[48], although he/she might still have personal claim against the acquirer, e.g. based on the fact that the alienation transaction is not valid.[49]

Likewise, the modern court practice admits only the right to compensation of damages.[50]

In consideration of complexity to prove the ownership rights of the claimant according to the CL, a question was discussed already in the pre-war period whether in the Latvian law there existed a separate institute of *Publiciana in rem actio*[51] or a claim by a fictitious owner.[52]

Having noted that *Publiciana* is not mentioned in the Codification of Local Laws, F. Konradi and A. Walter still draw an assumption that "*the practice of the courts of Riga recognises each justified acquisition as sufficient grounds for vindication*"[53]. For some time there was an idea which dominated in the legal science and court practice that the factual transfer of immovable property should be preferred over the ownership rights to an immovable property recorded in the land register.[54] Elements of a claim by a fictitious owner may be found in several judgments adopted during 2000–2005.[55]

The issue of granting possession to be the subject matter of an ownership claim is related to distinction between vindication (*rei vindicatio*) and negatory (*negatoria actio* or *prohibitoria actio*) claims.[56]

Indeed, it arises out of references to the Roman law sources in the Codification of Local Laws[57] that the view that a negatory claim is regulated under Article 1039 of the CL, is grounded.

Distinction between *rei vindicatio* and *actio negatoria* had a meaning in the Latvian law of the pre-war period also because these claims were subject to hearing in different courts – unlike the vindication claim, the negatory claim was within the competence of a magistrate court.

There are no signs that after reinstatement of the CL, and especially since in 1999 the Civil Procedure Law (CPL) established that the cases dealing with ownership rights to immovable property are admissible to a regional court, any distinction would be made of admissibility corresponding to the previously mentioned elements of a vindication and a negatory claim.

6 Competition of claims

There are the following types of competition of claims:

1) competition between the ownership or petitory claim and the claim on protection of possession or the possessory claim;
2) competition of the ownership claim and the contract execution claim;
3) competition of the ownership claim and the claim of restitution (on unjust enrichment or *condictio sine causa*).

Literature presents an opinion that competition of claims *"means that the claim by an owner who is not in actual possession of the estate may simultaneously arise from different so-called norms on claims where the envisaged claims are similar as to their content"*.[58]

6.1 Competition between the ownership or petitory claim and the claim on protection of possession or the possessory claim

Competition between the ownership claim and the claim on infringement or deprivation of possession is only apparent.[59] It is not possible to have a declaration of ownership rights through the claim on renewal of possession (Article 923 of the CL).

The outcome of a trial on protection of possession cannot serve as establishment of any rights altogether. Neither the judgment can fix any ownership rights of the claimant if the claim is satisfied, nor his/her scope of rights is narrowed somehow if the claimant loses in the trial. Irrespective of what would be the result of a trial on prevention of infringement of possession, the claimant still has the right to bring ownership claim for the same property. Likewise, the respondent cannot refer to such judgment as a proof of his/her ownership rights. Thus the court's conclusion is

even more surprising in the case SKC-435/2001 that declaration of ownership rights may be reached through bringing a claim about renewal of possession.[60]

Less surprising are the court's conclusions in the situations when the evidence about acquisition of property into possession is indicated as grounds for the fact that a party of the dispute (usually – claimant) has acquired ownership rights over the disputed property.

With regard to movable property, this kind of reasoning arises from the fact that the acquisition of property into possession mostly corresponds with the transfer of ownership rights to the acquirer of possession (Article 883 of CL). With regard to immovable property, acquisition into possession shall not be sufficient grounds to acquire property, even if the acquirer has concluded the respective deed with the owner of property. He/she only has a right to claim that such record is made (Articles 994, 1024, 1479 of CL). Thus, the fact that both movable and immovable property is in someone's possession may, in the best case, serve as one item of the evidence for ownership rights to a property, but shall not be recognised as an independent precondition to establish ownership rights. Still, the judicial practice in the ownership claims is controversial.[61]

6.2 Competition of the ownership claim and the contract execution claim

Competition of the ownership claim and the contract execution claim, unlike the matter discussed above, is encountered very rarely in the court practice. One cannot observe a tendency to mutually replace these two different types of claim. It also seems that in the major part of situations it would be impossible. Existence of any contract in principle excludes a chance that a party to a contract could prevent the breach of such contract, e.g., failure to transfer an alienated property or reclamation of an alienated property, by raising an ownership claim. Such claim would be dismissed because (in the first situation) the claimant is not yet, or (in the second situation) is no longer the owner of the property and thereof the claim, although grounded, should be dismissed exactly due to the fact that the claimant has wrongly indicated the grounds of the claim.[62]

6.3 Competition of the ownership claim and the claim of restitution (on unjust enrichment or *condictio sine causa*)

If the property cannot be reclaimed through an ownership claim, and there are no contractual relations between the claimant and the person with whom the reclaimed property is located, the claim on unjust enrichment remains the sole legal instrument of protection. The scope to apply the claim on unjust enrichment and its legal regulation is very different in various countries.[63]

However, *rei vindicatio* and *condictio* usually cannot be mutually interchangeable at will of a claimant.

According to the principle of causality – since, in the given case, a void transaction does not transfer ownership rights, it is possible to apply the principle of vindication – *ubi rem meam invenio, ibi vindico* (where I find my property, there I also reclaim it).[64] Still, in case there is a void deed within the basis of the transfer of ownership rights, the transferred property may not be reclaimed by the ownership action, but by the claim of unjust enrichment, most frequently *condictio indebiti* – a claim defined as reclaim of satisfaction of non-existent debt (Articles 2369-2383 of CL). *Condictio indebiti* is a personal claim in difference from *rei vindicatio*, which is *action in rem*. As this claim is of a personal character, a conclusion may be drawn

that the claimant has lost his/her ownership rights because otherwise the claimant would have brought *rei vindicatio*.[65]

It must be concluded that there is no competition of claims in case of vindication and unjust enrichment actions. The owner, should he/she have a chance, always will prefer an ownership claim which allows reclaiming the property itself or if it is not possible – the value of the reclaimed property (Article 1057 of CL).

7 Liability for alienation of property during the time of trial

The legal norm provided under Article 1055 of CL (liability about alienation of property during the time of trial) which, according to its placement, refers to the mechanism for compensation of damages, is interpreted rather broadly in practice, i.e. as a restitution claim against the acquirer of property. In different cases of ownership actions, the idea of both the "time of trial" and "trial" is understood differently. Sometimes it is understood as events that took place before the beginning of trial[66] or it is recognised as a time period when the claim on division of property of spouses[67] was reviewed between the same parties instead of the ownership claim, or denationalisation claim.[68] The right interpretation should be the one which by the concept of the "time of trial" understands the period that continues from raising the ownership action until the judgment in the given case is enforced.

The different interpretations with regard to consequences of the norm mentioned above have a quite far-reaching effect – whether the liability described in the given norm only refers to the defendant's improvement of the property and compensation of damages incurred due to the property (which would not be necessary in case the property itself is not returned), to the duty to compensate the value of property related to accidental destruction of the property, which in the given case would serve as a substitute (the narrower interpretation) of the claim on return of the property or to the bad faith of the defendant by selling the disputed property during the trial of the ownership claim would also influence the rights of the third person, who has acquired the property during such alienation, to keep this property, respectively – whether the alienation of property during the time of trial is a precondition to reclaim the property from a third person (the broad interpretation).

There are several arguments in favour of the narrower interpretation. Firstly, the second sentence of Article 1055 of CL: "*the plaintiff need not be satisfied only with recovery of the payment received for the property, but he/she may also claim recovery of the property itself and its appurtenances (Article 1052), or for compensation for the value of the property and its appurtenances, and for all loses and costs.*" The conjunction "or" clearly indicates that in case all damages related to alienation of property are compensated, the duty to return the property alienated in bad faith is lost. Article 1057 of CL also indicates to the same effect, providing consequences in the situation when *"the defendant does not return the property in compliance with a judgment of a court,"* which, in addition, clearly shows (again – contrary to the provisions of the CPL), that such behaviour is a "free" prerogative of a defendant.

Secondly, also the CL provisions on liability of a possessor in bad faith only refer to division of losses and costs instead of restitution.

Thirdly, by repeating norms on liability of a possessor in bad faith in general, the same consequences are specifically defined as a legal regulation of consequences for unintentional destruction of the reclaimed property within the framework of an ownership claim (Article 1054 of CL). If, according to this norm, the liability in a

form of the duty to compensate the value of the property enters due to unintentional destruction of the reclaimed property during the time of trial, there are no grounds to assume that the plaintiff would have a basis for reclaiming the property itself from a third person in case of its alienation.

8 Restrictions to the ownership claim

According to Article 1065 of CL, an ownership action may not be brought if the owner has, in good faith, entrusted a movable property to another person, delivering it pursuant to a lending contract, bailment, pledge or otherwise, and such person has given possession thereof to some third person. In this case, there may be allowed only an action *in personam* against the person to whom the owner has entrusted his/her property, but not against a third person who is a possessor of the property in good faith.

When commenting a prototype of this Article in the Codification of Local Laws (CLL dated 1864) – Article 923, V. Bukovsky has indicated, by reference to C. Erdmann[69], that this restriction only refers to the cases when the property was delivered into possession of another person instead of delivered into holding. Thus, according to this interpretation, the owner may vindicate the property if it was delivered for the lease.[70] This interpretation is also supported by the authors of the comments of 2002. [71]

F. Konradi and A. Walter have critically viewed interpretation of the norm mentioned above (Article 923 of CLL, dated 1864). They indicate that "*only in one situation the first owner of property may reclaim it and keep it despite that according to the rule of* "Hand muss Hand Wahren" *he has absolutely lost his ownership rights over this property. Such situation may be encountered when the property, through re-alienation, is again at the disposal of the unfaithful alienator. Although the latter has acquired the alienated property in full ownership, the first owner still may bring against him a personal contract claim on restitution of property and in this way again become a possessor of the property, despite that pursuant to Article 923 [of CLL dated 1864 – J. R.] he had lost ownership rights to this property and thus also the ownership claim*".[72]

This principle was similarly commented also earlier. F. Sauvigny, first stating that the aforementioned principle is understood in various ways in different legal systems, still maintains that the property delivered to the tenant may not be reclaimed through the ownership action in any situation.[73]

Summary

Legal regulation of an ownership claim has changed several times since reinstatement of the CL. Its scope has been enlarged by including not only establishment of the existing ownership rights of a plaintiff, but also renewal of the lost ownership rights, thereby turning it into a claim resulting in "rectification" of the record about the current owner of an immovable property. A judgment of such "rectification" trial becomes a legal fact based on which a new record is made in the land register. To substantiate such a claim, it is stated that rectification of a record justifies absence of the good faith of the acquirer. Still, there is a number of judgments where a record has been "rectified" despite the fact that the immovable property has been acquired in good faith. Thus. the concept of a "rectification" claim, which is not based on the interpretation of law, but rather aimed at application of law *contra legem*, has not justified itself as it has not served to develop a uniform court practice.

The CL sets forth overly strict criteria to prove the plaintiff's ownership rights. The judicial practice mostly ignores them. Such approach corresponds to the modern development tendencies in other countries.

The difference between a vindication (*rei vindicatio*) and a negatory claim has a solely historical meaning, therefore the legal norms regulating ownership claim shall be attributed to both cases.

Although the legal literature expresses an opinion that the plaintiff may freely choose among several types of claims to protect his/her ownership rights, this competition is only ephemeral, because competitive actions on protection of possession and execution of a contract are aimed at a different objective and shall not be applicable for protection of ownership rights. Furthermore, an ownership claim and a claim on unjust enrichment are not competing with each other; still, the Latvian legal science has not developed clear criteria to separate them, as it is still disputable whether the CL provides the principle of causality or abstraction. In the legal systems where the principle of abstraction is provided, the claim on unjust enrichment is widely used to protect a person who has lost his/her property.

The idea expressed in the legal science that restrictions for reclaim of movable property under Article 1065 of CL should be interpreted narrowly, is wrong.

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[21] The most important difference is that, unlike the Latvian law, the law both in Germany and Switzerland *expressis verbis* state that rectification of such record may not infringe the ownership rights of a third persons which are secured by this record or on the basis of which these rights are grounded, contrary to the will of these persons. While the "rectification claim", to which point the quoted Latvian authors, is exactly expressed as such which deletes in the land register ownership rights inherent to other persons contrary to the will of these persons.
Article 975 of the Swiss Civil Code (SZB) provides that such claim shall leave untouched the rights acquired through the entry by third persons who have acted *bona fide*. While according to Article 894 of the German Civil law (BGB). to rectify such record one shall require approval from the person whose rights are affected by the rectification. Such claim may be raised only by a person whose rights are not registered or registered incorrectly, or is disadvantaged by the registration of encumbrance or restriction which does not exist.

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