

ПРАКТИЧНА ЦИВІЛІСТИКА

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SUBSIDIARY APPLICATION OF DAMAGES COMPENSATION OBLIGATIONS

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The obligations of damages compensation take a special place in the system of civil obligations, being an universal instrument of protection for damage caused to rights of civil legal relations participants. In an order to ascertain the mechanism of their application, let us consider the possibilities of their use in regard to the property relationships on purpose to define a place and value of compensation of damages caused to the owner in the general system of the property rights protection by means of civil legislation.

The choice of such subject for investigation is caused by the importance of providing of the property rights protection, due to what this aspect of application for norms of institute of damages compensation has already been attracted researchers' attention repeatedly [1, 2, 3, 4]. But a significant number of questions still remains unsearchable, what is especially noticeable in the context of updating of domestic civil legislation.

Based on the foregoing we can conclude that the issues of a scientific analysis of the legal regulation of damages compensation are important in theoretical and practical perspectives, what leads to the expediency of consideration of the relevant problem.

Proceeding to consideration of questions relating to the issues outlined above, we act on the premise that the concept of the civil law protection of property rights covers all the set of means provided by civil legislation which are used in connection with violations committed against these rights and are aimed at reinstatement or protecting of owners' property interests [5, p. 240; 6], though it is mostly understood as so-called suits in rem and exactly they are analyzed in detail [7, pp. 652 – 728; 8, pp. 49 – 96; 9; 10; 11, pp. 67 – 75; 12, pp. 364 – 375]. Sometimes the question is put wider and then the matter is about “the responsibility for violation of property rights” [13, p. 160] or about “the protection of property rights” [14, pp. 172 – 203].

At that, within the limits of the mentioned totality a few groups of methods of the property rights protection are distinguished. However, there is no unity among the scientists in the positions concerning the grounds and details of classification for the marked methods of protection. Thus, some authors distinguish only two types of methods of the property rights protection: proprietary and obligatory methods [15, p. 527]. Others name proprietary and obligatory methods and other methods of protection [16, pp. 171 – 173]. Certain lawyers distinguish the yet more types of the property rights protection: 1) basic proprietary methods; 2) subsidiary proprietary methods; 3) special methods; 4) obligatory methods [17, p. 3]. Some scientists, not specially classifying methods of the property rights protection, at the same time, state the fixation by the Civil Code of Ukraine a separate method of the property protection – a preventive one (part 2 Art. 386 of CC) [18, p. 130].

However, a lack of common approach and unified criteria does not allow to lay down a common idea about the system of protection in this area, what is undesirable from the standpoint of practice, where the exact definition of applicable norms depends on a clear definition of features and typology of those or other relationships, the possibility of the subsidiary application of the rules, the possibility of law analogy etc.

Taking into account the comments above, we will try, foremost, to define expediency and possibility of division of methods of the property rights protection into types using certain criteria.

In our opinion, from the point of practice view, the initial division of the methods of the property rights protection should be the distinction of special (specific) and general universal (auxiliary, subsidiary) methods of protection.

Among the first ones are the methods of property protection, the primary objective of which is the protection of property relations, ensuring the

existence, preservation of property rights as such. A special chapter in the third book of the Civil Code of Ukraine “Ownership and other property rights” – the Chapter 29 “Property Rights Protection” – is dedicated to them.

In turn, the analysis of concepts and provisions of the Civil Code of Ukraine in the field of the property rights protection affords ground for the conclusion that from the legislators’ standpoint the proprietary means of property protection are recognized as crucial ones, to which in the third book of the Civil Code of Ukraine “Ownership and other property rights”, mainly, the special chapter 29 – “Protection of property rights” is devoted (articles 387 – 392 are devoted to them completely and article 386 is devoted to them in part, i. e. practically seven out of nine items).

However, not only traditional lawsuits in rem are enumerated in this chapter – about the return of property from illegal possession, about removing obstacles in the property rights realization, – but it is also mentioned that there are other ways to protect property rights, what gives reasons for their separation.

Thus, according to the concept of the Civil Code in this area as the result of the special (specific) methods of the property rights protection division there must be the distinction of: (1) proprietary special methods of property rights protection (a claim for the prohibition from actions which violate the property rights – part 2, Art. 386; a replevin (a claim for vindication) – Art. 387-390; a claim for the removal of obstacles in realization of right to use and dispose of property – Art. 391; a claim for recognition of property rights – Art. 392), and (2) other special methods of the property rights protection (recognition of invalid legal act that violates the right of property – Art. 393; compensation of damages caused to owners of land, house, other buildings due to the decline of their value – Art. 394).

The characteristic requirements for claims submitted in implementing the mentioned special methods of protection, are the proof by plaintiff of the existence of his ownership on certain property, and the fact of committing by others (not authorized by him) persons actions which violate the right of property in general or separate owner’s authorities.

It should be noted that there is a specific civil legal method of the property rights protection, which is provided not by the regulations of Chapter 29 of the Civil Code of Ukraine – “The protection of property rights”, but is mentioned in Chapter 82 of the Civil Code – “Compensations of harm”. This is the regulations of Art. 1170 of the Ukrainian Civil Code, according to which in case of passing the law

that terminates the ownership on certain property, the harm, caused to the owner of such property, is compensated by the state in full.

The terms of filing of a claim in this case are the following: (1) the existence of the plaintiff title to certain property in respect of which a bill that terminates ownership was passed; (2) passing a law that terminates ownership; (3) causing to the owner of such property damage as a result of passing a law that terminates the right of ownership.

The plaintiff is the owner, whose rights are violated with the laws that terminates the right of ownership, and the defendant is the state.

The content of the claim is a request of the owner for the full compensation of damage caused to him by adoption of the law that terminates the right of ownership.

The general methods of protection, in our opinion, should include the universal legal methods of the civil rights protection, and also methods aimed at protecting other subjective civil rights and which provide at the same time the protection of owner’s rights.

In turn, they can be divided into general, contractual and non-contractual methods.

The general methods of the property rights protection include the recognition of the deal as invalid, the termination or the amendment of the legal relationship, the recognition as invalid of an act of the state body, government body of the Autonomous Republic of Crimea, or of the local self-government body, or their official and public officers (part 2 Art. 16 of the Civil Code of Ukraine), the compensation of harm (Art. 22 of CC), the compensation for the moral damage (Art. 23 of the CC).

Among the contractual methods of the property rights protection there should be named claims due to non-discharge or an improper discharge of the obligations (claim for the transfer of goods acquired under sales contract, or order-made goods, if the right of ownership arose before the transfer of goods; claim for the return of goods provided for use under contract; claim for the compensation of damage caused to the owner by non-discharge or an improper discharge of the obligations).

The non-contractual methods of the property rights protection are claims based on non-contractual obligations (due to representation of a thing on competition – Art. 1157 of the CC of Ukraine; due to non-transfer of assets derived therefore from fulfillment of actions in valuable interests of other person without its power of attorney – Art. 1159 of the CC of Ukraine; due to creation of threat to property – Chapter 81 of the CC of Ukraine; due to harm-doing – Chapter 82 of the CC of Ukraine;

claims for the return the groundlessly acquired or saved property Chapter 83 of the CC of Ukraine etc.).

Detailed consideration of the above-mentioned methods of the property rights protection is not our task. The proposed above classification was to primarily pay attention to the special importance of the damages compensation obligations among the other (real and obligatory, contractual and non-contractual) means of the property rights protection.

This importance is that the damages under Chapter 82 of the CC of Ukraine is not only one of the universal means of the property rights protection, but is also a powerful subsidiary method.

In particular, the use of such a special method of the property rights protection as the recognition as invalid of a legal act, that violates of the property rights, according to Part 2 Art. 393 of the CC of Ukraine may be accompanied by the restoration of the situation that existed before the adoption of this act. If it is impossible to restore the previous position the owner has a right for the compensation of property and moral harm. However, this norm does not specify the certain principles and terms on which such compensation should be conducted. So does not assign the principles, conditions and amount of damages caused to the owner Art. 394 of the CC of Ukraine, which is restricted by the pointing out that the owner of land, houses and other buildings shall be entitled to compensation due to decrease in value of these objects as a result of activity that led to the reduction of environmental and noise proofness of area, natural characteristics of land degradation [18, pp. 189–193].

Appeal to the Art. 22 and Art. 23 of the CC of Ukraine, which contain rules on compensation of losses and other ways of the property damage compensation as well as compensation for moral damage, does not let to achieve the desired effect, because that rules contain only general provisions for such compensation.

Premises also apply to cases of reimbursement of the losses, inflicted by the property rights violations, not involved in the deprivation of the possession. It also was suggested in literature that such losses can be recovered by the satisfaction of a negatory claim [16, p. 261], however, as experience indicates, it is not always possible to achieve.

In this connection it is expedient to appeal to the norms of Chapter 82 of the Civil Code of Ukraine, which regulate the non-contractual relations arising due to harm-doing.

It should be noted that the provisions of Chapter 82 of the CC of Ukraine have, though, dual nature, being in its essence and purpose both norms of direct application and of the subsidiary application.

Under the “direct application” we mean application of the specially set norms of legislation to those or other relations in cases directly prescribed by law. The subsidiary application of norms embraces a situation, when a law enforcement body uses the concrete requirements of the related legal institute or a related (coherent) branch of law [20, pp. 111 – 112]. Meanwhile the norms of the other branch of law are used usually only in those cases, when for the formulation of legislation economy legislator avoids duplication of identical or similar norms in different branches of law [21, pp.17, 746, 747]. The obligations of damages compensation are an exception from a general rule, as they are used in all cases of harm-doing, regardless of branch kind of relationships to the participants of which harm was inflicted. But they can be applied only in the absence of the special branch norms which regulate the responsibility at the branch level. The dynamics of the application of civil law norms on liability for damage in other relationships is clearly seen in the field of the existed in due time collective farm legislation [22, pp.14; 20, p. 132].

So, on the one hand, Chapter 82 of the CC rules are used to civil relations arising under the circumstances provided by the regulations of this chapter (in certain cases of harm-doing as a result of wrongful and, sometimes, lawful actions).

On the other hand, Chapter 82 of the CC rules can be applied subsidiarily to the civil relations arising from reasons not directly provided in the mentioned chapter.

And, in some cases secondary application of this chapter regulations occurs due to the direct order of the law (for example, Art. 1165 of the CC of Ukraine stipulates that “the damage caused due to no removal of threat to life, health, property of natural persons or to property of legal entities shall be reimbursed in accordance with this Code”, i. e. under the CC regulations about the damages compensation – Chapter 82 of the CC of Ukraine), while in others – such secondary application is based on consideration of the essence of the appropriate relationship and a lack of the legal regulation [23, p. 271].

Concerning the special methods of the property rights protection, the Chapter 82 of the CC of Ukraine regulations are applied to them exactly from the last reasons – in consideration of the nature of the ownership violation and a lack of their regulation in the third book of the Civil Code in an order to avoid duplication of the rules on damages.

Thus, as stated above, owner’s rights may be protected by filing a claim for compensation of damages caused by anientisement or destruction

of property [24, pp. 542 – 543]. Such method of protection subject to the Chapter 82 of the Civil Code of Ukraine regulations, titled as “Compensation of damages”, is subsidiary in nature, because it can be used in cases when the application of other legal methods (special proprietary, contractual etc.) is impossible due to the fact that a special norm of legislation is absent, the thing is destroyed or no longer exists, there is no contract between the participants of a dispute and so on.

General grounds of responsibility for the damages are established by Art. 1166 of the Civil Code of Ukraine, which provides that property harm caused by unlawful decisions, actions or inactivity to personal non-property rights of citizens or legal entities, as well as damage caused to property of citizens or legal entities shall be reimbursed in full by the person who inflicted it.

Damage caused to the owner by anientisement or destruction of property should be reimbursed on the principles set by the norms of Chapter 82 of the Ukrainian Civil Code: (1) damage to property must be reimbursed in full by the person who caused this damage or a person indicated in the law; (2) regardless of sphere of its infliction the fact of damage to a person or property is recognized illegitimate, if the person who caused the damage does not prove that he acted lawfully; (3) components of civil infraction, that serves as the basis of tort obligation, are fixed in Art. 1166 of the CC of Ukraine. They include such terms as harm, unlawful behavior, causal connection between unlawful behavior and damages, guilt of tortfeasor [25, p. 621].

Consequently, the terms for filing of a claim in this case are: (1) the plaintiff’s rights on the thing; (2) the fact of destruction, damage or deterioration of the thing (property damage); (3) absence of an agreement between the proprietor and the person who destroyed or damaged the property on transmission of thing into the disposal of the last on his mind. The plaintiff is a owner, whose rights are violated by destruction, damage or deterioration of things. The respondent is a person whose behavior thereof caused the destruction, damage or

deterioration of the things, or the person indicated in the law (parents, guardians, schools etc., the State, the Autonomous Republic of Crimea, self-government institutions). The content of the claim is a demand of the owner for the compensation of property and moral damage caused by the destruction, damage or deterioration of things.

Methods of compensation for damages caused by the destruction, damage or deterioration of the things are defined in Art. 1192 of the CC of Ukraine. According to this norm the court at aggrieved person’s option can oblige the person who caused damage to property, to compensate it in nature (to pass a thing of the same sort and the same quality, to repair a damaged thing etc.) or compensate caused damages in full. The measure of damages, in turn, is determined according to the real value of the lost property at the time of trial or performance of work necessary for the restoring of the damaged things [26].

Summarizing the foregoing, we can conclude that the rules of the Chapter 82 of the Civil Code of Ukraine, devoted to the regulation of the property damage compensation relations, in their nature are the universal methods of the property rights protection (except the Art. 1170 of the CC), used in case of destruction, damage or deterioration of things. In addition, the rules of the mentioned Chapter are applied subsidiarily in the cases of the use of the special methods of protection under the rules of the Chapter 29 of the Civil Code of Ukraine. The compensation of harm to the owner is performed on the general principles of the damages compensation obligations.

It should be noted that based on the analogical principles the Chapter 82 of the Civil Code of Ukraine may be used also for the intellectual property protection [27, pp. 301-305; 28, pp. 72-73; 29; 30; 31, pp. 311-333], (although sometimes the matter is about a more wide concept of its “guard” [32], which cover the concept of legal protection, but leave outside the methods of a proper civil legal protection [33]), the category of which has a genetic affinity with the right of ownership [34].

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АНОТАЦІЯ

Ківалова Т.С. Субсидіарне застосування зобов'язань відшкодування шкоди. — Стаття.

Стаття присвячена дослідженню механізму застосування зобов'язань відшкодування шкоди. Розглянуто можливості їх використання стосовно відносин власності з метою встановлення місця і значення відшкодування шкоди, завданої власнику, у загальній системі захисту права власності засобами цивільного законодавства. Визначено договірні та недоговірні способи захисту права власності. Зазначено, що відшкодування шкоди є не лише одним з універсальних способів захисту права власності, але й виступає як потужний субсидіарний засіб.

Ключові слова: відшкодування шкоди, власність, захист права власності, договірні способи захисту, недоговірні способи захисту, універсальний спосіб, субсидіарний засіб, майновий інтерес, позов, майнова шкода.

АННОТАЦИЯ

Кивалова Т.С. Субсидиарное применение обязательств возмещения вреда. — Статья.

Статья посвящена исследованию механизма применения обязательств по возмещению вреда. Рассмотрены возможности их использования относительно отношений собственности с целью установления места и значения возмещения вреда, нанесенного собственнику, в общей системе защиты права собственности средствами гражданского законодательства. Определены договорные и недоговорные способы защиты права собственности

ти. Отмечено, что возмещение вреда является не только одним из универсальных способов защиты права собственности, но и выступает как мощное субсидиарное средство.

Ключевые слова: возмещение вреда, собственность, защита права собственности, договорные способы защиты, недоговорные способы защиты, универсальный способ, субсидиарный способ, имущественный интерес, иск, имущественный вред.

SUMMARY

Kivalova T.S. Subsidiary application of damages compensation obligations. – Article.

The article investigates the mechanism of obligations application of damages compensation. The possibilities of their use regarding the property relations to define the place and meaning of damage compensation caused to owner, in general system of property rights protection by means of civil legislation are examined. The contractual and non-contractual methods of property rights protection are defined. It is noted that damages compensation is not only one of universal methods of property rights protection, but also a powerful subsidiary means.

Keywords: damages compensation, property, protection of property rights, contractual methods of protection, non-contractual methods of protection, universal method, subsidiary method, property interest, claim, property damage.