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## **Property rights to real estate during the SARS-CoV-2 pandemic – review of civil law issues**

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### **Abstract:**

The SARS-CoV-2 pandemic and the legal instruments issued in its course and aimed at limiting its adverse impacts have also affected property law. The scope of exercising property rights, in particular the right to use things and the effectiveness of claims aimed at protecting property rights, has been narrowed down. The article criticises the complete ban on conducting evictions during the state of epidemic threat or state of epidemic. It also presents the issue of infections in the context of interactions between pieces of real estate (nuisances). Finally, possible solutions rooted in applicable property law are outlined that may help adapt to the current epidemic situation, e.g. by establishing isolation or quarantine easements.

**Keywords:** property law and the pandemic, ban on eviction during the pandemic, isolation or quarantine easement

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## 1. Introduction

The state of epidemic of the SARS-CoV-2 virus which has now been persisting for two years (hereinafter referred to as “the pandemic”) has exerted a considerable impact on the majority of social relations, and relations in the sphere of civil law are no exception. The legal instruments issued during that time with a view to reducing the negative consequences of the pandemic set up a special legal system which for the most part has the nature of public law, with only some of its norms pertaining directly to substantive civil law.<sup>2</sup> It should be noted that given the current legal developments, the sphere of property law remains relatively stable in comparison to, for example, the law of obligations to which some of the new regulations pertain. This branch of law is the arena of vivid discussions about the contents and performance of agreements during the pandemic,<sup>3</sup> coupled with interest in new opportunities to apply the *rebus sic stantibus* clause<sup>4</sup> which has become somewhat “dusted” in practice, and also about civil liability issues.<sup>5</sup> Analyses of the impact of the pandemic and the special legal system that accompanies it have also appeared with respect to the general part of the Civil Code, where the discussion is focused especially on the issue of statute of limitations, including whether the pandemic is a *force majeure* that causes the statute of limitations to be suspended.<sup>6</sup> In contrast with these, the “quiet” among property law theorists seems to suggest that the new conditions have had no bearing on the civil law situation of holders of real estate property rights. However, the effects of the pandemic and its accompanying legal regime may be felt in property law as well, although only some of them can be traced back to regulations directly dealing with property rights, as explained in the following considerations. As an aside, it should be stressed that the continued pandemic has “tested” the functioning of general norms related to infectious diseases, which are now being applied as general law norms<sup>7</sup>, at

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<sup>2</sup> Zob. zwłaszcza Ustawę z dnia 2 marca 2020 r. o szczególnych rozwiązaniach związanych z zapobieganiem, przeciwdziałaniem i zwalczaniem COVID-19, innych chorób zakaźnych oraz wywołanych nimi sytuacji kryzysowych (Dz. U. 2020 poz. 1842) dalej jako *u.Cov*. Pośród publicznoprawnych unormowań dotyczących procesowej ochrony cywilnych praw podmiotowych można odnotować interesujące w kontekście niniejszego opracowania zmiany w procedurze cywilnej przewidziane w art. 15zszs1-15zszs2 zmierzające do ograniczenia styczności osób.

<sup>3</sup> K. Stradomska-Balcerzyk, *Kształtowanie cywilnoprawnych stosunków zobowiązaniowych w świetle ustawodawstwa epidemicznego*, „Monitor Prawniczy” 2020, nr 17, s. 898-905.

<sup>4</sup> Np. B. Nowak-Górski, D. Mróz, K. Olszak, *Stosowanie klauzuli rebus sic stantibus w dobie epidemii wirusa SARS-CoV2*, „Monitor Prawniczy” 2020, nr 10, s. 507-513; R. Strugała, *Wpływ pandemii COVID-19 na wykonywanie umów w świetle art. 3571k.c.*, „Monitor Prawniczy” 2020, nr 11, s. 560-566.

<sup>5</sup> Zob. np. J. Kondek, *Wpływ sytuacji kryzysowych na stosunki cywilnoprawne*, Warszawa 2021, s. 203-237.

<sup>6</sup> Np. J. Gołaczyński, *Przedawnienie roszczeń majątkowych i terminy zawite w okresie po ogłoszeniu stanu epidemii związanej z Covid-19*, „Monitor Prawniczy” 2020, nr 8, s. 397-401.

<sup>7</sup> Ustawa z dnia 5 grudnia 2008 r. o zapobieganiu oraz zwalczaniu zakażeń i chorób zakaźnych u ludzi (Dz. U. 2020 poz. 1845) dalej jako: *u.chor.zak*.

a scale unprecedented in recent history. Accordingly, one should state that the observations presented below are primarily of a general nature, being applicable also to other infectious diseases and their impact on the sphere of property law.

## **2. The pandemic and its consequences as civil law events**

Discussing the impact of the pandemic on civil law relationships should be preceded by assigning the occurrences generating these effects to various legal categories. In civil law, the notion used to describe the event linked to civil law effects (especially the emergence, termination or amendment of a civil law relationship) is the civil law event<sup>8</sup>; this notion is useful for a systematic classification of causes of civil law effects related to the pandemic. With reference to civil law events proposed in the theory of typology, it should be stated that the pandemic, together with the accompanying legislative measures, led to the emergence of civil law events of a diverse nature. Firstly, the very entry into force of certain provisions of the uCov [Act of 2 March 2020 on specific solutions related to the preventing, counteracting and combating COVID-19, other infectious diseases and crisis situations caused by them – trans. note] is a civil law event that leads to modification of civil law relationships between their parties (for example the prohibition of terminating tenancy agreements until 20 June 2020 – Article 31t of the uCov, or the expiry of mutual obligations of parties to a tenancy agreement during the period in which conducting activities in so-called large format stores was prohibited pursuant to Article 15ze of the uCov). The start of application of a local law instrument that modifies the contents of a civil law relationship (for example a resolution decreasing the annual fee (Article 15jd of uCov) should be viewed on par with entry into force of a statutory provision. Secondly, the uCov has created a number of new civil law events that constitute legal transactions, for example a unilateral statement of will of the tenant about extending the tenancy agreement on previous conditions (Article 3s of the uCov<sup>9</sup>) or a statement of will of the tenant resulting in extension of the deadline to terminate a tenancy agreement or the amount of rent (Article 31u of the uCov). Thirdly, certain administrative decisions issued by a national sanitary inspector based on the Infectious Diseases Act (IDA), for example a decision prohibiting entry to infected premises (Article 33.2.1 of the IDA) should also be treated as civil law events, because they result in restricting the right to use the premises to which the prohibition applies. Fourthly, the social situation

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<sup>8</sup> Zob. Z. Banaszczyk [w:] M. Safjan (red.), *System Prawa Prywatnego. Prawo cywilne – część ogólna*. t. 1, Warszawa, 2007, s. 87.

<sup>9</sup> Z uwagi na zasadę *numerus clausus* jednostronnych czynności prawnych doszło zatem do ustanowienia nowego typu czynności jednostronnej.

caused by the pandemic, and especially specific cases of infection and the accompanying obstacles, may fulfil the hypotheses of substantive civil law norms, leading to the emergence of civil law effects and, taking this issue more broadly, may contribute to the situation of an entity as a whole which is taken into consideration when applying civil law.

### **3. Effects of the pandemic related to the right of ownership of real estate**

#### **3.1 Exercise of the right to use a thing**

A change of the scope of exercising the right of ownership may result from statutes that introduce new restrictions of that right (Article 140 of the Civil Code)<sup>10</sup>, a situation that occurred with the passing of uCov and its subsequent amendments. Narrowing down the scope of exercising the right of ownership due to the pandemic also occurs because of updated regulations found in legal instruments which were in force as early as before the pandemic (especially the IDA). The restrictions discussed below have for the most part a public law character and are a form of compromise between the right of the owner and the interests of the general public. These issues are worth analysing in several dimensions, the first of which is exercising the right to use and collect fruits from real estate in light of the effects of the pandemic. uCov regulations contain a number of provisions that reduce the rights of the owner to collect such fruits. Some of these provisions apply solely to the authority sphere of public entities – in order to protect entities that noted a decrease of economic turnover due to the pandemic (especially entrepreneurs), the State Treasury waives part of its income from annual fees for perpetual usufruct, tenancy and lease rents and usufruct fees (Articles 15ja-15jca of the uCov). An analogous effect with respect to local government units is optional and dependent on passing a suitable resolution by the decision-making body of the unit (Article 15jd of the uCov). In turn, private owners of real estate used as shopping centres whose area exceeds 2,000 sq. m. lose the right to collect civil fruits in the scope of application of Article 15ze due to the expiry, by operation of law, of mutual obligations of the parties to a tenancy, lease or other similar agreement under which commercial space was handed over for use during the period in which the trading ban was in effect. The use of a thing may also be impeded indirectly, due to restrictions resulting for example from the obligation to persons

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<sup>10</sup> Pod warunkiem zachowania art. 64 i 31 Konstytucji RP; o konstytucyjności ograniczeń prawa własności zob. S. Jarosz-Żukowska, *Konstytucyjna zasada ochrony własności*, Zakamycze 2003.

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inhabiting the real estate to undergo isolation, which may lead to temporary restriction of the possibility of using the real estate by other persons in whole or in part.

### **3.2 Claims for delivery**

#### **a) Conducting enforcement consisting in vacating residential premises**

It needs to be noted that during the pandemic the effectiveness of the procedural aspect of the claim for delivery at the enforcement stage is considerably weakened. This is because while the state of epidemic threat or state of epidemic announced due to COVID-19 remains in force, Article 15zzu of the uCov suspends, as a rule, the exercise of enforcement orders to vacate residential premises.<sup>11</sup> Introducing this solution of an episodic nature has been justified by the need to protect tenants whose material situation has deteriorated due to the pandemic; the protection is aimed at preventing the loss of living quarters in times of a major threat.<sup>12</sup> This solution has, however, been criticised as having numerous drawbacks,<sup>13</sup> for example shifting the lion's share of the burden of ensuing such protection on owners of real estate who not infrequently have themselves suffered losses due to the pandemic. It was noticed that, contrary to the suggested *ratio legis* for the statute, Article 15zzu of the uCov extends the protection to anyone threatened with eviction, regardless of their financial situation. Additionally, the provision applies to all enforcement orders, regardless of the date on which they were issued, and as such also to orders issued prior to the announcement of the state of epidemic on grounds that could not have been related to the pandemic. Moreover, protection is granted also when the person who is obliged to vacate the premises has a title to other premises to which they could be evicted. In consequence, a conclusion has been formulated that the prohibition contained in Article 15zzu of the CoV is an excessive restriction of the right of ownership compared to constitutional criteria (Article 64.3 in conjunction with Article 31.3 of the Constitution of the Republic of Poland). The problem presented above applies to a key issue that directly affects the quality of life and basic interests of people entangled in this peculiar conflict of interests, hence it is worth to examine it in more detail. The cited norms demonstrate an attempt to integrate in the legal system a conflict of law rule applicable when two subjective rights collide. According to the concept of precedence of subjective rights, property rights should yield to protection of the

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<sup>11</sup> Enumeratywnie wyliczone wyjątki zawiera ust. 2 przytoczonego przepisu, pośród których trzeba zaakcentować orzeczenia wydane na podstawie art. 11a Ustawy z dnia 29 lipca 2005 r. o przeciwdziałaniu przemocy w rodzinie (Dz. U. 2020 poz. 218 i 956).

<sup>12</sup> Zob. stanowisko MS wyrażone w piśmie o sygn. DLPC-V.053.3.2021 oraz odpowiedź na interpelację poselską Podsekretarza stanu w MS z dnia 21 stycznia 2021 r., znak BM-I.0520.801.2020.

<sup>13</sup> Zob. stanowisko RPO wyrażone w piśmie z dnia 1 lipca 2021 r. o sygnaturze IV.7214.70.2020 r.

most essential personal rights, which in this case means that the right of ownership must give ground to the protection of personal rights of a person who is obliged to vacate the premises, inasmuch as these rights are jeopardised due to current difficulties related to the pandemic. Let us consider the arguments on both sides. During the pandemic, the opportunities of some professional groups to earn their livelihood have certainly been much reduced, which strengthens arguments based on humanitarian reasons and prompts the introduction of extraordinary means of protection that allow these groups to survive the most challenging times. It should also be considered that stopping evictions achieves the objective of preventing homelessness, thus it can be argued that it is a form of realising social housing policy which is an obligation of the state (Articles 75 and 76 of the Constitution of the Republic of Poland). These reasons are counterbalanced by the allegation that protection is unreasonably extended to persons subject to eviction for reasons that arose prior to the pandemic. If it is assumed that the purpose of the protection is to prevent persons affected by the consequences of the pandemic from becoming homeless, such protection is justified primarily because of the currently prevailing restrictions and not the reason for eviction.

Assessing the consequences of Article 15zzu of the uCov from a social viewpoint, some of its advantages include social interest in limiting population movements, which might contribute to decreased risk of infection, or the interest of people directly involved in enforcement measures that require physical contact, who will not thereby be forced to take personal risks.

Speaking about counterarguments, the chief of them appears to be the interests of owners of premises who are deprived of the opportunity to recover full control of a thing. Firstly, the assumption that that as a class of premise owners their life and financial situation is supposedly better compared to persons who reside in someone else's premises, and therefore sacrificing their interests, as a stronger group, to the interests of the weak would be aligned with the principles of social justice, is for the most part erroneous. In the current social reality, rental income is for many families the key item in their home budgets, and depriving them of these advantages may lead to threatening their existence, hence arguments based on humanitarian grounds are applicable to that social group as well. It should also be remembered that excluding evictions actually makes protection of the right of ownership ineffective. Therefore, in order to avoid violations of the right of ownership as the broadest property right, such limitation could be applied only exceptionally, due to a particularly significant social interest, and therefore in a manner that is least onerous for those

concerned.<sup>14</sup> It needs to be mentioned here that, recognising the need to bolster the position of landlords who are natural persons not conducting economic activities related to tenancy of premises, the institution of occasional tenancy was set up,<sup>15</sup> allowing to secure the interests of the landlord against the stalemate arising from prolonged inability to evict the tenant while taking into account the residential interests of the tenant by the prior formal indication of other premises in which the evicted person could reside. Currently, the prohibition found in Article 15zzu of the uCov deprives landlords of protection that is the essence of occasional tenancy, allowing persons that occupy the premises without legal basis to resist eviction, for example merely for the comfort to remain in their current place, even though they are able to move to other premises. The same holds true in other cases in which persons subject to eviction are able to move to other premises, because proceeding with eviction would not lead to homelessness of persons subject to enforcement. The above considerations lead to the conclusion that, in addition to the target group of beneficiaries threatened with homelessness, Article 15zzu of the uCov blocks eviction also with respect to persons who do not require protection and take advantage of it somewhat accidentally. This group includes not only persons who have alternative premises to reside in, but also primarily all those who have (or are capable of acquiring) financial resources sufficient to bear the costs of renting them. The reason for terminating a legal relationship granting a right to use the premises may, after all, be the disorderly conduct of the occupants (destruction or unlawful subtenancy of premises), and not their financial problems related to the pandemic. At the same time, it should be noted that among those evicted whose grounds for terminating a legal relationship that entitles them to occupy the premises are not related to a difficult financial situation caused by the pandemic, a precise indication of the target group of beneficiaries would in practice be saddled with considerable difficulties, because the court ordering eviction is not always obliged to examine the financial situation of the person against whom a decision is pronounced (as for example in case of institutional tenancy), hence such information cannot be found even in the contents of reasoning for the judgement.

On the other hand, referring to arguments that Article 15zzu of the uCov furthers social interest in restricting the movement and personal contacts of people, it

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<sup>14</sup> S. Jarosz-Żukowska, *Gwarancja ochrony własności i innych praw majątkowych*, [online:] [http://www.repozytougovrium.uni.wroc.pl/Content/53675/PDF/29\\_Sylwia\\_Jarosz\\_Zukowska.pdf](http://www.repozytougovrium.uni.wroc.pl/Content/53675/PDF/29_Sylwia_Jarosz_Zukowska.pdf), s. 543-544, [dostęp: 14.09.2021].

<sup>15</sup> Art. 19a-19e ustawy o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie Kodeksu cywilnego (Dz. U. 2020 poz. 611).

should be noted that the fluctuating level of epidemic threat that allows social life to revert almost to a normal state, as well as the achieved level of possible safety measures (rising percentage of those vaccinated, possibility of using personal protection means reducing the risk of infection) means that these arguments are losing their strength over time.

Summarising the above discussions, a conclusion appears that the current wording of Article 15zzu of the uCov does not accurately achieve the related objective of supporting tenants facing financial challenges due to the pandemic, since, in addition to the target group, eviction is also blocked with respect to those who do not require such protection at the expense of vital interests of premise owners, that are suppressed for the indefinite and unforeseeable time in which the prohibition remains in force. Hence, the proposal to amend the article so as to restore the possibility of evicting persons not threatened with homelessness. This might occur either by extending the list of exceptions found in paragraph 2 of the analysed provision, in particular by taking into account occasional tenancy, or by changing its formula as a whole, modelled on Article 16 of the Premises Tenancy Act, as follows: "Judgements ordering premises to be vacated are not enforced during the state of epidemic threat or state of epidemic announced due to COVID-19 if no premises have been indicated to which the evicted person could be moved." Another option to be considered is abolishing Article 15zzu of the uCov altogether and replacing the former protection consisting in excluding eviction by operation of law by another method that would require the person to be evicted to take active steps to demonstrate their difficult financial situation due to the pandemic. A more proper means of protection would perhaps be to afford such a person a special type of action in which the plaintiff could ask for eviction to be halted after demonstrating specific circumstances related to their own financial situation, taking into account to the causation between their situation and the state of epidemic.

#### **b) Real estate whose residents are subject to self-isolation or quarantine**

The case of excluding evictions discussed above is not the only instance in which a claim for delivery is weakened during the pandemic. Another example of this is illustrated by Article 34.1 in conjunction with Article 2.11a) of the IDA, pursuant to which a sanitary inspector is entitled to issue a decision obliging a sick person to self-isolate at home, that is "in the place of residence or stay," which is combined with the prohibition of leaving such place (Article 34.4 of the IDA), unless otherwise decided by the sanitary inspection authority. In cases where such an obligation applies to a person that unlawfully occupies someone else's real estate, the owner's claim for



delivery may be opposed by the public law obligation of that person to remain in their current place of residence. It is true that regulations pertaining to a claim for delivery in the Civil Code provide for the possibility of temporarily rendering the claim ineffective, but only when the person actually in control of a thing has a right to exercise such control which is effective with respect to the owner (Article 222.1 *in fine* of the Civil Code). It should however be remembered that the place of isolation is established by Article 34 of the IDA on the basis of actual notions (place of residence or stay), without reference to any subjective rights a person may have to the occupied premises. The purpose of the legislator here is solely to enforce the stay of a sick person in the currently occupied location for a specified time, and not to decide on subjective rights to occupied premises. Likewise, in the analysed case it cannot be assumed that the decision of the sanitary inspection is in itself a source of a subjective right to use the actually occupied premises.<sup>16</sup> For the above reasons, the cited regulations could hardly be used to argue the existence a subjective right to the premises on which the obligation to isolate is to be fulfilled. This issue should, however, be further analysed in more detail. Regardless of how this problem is resolved, it should be assumed that the public law obligation to remain in the current location due to social interest must be fulfilled, hence the specific position of the isolated person consists in their right to make an allegation based on public law provisions that temporarily renders the claim for delivery of an owner seeking recovery of the premises ineffective. Although the isolated person does not in such case have a right to control the thing which is effective with respect to the owner (Article 222.1 of the Civil Code), the legal basis of this allegation is the statute which, in the name of public interest, sets the bounds of exercising the right of ownership beyond which protection cannot be granted (Article 140 of the Civil Code). In addition to the reasoning presented above, one may also attempt to devise another concept allowing isolation or quarantine to be undergone on premises subject to a claim for delivery. The legal basis for excluding the claim for delivery can be sought in Article 142 of the Civil Code, according to which this situation may be treated as a state of higher necessity in which the premises of another party are used to avert a threat (risk of infection) to others, while the owner remains entitled to be compensated for the resulting damage. As an aside, it is worth noting that under Article 142 of the Civil Code there are doubts as to legal classification of a person using someone else's thing on that basis; one of the proposed ideas is that such person acquires by

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<sup>16</sup> Por. uzasadnienie wyroku Sądu Najwyższego z dnia 23 stycznia 2013 r., I CSK 295/12, LEX nr 1293936.

operation of law a right whose contents is defined by that norm.<sup>17</sup>

### 3.3 Claim for restitution and supplementary claims

Confirmed cases during the pandemic also give rise to a number of situations involving the application of claims for restitution which were not formerly analysed in detail but are vital in practice, especially as regards relations between neighbours. The presence of persons undergoing isolation, quarantine, epidemiological supervision or actually sick on real estate may be viewed in relation to potential impact on neighbouring real estate. In particular, one should pay attention to the possibility of indirect nuisances consisting in physical nuisances, namely the penetration of particles of matter containing airborne virus droplets, into adjacent real estate. This kind of impact may be present especially at the outdoor boundary of adjoining land real estate (for example a garden surrounding a single family home and adjacent to the neighbour's garden), and even between buildings located on separate real estate when they are situated in close proximity, especially if the distance between the windows of both is short. This occurrence may also manifest between premises located on the same real estate, in the space that forms common parts of real estate. Moreover, if a person who may be a source of infection resides on a portion of real estate, the owners of adjacent real estates may experience negative mental feelings in the form of anxiety, loss of security, depressed mood or irritation, which may be classified as symptoms of non-physical nuisances.<sup>18</sup> The scope of protecting a real estate owner against nuisances has been defined in Article 144 of the Civil Code using a reasonable impact measure which is determined using two criteria: the social and economic purpose of the real estate and local relations, taking into account the feelings experienced by a person with average reasoning capacity.<sup>19</sup> Assessing whether the discussed nuisances are within the admissible bounds requires referencing the view grounded in literature according to which impacts that directly and genuinely threaten the life and health of a person or group of persons cannot be tolerated when Article 144 is applied.<sup>20</sup> Hence, firstly, the social and economic

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<sup>17</sup> J. Ignatowicz [w:] J. Ignatowicz, K. Stefaniuk, *Prawo rzeczowe*, Warszawa 2009, s. 66.

<sup>18</sup> O istocie immisji zob. A. Sylwestrzak [w:] M. Balwicka-Szczyrba, G. Karaszewski, A. Sylwestrzak, *Sąsiedztwo nieruchomości. Komentarz*, Warszawa 2014, s. 29-33.

<sup>19</sup> Osobista szczególna wrażliwość i lękliwość konkretnej osoby, podsycana szerzącymi się, zwłaszcza za pośrednictwem Internetu, teoriami spiskowymi, czy teoriami o pozaziemskim pochodzeniu wirusa, nie będzie zatem brana pod uwagę. Zob. wyr. Sądu Najwyższego z dnia 22 listopada 1985 r., II CR 149/85, OSNC, 1986, nr 10, poz. 162.

<sup>20</sup> J. Gładyszowski, *Mierniki dopuszczalnych zakłóceń sąsiedzkich na tle przepisu art. 144 k.c.*, NP., 1975 r., nr 3, s. 416; S. Rudnicki, *Sąsiedztwo nieruchomości. Problematyka prawna*, Kraków 1998, s. 25.

purpose of real estate should include residential purpose which is not compromised by the sickness of real estate inhabitants. Secondly, the spread of infections over the entire territory of Poland tends to support the belief that the “local relations” aspect has nowadays been modified, since contracting an infectious disease and also being subject to the special isolation and quarantine regime has become a new social norm. When considering whether a nuisance is allowed, a significant role is played by the attitude of the person from whom the threat originates – whether they behave reasonably or spitefully; the intensity of disturbance and the time when they occur are also taken into account.<sup>21</sup> An auxiliary role is played here by administrative law norms, as well as guidelines on fighting the epidemic issued by the Chief Sanitary Inspector (for example with respect to social distancing or wearing face masks). As a rule, it should therefore be agreed that the very fact that a person undergoing isolation or quarantine resides on premises does not provide owners of adjacent real estate with grounds for resorting to means of legal protection; such protection could, however be triggered if behaviours increasing the risk of infection are undertaken.<sup>22</sup>

Further, one should note the impact of the pandemic on the satisfaction of supplementary claims of the owner (Articles 224-225 of the Civil Code) which become statute-barred within one year counted from the date of returning the thing (Article 229 of the Civil Code). The limitation period could, however, be suspended pursuant to Article 121.4 of the Civil Code if the pandemic resulted in obstacles similar to force majeure, i.e. preventing the entitled person from advancing the claim before a court if the court or any of its departments ceases to work due to the obligation to undergo quarantine.

#### **4 Property rights on someone else's thing during the pandemic**

The consequences of the pandemic with respect to property law discussed above are for the most part applicable also to property rights on someone else's real estate. The right to use the thing is thereby restricted (for example due to the temporary prohibition of conducting economic activities in certain sectors), as is the

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<sup>21</sup> Inaczej będziemy traktować sytuację, w której osoba poddana obowiązkowi izolacji otwiera okno w celu przewietrzenia mieszkania, a inaczej sytuację, w której przebywa dłuższy czas w pobliżu granicy nieruchomości, kierując oddziaływanie (np. kaszel) na grunt sąsiada.

<sup>22</sup> Zagrożony właściciel może w takiej sytuacji skorzystać również z ochrony dóbr osobistych (art. 24 k.c.); przepisy statuujące tę ochronę oraz art. 144 k.c. wzajemnie się uzupełniają i dają podstawę do różnych roszczeń. Zob.: W. Katner, *Ochrona własności nieruchomości przed naruszeniami pośrednimi*, Warszawa 1982, s. 70; R. Czarniecki, *Naruszenie dóbr osobistych przez immisję pośrednie*, „Nowe Prawo” 1979, nr 12, s. 53-55. Na marginesie trzeba nadmienić, że w doktrynie prezentowany jest także pogląd przeciwny, wyłączający spod zasięgu roszczenia negatoryjnego wartości o charakterze niematerialnym – tak np. A. Stelmachowski [w:] T. Dybowski (red.), *System Prawa Prywatnego. Prawo rzeczowe*, t. 3, Warszawa 2003, s. 291.

right to collect civil fruits (for example due to losing the possibility of collecting rent from tenants – Article 15ze of the uCov). Similar issues arise also with respect to exercising claims for delivery and claims for restitution (Article 251 of the Civil Code in conjunction with Article 222 of the Civil Code, and in case of perpetual usufruct, Article 222 by way of analogy).

It should be noted that the factual background and the legal regime related to the pandemic may be taken into account in agreements establishing limited property rights as events which the parties take as the basis when determining the contents or duration of such rights, especially since the rights may be linked to a condition or time limit even when the thing encumbered is real estate (Article 245.2, first sentence of the Civil Code). This applies primarily to easement and usufruct. For example, it would be possible to establish a right of usufruct on real estate subject to a resolutive condition of lifting the state of epidemic threat or state of epidemic (e.g. in order to provide means of subsistence to a person affected by the negative economic effects of the pandemic). In turn, when easements are involved, the applicable norms allow to establish rights, especially in the form of affirmative easements, whose function would be to make real estate available for purposes of undergoing isolation/quarantine by the beneficiary (in case of personal easement) or a wider group of persons (in case of praedial easement which could also be exercised by the beneficiary's household members, tenants, borrowers etc.). Perhaps the prevailing conditions will provide circumstances in which other, not previously known kinds of easement can appear, which is supported by the typological openness<sup>23</sup> resulting from the relatively wide discretion which the legislator affords to parties defining the contents of the right they establish (Article 285.1 of the Civil Code).<sup>24</sup> While the boundaries of this discretion are delimited by the objective specified in Article 285.2 of the Civil Code, which is served by establishing the praedial easement, namely increasing the usefulness of the dominant real estate or its designated portion, in the case discussed above this objective would be fulfilled because exercising the easement would cause the person undergoing quarantine to leave the dominant real estate. The presence of such person, as demonstrated above, considerably limits the discretion of using such real estate. Such easement, although exercised by the act of residing on someone else's real estate, could probably not be classified as a special kind of the residence easement referred to in Article 301 of the Civil Code due to its focused nature that

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<sup>23</sup> Zob. K. Zaradkiewicz [w:] K. Pietrzykowski (red.), *Kodeks cywilny t. 1, Komentarz do art. 1–449*<sup>10</sup>, Warszawa 2011, s. 988.

<sup>24</sup> Zob. E. Gniewek [w:] E. Gniewek (red.), *System Prawa Prywatnego. Prawo rzeczowe*, t. 4, Warszawa 2005, s. 418.

excludes automatic application of a norm establishing the right of the beneficiary to allow others to reside on the premises. Another supporting argument, being the consequence of this focus, is the provisional nature of the easement, reflected in the relatively short periods during which the right is exercised (even if it is assumed that such periods can be repeated) as contrasted with the period of exercising the residence easement, which is as a rule assumed to be long-lasting and stable. This conviction is bolstered by the contents of paragraph 2 that provides for a possibility of establishing a residence easement also for the benefit of designated close family members who are successors of a deceased beneficiary.<sup>25</sup> An isolation/quarantine easement or, more widely, seclusion easement might therefore be a type of affirmative easement, separate from residence easement, which depending on the manner of designating the beneficiary could take the form of praedial or personal easement and consist in the temporary entitlement to reside on someone else's real estate that materialises when the prerequisites specified in the agreement (undergoing compulsory isolation or quarantine) are fulfilled. However, the proposals presented above are not unquestionable because it may be argued that exercising property rights, which by their very nature are stable but rarely allowed to be limited by a condition or time limit,<sup>26</sup> to achieve transient objectives is controversial. On the other hand, the duration of the state of epidemic and the occurrence of infections in Poland is not known in advance and can hardly be guessed with any degree of credibility. It cannot therefore be excluded that this state will persist for a longer time, even many years, which in turn would support using property rights to satisfy interests related to that state.

## 5 Summary

In the conclusion, it is worth noting that the consequences of the pandemic and the accompanying special legal regime give rise to a number of new legal issues in property law that require novel analysis. Some of these issues were presented in this article by way of illustration. They can serve as an encouragement for further detailed analysis of legal effects of the pandemic in property law. In ordering this entire range of issues, it will be helpful to proceed systematically along the three dimensions

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<sup>25</sup> O konstrukcji prawnej sukcesji służebności mieszkania A. Bieranowski, *Służebność mieszkania*, Warszawa 2011, s. 154–166.

<sup>26</sup> Nawiązuję tu do poglądu, według którego zawarcie umowy najmu po raz pierwszy stanowi czynność przekraczającą zakres zwykłego zarządu, podczas gdy kolejne umowy kwalifikowane są jako przejawy zwykłego zarządu rzeczą wspólną. Zob. G. Karaszewski [w:] M. Balwicka-Szczyrba (red.), *Zarząd majątkiem wspólnym. Komentarz*, Warszawa 2016, s. 57.

of analysis outlined below.

1. Firstly, the legal effects of the pandemic made their stamp especially on the exercise of property rights, which was considerably narrowed down. For example, as noted in earlier discussions, the presence of persons undergoing compulsory isolation or quarantine on real estate

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<sup>26</sup> M. Balwicka-Szczyrba, A. Sylwestrzak [w:] M. Habdas, M. Fras (red.), *Kodeks cywilny. Komentarz*, t. 2 *Własność i inne prawa rzeczowe* (art. 126–352), Warszawa 2018, s. 551–552.

has a major impact on the exercise of owner rights. This occurrence may also have other repercussions for example as regards the legal classification of tenancy agreements concluded for the purpose of undergoing isolation/quarantine. If the premises are jointly owned, it can be effectively argued that concluding a tenancy agreement for this purpose is an act going beyond regular management of a thing held in common and requires the consent of all joint owners (Article 199 of the Civil Code), regardless of whether the premises were formerly rented, if previous tenancy agreements did not have this nature<sup>27</sup>.

2 Secondly, it should be noted that some of the solutions which the uCov introduced in order to prevent the negative consequences of the pandemic had been designed to be transitional and short-term in nature, but with the passage of time have become increasingly onerous and are already in need of reform to account for their long-lasting application, as demonstrated by the example of Article 15zzu of the uCov which unnecessarily blocks the eviction of persons who do not require such protection.

3 Thirdly, when it comes to the bounds of freedom of contract in determining the contents of property rights and their temporal limits, new and previously unknown ideas, yet allowed in light of applicable property law provisions, will appear in legal transactions, perhaps in response to the current social situation, such as isolation/quarantine easement or usufruct of real estate for the duration of the state of epidemic.

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