

## Legal effects of concluding contracts for the purchase of residential buildings from housing cooperatives by cooperative members and a non-members

Skutki prawne zawarcia umów związanych z nabyciem budynku mieszkalnego od spółdzielni mieszkaniowej przez jej członka oraz osobę nieposiadającą statusu członka spółdzielni

Правовые последствия заключения договоров на приобретение жилых домов у жилищных кооперативов членом кооператива и лицом, не являющимся членом кооператива

Правові наслідки укладення договорів купівлі житлового будинку від житлового кооперативу його членом та особою, яка не має статусу члена кооперативу

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**Summary:** The motivation for writing this article was that I, as a solicitor, have conducted 18 court cases on behalf of persons who had actions brought against them by housing cooperatives aiming to terminate residential construction contracts concluded in 2010 and 2011 by and between the cooperatives and my clients. A common factor for all my clients was that they were not members of the housing cooperatives at the time they entered into these contracts. After becoming housing cooperative members in 2012, my clients concluded the contracts in the form of notarial deeds: first preliminary and then final contracts. All clients paid the agreed-upon price for house construction. This is because, at the time, residential construction contracts could only be concluded with cooperative members and my clients only acquired membership later in 2012. Between 2015 and 2016, the housing cooperatives brought actions against my clients, demanding that the contracts they concluded with the clients be declared void. The validity and relevance of the problem I have researched are evidenced by the fact that some of the court proceedings have not resulted in a final decision to this day. The research aims to determine the validity of the contracts entered into by my clients in connection with their purchases of buildings from housing cooperatives. The most significant problem was the 'commencement' of the acquisition process without being a cooperative member. To this end, I used the method of dogmatic analysis of the law and interpreted the legal provisions and court decisions in force throughout the period (from 2010 until today), as well as the most important decision of the Constitutional Tribunal on this issue, i.e. that of 5 February 2015. I have answered the question of whether the lack of cooperative member status at the time of concluding a building construction contract could render the contract null and void, and therefore, whether the claims of housing cooperatives deserve to be dismissed or admitted.

**Key words:** membership, cooperative, contract validity

**Streszczenie:** Pretekstem do napisania tekstu było prowadzenie przeze mnie jako adwokata 18 spraw sądowych na rzecz osób, przeciwko którym spółdzielnie mieszkaniowe wytoczyły powództwa o unieważnienie umów zawartych w 2011 i 2012 r. w formie pisemnej ze spółdzielniami mieszkaniowymi o wybudowanie i przyzręczenie ustanowienia odrębnej własności domu jednorodzinnego. Osoby te w chwili zawierania umów nie były członkami spółdzielni mieszkaniowej. Po uzyskaniu statusu członków spółdzielni (w 2011 i 2012 r.) moi klienci zawarli umowy w formie aktu notarialnego: najpierw umowy przedwstępne, a potem umowy przyzręczone. Wszyscy zapłacili za wybudowanie domów. Ze względu na to, że w spornym okresie umowy o wybudowanie domów mogły być zawierane tylko z członkami spółdzielni (moi klienci uzyskali je w 2012 r.), w latach 2015 i 2016 spółdzielnie mieszkaniowe

wytoczyły powództwa o stwierdzenie nieważności zawartych umów. Celem podjętych badań było udzielenie odpowiedzi na pytanie o skuteczność prawną zawartych umów, związanych z nabyciem budynku mieszkalnego od spółdzielni mieszkaniowej przez osoby, które „rozpoczęły” proces nabywania, nie będąc członkami spółdzielni mieszkaniowej. W artykule posłużyłam się metodą dogmatyczną. Dokonałam wykładni obowiązujących w całym okresie (od 2010 r. do chwili obecnej) przepisów prawa, orzecznictwa sądowego, kluczowego w tej sprawie wyroku Trybunału Konstytucyjnego z dnia 5 lutego 2015 r. Udzieliłam odpowiedzi na pytanie, czy brak statusu członka spółdzielni w chwili zawierania umowy o budowę domów mógł powodować nieważność zawieranych umów.

**Słowa kluczowe:** członkostwo, spółdzielnia, ważność umów

**Резюме:** Предлогом для написания настоящей статьи послужил факт, что Автор, как адвокат, провела 18 судебных дел от имени лиц, против которых жилищные кооперативы подали иски о признании недействительными договоров, заключенных в 2011 и 2012 годах в письменной форме с жилищными кооперативами на строительство и обещание установить отдельное право собственности на одноквартирный жилой дом. На момент заключения договоров эти лица не являлись членами жилищного кооператива. После получения статуса членов кооператива (в 2011 и 2012 годах), клиенты заключили договоры в форме нотариального акта: сначала предварительные, а затем основные договоры. Все они оплатили строительство домов. В связи с тем, что в указанный период договоры на строительство домов могли заключаться только с членами жилищных кооперативов (мои клиенты получили их в 2012 году), в 2015 и 2016 годах жилищные кооперативы подали иски о признании заключенных договоров недействительными. Цель проведенного исследования заключалась в том, чтобы ответить на вопрос о юридической силе заключенных договоров, связанных с приобретением жилого помещения у жилищного кооператива лицами, которые «начали» процесс приобретения, не являясь членами жилищного кооператива. В статье используется догматический метод. Автор истолковывала правовые положения, действовавшие в течение всего периода (с 2010 года по настоящее время), судебную практику, ключевое решение Конституционного суда от 5 февраля 2015 года по данному вопросу. Автор ответила на вопрос, могло ли отсутствие статуса члена кооператива на момент заключения договора на строительство домов сделать заключенные договоры недействительными.

**Ключевые слова:** членство, кооператив, действительность договоров

**Резюме:** Приводом для написания текста послужило то, что я, как адвокат, вела 18 судебных дел против лиц, против которых жилищные кооперативы подали иски о признании недействительными договоров, заключенных в 2011 и 2012 годах в письменной форме на строительство и обещание установить отдельную собственность на односемейный дом. Эти лица на момент заключения договоров не входили в состав жилищного кооператива. После приобретения статуса членов кооператива (в 2011 и 2012 годах) мои клиенты заключили договоры в форме нотариального акта: сначала предварительные, а затем основные. Каждый оплатил строительство своего дома. В связи с тем, что в спорный период договоры на строительство домов могли заключаться только с членами кооператива (мои клиенты получили этот статус в 2012 году), в 2015 и 2016 годах жилищные кооперативы подали иски о признании заключенных договоров недействительными. Методом исследования было исследование на предмет юридической силы заключенных договоров купли-продажи жилья у жилищного кооператива лицами, которые «начали» процесс приобретения, не будучи членами жилищного кооператива. В статье использован догматический метод. Я провела толкование нормы закона, что действовало в течение всего периода (с 2010 года по настоящее время), судебных решений, ключевого решения Конституционного Трибунала от 5 февраля 2015 года. В статье дан ответ на вопрос, могла ли отсутствие статуса члена жилищного кооператива привести к признанию заключенных договоров недействительными.

**Ключеві слова:** членство, кооператив, чинність договорів

## Introduction

The following considerations focus on the determination of legal consequences ensuing from the conclusion of written construction contracts and final contracts

for the establishment of separate ownership of a single-family residential building, under the Act on Housing Cooperatives of 15 December 2000 (based on its wording as of 6 April 2000),<sup>1</sup> which were concluded by and between housing cooperatives and individuals who were not cooperative members at the time.<sup>2</sup>

In practice, it was often the case that construction contracts and final contracts to establish separate ownership of single-family residential houses were concluded with non-members of housing cooperatives before the Act on Housing Cooperatives, in the wording valid as of 9 September 2017, came into force. Subsequently, the 'purchasers' were granted cooperative membership and concluded a preliminary contract, in the form of a notarial deed, for the transfer of the right of perpetual usufruct of the land and establishment of separate ownership of the building, under which the cooperative (pursuant to the provisions of the Act on Housing Cooperatives of 15 December 2000) undertook to transfer to the 'purchaser' the right of perpetual usufruct together with the ownership of the residential building constituting a separate property, and the 'purchaser' undertook to acquire these rights. Then, while performing the preliminary contract, the parties concluded another notarial deed contract for the transfer of the right of perpetual usufruct and share in the property, establishment of separate ownership of the building and a *quoad usum* agreement, under which the cooperative transferred to the 'purchaser' the ownership of the residential building constituting a separate property along with the right of perpetual usufruct to the land on which the building was located. While this sequence of events seems logical and consistent, unfortunately, it evokes numerous legal issues.<sup>3</sup>

## 1. The influence of the membership relationship on the validity of concluded contracts

The key point is that this relationship between the 'purchaser' and the housing cooperative began when the 'purchaser' was not yet a member of the housing cooperative.

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<sup>1</sup> Journal of Laws [Dziennik Ustaw] 2001 no. 4, item 27 as amended.

<sup>2</sup> To learn more about cooperative member status, see: K. Pietrzykowski, *Charakter prawny stosunku członkostwa*, in: *System Prawa Prywatnego*, vol. 21. *Prawo spółdzielcze*, ed. K. Pietrzykowski, Warszawa 2020, pp. 100 ff.

<sup>3</sup> A. Stefaniak, *Prawo spółdzielcze. Ustawa o spółdzielniach mieszkaniowych. Komentarz*, Warszawa 2018 [LEX database], Commentary on Article 3.

Pursuant to Article 3 (1) of the Act on Housing Cooperatives of 15 December 2000, in the wording valid from 6 April 2010 to 9 September 2017, i.e. the period during which the construction contract, preliminary contract and final contract were concluded, a natural person could be a cooperative member even if he or she had limited or no legal capacity. During the above period, this provision did not specify the moment in which a person is granted cooperative membership. In the wording in force after 9 September 2017, Article 3 (1) (4) of the aforementioned Act indicates that a cooperative member is a natural person who is entitled to the claim to establish separate ownership of premises, hereinafter referred to as the 'expectancy right', even if he or she does not have legal capacity or has limited legal capacity. Moreover, Article 3 (3<sup>2</sup>) (2) stipulates that cooperative membership arises at the moment of acquisition of the expectancy right. This effect arises by virtue of law.

In its wording valid when the construction contract, preliminary contract and final contract were concluded, Article 18 (1) provided that the cooperative concludes a residential construction contract with a cooperative member applying for the establishment of separate ownership of the premises. In contrast, the Article's wording after 9 September 2017 indicates that a residential construction contract is concluded with a person applying for the establishment of separate ownership of premises. The consequences of concluding the contract set out in Article 18 are regulated by Article 19, according to which the above-mentioned expectancy right arises at the moment of concluding this contract.

Bearing the above in mind, it should be noted that before 9 September 2017 a residential construction contract could only be concluded with a member of a housing cooperative. Since the above-mentioned date, this contract may be concluded not only with a cooperative member but also with any non-member who simply applies for the establishment of separate ownership of premises.<sup>4</sup> At the same time, it is assumed that at the time the parties concluded the construction contract under consideration, it was necessary for anyone applying for membership to be approved by the resolution of the cooperative's assembly in order to become a cooperative member. The less restrictive approach assumes that it was enough for a prospective member to apply for cooperative membership, with the simultaneous conclusion of the residential construction contract.<sup>5</sup> If the above reasoning is deemed acceptable, it remains undisputed that the 'purchaser' was not a cooperative member at the time the construction contract was concluded, and as such, it was concluded with a person who was not entitled to it.

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<sup>4</sup> *Komentarze Prawa Prywatnego*, vol. 6B. *Prawo spółdzielcze i mieszkaniowe. Komentarz*, ed. K. Osajda, Warszawa 2018 [Legalis database], Commentary on Articles 3, 18, 19.

<sup>5</sup> K. Pietrzykowski, *Spółdzielnie mieszkaniowe. Komentarz*, Warszawa 2018 [Legalis database], Commentary on Articles 3, 18, 19.

In the wake of the above, it is necessary to consider the consequences of entering into a residential construction contract with a person who is not formally a cooperative member. At first glance, it appears that such a contract may be considered free from legal defects only if the acquirer of the rights arising from the contract was a cooperative member when the contract was concluded or at least signed a membership declaration concurrently with the conclusion of the contract. It should be noted, however, that in light of Article 3 of the Act on Housing Cooperatives, amended as a result of the Constitutional Tribunal's judgment of 5 February 2015 (K 60/13), a person who has the right to a claim arising from a residential construction contract for the establishment of separate ownership of the premises – the so-called 'expectancy right' – acquires the status of a housing cooperative member by virtue of law. This rule has been applied retroactively to anyone who had been entitled to expectancy right before the amended Act on Housing Cooperatives came into force. Thus, due to the constitutional and civil law principle of the protection of property and other proprietary rights, it may be assumed by analogy that 'purchasers' legally became cooperative members already at the time of conclusion of the construction contracts. This is since they acquired the expectancy right mentioned in Article 3 of the Act on Housing Cooperatives as early as that moment. Their subsequent admission as cooperative members by means of a resolution of the cooperative assembly was, in such a case, merely a confirmation of their cooperative member status. Acceptance of the above argumentation leads to the conclusion that the construction contracts under consideration were concluded in compliance with the law and thus shall be deemed valid and effective. In the justification of its judgement of 5 February 2015 (K 60/13), the Constitutional Tribunal indicated that the legislator, within the binding constitutional framework, has considerable freedom to shape the content of subjective rights at the level of ordinary legislation. At the same time, it is not constrained in its ability to make the effect of the acquisition of a subjective right conditional on the potential buyer being admitted as a housing cooperative member. Nonetheless, the legislature's freedom is by no means absolute and unlimited. Its limit is the protection of constitutionally guaranteed freedoms and rights. The legislator may not arbitrarily shape the content and limits of individual property rights. It cannot introduce provisions which, in practice, will lead to purchasers committing significant financial resources without a guarantee of acquiring specific property rights. The acquisition of a vital property right cannot be derived from cooperative membership.<sup>6</sup>

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<sup>6</sup> Based on the statement of reasons for the judgement of the Constitutional Tribunal of 5 February 2015, K 60/13, Journal of Laws 2015 item 201 and 30 March 2004, K 32/03, Journal of Laws 2004 no. 63, item 591.

Moreover, taking into account the legal structure of the residential construction contract and its exclusively preparatory (development) character, it should be stated that this contract, if concluded with a non-member of a cooperative, is not burdened with absolute nullity. Even if we assume that the 'purchasers' were not cooperative members at the time when the construction contracts were concluded, the only result of this in the cases I have analysed would be that the 'purchasers' would have acquired a claim within the scope of the contract, which would then be transformed into a full expectancy right of separate ownership of premises no later than on the date of acquiring cooperative membership. Thus, the moment its defects have been removed, the construction contract would become fully valid and effective.

Even if the above argumentation were to be rejected, what is brought to the fore is that a residential construction contract, due to its specificity, cannot be treated as a preliminary contract, let alone a final one. Thus, preliminary and final contracts concluded by and between the parties should be treated as separate contracts, independent of the construction contract. The effects of their conclusion should thus be considered separately from the construction contract's validity or otherwise not as ones arising from it. By concluding a preliminary contract, the parties, in a way, sanctioned any potential deficiencies in the construction contract. Thus, even if we assume that the construction contract was indeed concluded with a non-member of a cooperative, then at the time the preliminary contract was concluded, i.e. after the 'purchaser' had already formally acquired cooperative member status, the parties reaffirmed their intentions and produced legal effects by creating an obligation to transfer the perpetual usufruct right to the land and establish separate ownership of the building. Therefore, both the preliminary contract and the final contract are valid. It should thus be acknowledged that the cooperative effectively transferred to the 'purchaser' the ownership of the residential building, constituting a separate property, together with perpetual usufruct to the land on which the building was located.

In light of the amended Article 3 of the Act on Housing Cooperatives, a person entitled to the claim for the establishment of separate ownership of premises, the so-called 'expectancy right', which arises from a residential construction contract, shall acquire the status of a housing cooperative member by virtue of law.<sup>7</sup> Due to the constitutional and civil law principle of the protection of ownership and other proprietary rights, it may be assumed that the 'purchaser' legally became a cooperative member as early as the conclusion of the construction contract. The construction contract has been concluded in accordance with the law and is therefore valid and effective.

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<sup>7</sup> K. Pietrzykowski, *Charakter prawny członkostwa...*, p. 104.

Even if we assume that the ‘purchaser’ did not have the status of a cooperative member at the time of entering into the construction contract, the only effect of the contract was that the purchaser acquired the claim to the extent covered by it; at the same time, no later than on the date of acquiring cooperative membership, the claim transformed into the full expectancy right of establishing separate ownership of the premises.

Preliminary contracts and final contracts concluded by and between the parties should be treated as separate contracts, independent of the construction contracts. The effects of their conclusion should be considered separately from the construction contract’s validity or otherwise not as ones arising from it. By concluding a preliminary contract, the parties, in a way, sanctioned any potential deficiencies in the construction contract. Both the preliminary contract and the final contract are valid.

## Conclusions

In business practice, cooperatives claim that contracts concluded with non-members of cooperatives shall be void, raising the argument of the so-called non-retroactivity of the amended Article 3 of the Act on Housing Cooperatives. I would like to stress that in line with the argumentation raised above, the assumption that the ‘purchasers’ legally became cooperative members as early as the time of concluding the construction contract may, by analogy, result not from the retroactive application of Article 3 itself, but rather from the constitutional and civil law principle of the protection of property and other proprietary rights. As stated in Article 21 (1) of the Polish Constitution, the Republic of Poland protects ownership.<sup>8</sup> Further, pursuant to Article 64 of the Polish Constitution, everyone has the right to ownership. The Constitution of the Republic of Poland also states that everyone shall enjoy the equal legal protection of ownership.<sup>9</sup> At the same time, ownership may only be limited by statute but only to the extent that this does not violate the essence of the right of ownership. This results explicitly from the above-mentioned principles that the right of ownership, as a fundamental right of every Polish citizen, is subject to special protection guaranteed by the legal act of the highest rank. Therefore, evoking the constitutional principles indicated above, one could formulate the following thesis: the legislator’s omission resulting in the lack of an appropriate

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<sup>8</sup> The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997 no. 78, item 483.

<sup>9</sup> Compare: judgment of the Constitutional Tribunal of 5 February 2015.



interim provision that would also regulate, in accordance with the amendments introduced by the Constitutional Tribunal's judgement, the situation of persons who acquired the expectancy right, housing cooperative membership, and ultimately the ownership right before the amendments came into force, cannot constitute grounds for treating them unfairly and differently from persons for whom the Act provided the relevant interim provisions. The view that 'purchasers' should be deemed to have become cooperative members upon entering into a construction contract with their cooperatives is based on compliance with constitutional principles and not directly on the literal wording of the Act on Housing Cooperatives.

It should be further emphasized that pursuant to Article 5 of the Civil Code, one may not make use of his or her right in a way that would be contrary to the socio-economic purpose of this right or the principles of social co-existence. Pursuant to the provisions of law, such action of the entitled person shall not be considered the exercise of his or her right and shall not be protected. Actions of housing cooperatives that aim to deprive persons of the right of ownership to the real estate that the latter have paid the agreed-upon price for could be deemed an abuse of the natural right by such cooperatives. However, the arguments presented herein would need to be elaborated further to use this thesis in a trial.

*Translated by Ewa Wyszczelska*

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