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Limits of a notary's obligation of disclosure in the making of a deed – gloss on the Supreme Court judgment of 28 June 2019, IV CSK 224/18

THESIS

A notary is liable for harm inflicted in the course of a notarial transaction whether on a client or third parties, on the basis of Article 415 of the Civil Code, on account of failure to exercise due diligence (Article 49 of the Act of 14 February 1991: Notarial Law, consolidated text: Polish Journal of Laws – Dz.U. 2019, item 540, as amended), in a culpable manner, allowance being made for the professional nature of the notary's activities (Article 355 § 2 Civil Code) and the limits of professional diligence set out by Article 80 § 1 to § 3 NLA.

FACTS OF THE CASE

The facts in the judgment at hand are that the claimant claimed the amount of PLN 87,189.53 from the defendant notary pursuant to Articles 49 and 80 of the Act of 14 February 1991: Notarial Law[1] and Article 474 of the Civil Code, in damages for harm inflicted by the defendant notary's deputy in the making of a deed of donation of a residential apartment.

The claimant claimed damages from the defendant notary for harm inflicted by a notarial associate – for whom the defendant notary was liable – as a result of the associate's failure to investigate the legal basis for the donor's acquisition of the apartment estate from the defendant's municipality and failure to advise the claimant as

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1 Consolidated text, Dz.U. 2019, item 540, as amended; hereinafter NLA.

the donee – in the drafting and execution of the contract of donation of the apartment estate of 31 December 2009 – that any subsequent alienation by the claimant of the donated estate could trigger the consequences set out in Article 68 para. 2 of the Act of 21 August 1997 on real estate management,[2] in the form of an obligation to refund the discount granted by the Municipality of Olsztyn as the original owner. The claimant explained that the amount claimed was the value of the refunded discount along with statutory interest and the claimant's costs in judicial and enforcement proceedings.

By judgment of 10 February 2017, the Regional Court in Olsztyn dismissed the claim for failure to specify the grounds for the defendant notary's liability in tort. In the court's view, the notarial associate's obligation of disclosure in the making of the donation contract of 31 December 2009 (Article 80 paras 2 and 3 REMA) did not extend to instructing the claimant on the consequences of hypothetical future disposals of the residential apartment donated to him by his wife. The Court also noted that the obligation to refund the discount, on which the claimant's alleged harm hinged, originated not from the donation contract of 31 December 2009 but from a subsequent donation contract of 28 December 2010, executed in different notarial offices.

By judgment of 8 December 2017, the Court of Appeal in Białystok dismissed the claimant's appeal, agreeing with the findings of facts and legal reasoning of the court of first instance.

By judgment of 28 June 2019, the Supreme Court dismissed the appeal-in-cassation for want of merit.

COMMENTARY

The core issue in this judgment was to answer the question of what is the scope of the obligations imposed on notaries by the provisions of Article 80 § 2 and § 3 NLA. Even more detailed questions come forward in this context. Firstly: does the notary have a duty to personally examine the grounds of the acquisition of the estate concerned in the contract made before the notary for the alienation of such estate, and to check the title in the land-and-mortgage register, which, in consequence, could be indicative of the absence of special diligence and justify the view that notarial misconduct has occurred? Secondly and more importantly: what is the scope of the notary's obligation of disclosure, i.e. is the notary required to instruct the parties only about the consequences of the specific transaction being made before the notary or also about the consequences likely to arise from another contract? Ultimately, which is even more particularly highlighted by this case: does the notary have an obligation to instruct the transferee about the obligation to refund the discount in the event of the grounds of Article 68 para. 2 REMA materialising when the transferor is the original transferee to whom the discount has been granted and the transferee is a person close to the transferor? These issues, which are of significant importance, as they touch upon the scope of the notary's duties, have not been more broadly explored to date by either scholars or courts.

[2] Dz.U. 2018, item 2204, as amended; hereinafter REMA.

The Supreme Court's decisions emphasize the notary's special role as a 'custodian guaranteeing the compliance of civil law transactions with the provisions of law and the associated liability in the context of societal perception of a notarial deed form as a guarantee of the certainty of legal transactions and certainty and stability of perfected rights'.[3]

However, the scope of the notary's liability is a matter of significant controversy in court decisions, especially in common courts. Some courts find that notaries' obligation is limited to examining the consequences arising from the transaction being executed before them; thus, the notary is not required to engage in document review, including the basis for the acquisition, or to instruct the parties about consequences other than those directly arising from the transaction underway. Other courts, on the other hand, construe the notary's duties broadly, holding that besides the direct consequences of a transaction, the notary also should instruct the parties about indirect consequences, especially if the circumstances of the transaction hint at the possibility.[4]

No conclusive answers or guidelines in this matter can be found in the very limited literature available on the subject.

THE NOTARY'S STATUS – GENERAL REMARKS

Before embarking on the analysis of the above-identified problems, it would be expedient to make some remarks about the notary's status under law.

In accordance with Article 49 NLA, the notary is liable for harm inflicted while engaging in notarial activities, on the terms set forth in the Civil Code, subject to special diligence required in such activities. On the other hand, Article 80 § 1 NLA provides that the notary should draft deeds and documents intelligibly and clearly. In notarial activities, the notary is required to see to the due protection of the rights and legitimate interests of parties and others for whom a transaction can trigger legal effects and is also required to provide the parties with the necessary explanation concerning the notarial transaction underway (Article 80 § 2 and § 3 NLA).

The provisions just cited define the limits of these obligations only in a very general way; literature[5] and court decisions[6] have, however, gone a long way

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[3] Supreme Court judgment of 27 April 2016, II CSK 518/15, sn.pl; see also: resolution of the Supreme Court – Civil Chamber of 18 December 2013, III CZP 82/13, Legalis; judgments: of 12 June 2002, III CKN 694/00, Legalis; of 17 May 2002, I CKN 1157/00, Legalis; of 23 January 2008, V CSK 373/07, Legalis; of 7 November 1997, II CKN 420/97, Legalis; the nature of this liability is liability in tort (the Supreme Court judgments: of 27 April 2016, II CSK 518/15, Legalis; of 9 May 2008, III CSK 366/07, unpublished; of 12 June 2002, III CKN 694/00, OSNC 2003, No. 9, item 124; of 5 February 2004, III CKN 271/02, unpublished; the Supreme Court resolution of 1 June 2007, III CZP 38/07, OSNC 2008, No. 7–8, item 76).

[4] See A. Oleszko, *Przegląd orzecznictwa w sprawach notarialnych*, Rejent 12, 2015, p. 7 et seq.

[5] A. Oleszko, *Prawo o notariacie. Komentarz*, Part II, Warszawa 2012, pp. 256–257; M. Kolasiński, *Odpowiedzialność cywilna notariusza*, TNOiK, Toruń 2005.

[6] Compare the Supreme Court judgments: of 27 April 2016, II CSK 518/15, OSP 2017, No. 1, item 2; of 9 May 2008, III CSK 366/07, unpublished; of 12 June 2002, III CKN 694/00, OSNC 2003, No. 9, item 124; of 5 February 2004, III CKN 271/02, unpublished; and the Supreme Court resolution of 1 June 2007, III CZP 38/07, OSNC 2008, No. 7–8, item 76.

toward narrowing them down. The notary gives shape to the property interests of various persons and entities, deciding the future fate of business relationships, guarantees the compliance of civil law transactions with the provisions of law and is a 'custodian' of the existing legal order. Notarial deeds must provide legal safety to all participants.[7]

The literature on the subject notes that these obligations should in principle be limited to predicting the civil law consequences tightly linked to a relevant notarial transaction or at least related to the official activities of the notary drafting a relevant document.[8]

As regards the sale of communal properties outside of tenders and involving discounts, Aleksander Oleszko notes that both the value of the discount and the refund depend on a number of factors, for which reason the notary is not required to advise about this manner of property acquisition, as such an assessment is not within the limits of the notary's competence.[9]

On the other hand, Gerard Bieniek points out the differences in the notary's conduct in the drafting of a dispositive contract of sale where the transferee takes advantage of discounts to bring the price down.[10]

Literature emphasizes that: 'The notary is oftentimes required to offer guidance to the original transferee about the possible consequences provided for in Article 68 REMA in respect of having to refund the discount, and in any case whenever drafting a contract for further alienation of the estate to a close person.'

In Aleksander Oleszko's opinion, before making expectations of the notary in this regard, one should be mindful that Article 68 REMA has undergone frequent amendments, giving rise to a multitude of legal doubts. The notary cannot be saddled with burden of explaining such doubts as to the refund.[11]

The author goes on to observe that greater expectations should be made of the notary in respect of further alienation of the property by its original transferee having taken advantage of the discount and the transferee being a close person who cannot claim this privilege. The notary should drive the point home that alienation of property in violation of Article 68 para. 2 REMA could trigger a demand for the discount to be refunded, even though the transferor might have allocated the price of sale to the construction of a detached house.[12]

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[7] Compare reasons for the Supreme Court resolution of 18 December 2013, III CZP 82/13, OSNC 2014, No. 10, item 101.

[8] For example, a notary cannot be required to instruct the transferees of land estates built over with multi-apartment buildings becoming owners (perpetual usufructuaries) of land developed as a result of previous 'handover processes' of the Treasury assets to local-government units that only they, as the current property owners as opposed to anyone before them, should be aware of the possibility of tenants (and persons close to them) exercising first-purchase rights if selling to a third party (the Supreme Court judgment of 26 April 2009, I CSK 137/09, LexPolonica No. 2375685). Moreover, a notary cannot be required to advise a developer, as a professional participant in real-estate trade, about the zoning fee.

[9] A. Oleszko, *Prawo o notariacie. Komentarz*, Part II, Vol. I, Warszawa 2012, p. 273.

[10] See G. Bieniek, *Ustawa o gospodarce nieruchomościami. Komentarz*, Warszawa 2011, pp. 376–394.

[11] Thus A. Oleszko, *supra* n. 9, 278; and G. Bieniek, *ibid*., p. 383.

[12] A. Oleszko, *ibid*., p. 279.

The literature also observes that the limit of the necessity of the notary's explanations is the possibility of the notarial transaction 'triggering legal consequences'.[13]

Confronting the above reflection with the judgment under analysis, it must be noted that the donation contract between the claimant and his wife did not trigger consequences in the form of an obligation to refund the discount, and it apparently is not the notary's role to predict what other contracts the transferee contemplated or would contemplate. Another issue is that the claimant went too far in delineating the notary's duties preceding the execution of the deed. From the Supreme Court's reasoning and from the findings of facts binding on this court it occurs that during the drafting and execution of the donation contract of 31 December 2009 the notarial deputy undertook acts of diligence consisting in a title check in the land-and-mortgage register book for the residential apartment, drafted a formally correct and valid donation contract, successfully transferring the ownership of the apartment (as a separate estate) to the claimant and constituting the basis for disclosing the claimant as the owner in the said book, and instructed the parties about the consequences of the transaction as identified in the legislation cited within the contract.

Thus, the notary checked the contents of the land-and-mortgage register book and found that it allowed the notarial deed to be made. The donor, on the other hand, did not advise the notary about having purchased the property at a discount.

The notary's professional obligations do not eliminate the transactional party's need to see to its own interests, including without limitation a title check in the publicly available land-and-mortgage register book.[14] Two special circumstances of the present case must be emphasized in this context: firstly, that the disputed donation took place between spouses, which needed not prompt, on the part of the notary, a higher degree of prediction of harm the parties could inflict on each other; and secondly, that the claimant did not deny having been a professional realtor at the time. As a professional and the donor's husband, the claimant had more reason that the notary to suspect that any further alienation of the property would forfeit the discount. As the analysis of the reasons for the judgment at hand shows, this evaluation is not changed by the fact that the claimant did not review the wife's acquisition contract until in 2012.

LEGAL STATUS OF THE NOTARY IN THE SUPREME COURT'S DECISIONS

The notary is a guarantor of the safety of legal transactions and not only a position of public trust but also, as some put it, an auxiliary body of the administration of justice, an active participant in the broadly understood administration of justice.[15]

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[13] *Ibid.*, p. 282.

[14] The Supreme Court judgment of 17 September 2003, II CK 10/02, LexPolonica No. 363363.

[15] The Constitutional Tribunal judgment of 10 December 2003, K 49/01, OTK-A Zb.Urz. 2003, No. 9, item 101; and the Supreme Court resolution of 1 June 2007, III CZP 38/07, OSNC 2008, No. 7–8, item 76.

The notary is a person in a position of public trust, and documents containing notarial transactions are official documents within the meaning of the Code of Civil Procedure.

Already in its decision of 22 March 1935,[16] the Supreme Court took the view that one should not expect the notary to establish beyond any doubt the authenticity of a document being submitted for the transaction because 'sufficient diligence' was enough, which meant, for example, the need to turn attention to visible signs of forgery.

In the judgment of 25 September 2002 the Supreme Court held: 'The obligor's due diligence in the scope of the obligor's business activity, which is defined in the context of the professional nature of such activity, does not imply exceptional diligence but [only diligence] adapted to the person acting, the object of the activity, and the circumstances in which the activity is taking place.'

In the Supreme Court's body of decisions attention should be drawn to the resolution of 9 May 1995, III CZP 53/95,[17] whereby the notary cannot refuse a notarial activity pursuant to Article 80 § 2 NLA; such refusal is only possible if the condition set out in Article 81 NLA is met.

Concerning the notary's statutory obligations, in the judgment of 17 May 2002[18] the Supreme Court took the view that the notary's statutory duty (Article 80 § 2 NLA) is – unless requesting appropriate documents – personal inspection of the land-and-mortgage register. If the notary checks the book in a manner which is not diligent, missing certain entries or mentions of applications, and provides the client with assurances of a state of affairs inconsistent with the contents of the entries to the book or applications filed to it, then the notary fails to be diligent within the meaning of Article 49 NLA and is liable for the full extent of the harm.[19] For the notary is not merely allowed to, as everyone else, inspect land-and-mortgage register books but also to inspect the files. Where the notary accepts the future transferee's mandate to check all encumbrances on a property, the notary plainly acts with less than adequate diligence in failing to notice the mention of an application and inspect its contents.

In the judgment of 5 February 2004, III CK 271/02,[20] the Supreme Court – following in the footsteps of its earlier resolution of 29 May 1990, III CZP 29/90,[21] and the rationale therein – found the notary to exercise preventive jurisdiction, influencing the interested parties' conduct to shape their transactions in accordance with law and with the principles of social co-existence. The Supreme Court endorsed

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16 C I 2123/34, PN 1935, No. 17, item 381.

17 LEX No. 563626.

18 I CKN 1157/00, LEX No. 55249; the Supreme Court judgment of 14 June 2017, IV CSK 104/17, OSNC 2018, No. 3, item 35.

19 Compare the Supreme Court decision C III 577/36, PN 1937, No. 17–18, item 140; and the Supreme Court judgment of 7 November 1997, II CKN 420/97, unpublished.

20 LEX No. 602711.

21 OSNC 1990, No. 12, item 150.

this view in the reasons expounded in the resolution of a seven judges' panel of 7 November 2010, III CZP 86/10.[22]

As regards the model of the notary's conduct in connection with Article 81 NLA, the Supreme Court's judgment of 7 November 1997, II CKN 420/97,[23] plays an important role. There, the Court held that notaries are liable for the execution of a legal transaction inconsistent with law. It also noted that the notary has an obligation to advise the interested parties of the conflict with law and to refuse to execute the transaction if a party so notified continues to demand the execution of the notarial deed. The Supreme Court emphasized that while a warning of the legal risk associated with the contract being made does satisfy Article 80 § 2 NLA, it is not sufficient for the purposes of Article 81 NLA.

In the resolution of 18 December 2013, III CZP 82/13, the Supreme Court, in reference to the notary's status and tasks under Polish law, explained as follows:

> The notary is a person in a position of public trust, and documents containing notarial transactions are official documents within the meaning of the Code of Civil Procedure. The notary's task is to guarantee the safety and reliability of legal transactions. The state transferred to the notary part of its own powers in respect of activities it deemed to be of legal and general social significance. The notary's tasks are also important from the perspective of a subject of civil law. The notary gives shape to the property interests of various persons and entities, deciding the future fates of business relationships, guarantees the compliance of civil law transactions with the provisions of law and is a 'custodian' of the existing legal order. Notarial deeds must provide legal safety to all participants. The notary has to eliminate or mitigate the risk of a future court dispute, and, should such a dispute take place, the notary's role is to assist the civil proceedings by supplying clear evidence.

The Court also emphasized that:

> the evaluation of the notary's liability in connection with a violation of Article 81 NLA is unaffected by the attitude of the counterparties and by the notary's exhaustive explanation of the dangers involved in the transaction. The key is to eliminate the risk of defective notarial transactions, not merely to compel the parties to a deeper reflection on the transaction underway or to provide them with correct information about the consequences and hazards relating to it.

In the judgment of 27 April 2016 the Supreme Court emphasized that special diligence as the grounds of liability under Article 49 NLA has to be evaluated on a case-by-case basis, with any attempt at construing on this basis a universal rule of legal compliance for the notary being incorrect here.[24]

The overview of a selection of the most representative decisions shows that the notary's basic obligations arise directly from the principles of the legal order and are binding on a third party just as well as the notary's client. The statute unquestionably requires the notary to observe special diligence while fulfilling these duties.

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[22] OSNC 2011, No. 5, item 41, as well as the reasons for the Supreme Court resolution of 29 May 1990, III CZP 29/90, OSNC 1990, No. 12, item 50.

[23] OSNC 1998, No. 5, item 76.

[24] Compare the Supreme Court judgment of 27 April 2016, II CSK 518/15, OSP 2017, No. 1, item 2.

ORIGINAL ANALYSIS

In the case at hand the key issue was the refund of the discount granted to the original transferee (the claimant's wife) of a separately owned apartment under Article 68 REMA. The numerous amendments to this provision, especially concerning who exactly is required to refund this discount, undoubtedly attract much attention. The difficulties in the interpretation and application of this provision were also noted by the Supreme Court in the reasons for the discussed judgment.[25] From the language of the notarial contract of 7 December 2009 it followed that the notary had instructed the parties on Article 68 REMA. Hence, the execution of a donation contract for the apartment estate with the claimant as the donee did not have the effect of requiring the transactional parties to refund the discount; this is because the claimant, as husband, was the donor's close person within the meaning of Article 68 para. 2a(1) REMA in the wording applicable on the date of entering into the said contract. While drafting the contract, the notarial deputy instructed the parties on the direct legal effects of the transaction specified in the legal instruments cited in the text of the contract. The Supreme Court emphasized that the obligation to provide the parties with the necessary explanation as to the notarial transaction being effected (Article 80 § 3 NLA) did not include the notarial deputy's activities in the area of advising or informing the claimant not directly on the form, contents and legal effects of the notarial transaction being the donation of the apartment but in reference to the claimant's intentions or all possible hypothetical future transactions involving the object of the acquired right. A contrary view would be hardly acceptable as it would exceed the notary's statutory scope of duties identified in Article 80 § 2 and § 3 NLA and determined by the function of the notary as the main regulator of the business sphere and the legal safety of the contracting parties, as well as the 'guarantor' of the certainty and stability of civil transactions. It would make the notary's position identical to that of a private legal, tax or investment advisor retained by one of the parties to the transaction and would also presuppose a duty for the notary to foresee the type and nature of the party's potential future transactions involving the subject-matter of the contract now before the notary, for which proposition there would be no legal basis. It is beyond any doubt that the notary had a duty to instruct the original transferee on the consequences of a hypothetical alienation within five years, which was actually done in the 2009 notarial deed, as the analysis of the facts of the case shows. Any interpretation of the relevant provisions lending itself to the conclusion that the obligation to advise applies to the notary even where the original transferee is donating the property to the spouse with no resulting obligation to refund the discount would appear to be incorrect. The notary, *de lege ferenda* in a way, would have to advise the donee that if the latter wanted to alienate the property within five years, the obligation to refund the discount had to be taken into account.

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[25] Compare the Supreme Court resolutions of 24 February 2010, III CZP 131/09, OSNC 2010, No. 9, item 118; resolution of the seven judges' panel of the Supreme Court of 11 April 2008, III CZP 130/2007, OSNC 2008, No. 10, item 108; judgments of the Supreme Court: of 14 July 2010, V CSK 15/10, OSNC-ZD 2011, No. A, item 15; of 24 January 2013, II CSK 286/12, unpublished.

It appears that – as the courts adjudicating on the merits were right to conclude – the correct interpretation of Article 80 § 2 and § 3 cannot impose on the notary such a far-reaching obligation to predict the parties' future conduct. Furthermore, in its literal reading Article 80 § 2 refers to the notarial transaction being in the process of execution before the notary and not one that might or might not be effected in the future, being highly improbable due to the loss of the discount. The above-referenced duties, however, are not unlimited, and, according to the view established among scholars, they should: 'in principle be limited to predicting the civil law consequences strictly linked to the relevant notarial transaction'. The notary's obligations do not eliminate the transactional party's need to see to its own interests, including without limitation a title check in the publicly available land-and-mortgage register book.[26] The party should also inform the notary of any circumstances potentially affecting the relevant transaction, especially when the party is a professional in real-estate trade.

Additionally, it must be noted that Article 19 § 2 NLA explicitly prohibits the notary from advising in business transactions.

Furthermore, Article 19 § 3 NLA provides for the necessary explanation concerning the notarial deed underway, that is for appropriate guidance to be given by the notary witnessing the transaction giving rise to the obligation of refunding the discount. These limits do not include the imposition on the notary of an obligation to analyse previous notarial deeds for potential terms involving the discount in order to warn the parties of the possibility of having to refund it upon alienation of the property. Thus, the scope of the notary's disclosures does not include the obligation to evaluate the substantive law and predict consequences arising, as they do in the facts at hand, from further alienations. It is aptly noted that the notary's obligation of due diligence cannot be regarded as tantamount to the obligation of performing an interpretation of law in such a manner as to subsequently be approved by the court.[27] The notary does not resolve disputes about what the law is or exercise the administration of justice. It is unquestionably one of the notary's chief tasks to protect the safety of legal transactions by preventively eliminating defective legal transactions and to protect the party's interests by preventing the party's engagement in an undertaking capable of later being found to be defective. The proceedings connected with the execution of notarial transactions do not equip the notary with legal tools to gather complete information in this matter and, in particular, to determine the facts with the same degree of certainty as a court typically does.

LIMITS OF THE NOTARY'S PROFESSIONAL DILIGENCE

Another imputed ground of liability in the judgment at hand comes down to the alleged duty on the part of the notary (notarial associate) to examine the contract for the acquisition of the residential apartment as a separate estate from the municipality

[26] The Supreme Court judgment of 17 September 2003, II CK 10/02.
[27] III CZP 82/13.

and advise the claimant about the consequences of a hypothetical further alienation in the future in the form of triggering the obligation to refund the discount granted to his wife when purchasing the same estate from the municipality. The dispute, therefore, focused around the scope of the notarial deputy's duties attendant on the execution of the relevant deed in the form of a notarial deed, the limits of the notary's obligation to have care of the due protection of the rights and interests of the parties to that transaction (the claimant and the wife) and the obligation to provide information to the parties (Article 80 § 2 and § 3).

It appears that the notary has an obligation to exercise special diligence, which includes not only the requirement of drafting and executing the notarial deed in compliance with formal requirements but also the evaluation of substantive law, which is only possible to determine following review of the documents relating to the subject matter of the notarial deed, along with the consequences of any further alienation. This is because the notary's liability for harm inflicted in the execution of notarial transactions materializes when the grounds set out in Article 49 NLA are met, provided that the notary has an obligation of special diligence in the making of the transaction.

The above thus invites yet another question about the limits of the notary's professional diligence.[28] Due to the importance of this profession, the search for the appropriate solutions to narrow down the criterion of special diligence refers to Article 355 § 2 Civil Code. One could agree with Edward Drozd's opinion that the reference to 'special diligence' does not explain anything. The scope of the notary's professional diligence is determined by the scope of the notary's duties.[29] According to Agnieszka A. Machnicka, on the other hand, diligence is defined as a set of positive qualities characterising the obligor's conduct; this conduct should be described by conscientiousness, forethought, prudence, caution and care to the achievement of the intended purpose.[30] According to Zbigniew Banaszczyk and Paweł Granecki, due diligence is an objectively existing model of conduct created for the purpose of the correct performance of the obligation as best possible, while securing the obligors' interests by referring the contents of the diligence to the relevant type of relationships.[31]

Aleksander Oleszko is correct in noting that Article 49 NLA introduces one of the multiple types of professional diligence.[32]

Considering the professional nature of the activity, one could adhere to Marek Safjan's view that the professional diligence criterion aggravates the required standard performance of an obligation, as it allows the charge of failure of diligence

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[28] For more details, see M. Sekuła-Leleno, *Glosa do wyroku SN z 27.04.2016 r. II CSK 518/15*, Rejent 1, 2017, pp. 89–108.

[29] E. Drozd, *Odpowiedzialność notariusza w wypadku nieważnej (bezskutecznej) czynności prawnej*, [in:] Romuald Sztyk (ed.), *III Kongres Notariuszy Rzeczypospolitej Polskiej. Nowoczesny notariat w bezpiecznym państwie*, Warszawa 2006, p. 81.

[30] See A.A. Machnicka, *Przedkontraktowe porozumienia – umowa o negocjacje i list intencyjny. Studium prawnoporównawcze*, Warszawa 2007, p. 247.

[31] See Z. Banaszczyk, P. Granecki, *O istocie należytej staranności*, Palestra 7–8, 2002, p. 19; and, in this particular scope, M. Sośniak, *Należyta staranność*, Katowice 1980, pp. 115–119.

[32] A. Oleszko, *Ustrój polskiego notariatu*, Kraków 1999, p. 222.

in the context of such duties as, even though perhaps not formulated by the parties, are tightly connected with the professional nature of the relevant activity, and thus shape the counterparty's legitimate expectations.[33]

Against this background, Mieczysław Sośniak aptly notes that the requirement of always the highest diligence should not be assumed, nor should the standards be *a limine* reduced to the absolute minimum. Sośniak supports reference to the term 'due diligence', functioning in the context of Article 355 § 1 Civil Code. This, therefore, involves the diligence required in the relevant type of relationships, such as may be required of the respective group of persons, whereby it is average or very high, depending on the circumstances.[34]

It ought to be emphasized, however, as the subject literature nowadays sometimes tends to do, and correctly so, that the assertion alone that in the specific case the evaluated conduct of a given person diverged from the above-discussed normative model implies only the conclusion that such a person has failed to exercise due diligence but does not yet make the attribution of culpability a decided matter. Here, some writers note that misconduct cannot be imputed not only where compliance with the requirements of due diligence is impossible as a matter of fact but also whenever the choice of the relevant course of action has been made due to having access only to incomplete or misleading information and thus in the case of justified error or abnormal motivational situation (e.g. acting under the influence

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[33] See: M. Safjan, [in:] J. Okolski (ed.), *Prawo handlowe*, Warszawa 1999, p. 389.

[34] M. Sośniak, *Elementy winy nieumyślnej w prawie cywilnym*, Pr.Nauk.UŚl.Pr.Prawn. 6, 1975, pp. 161–162; *idem*, *supra* n. 31, p. 171. In his monograph he notes that due diligence may variously imply ordinary, average or above-average diligence. According to him, however, one cannot of speak of an elevated threshold of diligence, e.g. for professionals, as even professional diligence is simply another type of diligence, which should also be classified as due diligence, since the latter is simply adapted to the specific set of facts, both as to the persons or entities whose conduct is being evaluated and the subject matter involved in the transaction, as well as the circumstances wherein the transaction has taken place. The distinction lies, therefore, in the shape of the objectivised normative models of diligence and not the level of assiduity in action; see M. Sośniak, *supra* n. 31, pp. 189–190. A contrary view is presented in the judgment of the Court of Appeal in Kraków of 9 March 2001, I ACa 124/01, Przegląd Sądowy 10, 2002, p. 130, wherein the court held that above-average diligence is required of physicians, due to the object of their activities being the human person and the consequences that are often irreversible. This view is endorsed by Mirosław Nesterowicz in his gloss on that judgment, who – in agreement with the court's thesis – submitted that the requirements made of a specialist must be higher, also reflecting the state of knowledge and progress made in the field of medicine, due to the fact that a physician should always maintain continued professional development in terms of knowledge and skill; see M. Nesterowicz, *Glosa do wyroku Sądu Apelacyjnego w Krakowie z dnia 9 marca 2001 r., I ACa 124/01*, Przegląd Sądowy 10, 2002, p. 132. Nesterowicz is justified in his tendency to rely on the term 'due diligence' as opposed to average diligence, for the latter does in fact invoke negative associations in certain writers. For example, Stefan Grzybowski submits that: 'In pursuit of findings involving the physician's civil liability one has to have regard to the existing state of medical knowledge and art and the appropriate level of prudence, diligence and care for the patient. This does not mean average values, [just about] any sort of values, the adoption of which would be the result of capitulation in the fact of an oftentimes unsatisfactory current state of affairs; on the contrary, it implies the highest level;' see S. Grzybowski, *Odpowiedzialność cywilna lekarza*, [in:] *idem* (ed.), *Odpowiedzialność cywilna za wyrządzenie szkody (zagadnienia wybrane)*, Warszawa 1969, pp. 159–160.

of a threat).[35] There can be no doubt that in their legal aspect the purpose of the notary's activities is to safeguard the certainty of legal transactions and as such also of the legal order. Hence, it is aptly emphasized in the literature on the subject that the notary cannot 'approach without any criticism or reflection the submitted documents touching not only on the validity and effectiveness of the transaction attested in the deed but also on the nature of the notarial document itself'.[36]

Biruta Lewaszkiewicz-Petrykowska correctly observes that 'almost all proposals for the improvement of so-called professional liability are characterised by a desire for making it more severe and more objective,' and appears, moreover, to be consistent with this view. Lewaszkiewicz-Petrykowska is right in asserting that the aggravation of liability needs to have its own limits. Making all professionals liable for all consequences of their activities would not be expedient.[37]

The narrowing down of the notary's culpability is a search for (construction of) of a normative model of the notary's professional (special) diligence, which matter is not quite uncontroversial.[38] In its reasons, the Supreme Court aptly noted that the notary was liable for harm inflicted in the making of a specific notarial deed as a result of failure to comply with the obligation to inform the parties about all of the consequences of the statements made by them and constituting the contents of the transaction underway. This means the civil law consequences linked directly to the notarial deed or the official activities of the notary executing the deed.

CONCLUSIONS

Evaluation of the notary's conduct must reflect the professional nature of the notary's activities (Article 355 § 2 Civil Code) along with the criterion of special diligence expressly set out in Article 49 NLA.[39] The requirement of special diligence is linked to the notary's role as a custodian of the legal order and bearer of public trust (Article 2 § 1 NLA) exercising care so that the participants of legal transactions shape their legal relationships in accordance with law and with the principles of social co-existence, mitigating the risk of future litigation.[40] The notary's duties in this regard are narrowed down by Article 80 § 2 NLA, mandating that the notary must ensure the due protection of the rights and legitimate interests of parties and others

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[35] P. Machnikowski, *System Prawa Prywatnego*, Warszawa 2018, p. 415.

[36] A. Oleszko, *Staranność zawodowa notariusza w świetle art. 80 prawa o notariacie*, Rejent 9, 1997, pp.16–17.

[37] B. Lewaszkiewicz-Petrykowska, *Nowe tendencje w zakresie cywilnej odpowiedzialności zawodowej*, [in:] A. Mączyński, M. Pazdan, A. Szpunar (eds), *Rozprawy z polskiego i europejskiego prawa prywatnego*, Kraków 1994, p. 190.

[38] See, e.g. M. Safjan, [in:] K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz*, Vol. 1, Warszawa 2002, 677 et seq.; A. Oleszko, *Akt notarialny jako podstawa odpowiedzialności prawnej notariusza – dyscyplinarnej, cywilnej, karnej*, Warszawa 2015.

[39] Compare the Supreme Court judgment of 12 June 2002, III CKN 694/00, OSNC 2003, No. 9, item 124.

[40] Compare the Supreme Court resolution of 18 December 2013, III CZP 82/13, OSNC 2014, No. 10, item, 101.

for whom the transaction could have legal consequences. The function exercised by the notary, in connection with the liability grounds arising from Article 415 Civil Code read in conjunction with Article 49 REMA, has the result that the slightest form of culpability (*culpa levissima*), determined in reliance on the aforementioned stringent test of diligence, is sufficient to hold the notary liable.[41]

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[41] Compare the Supreme Court judgments: of 14 June 2017, IV CSK 104/17, OSNC 2018, No. 3, item 89; of 22 March 2019, I CSK 89/18.

LIMITS OF A NOTARY'S OBLIGATION OF DISCLOSURE IN THE MAKING OF A DEED – GLOSS ON THE SUPREME COURT JUDGMENT OF 28 JUNE 2019, IV CSK 224/18

Summary

A notary is liable for harm inflicted in the course of a notarial transaction whether on a client or third parties, on the basis of Article 415 of the Civil Code, on account of failure to exercise due diligence (Article 49 Notarial Law Act), in a culpable manner, subject to the professional nature of the notary's activities (Article 355 § 2 Civil Code) and the limits of professional diligence set out by Article 80 § 1 to § 3 NLA. The notary is the bearer of an office of public trust, and documents containing notarial transactions are official documents within the meaning of the Code of Civil Procedure. The notary's task is to guarantee the safety and credibility of legal transactions, which is of importance both to the public interest and the private interests of parties to notarial transactions. The proceedings before the notary are not a contest between the parties, and the nature of control exercised by the notary is preventive.

Keywords: notarial tort, harm, disclosure obligation, due diligence, status of a notary

GRANICE OBOWIĄZKU INFORMACYJNEGO NOTARIUSZA PRZY SPORZĄDZANIU AKTU NOTARIALNEGO – GLOSA DO WYROKU SĄDU NAJWYŻSZEGO Z 28 CZERWCA 2019 R., IV CSK 224/18

Streszczenie

Notariusz ponosi odpowiedzialność za wyrządzoną przez niego przy wykonywaniu czynności notarialnej szkodę zarówno wobec klienta, jak i osób trzecich, na podstawie art. 415 k.c., za niezachowanie należytej staranności (art. 49 u.p.n.), w sposób zawiniony, z uwzględnieniem zawodowego charakteru jego działalności (art. 355 § 2 k.c.) i granic staranności zawodowej wyznaczonych przez art. 80 § 1–3 u.p.n. Notariusz jest osobą zaufania publicznego, a dokumenty zawierające czynności notarialne mają charakter dokumentów urzędowych w rozumieniu kodeksu postępowania cywilnego. Jego zadaniem jest zapewnienie bezpieczeństwa i wiarygodności obrotu prawnego, co jest istotne zarówno z punktu widzenia interesu publicznego, jak i prywatnych interesów stron czynności notarialnych. Postępowanie przed notariuszem nie ma charakteru sporu między stronami, a kontrola sprawowana przez niego jest kontrolą prewencyjną.

Słowa kluczowe: delikt notarialny, szkoda, obowiązek informacyjny, należyta staranność, status notariusza

LOS LÍMITES DE OBLIGACIÓN DE INFORMACIÓN POR PARTE DE NOTARIO A LA HORA DE PREPARAR LA ESCRITURA PÚBLICA – COMENTARIO A LA SENTENCIA DEL TRIBUNAL SUPREMO DE 28 DE JUNIO DE 2019, IV CSK 224/18

Resumen

El notario incurre en responsabilidad por el daño ocasionado a la hora del acto notarial tanto frente al cliente como a los terceros, en virtud del art. 415 del código civil, por no observar diligencia debida (art. 49 de la ley derecho de notariado), mediando la culpa, teniendo en cuenta el carácter profesional de su actividad (art. 355 § 2 del código civil) y dentro de los límites de diligencia profesional establecidos por el art. 80 § 1–3 ley derecho de notariado. El notario es una persona de fe pública y los documentos notariales se consideran como documentos oficiales de acuerdo con el código de procedimiento civil. Su papel consiste en dar la seguridad y credibilidad de tráfico jurídico, lo que es importante tanto desde el punto de vista de interés público como de interés privado de partes de actos notariales. El proceso ante el notario no tiene carácter litigioso entre las partes y el control ejercido por él es un control preventivo.

Palabras claves: infracción notarial, daño, obligación de información, diligencia debida, estatus de notario

ПРЕДЕЛЫ ОБЯЗАННОСТЕЙ НОТАРИУСА ПО ИНФОРМИРОВАНИЮ ПРИ СОСТАВЛЕНИИ НОТАРИАЛЬНОГО АКТА. КОММЕНТАРИЙ К РЕШЕНИЮ ВЕРХОВНОГО СУДА ОТ 28 ИЮНЯ 2019 Г., IV CSK 224/18

Аннотация

Нотариус несет ответственность за ущерб, причиненный им при осуществлении нотариальной деятельности, как перед клиентом, так и перед третьими лицами (ст. 415 ГК) за несоблюдение должной осмотрительности (ст. 49 Закона «О нотариате») по собственной вине, с учетом профессионального характера его деятельности (ст. 355 § 2 ГК) и пределов должной осмотрительности, определенных в ст. 80 § 1–§ 3 Закона «О нотариате». Нотариус является лицом общественного доверия, а документы, с которыми совершались нотариальные действия, являются официальными документами в понимании Гражданского процессуального кодекса. Задача нотариуса – обеспечить безопасность и достоверность юридических сделок, что важно с точки зрения как общественных интересов, так и частных интересов сторон, являющихся участниками нотариальных действий. Нотариальный процесс не носит характера спора между сторонами, а контроль, осуществляемый нотариусом, имеет упреждающий характер.

Ключевые слова: нотариальный деликт; ущерб; обязанность по информированию; должная осмотрительность; статус нотариуса

GRENZEN DER INFORMATIONSPFLICHT DES NOTARS BEI DER ERRICHTUNG VON NOTARIELLEN URKUNDEN – KOMMENTAR ZUM URTEIL DES SĄD NAJWYŻSZY, DER HÖCHSTEN INSTANZ IN ZIVIL- UND STRAFSACHEN IN POLEN, VOM 28. JUNI 2019, IV CSK 224/18

Zusammenfassung

Ein Notar haftet für von ihm bei der Ausübung notarieller Geschäfte schuldhaft verursachte Schäden – sowohl Kunden als auch Dritten gegenüber – gemäß Artikel 415 des polnischen Zivilgesetzbuches, wenn er seine Sorgfaltspflicht verletzt (Artikel 49 des polnischen Notariatsgesetzes), unter Berücksichtigung der beruflichen Natur seiner Tätigkeit (Artikel 355 § 2 des polnischen Zivilgesetzbuches) und der der in Artikel 80 § 1–§ 3 des polnischen Notariatsgesetzes festgelegten Grenzen der beruflichen Sorgfalt. Notare sind Personen des öffentlichen Vertrauens und notarielle Urkunden amtliche Dokumente im Sinne der polnischen Zivilprozessordnung. Ihre Aufgabe besteht darin, die Sicherheit und Verlässlichkeit des Rechtsverkehrs zu wahren, was sowohl aus Sicht des öffentlichen Interesses, als auch der privaten Interessen der Parteien notarieller Rechtsgeschäfte von Wichtigkeit ist. Das Verfahren vor dem Notar ist von seiner Natur her keine Streitigkeit zwischen Parteien und die von ihm ausgeübte Kontrolle hat vorbeugenden Charakter.

Schlüsselwörter: Amtsdelikt eines Notars, Schaden, Informationspflicht, gebotene Sorgfalt, Notarstatus

LIMITES DE L'OBLIGATION D'INFORMATION DU NOTAIRE LORS DE LA PRÉPARATION D'UN ACTE NOTARIÉ – COMMENTAIRE DE L'ARRÊT DE LA COUR SUPRÊME DU 28 JUIN 2019, IV CSK 224/18

Résumé

Le notaire est responsable des dommages causés par lui dans l'exercice des acts notariés au client et aux tiers, conformément à l'art. 415 du Code civil, pour défaut de diligence raisonnable (article 49 de la loi sur le droit notarial), de manière coupable, compte tenu du caractère professionnel de son activité (article 355 § 2 du Code civil) et des limites de la diligence professionnelle énoncées à l'article 80 § 1–§ 3 de la loi sur le droit notarial. Un notaire est une personne de confiance et les documents contenant des acts notariés sont des documents publics au sens du Code de procédure civile. Sa tâche est d'assurer la sécurité et la crédibilité des transactions juridiques, ce qui est important tant du point de vue de l'intérêt public que des intérêts privés des parties aux actes notariés. La procédure devant le notaire n'est pas un différend entre les parties, et le contrôle exercé par lui est un contrôle préventif.

Mots-clés: délit de notaire, dommages, obligation d'information, due diligence, statut de notaire

LIMITI DELL'OBBLIGO INFORMATIVO DEL NOTAIO NELLA REDAZIONE DI UN ATTO NOTARILE – GLOSSA ALLA SENTENZA DELLA CORTE SUPREMA DEL 28 GIUGNO 2019, IV CSK 224/18

Sintesi

Il notaio è responsabile del danno da lui causato nell'esercizio delle attività notarili, sia nei confronti del cliente che nei confronti di terzi, sulla base dell'art. 415 del Codice civile, del mancato rispetto della dovuta diligenza (art. 49 della legge Diritto notarile), colpevolmente, considerando il carattere professionale della sua attività (art. 355 § 2 del Codice civile) e il limiti della diligenza professionale stabiliti dall'art. 80 § 1–§ 3 della legge Diritto notarile. Il notaio è una persona che gode di fede pubblica e i documenti che contengono gli atti notarili hanno carattere di documenti ufficiali ai sensi del procedimento civile. Il suo compito è assicurare la sicurezza e la credibilità delle transazioni legali, essenziale sia dal punto di vista dell'interesse pubblico che degli interessi privati delle parti degli atti notarili. Il procedimento davanti al notaio non ha carattere di controversia tra le parti e il controllo da lui esercitato è un controllo preventivo.

Parole chiave: illecito notarile, danno, obbligo informativo, dovuta diligenza, status di notaio

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