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Umowa deweloperska – początek biegu terminu na stwierdzenie wad lokalu mieszkalnego, domu jednorodzinnego i gruntu

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Streszczenie:

W artykule rozważona jest kwestia jaki moment/jakie momenty należałoby uznać za początek biegu terminu na stwierdzenie wad dwóch przedmiotów umowy deweloperskiej, tj. lokalu mieszkalnego/domu jednorodzinnego (1) oraz gruntu (2), na którym dom jednorodzinny/budynek, w którym znajduje się lokal mieszkalny, jest posadowiony. Wyżej wskazane zagadnienie spotkało się już z komentarzem doktryny, ale jedynie w odniesieniu do budynku[2]. Tym samym, niniejsze opracowanie stanowi uzupełnienie wspomnianych rozważań.

Słowa kluczowe: umowa deweloperska, lokal mieszkalny, dom jednorodzinny, nieruchomość wspólna, wada fizyczna, wada prawna, rękojmia, odbiór, wydanie

Development agreement – the beginning of the time limit for discovering defects in a residential unit, a single-family house and land

Abstract

This paper considers the issue what moment should be regarded as the start of the time limit for discovering defects in two items of property obtained under a development agreement, *i.e.,* (1) a residential property or a single-family house and (2) the land on which the single-family house or the building in which the residential unit is located stands. The above-mentioned issue has already been commented on by legal academics/scholars and commentators, but only in relation to the building itself. This paper serves to supplement the above-mentioned considerations.

Key words: development agreement, residential unit, single-family house, common property (areas), physical defect, legal defect, statutory implied warranty, acceptance, delivery

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[2] Zob. T. Tomczak, *Umowa deweloperska – początek biegu terminu na stwierdzenie wad budynku*, „@Nieruchomości" 2021, nr 5 (Tom specjalny), s. 101–115.

1. Introduction

The Act of 16 September 2011 on the Protection of Rights of Buyers of Residential Units and Single-Family Houses[3] regulates one of the most important types of contract in civil law transactions, namely *umowa deweloperska* [literally translated as development agreement or developer agreement]. Although *umowa deweloperska* has been in use for many years, there are a number of issues related to it that have not been addressed properly by legal academics/scholars and commentators. It is noted in the literature that "one such issue is the determination of the moment that triggers the period for the discovery of a defect in any of the items of property acquired under a development agreement".[4] This issue has already been researched in the literature with regard to the building itself.[5] This paper serves as an addition to the research. It looks at the same issue, but focuses on a residential unit/a single-family house and the land.

2. Introductory discussion

A development agreement that has been performed properly should deliver two items of property to the buyer, i.e. a single-family house or a residential unit (the first item of property) and the land on which the house or building (or block of flats) stands (the second item of property).[6] It is important to draw a clear line between these two items in the light of the provision of s.27 of Act of 16 September 2011 on the Protection of Rights of Buyers of Residential Units and Single-Family Houses ("Buyers Rights Protection Act").[7] For the sake of precision, the start of that period is considered in relation to the building that contains the residential unit concerned, rather than unit itself.[8]

Before moving on to the essence of our considerations, three points are worth noting briefly in this introduction. Firstly, this paper is not intended as an extensive discussion of the allocation of interests in the aforementioned items of property.[9] Secondly, the author of this paper supports the prevailing view among legal academics/scholars and commentators that a development agreement is a separate nominate contract.[10] Thirdly, within the context of the implied quality warranty [Polish: *rękojmia*], a clear line should be drawn between the period for discovering a physical defect and the period for raising such a defect.[11] This paper discusses the first of the two periods, which is typically at least 5 (five) years.[12]

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[3] Dz.U. 2021 poz. 1445 ze zm. (dalej jako: u.o.p.n.).
[4] Zob. T. Tomczak, *op.cit.,* s. 102.
[5] *Ibidem.*
[6] Tak: *ibidem,* s. 102.
[7] Tak: *ibidem,* s. 102.
[8] Zob. *ibidem,* gdzie cały artykuł skupia się w istocie jedynie na wspomnianym zagadnieniu.
[9] Wspomniane zostało omówione [w:] T. Tomczak, *op. cit.,* s. 102–104.
[10] Argumenty za takim stanowiskiem, z którymi zgadza się autor niniejszego artykułu, przedstawia: T. Czech, *Ustawa deweloperska. Komentarz,* Warszawa 2018, komentarz do art. 3, pkt 62–67, w szczególności pkt 67. Zob. też: T. Tomczak, *op.cit.,* s. 104 oraz przywoływana w obu tych opracowaniach literatura. Jak się okaże poniżej, kwalifikacja prawna umowy ma istotne znaczenie w kontekście analizowanego w niniejszym artykule problemu. Zob. m.in. pkt 2.1.1.1. niniejszego artykułu, gdzie rozważana jest kwestia tego, czy art. 27 u.o.p.n. reguluje swoistą odpowiedzialność dewelopera.
[11] Są to dwa odrębne terminy, które wiążą za sobą różne skutki prawne. Szeroko na ten temat: T. Tomczak, *op.cit.,* s. 105–106.
[12] Zob. T. Tomczak, *op.cit.,* s. 105–106.

3. The essence of the problem

3.1. Residential unit or a single-family house

3.1.1. Residential unit or a single-family house: physical defects

If a development agreement has been performed properly, the buyer should acquire a residential unit or a single-family house. The question may therefore be asked about the start of the period for discovering physical defects in such properties. In particular, the question is whether the provision of Article 568 of the Civil Code should apply and, if yes, to what extent.

3.1.1.1. One or two doctrines of liability?

This seemingly simple problem raises many questions among legal academics/scholars and commentators in view of the provision of Article 27 of the Buyers Rights Protection Act, where subsections 1-5 regulate, at least to a certain extent, the liability of property developers for defects in residential units/single-family houses and where – to the extent not covered by subsections 1-5, subsection 6 contains a reference to the provisions of the Polish Civil Code[13] (Act of Parliament of 23 April 1964) dealing with the implied quality warranty [Polish: rękojmia]. The first question is whether Article 27 of the Buyers Rights Protection Act provides for the liability of property developers irrespective of the liability based on the doctrine of the implied quality warranty. In other words, the question is whether Article 27 of the Buyers Rights Protection Act provides for the liability of property developers in a way that does not affect the buyer's right under the statutory implied quality warranty. This question is asked by legal academics/scholars and commentators.[14] It seems that such views could be defended if it is assumed that the ownership transfer agreement ("contract of sale") is a contract separate from the development agreement.[15] If such an assumption was made, property developers would be liable under the development agreement and the sale agreement. This, however, would make sense from the perspective of the average property buyer. In practice, it is often the case that a buyer signs a development agreement and this is followed by the ownership transfer agreement two or three years later. Moreover, the latter is frequently referred to *contract of sale*. The buyer will, more often than not, have to attend two conveyancing meetings and to sign two agreements, with plenty of time passing between one and the other.

This view on dual liability cannot be supported. As noted above, it should be assumed according to the prevailing view that the development agreement is a separate type of nominate contract and that the ownership transfer agreement is executed only as part of the performance of the development agreement.[16] In other words, the development agreement creates a complex legal relationship with many rights and obligations for the parties. One of them is the property developer's obligation to transfer the legal title to (ownership of) the real

[13] Dz.U. 2020 poz. 1740 ze zm., dalej: k.c.
[14] Tak, jak się wydaje: E. Targońska, *Odbiór lokalu mieszkalnego w świetle umowy deweloperskiej,* Warszawa 2018, 3.5. Odbiór jako moment rozpoczęcia okresu odpowiedzialności za wady lokalu oraz L. Siwik, *Odpowiedzialność dewelopera za wady fizyczne lokalu mieszkalnego lub domu jednorodzinnego*, „Rejent" 2017 nr 6, s. 55–63.
[15] Tak wydaje się L. Siwik, *op. cit.*, s. 55–63.
[16] Zob. T. Czech, *Ustawa…*, *op. cit.*, komentarz do art. 22, pkt 288–290.

property to the buyer.[17] Consequently, the conclusion should be that this single legal relationship does not make the property developer liable according to two doctrines of liability. Krzysztof Kułak rightly notes that Article 27 of the Buyers Rights Protection Act is a *lex specialis* and as such it only modifies the rules of the general doctrine of implied quality warranty.[18] In other words, the property developer is subject to one modified doctrine of liability rather than liable according to two separate doctrines. This, however, raises another important question: which doctrine of liability is modified by Article 27 of the Buyers Rights Protection Act.

3.1.1.2. Which doctrine of liability is modified by Article 27 of the Buyers Rights Protection Act?

It needs to be noted than Article 27(6) of the Buyers Rights Protection Act only contains a reference to the provisions of the Polish Civil Code (Act of Parliament of 23 April 1964) dealing with the implied quality warranty.[19]

Legal academics/scholars and commentators rightly note that this provision so worded is not conclusive as regards which implied warranty doctrine is to apply.[20] Since the Buyers Rights Protection Act came into force, at least three views on that issue have emerged in the literature. These views are presented synthetically by Tomasz Czech.[21] He rightly argues that the provision contains a reference to the provisions dealing with the doctrine of statutory implied product liability [liability for defects in an item of property sold] (Articles 556–576 of the Civil Code).[22] This leads to the argument that the provision of Article 27 of the Buyers Rights Protection Act modifies the provisions on statutory implied product liability [liability for defects in an item of property sold].[23]

3.1.1.3. Reference in Article 27(6) of the Buyers Rights Protection Act to the Civil Code provisions on the implied quality warranty to be applied mutatis mutandis

The above argument is, however, insufficient for us to proceed to a discussion on the essence of this part of this paper. The question arises what the nature of this reference is, i.e. whether the reference in s.27(6) of the Buyers Rights Protection Act to the provisions on liability for defects in an item of property sold means that these provisions should be applied directly or *mutatis mutandis*. Authors who interpret the provision of Article 27(6) literally take

[17] Podobnie choć w kontekście stosunku art. 27 ust. 1–5 u.o.p.n. do kodeksowej regulacji rękojmi: K. Kułak, *Rękojmia za wady w świetle art. 27 ustawy o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego – wybrane zagadnienia,* „Przegląd Prawa i Administracji", nr CXX/2, Wrocław 2020, s. 420–425.
[18] Zob. K. Kułak, *op.cit.*, s. 421. Podobnie: T. Czech, *Ustawa…*, komentarz do art. 27, pkt 31, J. Lic, *Odpowiedzialność dewelopera za wady fizyczne z tytułu rękojmi,* „Rejent" 2015, nr 10, s. 66.
[19] Dz.U. 2020 poz. 1740 ze zm.
[20] Podobnie: T. Czech, *Ustawa…*, komentarz do art. 27, pkt 27–28.
[21] Wspomniany autor zaznacza, że można rozważać: 1) stosowanie reżimu rękojmi umowy o dzieło (art. 637–638 k.c.); 2) stosowanie reżimu rękojmi za wady rzeczy sprzedanej (art. 556 i n. k.c.); 3) zależność reżimu rękojmi od treści konkretnej umowy deweloperskiej. Zob. *ibidem,* pkt 29. W doktrynie można jeszcze spotkać rozważania, czy art. 27 ust. 6 u.o.p.n. nie odsyła może do przepisów o rękojmi przy umowie o roboty budowlane. Zob. K. Kułak, *Rękojmia…*, s. 420.
[22] Zob. T. Czech, *Ustawa…*, komentarz do art. 27, pkt 30–31. Zob. też K. Kułak, *op.cit.*, s. 419.
[23] Na marginesie można zaznaczyć, że w doktrynie zwraca się uwagę, że przedstawiony problem obecnie ma znaczenie drugorzędne lub ma charakter jedynie teoretyczny (zob. przykładowo: K. Kułak*, op.cit.*, s. 419). Nie można zgodzić się z tym poglądem, ponieważ stwierdzenie, że art. 27 ust. 6 u.o.p.n. odsyła do reżimu rękojmi innego niż za wady rzeczy sprzedanej, wyraźnie zezwalałoby na odpowiednie stosowanie art. 556 i n. k.c., co rozwiązywałoby problem przedstawiony poniżej.

the view that the reference means that the provisions referred to should be applied directly.[24] This view is normally supported by authors who argue that Article 27(6) of the Buyers Rights Protection Act contains a reference to the provisions dealing with the doctrine of statutory implied product liability [liability for defects in an item of property sold].[25] If it was assumed that it is rather a reference to a different doctrine of statutory implied warranty, the conclusion would be that Article 556 and subsequent provisions of the Civil Code would, to the extent not provided for in Article 27 of the Buyers Rights Protection Act, have to be applied *mutatis mutandis* for the reason that it would be a reference to a provision that itself contains a reference.[26] However, even it is accepted that Article 27(6) is a reference to the provisions on to implied liability for defects in an item of property sold[27], the conclusion should be – contrary to the outcome of literal interpretation of the provision – that those provisions **should be applied *mutatis mutandis***. As the legislative quality of the Buyers Rights Protection Act is so low,[28] the literal wording of the provisions should not be given priority. Direct application of Article 556 and subsequent provisions of the Civil Code is simply not the right approach for the complicated legal relationship that is created through the conclusion of a development agreement.[29] It should therefore be argued that Article 27(6) of the Buyers Rights Protection Act contains a reference to the provisions dealing with the implied liability for defects in an item of property sold.

3.1.1.4. Article 27 of the Buyers Rights Protection Act versus Article 568(1) of the Civil Code

This relatively long introduction was necessary to determine whether Article 568 of the Civil Code should apply to the development agreement at all and, if it should, to what extent. It follows that it should first be considered whether Article 27 of the Buyers Rights Protection Act contains provisions that would exclude the applicability of Article 568 of the Civil Code according to the doctrine of *lex specialis derogat legi generali*.

Article 27 of the Buyers Rights Protection Act contains provisions regarding the buyer's acceptance of a residential unit or a house and provides for the buyer's option to raise defects to be included in an acceptance report. It may seem *prima facie* that this provision is a *lex specialis* in relation to the provision of Article 568(1) of the Civil Code, thus excluding the applicability of the latter. However, a close inspection of the two provisions shows that this statement is not true. If it is assumed that Article 27 of the Buyers Rights Protection Act excludes the applicability of Article 568(1) of the Civil Code, it should be concluded that the buyer may raise defects during the acceptance process only or, alternatively, until the

[24] Zob. T. Czech, *Ustawa…*, komentarz do art. 27, pkt 31.
[25] Zob. *ibidem.*
[26] Zob. przykładowo: K. Kułak*, op.cit.*, s. 420.
[27] Tak jak zostało to zostało przyjęte powyżej.
[28] Na nieprecyzyjną redakcję wielu przepisów zwraca uwagę m.in. J. Pisuliński [w:] *Prawo rzeczowe. System rawa prywatnego*, red. E. Gniewek, Warszawa 2013*,* s. 767. Zob. też: K. Kułak, *op. cit.*, s. 418; Zob. T. Czech, *Umowa deweloperska w systemie polskiego prawa cywilnego*, „Temidium" 2013, nr 2, s. 41; R. Strzelczyk, *Umowa deweloperska w systemie prawa prywatnego*, Warszawa 2013, s. 129.
[29] Podobnie: K. Kułak*, op.cit.*, s. 420. Wskazana niemożliwość stosowania wprost art. 556 i n. k.c. zostanie jeszcze wykazana poniżej.

ownership transfer agreement is entered into. The buyer would not then have 5 years within which to discover any defects, as is the case with the standard agreement for the sale of real estate. This interpretation would obviously contradict the purpose of the Buyers Rights Protection Act, i.e. to protect the rights of buyers rather than to limit their rights.[30]

It is therefore necessary to consider whether Article 27 of the Buyers Rights Protection Act modifies the provision of Article 568(1) of the Civil Code and, if yes, what the extent of the modification is. As no time limit is set for the buyer to discover defects, it follows that the provisions of Article 568 of the Civil Code should be applied *mutatis mutandis*, and this means that a 5-year time limit should apply and that no modification occurs in this regard.[31] In other words, the 5-year time limit is not reduced or extended, at least directly, by the provision of Article 27 of the Buyers Rights Protection Act. However, the key question that should be asked for the purposes of this paper is when this time limit begins.

Article 27 of the Buyers Rights Protection Act is clearly not conclusive as regards the start of the 5-year time limit or as to whether the provision of Article 27 was intended to determine the start of that time limit. Admittedly, Article 27(1) of the Buyers Rights Protection Act provides that before the legal title to a residential unit or a single-family house is transferred to the buyer, the buyer must *accept* the property. An attempt could therefore be made to defend the argument that Article 27 of the Buyers Rights Protection Act is intended to modify the provisions of the Civil Code to the effect that the time limit for the buyer to discover defects begins upon the buyer's acceptance of the property, as provided for therein, or at the moment when the buyer proceeds to start the acceptance process.[32] However, this argumentation raises a question. The question follows if only from the simple fact that it is not expressly stated in Article 27 of the Buyers Rights Protection Act that the time limit specified in Article 568(1) of the Civil Code begins when the residential unit or single-family house is accepted by the buyer or, at least, when the buyer proceeds to start the acceptance process. The provision of Article 27 itself can hardly be relied upon for the answer to the question. Given the reference contained in Article 27(6) of the Buyers Rights Protection Act and the foregoing argument that only one doctrine of liability should apply, an attempt can be made to solve the problem by referring to Article 568(1) of the Civil Code.

Article 568(1) of the Civil Code provides that the time limit for the buyer to discover a defect in an item of property begins when that item is delivered to the buyer. The *delivery* of an item of property is not defined in the Civil Code, although the Supreme Court's judgments provide some indication as to how such delivery should be understood. The delivery of an item of property will obviously take place when possession of that item is transferred.[33] Possession

[30] Zob. *Uzasadnienie projektu u.o.p.n.*, s. 1. Tego rodzaju wnioski odrzucają też: A. Burzak, M. Okoń, P. Pałka, *Ochrona praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego. Komentarz*, Warszawa 2012, komentarz do art. 27, pkt 4. Aby tego rodzaju argumentów uniknąć, można optować za odrębnych charakterem reżimu z art. 27 u.o.p.n. Teza taka została jednak powyżej odrzucona.
[31] Zob. T. Tomczak, *op.cit.*, s. 105–106.
[32] Zob. E. Targońska, *op.cit.*, podrozdział 3.5. *Odbiór jako moment rozpoczęcia okresu odpowiedzialności za wady lokalu.*
[33] Wyrok SN z dnia 28 lipca 1999 r., II CKN 552/98, LEX: 37931.

will be transferred when the item is placed in the buyer's hands[34], when actual control of the item is handed over the buyer[35], or when the buyer takes over the item for use by himself.[36] It is, however, more controversial whether for delivery of an item of property under a contract of sale will take place it is sufficient for the buyer **to be enabled** to take control of the item.[37]

This indicates how the *delivery* that is provided for in Article 568(1) of the Civil Code can be understood. This should be followed by looking at the relationship between such delivery and the acceptance referred to in Article 27 of the Buyers Rights Protection Act. However, before these two concepts, which are used in two different statutes, are compared, it is necessary to consider briefly the relationship between them within the framework of the Civil Code itself (the contract of sale). One view taken by legal academics/scholars and commentators is that delivery and acceptance are in fact the same thing and that "each is targeted at a different actor".[38] This, however, can be misleading. The Supreme Court rightly argues that delivery and acceptance are two different things and that the relationship between them is such that the obligation to accept an item of property is a correlate of the obligation to deliver the same item.[39] It is not necessary for these two obligations to be fulfilled simultaneously and it is not necessary for the delivery of an item of property to be followed by the buyer taking over that item.[40]

In the case of a contract of sale, it follows that the seller has the obligation to deliver an item of property and the buyer has the obligation to accept that item. When the item is accepted by the buyer, the actual control of the item will be deemed to have passed from the hands of the seller to the hands of the buyer. In other words, if the buyer has accepted the item, it may be concluded that delivery of the item has taken place, and such delivery will trigger the start of the time limit set out in Article 568(1) of the Civil Code.[41]

It is, however, necessary to consider whether such delivery is the same delivery that is provided for in Article 27 of the Buyers Rights Protection Act. In other words, the question to be asked is whether Article 27 of the Buyers Rights Protection Act provides for the transfer of actual control of a residential unit or a single-family house by the property developer to the buyer. The answer to this question is not straightforward, because the nature of the concept of acceptance that this paper deals with is the subject of considerable disagreement in the

[34] Wyrok SN z dnia 28 lipca 1999 r., II CKN 552/98, LEX: 37931. Nie musi w tym przypadku chodzić o wręczenie rzeczy „z ręki do ręki" (*traditio corporalis*). Jak podkreśla to Sąd Najwyższy, sposób dokonania „wydania" zależy od okoliczności i woli stron. Zob. wyrok SN z dnia 25 września 2014 r., II CSK 664/13, LEX: 1544224.
[35] Zob. wyrok SN z dnia 25 września 2014 r., II CSK 664/13, LEX: 1544224.
[36] Por. wyrok SN z dnia 28 lipca 1999 r., II CKN 552/98, LEX: 37931.
[37] Por. wyrok SN z dnia 28 lipca 1999 r., II CKN 552/98, Legalis: 44521 oraz wyrok SN z dnia 23 marca 2004 r., V CK 363/03, Legalis: 278116 z wyrokiem SN z 26 listopada 2002 r., V CKN 1418/00, Legalis: 57307 oraz wyrokiem SN z 25 września 2014 r., II CSK 664/13, Legalis: 1162512.
[38] Zob. E. Targońska, *op.cit.*, podrozdział 3.4a. *Związek pomiędzy odbiorem i wydaniem lokalu.*
[39] Zob. wyrok SN z dnia 28 lipca 1999 r., II CKN 552/98, LEX: 37931.
[40] Por. wyrok SN z 28 dnia lipca 1999 r., II CKN 552/98, LEX: 37931. W orzeczeniu tym, w przytoczonym zdaniu, nie występuje słowo „zawsze".
[41] „Zwykle", ponieważ w doktrynie i orzecznictwie można spotkać tezy, że nie może on zacząć biec przed przejściem na kupującego tytułu własności. Więcej na ten temat poniżej. Natomiast na marginesie warto przytoczyć tezę Sądu Najwyższego, że wydanie rzeczy, o którym mowa w art. 548 k.c., nie musi nastąpić przez jej wręczenie, „z ręki do ręki" (*traditio corporalis).* Sposób dokonania „wydania" zależy od okoliczności i woli stron. Należy jednak pamiętać, że stwierdzenie takie padło na gruncie art. 548 k.c., a nie 568 k.c. Zob. wyrok SN z dnia 25 września 2014 r., II CSK 664/13, LEX: 1544224.

literature. The question arises whether such acceptance is an act in fact or an act in law and, if it is the latter, what kind of act of in law it is.[42] However, for the purposes of this paper, priority should be given rather to the question whether such acceptance of a property should be deemed as delivery of the same property to the buyer within the meaning of Article 568(1) of the Civil Code. Some authors agree with such an understanding of the problem. In consequence, the time limit for the buyer to discover defects should begin when such acceptance takes place.[43] Such statements cannot be supported in their entirety. The purpose of acceptance seen as a correlate of the delivery provided for in Article 568(1) of the Civil Code is different to the purpose of the acceptance provided for in Article 27 of the Buyers Rights Protection Act. The purpose of the former is primarily to transfer actual control of an item of property. The purpose of the other is to enable the buyer to inspect the condition of the residential unit/single-family house constructed by the property developer and to assess whether the property has any defects.[44] In other words, the former type of acceptance should not automatically be equated with the latter.[45] It follows that the fact that the acceptance of an item of property provided for in Article 27 of the Buyers Rights Protection Act has taken place does not necessarily have to constitute delivery of the same item within the meaning of Article 568(1) of the Civil Code. However, in practical terms, it may happen that when acceptance under Article 27 of the Buyers Rights Protection Act takes place, delivery will take place at the same time.[46] This will depend on particular circumstances, such as whether actual control of the residential unit/single-family house has been transferred to the buyer. With a view to the future (*de lege ferenda)*, it could be proposed that lawmakers should modify the provision of Article 27 of the Buyers Rights Protection Act. More specifically, the word *acceptance* might be replaced by a different word or phrase as a way to eliminate the problem of the relationship between Article 568(1) of the Civil Code and Article 27 of the Buyers Rights Protection Act. However, for the purposes of this paper, a distinction will be made further in this paper between (a) legal acceptance, which is a correlate of the delivery provided for in Article 568(1) of the Civil Code, and (b) technical acceptance, which is provided for in Article 27 of the Buyers Rights Protection Act.

On that basis, it is imprecise to argue that the time limit for the buyer to discover a defect begins when an "acceptance report" is signed.[47] An acceptance report is nothing more than a formal manifestation of the technical acceptance process.[48] As was noted above, the buyer may take over actual control of the residential unit or single-family house at the time of

[42] Obszernie wspomniany problem omawia: K. Ciućkowska-Leszczewicz, *Wpływ wad na odbiór przez nabywcę przedmiotu umowy od dewelopera*, [w:] *Działalność deweloperska w praktyce obrotu gospodarczego*, red. M. Królikowska- Olczak, A. Bieranowski, J.J. Zięty, Warszawa 2014, s. 253 i n. oraz E. Targońska, *op.cit.*, podrozdział 2.1. Pojęcie i charakter odbioru w umowie deweloperskiej.
[43] Zob. A. Burzak, M. Okoń, P. Pałka, *op.cit.*, komentarz do art. 27, pkt 4.
[44] Podobnie: K. Ciućkowska-Leszczewicz, *op.cit.*, s. 253 i n.
[45] Zob. *ibidem.*
[46] Podobnie: *ibidem.* Zob. też: R. Strzelczyk*, op.cit.*, Warszawa 2013, s. 410–411.
[47] Zob. M. Kos-Kłoboda, *Odpowiedzialność sprzedawcy za wady fizyczne nieruchomości*, „Nieruchomości i Prawo" 2012, nr 1, s. 12. Autorka ta podkreśla, że wydanie następuje „zwykle" na podstawie podpisanego przez obie strony protokołu.
[48] Por. K. Kułak*, op.cit.*, s. 418.

its technical acceptance and when the acceptance report is signed. A practical manifestation of the transfer of such control could be the fact of handing the keys to the property over to the buyer during that acceptance process.[49] The signing of the acceptance report may serve as proof that both the technical acceptance process and the legal acceptance process have been completed, provided that the buyer has taken over actual control of the property. If the buyer has signed a report of acceptance without qualification [no defects specified therein], but the developer has not handed the property keys to the buyer, it can hardly be said that the legal acceptance of the property has been completed. Consequently, it seems that there is no reason why the parties should not be free to agree during the technical acceptance process that the legal acceptance will be completed later.[50]

It needs to be noted at this point that in accordance with Article 27(3) of the Buyers Rights Protection Act, the buyer is entitled to raise defects in the property during the technical acceptance process and require that they are included in the acceptance report. That provision is interesting in the sense that the buyer is entitled on the basis of the provision to discover a defect in the property even before the property is delivered, i.e. before the start of the time limit set out in Article 568(1) of the Civil Code.[51] In other words, the buyer is free to discover a defect in the property (a residential unit or a single-family house) during the technical acceptance process, although it may be the case that this process will not be followed by delivery of the property, for example because material defects in the property have been discovered[52] or simply because actual control of the property has not been transferred to the buyer.[53] The question may therefore be asked whether it was the lawmakers' intention that the 5-year time limit for the buyer to discover a defect in a property as set out in Article 568(1) of the Civil Code should be the moment when the buyer proceeds to begin the technical acceptance process, whether or not legal acceptance has taken place. However, the answer to this question should be negative on the basis that if such was the intention of the lawmakers, the law would not provide appropriate protection to the buyer.[54] Admittedly, Article 568(3) of the Civil Code provides that if the buyer has requested the developer to correct a defect, the period within which the buyer may withdraw from the agreement or require a reduction in the price begins when the time limit for the developer to correct the defects has ended and the defect has not been corrected. It follows, however, that the time limit provided for in that section is for the buyer to raise a defect, not to discover a defect.[55] Neither the Buyers Rights Protection Act nor the Civil Code contains provisions under which the time limit for the buyer to discover a defect would begin anew (or would be interrupted)[56], the start of the time limit

[49] E. Targońska, *op.cit.*, podrozdział 2.1. Pojęcie i charakter odbioru w umowie deweloperskiej.
[50] Np. w momencie zawarcia umowy rozporządzającej albo zapłaty ostatniej raty.
[51] Podobnie: K. Kułak*, op.cit.*, s. 421.
[52] Kwestia czy nabywca może odmówić odbioru lokalu, jest sporna w doktrynie. Zob. przykładowo: E. Targońska*, op.cit.*, podrozdział 2.5. *Procedura odbioru.*
[53] Np. nieprzekazanie kluczy.
[54] Którego interes właśnie u.o.p.n. ma chronić. Zob. *Uzasadnienie projektu u.o.p.n.*, s. 1.
[55] Zob. T. Tomczak, *op.cit.*, s. 105–106.
[56] Tak samo: J. Jezioro [w:] *Kodeks cywilny. Komentarz*, red. E. Gniewek, P. Machnikowski, Warszawa 2019, s. 1219.

would be suspended or the running of the time limit would be suspended on the basis that the buyer has requested the developer to correct a defect.[57] It is for this very reason that if the time limit for the buyer to discover a defect as provided for in Article 568(1) of the Civil Code was to begin as the moment when the buyer proceeds to begin the acceptance process, the buyer's interests would not be protected properly, and the Buyers Rights Protection Act is intended to protect them.[58] It follows that in order to assess whether the 5-year period for the buyer to discover a defect in a residential unit or a single-family house, as provided for in Article 568(1) of the Civil Code, has begun, it is necessary to verify in each case whether the property has actually been delivered to the buyer. The buyer is free to discover defects in the property even prior to his acceptance of the property, but this follows from the provision of Article 27 of the Buyers Rights Protection Act, which a *lex specialis* that modifies the general provisions, not from the fact that the time limit provided for in Article 568(1) of the Civil Code begins. Defects in the property may, however, affect the determination whether the property has been delivered.

If the buyer raises defects which prevent him from taking over actual control of the residential unit/single-family house[59], then even if the buyer has already received the keys to the property and has signed the acceptance report, the legal acceptance of the property cannot be regarded to have been completed.[60]

3.1.1.5. Partial legal acceptance

Another interesting question that may be considered is whether *partial legal acceptance* is available. It needs to be remembered that buyers often want to take possession of their properties as soon as possible. As a result, a buyer may want to accept his residential unit or single-family house partially (partial acceptance), even if the buyer has raised certain small defects regarding, for example, one room only. The buyer will then be able to begin the finishing work in the property or to move in sooner, and this will allow him to save the money he would otherwise have to spend on rent payments.[61] If, in such cases, the buyer is given the keys to the property and takes over actual control of it even if only one part of the property, the argument that at least partial acceptance has not been completed cannot reasonably be defended. Although this may be questionable, the law does not seem to forbid

[57] Jedynie na marginesie można zwrócić uwagę na nieobowiązującą już ustawę z dnia 27 lipca 2002 r. o szczególnych warunkach sprzedaży konsumenckiej oraz o zmianie Kodeksu cywilnego (Dz.U. 141 poz. 1176 z późn. zm.; dalej jako: u.s.w.s.k). Zgodnie z art. 10 wspomnianej regulacji termin na stwierdzenie wady biegł na nowo w razie wymiany towaru (art. 10 ust. 1 u.s.w.s.k.), a zawiadomienie sprzedawcy o niezgodności towaru konsumpcyjnego z umową przerywało bieg przedawnienia (art. 10 ust. 3 u.s.w.s.k.). Przedawnienie nie biegło też w czasie wykonywania naprawy lub wymiany oraz prowadzenia przez strony, nie dłużej jednak niż przez trzy miesiące, rokowań w celu ugodowego załatwienia sprawy (art. 10 ust. 3 u.s.w.s.k.). Ustawa ta nie miała jednak zastosowania do sprzedaży nieruchomości. Odnośnie do wstrzymania i zawieszenia terminów związanych z rękojmią zob. przykładowo: M. Kos-Kłoboda*, op.cit.*, s. 64–68.

[58] Zob. *Uzasadnienie…*, *op.cit.*, s. 1. Choć w doktrynie można spotkać głosy, że w odniesieniu do terminu na stwierdzenie wady fizycznej powinno stosować na zasadzie analogii przepisy dotyczące zawieszenia i przerwania biegu terminów przedawnienia. Zob. J. Jezioro, *op.cit.*, s. 1219.

[59] Np. ze względu na zajmowanie lokalu przez ekipę budowlaną dewelopera w celu usunięcia zgłoszonych wad.

[60] Oczywiście w takim przypadku nabywca powinien odmówić odbioru lokalu. Nie można jednak wykluczyć w praktyce sytuacji, w których deweloper będzie, przykładowo, przekazywał nabywcy klucze do mieszkania i na tej podstawie, powołując się na stosunkowo liczną literaturę, twierdził, że do odbioru doszło.

[61] Podobnie, choć bez wyróżnienia odbioru „częściowego": T. Czech, *Ustawa…*, komentarz do art. 27, pkt 25.

the taking over of actual control of at least a part of a residential unit or a single-family house.[62] The argument that in such cases it is a prerequisite that all actual defects raised by the buyer be corrected by the developer for delivery or legal acceptance to take place and for the time limit for discovering defects to begin is not supported by law. As was noted above, neither the Buyers Rights Protection Act nor the Civil Code contains provisions under which the time limit for the buyer to discover a defect would be interrupted or the start of the time limit would be suspended or the running of the time limit would be suspended.[63] That argument would have to be based on the assumption that partial acceptance of a residential unit or a single-family house is not permitted, but this assumption is false. It needs to be remembered that the transfer of actual control of even only one part of a residential unit or a single-family house means that the buyer will be able to cause defects in the property himself. It seems that there is no reason why the time limit for discovering defects should begin anew in respect of those parts of the property which are delivered later.[64]

3.1.1.6. Acceptance and raising defects during the acceptance process

The above is connected with another issue. It may very often be the case that legal acceptance will take place[65], but defects are raised and included in the acceptance report, which defects should be corrected by the property developer.[66]

The question may be asked whether it was the lawmakers' intention that no technical acceptance or legal acceptance take place before all defects are corrected. Nowadays, however, it is possible in practical terms that the buyer will take over actual control of the residential unit/single-family house[67] and will only make a gentlemen's agreement with the property developer that a person or persons appointed by the developer will be allowed access to the property to correct any defects. If any defects are raised and included in the acceptance report, the property developer will, according to Article 27(5) of the Buyers Rights Protection Act, have 30 days of the date of signing the acceptance report to correct all accepted defects or, subject to certain conditions, should correct such defects within a

[62] Jak zwraca uwagę J. Gołaczyński: „przedmiotem posiadania mogą być (…) części składowe rzeczy, o ile jest faktyczna możliwość zapewnienia posiadaczowi władztwa". Zob. J. Gołaczyński [w:] *Kodeks cywilny. Komentarz*, red. E. Gniewek, P. Machnikowski, Warszawa 2019, s. 617. Takie stwierdzenie zdaje się sugerować, że przedmiotem posiadania nie zawsze musi być rzecz. Teza taka natomiast jest kontrowersyjna ze względu na fakt, że art. 336 k.c. stanowi o posiadaniu „rzeczy" i można spotkać orzeczenia Sądu Najwyższego, które stanowią, że części składowych rzeczy posiadać nie można. Zob. wyrok SN z dnia 6 czerwca 1973 r., I CR 413/73, LEX: 7265. Wyrok ten zapadł w kontekście posiadania lokalu niebędącego nieruchomością lokalową i możliwości jego zasiedzenia.

[63] Choć, jak zostało to już zaznaczone, w doktrynie można spotkać głosy, że w odniesieniu do terminu na stwierdzenie wady fizycznej powinno stosować na zasadzie analogii przepisy dotyczące zawieszenia i przerwania biegu terminów przedawnienia. Zob. J. Jezioro*, op.cit.*, s. 1219.

[64] W doktrynie można spotkać stanowiska, że termin na zgłoszenie wad jest liczony odrębnie w odniesieniu do każdej ze stwierdzonych wad. Zob. A. Kozioł [w:] *Kodeks cywilny. Komentarz. Tom IV. Zobowiązania. Część szczególna (art. 535-764(9)*, red. M. Fras, M. Habdas, Warszawa 2018, komentarz do art. 568, pkt 3. W niniejszym artykule mowa jest o terminie na stwierdzenie wady, jednak nie wydaje się, aby przedstawionego poglądu nie można było przenieść na grunt omawianego terminu.

[65] Skomplikowanym i zasługującym na odrębny artykuł zagadnieniem jest kwestia, czy nabywca może odmówić odbioru technicznego lub prawnego, a jeżeli tak, to w jakich przypadkach. Problem ten stosunkowo szeroko omawia m.in. K. Ciućkowska-Leszczewicz*, op. cit.,* § 4. Wady przedmiotu umowy ujawnione w trakcie odbioru.

[66] Art. 27 u.o.p.n. w ten sposób modyfikuje generalne zasady rękojmi, że na tym etapie zezwala on nabywcy jedynie na zgłaszanie roszczenia o naprawienie lokalu/domu jednorodzinnego. Tak samo: K. Kułak, *op. cit.,* s. 421.

[67] Tj. dojdzie do odbioru prawnego.

different specified period. In these cases, the question is whether the time limit for discovering defects should begin as soon as legal acceptance is completed or only when the defects are corrected.[68] Given the fact that there is no law under which the time limit for discovering defects might be interrupted or suspended or the start of the time limit might be suspended, the conclusion should be under such circumstances that time limit for discovering defects began at the time of legal acceptance. As a consequence, the buyer is not protected sufficiently and, therefore, perhaps the law should be amended to address this issue. In particular, it may be argued that statutory provisions should be made that would allow the time limit for discovering defects to be at least suspended for the time taken to correct them. With the law as it stands today, it should be argued, as proposed by Julian Jezioro, that the provisions on the suspension and interruption of the prescription periods should be applied by analogy to the time limit for discovering physical defects.[69]

3.1.1.7. Buyer's right to accept the delivery of an item of property versus the start of the time limit for discovering defects

As was noted above, with regard to the contract of sale, the Polish Supreme Court's judgments have led to a dispute over whether *delivery of an item of property sold* should be interpreted only as actual receipt of that item[70] or whether for an item of property to be deemed delivered it is sufficient to enable the buyer to accept delivery of the item he has bought.[71] As was noted above, Article 568(1) of the Civil Code provides for legal acceptance and Article 27 of the Buyers Rights Protection Act provides for technical acceptance. However, the context of the Buyers Rights Protection Act and the wording of Article 27 of the Buyers Rights Protection Act seem to provide a clear indication that – in the case of *umowa deweloperska* [development agreement], it would be insufficient only to enable the buyer to accept delivery of the residential unit/single-family house. It is because actual control of the property must pass to the buyer.

3.1.1.8. Delivery of a property versus conclusion of the ownership transfer agreement

At the end of this part, it is worth looking at another interesting point. Legal acceptance, i.e. the transfer of actual control of a property, takes place or may take place before the ownership transfer agreement [Polish: *umowa rozporządzająca*] is entered into.[72] The legal title to the property will not pass to the buyer before such an agreement is concluded. In other words, when the legal acceptance process is complete, the buyer will

[68] Choć w doktrynie można spotkać głosy, że w odniesieniu do terminu na stwierdzenie wady fizycznej powinno stosować na zasadzie analogii przepisy dotyczące zawieszenia i przerwania biegu terminów przedawnienia. Zob. J. Jezioro*, op. cit.,* s. 1219. Ewentualnie od upływu wyżej wspomnianych terminów.
[69] Zob. J. Jezioro*, op.cit.*, s. 1219. Należy podkreślić, że autor postulat taki zgłasza na gruncie umowy sprzedaży, a nie w kontekście umowy deweloperskiej.
[70] Zob. wyrok SN z 26 listopada 2002 r., V CKN 1418/00, Legalis: 57307; wyrok SN z 25 września 2014 r., II CSK 664/13, Legalis: 1162512.
[71] Zob. wyrok SN z 28 lipca 1999 r., II CKN 552/98, Legalis: 44521 oraz wyrok SN z 23 marca 2004, V CK 363/03, Legalis: 278116.
[72] Zob. T. Czech, *Ustawa…*, komentarz do art. 27*,* pkt 25. A. Burzak, M. Okoń, P. Pałka, *op.cit.*, komentarz do art. 27, pkt 4.

possess the residential unit/single-family house[73], but he will not be the legal owner of the property.[74] This raises the question whether the argument that time limit for discovering defects in a residential unit/single-family house begins as soon as the legal acceptance of the property takes place can be defended. Can it be defended that the time limit may begin before the legal title to the property is transferred to the buyer? In other words, the question is whether the time limit should not begin until the legal title to the property is transferred or whether it should be interrupted when the legal title is transferred and then begin anew. These views could potentially be supported by the argument that delivery will not take place unless the buyer has taken over the item of property for use by himself[75], and no legal title on the side of the buyer may prevent the buyer's use of the property. Alternatively, the Supreme Court's judgment of 25 April 2014[76] may be relied on. According to the Court, the time limit under Article 568(1) of the Civil Code within which the buyer may claim his rights (starting on the date of delivery of the item sold to the buyer) must not begin before a contract of sale is entered into.[77] Such views with regard to the contract of sale and based on statutory provisions which are no longer effective can be found in the literature.[78] In the case of a non-standard contract of sale, the legal title to the item sold will pass to the buyer at the time when the contract is entered into (for generic items of property) or when the item is delivered (for specific items of property).[79] Therefore, it is hardly ever the case that the buyer takes possession of an item of property before he acquires the legal title to the item. However, it needs to be remembered that it is only a non-standard situation. There is no reason why the parties to a contract should not be free to agree that the legal title to the item sold will pass to the buyer at a later date[80], and such an agreement will not disqualify the contract as a contract of sale.[81] Nothing in Article 568 of the Civil Code makes the start of the time limit for discovering defects conditional upon the passing of the legal title to the buyer; the only prerequisite is delivery of the item sold.[82] Furthermore, the Buyers Rights Protection Act contains no specific provision intended to modify the provision of Article 568

[73] Autor zakłada, że posiadać można nie tylko rzecz, ale też przedmioty niebędące rzeczami, co sugeruje choćby art. 3431 k.c. i o czym była już mowa szerzej powyżej.
[74] Lub właścicielem gruntu, na którym dany dom jednorodzinny jest posadowiony, o czym więcej poniżej.
[75] Tak w wyroku SN z 28 lipca 1999 r., II CKN 552/98, LEX: 37931.
[76] II CSK 415/13, LEX: 1504834.
[77] Dalej w tym orzeczeniu możemy przeczytać, że jeżeli sprzedaż dotyczyła rzeczy znajdującej się – na podstawie innej umowy – w posiadaniu kupującego, termin ten rozpoczyna bieg z chwilą zawarcia umowy sprzedaży. Wyrok SN z 25 kwietnia 2014 r., II CSK 415/13, LEX: 1504834.
[78] „Gdy wydanie rzeczy następuje w celu wykonania przyszłej umowy sprzedaży, wówczas trzeba uznać, że odpowiedzialność sprzedawcy z tytułu rękojmi może powstać nie wcześniej niż z dniem zawarcia definitywnej umowy sprzedaży". Zob. J.J. Zięty, B. Pawlak, *Odpowiedzialność sprzedawcy z tytułu rękojmi za wady fizyczne budynku,* „Państwo i Prawo" 2013, nr 2, s. 69.
[79] Zob. art. 155 k.c. oraz A. Burzak, M. Okoń, P. Pałka, *op.cit.*, komentarz do art. 27, pkt 4.
[80] Zob. art. 155 § 1 k.c. *in fine*.
[81] Taka umowa sprzedaży będzie mogła często być zakwalifikowana jako szczególny rodzaj sprzedaży, tj. sprzedaż z zastrzeżeniem własności rzeczy sprzedanej (art. 589–591 k.c.). Zob. przykładowo wyrok SN z dnia 25 września 2014 r., II CSK 664/13, LEX: 1544224, w którym to wyroku można przeczytać, że niebezpieczeństwo padnięcia konia, jeżeli strony nie postanowiły inaczej, przechodzi na kupującego z chwilą jego wydania, niezależnie od tego, czy kupujący uzyskał własność. Wyrok ten zapadł na kanwie art. 548 § 1 k.c., a nie 568 § 1 k.c. Podobnie w wyroku SN z 28 lipca 1999 r., II CKN 552/98: „Przejście ryzyka związanego z niebezpieczeństwem przypadkowej utraty lub uszkodzenia rzeczy jest związane z chwilą wydania rzeczy sprzedanej bez względu na to, czy własność rzeczy przechodzi na kupującego także z tą chwilą, czy też wcześniej lub później. Dowodzi tego brak jakiegokolwiek nawiązania w treści art. 548 k.c. do kwestii różnych momentów przejścia własności przewidzianych w art. 155 k.c.".
[82] Podobnie: A. Burzak, M. Okoń, P. Pałka, *op.cit.*, komentarz do art. 27, pkt 4.

of the Civil Code. Although that argument may be questionable, it follows that the fact that the buyer has no legal title to an item does not mean that the time limit for discovering defects, as provided for in Article 568(1) of the Civil Code, does not begin or may not begin. It would be wrong to argue that the delivery of an item of property may only take place when the buyer has acquired the legal title to the item, not only actual possession of the item.[83] It may, of course, be considered whether the provisions of the Buyers Rights Protection Act should be amended by providing expressly that the time limit for discovering defects set out in Article 568(1) of the Civil Code will not begin before the ownership transfer agreement is concluded and that Article 27 of the Buyers Rights Protection Act is a *lex specialis* which allows for defects to be discovered before the conclusion of the agreement, but which does not define the start of the time limit provided for in Article 568(1) of the Civil Code. Alternatively, perhaps the law should be amended to provide that this time limit will be interrupted at the time when the ownership transfer agreement is concluded.

3.1.2. Residential unit or a single-family house: legal defects

It is, however, important and should be made clear that the above considerations cover only physical defects in a residential unit or a single-family house. The Buyers Rights Protection Act contains no provisions regarding legal defects and therefore the provisions of the Civil Code dealing with such defects should be applied according to the reference contained in Article 27(6) of the Buyers Rights Protection Act. Article 576 of the Civil Code provides that the rights resulting from the seller's statutory implied liability for legal defects in an item sold may be exercised by the application of the provisions of Articles 568(2)-(5) of the Civil Code, except that the time limit provided for in Article 568(2) of the Civil Code begins on the date when the buyer became aware of a defect in that item and, if the buyer became so aware only as a result of a third party's legal action, on the date when the court's order in the dispute with that third party.[84] Article 576 of the Civil Code, which deals with legal defects, contains no reference to Article 568(1) of the Civil Code, which provision makes the start of the time limit for discovering defects in an item conditional upon delivery of that item. Article 568(1) of the Civil Code does not apply to legal defects[85], which means that no time limit for discovering legal defects applies and the only limitation for the buyer is that there are time limits for raising such defects.[86] As a consequence, "the liability of the seller for legal defects in an item sold extends over a period of time significantly longer than that for his

[83] Por. wyrok SN z dnia 28 lipca 1999 r., II CKN 552/98, LEX: 37931.
[84] Uzasadnienie, dlaczego początek biegu terminu na stwierdzenie wady prawnej jest ustalony inaczej niż w przypadku wady fizycznej, można znaleźć przykładowo w: B. Więzowska-Czepiel, *Terminy dla realizacji uprawnień z tytułu rękojmi za wady prawne rzeczy sprzedanej – zmiany w wyniku nowelizacji dokonanej ustawą o prawach konsumenta,* „Studia prawnicze. Rozprawy i Materiały" 2015, nr 1, s. 59.
[85] Tak samo: D. Bierecki [w:] *Kodeks cywilny. Komentarz*, red. J. Ciszewski, P. Nazurek, Warszawa 2019, komentarz do art. 576 pkt 2.
[86] Podobnie: R. Trzaskowski [w:] *Kodeks cywilny. Komentarz. Tom IV. Zobowiązania Część szczegółowa*, red. J. Gudowski, Warszawa 2017, komentarz do art. 576.

liability for physical defects".[87]

This paper focuses on the time limit for discovering defects, not raising defects. However, it seems reasonable to comment briefly on legal defects at this point. Firstly, in practical terms, it is rather unlikely for the buyer to review the legal status of the property during the technical acceptance process or for the property developer to inform the buyer of that status at that time. Therefore, the argument that the time limit for discovering legal defects begins at the same time when the time limit for discovering legal defects cannot be accepted. In other words, technical acceptance and legal acceptance are irrelevant when considering the start of the time limit for discovering legal defects. Although the technical acceptance process should specifically deal with physical defects, as Krzysztof Kułak rightly emphasises, it is not forbidden for the buyer to raise legal defects and request them to be included in the acceptance report.[88]

Secondly, it seems that the Polish Supreme Court's judgment of 26 September 2000[89] should not apply to *umowa deweloperska* [development agreement]. That case was about a contract for the sale of real estate and the Court stressed that the statutory implied warranty [Polish: *rękojmia*] may only apply if the contract of sale was validly entered into. However, for the sake of consistency, if it is accepted that a development agreement is a separate type of nominate contract and that the provisions on the statutory implied warranty in contracts of sale should be applied *mutatis mutandis* to that contract, the development agreement may create rights under the statutory implied warranty in respect of legal defects. It needs to be remembered that – from this perspective – the ownership transfer agreement is only part of the performance of the development agreement.[90] Furthermore, there should be no reason why the buyer should be prevented from raising a legal defect in a property before entering into the ownership transfer agreement regarding that property. Article 576 of the Civil Code, if applied *mutatis mutandis,* clearly makes the start of the time limit for raising a defect conditional upon the buyer becoming aware of the defect.[91]

3.2. Land (other common areas of a property)

The discussion in this paper would not be complete without considering the start of the time limit for discovering defects in other common areas of a "property" or, to put in simply, in land.[92] Land may be owned, co-owned or held in perpetual usufruct/perpetual shared usufruct by the buyer. It seems that the legal title to land should not be a factor in an analysis regarding the start of the time limit for discovering a defect in the land.

As in the case of buildings, the Buyers Rights Protection Act contains no specific

[87] Zob. E. Habryn-Chojnacka [w:] *Kodeks cywilny. Tom II. Komentarz do art. 353–626*, red. M. Gutowski, Warszawa 2019*,* komentarz do art. 576 pkt 1.
[88] Zob. K. Kułak*, op. cit.,* s. 420.
[89] III CKN 288/00, LEX: 51883.
[90] O jednym stosunku prawnym o złożonej wewnętrznie strukturze w przypadku umowy deweloperskiej pisze również: K. Kułak*, op.cit.,* s. 425.
[91] Por. K. Kułak*, op.cit.,* s. 420.
[92] Kwestia budynku została już przeanalizowana w T. Tomczak, *op. cit.*

provisions dealing with the liability of property developers for defects in land.[93] It should therefore be argued that the provisions of Article 568(1) of the Civil Code will apply by analogy to the start of the time limit for discovering a defect.

If the building is a single-family house, the delivery of land should not usually be a matter of considerable contention. When the delivery of a single-family house is accepted, the land on which the house stands will be delivered as well, i.e. actual control of the land will be transferred to the buyer. However, it may be the case in practical situations that a single-family house has been delivered, but some of the land has not.[94] After all, the property developer may continue some work on the land (such as building a swimming pool or a playground). In this regard, however, considerations in the literature[95] indicate that all of the land may be delivered only after all the scheduled work on the land has been completed.

However, if the property is a residential unit, legal acceptance of the land (i.e. common areas other than the building) creates the same problems that are involved in legal acceptance of the common areas of the building.[96] It is, therefore, unnecessary to repeat the extensive discussion in the literature.[97] There is, however, a particular difference that deserves a broader discussion. It is more likely in the case of land that there will be two different start dates of the time limit for discovering a defects.[98] When a residential unit and the building is ready to be delivered to the buyer, the developer may still be doing some work on the common areas of the property, namely the land.[99] This likelihood is higher on the basis that it is not a requirement under the Buyers Rights Protection Act in respect of land (common areas other than the building) that before the land is accepted, notice be given of the completion of the works or an occupancy permit be obtained.[100] However, the principle should be the same. The time limit for discovering defects in land (common areas other than the building) should begin upon delivery of the land, i.e. when actual control of the land is transferred to the buyer, and no such transfer may be made before the developer completes all the scheduled works on the land. Naturally, in such a case, the developer may try and include the land in the acceptance report, but the very signing of this document should not trigger the time limit for discovering defects in the land if the land has not been delivered.

In summary, as there are no specific provisions in the case of land (common areas

[93] Zob. T. Tomczak, *op.cit.*, s. 107 i przywoływana tam literatura.
[94] Powyższe jest pewnym uproszczeniem, ponieważ u.o.p.n. powinno stosować się także do przypadków przeniesienia na nabywcę ułamkowej części własności nieruchomości wraz z prawem do wyłącznego korzystania z części nieruchomości służącej zaspokajaniu potrzeb mieszkaniowych. Tym samym, w przypadku domów bliźniaczych czy szeregowych zaznaczony problem może nabierać na znaczeniu. Opisany przypadek zobowiązania dewelopera, o którym nie stanowi wyraźnie art. 1 u.o.p.n., nie jest jednak omawiany w ramach niniejszego artykułu. Zob. J. Pisuliński*, op.cit.*, s. 768–770.
[95] T. Tomczak, *op.cit.*, s. 111.
[96] Szeroko na ten temat: T. Tomczak, *op. cit.*, s. 106–112.
[97] *Ibidem*.
[98] Tj. inną datę początkową w przypadku lokalu mieszkalnego i inną w przypadku gruntu (innych niż budynek części wspólnych nieruchomości).
[99] Prace te mogą też dotyczyć samego budynku, w którym znajduje się lokal mieszkalny, jednak zagadnienie początku biegu terminu na stwierdzenie wady w odniesieniu do budynku posadowionego na przekazywanym gruncie zostały wyłączone z zakresu niniejszego artykułu.
[100] Jedynie przykładowo można wskazać na sytuację, w której deweloper na gruncie wspólnym zobowiązał się wybudować basen służący do wspólnego użytku lokatorów.

other than the building), the principle that applies to buildings should apply to land.[101] The time limit for discovering physical defects in land should begin upon the delivery of the land, and the time limit for discovering legal defects in land should begin in accordance with Article 576 of the Civil Code.

4. Semi-mandatory nature of the provisions of Article 27 of the Buyers Rights Protection Act and 568(1) of the Civil Code

According to Article 28 of the Buyers Rights Protection Act, if a provision of a development agreement is less favourable to the buyer than a statutory provision regarding the same matter, the statutory provision prevails. Although the location of this provision in that statute may raise some questions, legal academics, scholars and commentators and the courts are in agreement as to the semi-mandatory nature of the provisions of the Buyers Rights Protection Act.[102] As a consequence, those provisions of a development agreement which deal with the start of the time limit for discovering defects in a residential unit or a single-family house and which are less favourable than the provision of Article 27 of the Buyers Rights Protection Act will be void. However, Article 27 of the Buyers Rights Protection Act makes no reference, at least not directly, to legal acceptance or to acceptance of a building or land (common areas other than the building). As Bartłomiej Gliniecki rightly stresses, the provisions of the Buyers Rights Protection Act, at least if they are interpreted literally, do not set a minimum standard of protection of the buyer's rights in respect of buildings and other common areas.[103]

The question may therefore be asked whether the developer and the buyer are free to include, in the development agreement, provisions regarding the start of the time limit for discovering defects which are less favourable to the buyer. For example, the parties may agree that the residential unit, the building and the land will be delivered to the buyer upon the signing of a report for technical acceptance of the residential unit, whether or not the delivery actually takes place. It seems that even without considering whether the applicability of Article 27 of the Buyers Rights Protection Act should be extended, such provisions should be regarded as ineffective anyway. Firstly, if it is accepted that the liability of the property developer for defects in a residential unit, the building itself or the land should be governed *mutatis mutandis* by the provisions of the Civil Code that deal with the seller's liability for defects in an item sold, then provision of Article 558 of the Civil Code should also apply. This provision prohibits any limitation of such liability towards consumers.[104] The buyer will usually be a consumer. An attempt to agree that the 5-year time limit for discovering a defect should

[101] Szerzej zob. T. Tomczak, *op.cit.,* s. 106–112.
[102] Zob. przykładowo: T. Czech, *Ustawa…*, komentarz do art. 27, pkt 3 lub Wyrok Sądu Apelacyjnego w Warszawie z dnia 16 lipca 2013 r., VI ACa 1568/12, Legalis: 749029.
[103] Prawidłowo Bartłomiej Gliniecki podkreśla, że przynajmniej w jej literalnym brzmieniu, przepisy u.o.p.n. nie wyznaczają minimalnego standardu ochrony w odniesieniu do budynku czy gruntu (innych części wspólnych nieruchomości). Zob. B. Gliniecki, *Ustawa deweloperska. Komentarz do ustawy o ochronie praw nabywcy lokalu mieszkalnego lub domu jednorodzinnego*, Warszawa 2012, komentarz do art. 27 u.o.p.n. pkt 2.
[104] Chyba że przepis szczególny dopuszcza takie ograniczenie. Zob. art. 558 § 1 *in fine*.

begin before delivery should be regarded as a limitation of such liability. Secondly, even if the above argument is not accepted[105], a provision intended to cause the 5-year time limit for discovering a defect, as set out in Article 568(1) of the Civil Code, to begin before delivery should be regarded as a prohibited contractual provision under Article 385^1(1) of the Civil Code.[106] A provision in an agreement whereby the time limit for discovering defects starts before delivery should be considered to be against the rules of decency and as a material breach of the buyer's interest.[107]

Finally, it needs to be stressed that the parties to a development agreement are not free to exclude the applicability of Article 27 of the Buyers Rights Protection Act or Article 568(1) of the Civil Code, but they are free to agree in the ownership transfer agreement that, for example, the time limit for discovering defects will begin anew (will be interrupted) upon the conclusion of the latter agreement.[108]

5. Summary

It should follow from the discussion in this paper that legislative changes are needed to ensure that the start of the time limit for discovering defects as a legal issue is provided for in the law clearly.

The number of points that raise questions is so large that it is possible to propose only some potential directions for new regulations. Firstly, the law draw a clear line between the acceptance provided for in Article 27 of the Buyers Rights Protection Act and the acceptance that is a correlate of delivery within the meaning of Article 568(1) of the Civil Code. Alternatively, the law should provide clearly that when acceptance of a property under Article 27 of the Buyers Rights Protection Act takes place, the delivery of that same property takes place simultaneously. Secondly, the proposal that comprehensive statutory provisions are needed to cover the delivery of buildings and other common areas should be supported.[109] A relatively straightforward solution would be to provide in the law that – in the case of development agreements – the 5-year time limit for discovering defects will be interrupted[110] when the ownership transfer agreement is concluded, except that the property must be delivered before such an agreement is concluded. Such a provision would encourage the property developer to deliver the property to the buyer and to conclude the ownership

[105] I tylko w takim przypadku, gdyby zaakceptować tezę, że nie może dojść do stwierdzenia przez Sąd abuzywności klauzuli, która jest sprzeczna z bezwzględnie obowiązującym przepisem prawa. Zob. przykładowo wyrok Sądu Apelacyjnego w Warszawie z dnia 16 lipca 2013 r., VI ACa 1568/12, Legalis: 749029.

[106] Zakładając, że nabywcą jest konsument albo podmiot, o którym stanowi art. 3852 k.c.

[107] Odnośnie niedozwolonych klauzul umownych, które mogą wystąpić w umowach deweloperskich zob. przykładowo: Urząd Ochrony Konkurencji i Konsumentów, *Raport Konsument na rynku deweloperskim*, Warszawa 2014 oraz M. Hejbudzki, *Wybrane klauzule niedozwolone w umowach deweloperskich* [w:] *Działalność deweloperska w praktyce obrotu gospodarczego*, red. M. Królikowska-Olczak, A. Bieranowski, J.J. Zięty, Warszawa 2014.

[108] Pod warunkiem oczywiście, że do wydania lokalu wcześniej doszło. Zob. też: wyrok SN z dnia 5 sierpnia 2005 r., II CK 28/05, LEX: 159121, w którym to orzeczeniu możemy przeczytać, że przewidziany w art. 568 k.c. termin wygaśnięcia uprawnień z tytułu rękojmi może być przedłużony umową stron.

[109] Tak w odniesieniu do budynku T. Tomczak, *op.cit.*, s. 112. Autor ten wskazuje jako możliwą drogę regulacji, np. dodatkowy odbiór końcowy części wspólnych i wskazanie owego odbioru jako terminu początkowego dla biegu terminu na stwierdzenie wad części wspólnych.

[110] Tj. zaczyna biec na nowo.

transfer agreement, both as soon as possible, which should be of benefit to the buyer.

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