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A GLOSS FOR THE JUDGEMENT OF THE SUPREME COURT DATED NOVEMBER 23, 2012, FILE REF. NO. IV CSK 598/12

THESIS

1. The disposal of an undertaking of a bankrupt company in the course of bankruptcy proceedings gives rise to events that are pertinent to legal succession under universal title.

2. The assessment of validity of a contested contractual provision shall not be entirely conditional upon the amount of payments made to date under a lease agreement.

In the action brought by Pomorska Agencja Finansowa – T. Spółka z o.o. registered in T., a legal successor of Wschodnie Towarzystwo Leasingowe [...] S.A., against Z. K. and J. K. for payment, and having convened in a closed session at the Civil Chamber on November 23, 2012, in order to consider the cassation complaint of the respondents with regard to the judgement of the Regional Court dated June 3, 2011, the Supreme Court set aside the contested judgement and remanded the case to the Regional Court leaving to it the decision about the cost of the cassation proceedings.

I

I do share the position of the Supreme Court presented in the case at hand. The presented judgement has a great deal of practical significance because, on the

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one hand, there are no grounds to use art. 5 of the Polish Civil Code[1] despite the fact that the total, aggregate amount of the regular payments nearly doubled the value of the leased assets, and on the other hand, it departs from the body of judgements to date in respect of the permissibility of universal succession when an undertaking is being acquired.

The application of art. 5 CC, which "merely outlines the limits of a subjective right, may not cause this right to cease or be forfeited by the original holder and be acquired by another person."[2] Mentioning ignorance of particular rules of community life by a party to a lawsuit cannot be deemed practical.[3] One who violates the norms of social intercourse should not take advantage of the protection provided for in art. 5 CC. The article imparts more flexibility to the legal system, the norms of which do not always correspond with the needs of the practice and may not always comply with those needs.[4] Exceptional cases may occur entailing doubts of moral or purposive nature.[5] On the face of it, the claim that the subjective right was abused seems justified by the obvious disproportion between the value of the machinery and the actual lease payments. It also seems that the attitude of both the claimant and the defendants does have some significance. Also, of some relevance is the question whether it would be sensible to invoke specific norms of community life which may have been breached. What seems likely is an abuse of the subjective right as well as the absence of equivalent of art. 5 CC in bankruptcy and reorganisation law.

The judgement has a great deal of importance for our analysis since it departs from the traditional approach of case law with regard to acquisition of an undertaking. The ruling of the Supreme Court may also have a lot of practical significance due to the fact that it may influence the level of interest of potential buyers in acquiring a bankrupt undertaking and on potentially changed tendencies in case law in the future.

Under civil law, property can be obtained by way of original acquisition, after the acquirer has gained the right which another person once had irrespective of the latter's will so long as the provisions of law permit that, or when the thing possessed

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[1] Act of 18 April 1964 (Polish Civil Code), Journal of Laws of 2017, item 459 [hereafter CC].

[2] S. Grzybowski, *Prawo cywilne. Zarys części ogólnej*, 3rd ed. (Warsaw: Państwowe Wydawnictwo Naukowe, 1985), 138.

[3] K. Piasecki, „Komentarz do art. 5," in *Kodeks cywilny z komentarzem*, ed. J. Winiarz (Warsaw: Wydawnictwo Prawnicze, 1980), 20.

[4] B. Ziemianin and Z. Kuniewicz, *Prawo cywilne. Część ogólna* (Poznań: „Ars boni et aequi" Przedsiębiorstwo Wydawnicze – Michał Rozwadowski 2007), 64.

[5] Z. Radwański, *Prawo cywilne – część ogólna*, 10th ed. (Warsaw: Wydawnictwo C.H. Beck, 2009), 108.

did not exist earlier or did not belong to any entity. In contrast, derivative acquisition occurs when the acquirer of an ownership right gains it from another person through transfer. The latter type of acquisition encompasses universal succession, which happens when a legal successor acquires the whole or a large share of estate through one legal transaction, and singular succession, which occurs when an identifiable item of estate is acquired.[6]

However, central to our discussion is the nature of acquisition of an undertaking in bankruptcy proceedings, therefore this will lie at the core of our analysis.

II

The District Court assumed that the claimant's demand to be remunerated for the non-contractual use of the leased items violates the principles of community life (see art. 5 CC), and it set aside the order to pay which had been issued, dismissing the action against the defendants, namely Z.K. and J.K. The Court argued that the lessees had settled the due payments in the amount 68,023.85 PLN while the value of the leased assets was 38,966.80 PLN. The defendants delivered their contractual obligations nearly in whole, which undoubtedly would have allowed them to purchase the leased items after the contract was terminated had the lessor not filed for bankruptcy. In the Court's opinion, claiming remuneration for the latter period of the use, now non-contractual, and not letting the defendants to purchase it should be deemed as contrary to principles of morality. The District Court also emphasised the fact that the claimant did not make contact with the defendants for a period of nearly 5 years, allowing the claim for the leased items to become time-barred, while the defendants made attempts to resolve the dispute amicably, which the claimant would not consent to. Under such circumstances the position of the Court seems doubtful.

III

Acknowledging the claimant's appeal, the Regional Court assumed that the facts of the adjudicated case did not permit art. 5 CC to be used to dismiss the action. The Court argued that the contract between the parties explicitly stated that when it expired, the lessees were to return the leased items at their expense and risk within 14 days after the agreement expired. The limitation of a recovery claim does not preclude a claim for non-contractual use, hence its assertion cannot be interpreted

[6] B. Ziemianin and K.A. Dadańska, *Prawo rzeczowe*, 3rd ed. (Warsaw: Wolters Kluwer Polska, 2012), 50–51, 66.

as a breach of law. In the Court's opinion, the circumstance that the defendants had paid lease contributions in the sum exceeding the value of the leased assets does not imply that the claim for the payment for non-contractual use is contrary to the principles of community life. The Court also concluded that no specific rule determining social relations was referred to which the claimant would have breached. The obligation of a judicial panel invoking art. 5 CC is to formulate a rule of community life with which the exercise of the subjective right is at conflict. Nevertheless, it must be noted that the argument that there was no specific breach of such a rule is debatable, and this will be the point of departure for our consideration of the position of the Supreme Court.

It is appropriate to note that the defendants – while showing concern for their interests and manifesting increased care – could have settled the matter with the lessor. In its resolution of December 18, 1990, the Supreme Court argued that economic activity pursued by a debtor gives rise to an expectation on the part of the trading partner as to the former's requisite amount of care.[7] In contrast, in a judgement of August 23, 2001, the Court assumed that professionals such as entrepreneurs, should present a higher standard of care in protection of their interests.[8] It was stressed that in the course of all judicial proceedings a debtor should demonstrate exemplary care.[9] The Constitutional Tribunal[10] emphasised the question of increased care on the part of an entrepreneur. Also, the Supreme Court, in its judgement of April 24, 1997, concluded that negative consequences of negligent conduct of a party in respect of which an entitled party asserts a right may not be annulled by way of art. 5 CC.[11]

The declaration of bankruptcy does not validate the lack of due care on the part of the defendants in this case. This corresponds with the well-established body of rulings,[12] which suggests that the norm laid down in art. 5 CC is of unique char-

[7] Resolution of the Supreme Court, dated December 18, 1990, file ref. no. III CZP 67/90, OSNC 1991, nos. 5–6, item 65.

[8] Judgement of the Supreme Court, dated August 23, 2001, file ref. no. IICKN 103/99, Lex Polonica no. 376861.

[9] M. Romanowski, „Zobowiązania rezultatu i starannego działania," *Przegląd Prawa Handlowego* 2 (1997), 26.

[10] Judgement of the Constitutional Tribunal, dated May 26, 2008, file ref. no. SK 20/07; judgement of the Constitutional Tribunal, dated November 10, 2009, file ref. no. P 88/08.

[11] Judgement of the Supreme Court, dated April 24, 1997, file ref. no. II CKN 118/97, OSP 1998, no. 1, item 3.

[12] Resolution of the Supreme Court dated May 20, 1966, file ref. no. III PZP 6/66, OSNCPiUS 1967, no. 1, item 5; resolution of the Supreme Court (7) dated October 27, 1983, file ref. no. III PZP 35/83, OSNC 1984, no. 6, item 86; judgement of the Supreme Court dated June 26, 1997, file ref. no. I CKN 131/9, unpublished.

acter. When assessing the breach of principles of social intercourse, the entirety of circumstances in a particular case need to be taken into consideration, not just one circumstance, even though of considerable importance. Of particular note is the observation of the Regional Court which noted that the agreement was terminated in May 2001, while the declaration of bankruptcy took place in February 2002, so the defendants could have sought the final settlement with the lessor. In the context of the presented case, an analogical judgement can be mentioned as relevant. It was issued on March 4, 1994, by the Supreme Court, to conclude that the difficult financial condition of the State cannot be an excuse of refusal to pay interest on awarded compensation payable by the Treasury.[13] All the more so in the analysed case, the difficult economical situation which led to the declaration is not a good reason to justify the lack of full settlement with the lessor. It should be noted that debtors who face insolvency are obliged, for example under art. 21 of bankruptcy and reorganisation law[14] to file an application to declare bankruptcy, and they are *a fortiori* to demonstrate care while making a final settlement with the lessor.

To recapitulate, the defendants should have been guided by due care and prudence. Their difficult financial condition could not justify their non-performance under the agreement.

IV

The Supreme Court rightly addressed the allegations used in the cassation complaint, which challenged the validity of the contractual provision in connection with art. 353^1 CC being infringed since no arrangements had been made, nor had the purpose and nature of the lease relationship been stated, and due to infringement of art. 58 §2 CC containing a prescript of respecting the principles of social intercourse when conducting legal transactions. The Court indicated that art. 353^1 and 58 §2 CC can serve as grounds for an assessment of the validity of a contractual provision when the agreement is being concluded, not during the performance thereof. The total amount of the payments made with respect the lease agreement cannot play a decisive role – all the more so because the lessees should have returned the leased assets to avoid paying more.

[13] Judgement of the Supreme Court dated March 4, 1994, file ref. no. III CRN 3/94, unpublished; judgement of the Supreme Court dated February 15, 1995, file ref. no. III CRN 11/95, unpublished.

[14] Act of 28 February 2003 (Bankruptcy and reorganisation law), Journal of Laws of 2012, item 1112 [hereafter BRL]. The state of law at the time of issuance of the glossed judgement of the Supreme Court dated November 23, 2012, file ref. no. IV CSK 598/12.

As the Supreme Court rightly remarked, norms of social intercourse can be infringed only in cases of evident and extreme wrong done to either of the parties.[15] Also, in its judgement of September 11, 2008, the Court of Appeals in Poznań pointed out that the principle of freedom of contract enshrined in art. 353[1] CC implies acknowledgement of actual inequality of parties to an agreement. The non-equivalence of the legal status of parties to an agreement does not require the occurrence of circumstances that would justify it if this results from the intent of the parties.[16] The Supreme Court validly concluded that a breach of art. 5 CC does not require a specific principle of social intercourse to be spelled out. The assessment whether a subjective right has been infringed should take into consideration the entirety of the case. This is in line with the judgement of the Supreme Court of January 6, 2009.[17]

It is appropriate to emphasise that, by analogy, in the system of law there are a number of regulations which may present an acute sanction but do not qualify as a breach of norms of social intercourse. Under bankruptcy and reorganisation law, it is possible that the court will not decide to cancel the liabilities of a debtor who has fulfilled the requirements of art. 369. A debtor may incur liability for failing to file for bankruptcy in a timely manner, even if this omission was not intentional. The application of art. 5 CC in conjunction with the disposition of art. 299 Polish Commercial Companies Code[18] is of marginal importance or it may even be called into question.[19] Also, a receiver, an insolvency administrator, or an estate manager – under art. 164 BRL – will lose his/her title to remuneration, even if the delay was 1 day. In the interpretation of the Supreme Court dated February 16, 1999, "one may not use art. 5 CC when failing to observe the estate distribution rank required to satisfy the creditors when dividing the amount obtained from the property in execution (art. 1052 of the Polish Code of Civil Procedure)."[20] Also, lack of due care with respect to an employee who is in a difficult financial situation implies negative consequences. According to the judgement of the Supreme Court of March 5, 1999, "lack of employment or other sources of income cannot be a reason for restoring the

[15] Judgement of the Supreme Court dated June 14, 2005, file ref. no. II CK 69/04, unpublished.

[16] Judgement of the Regional Administrative Court in Poznań dated September 11, 2008, file ref. no. I ACA 544/08, unpublished.

[17] Judgement of the Supreme Court dated January 6, 2009, file ref. no. I PK18/08, OSNAPiUS 2010, nos. 13–14 item 156.

[18] Act of 15 September 2000 (Polish Commercial Companies Code), Journal of Laws of 2016, item 1578 as amended.

[19] Judgement of the Supreme Court dated June 19, 2009, file ref. no. V CSK 459/08, unpublished.

[20] Decision of the Supreme Court dated January 27, 1999, file ref. no. I CKN 101/98, unpublished.

date by which to appeal the termination of an employment contract."[21] Under civil law, the legislator does not permit the possibility of buying immovable property by usucaption after 19 years of uninterrupted possession as an individual possessor (art. 172 §1 CC). Also, defendants who act in bad faith are not entitled to receive protection on account of norms of social intercourse being infringed (art. 174 CC).

Concluding, the principle of freedom of contract permits imbalance between parties, and the total amount of payments made under contract is not crucial for the resolution of a case. Within the system of law, the application of art. 5 CC has a unique character.

Another important question whether it is permissible to deem the acquirer of a bankrupt entrepreneur to be the latter's legal successor. This will be the focus of the following sections of the gloss.

V

As of May 4, 2012, the decision on the termination of the bankruptcy proceedings with respect to the company became legally effective, as did the decision on the removal of the company from the National Court Register on August 17, 2012. As a result, the sale of the entire undertaking of the company, conducted by the receiver in bankruptcy, to Pomorska Agencja Finansowa – T. sp. z o.o., with the registered office in T. – was an essential circumstance.

The Supreme Court noted that the acquisition of an undertaking does not constitute universal succession within the meaning of art. 551 CC. This view is based on the claim that the purchase of an undertaking does not involve transmission of the totality of obligations associated with its operation.

The relevant case law suggests that the lack of a definite legal base or other regulations is the main argument in favour of not adopting universal succession.[22] This view presents some difficulty. As early as in the classical period, the legal theory differentiated between statutory analogy (*analogia legis*) and legal analogy (*analogia iuris*) as extensive interpretation and reductionist interpretation, respectively.[23]

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[21] Judgement of the Supreme Court dated March 5, 1999, file ref. no. I PKN 604/98, published in *Monitor Prawniczy* 10 (1999): 8.

[22] Resolution of the Supreme Court dated June 25, 2008, file ref. no. III CZP 45/08, OSNC 2009, No. 7–8, item 97; judgement of the Supreme Court dated April 4, 2007, file ref. no. V CSK 3/07, published in *Monitor Prawniczy* 9 (2007): 460.

[23] A. Kacprzak, J. Krzynówek, and W. Wołodkiewicz, *Regulae Iuris. Łacińskie inskrypcje na kolumnach Sądu Najwyższego Rzeczypospolit*ej *Polskiej*, 2nd ed., ed. W. Wołodkiewicz (Warsaw: Wydawnictwo C.H. Beck, 2006), 56.

Canons of construction and legal reasoning are of major importance.[24] Beside changes done to the system of law, if any gaps have been found, a law enforcement body should take inferential rules into consideration.[25] By analogy, the absence of a clear precept which would make it possible to adopt universal succession can be juxtaposed with the lack of definition, which is not necessarily an obstacle to the determination of the factual and legal situation. Occasionally, even an over-elaborate definition creates certain risks. This is in line with the following inscription: *Omnis definitio in iure civili periculosa est: Parum est enim, ut non subverti posset.*[26]

Summing up, it is debatable whether the lack of a definite precept, especially when a legal entity is being s extinguished, makes it impossible to assume the entity of the acquirer's legal succession by way of universal succession.

VI

From the perspective of the system of law and using analogy, we can address the legal status of employees whose organisation is being acquired by a different company as a legal successor. In its judgement of November 23, 2006, the Supreme Court concluded that "if an employment establishment has been transferred to another owner and the former employer has been wound up, the previous obligations under the original employment relationship are to be addressed solely by the new employer."[27] Also, pursuant to art. 243 of the Labour Code,[28] the new employer is to use the contractual provisions which applied to the transferred employees to date for a period of one year. It is argued that the disposal of an undertaking as part of bankruptcy proceedings cannot be equated with the taking over of an employment establishment in the meaning of art. 23 LC. As a consequence, the acquirer does not take over the rights and obligations of the previous employer. This position is compatible with the principle of primary acquisition in bankruptcy proceedings.[29] However, this view provokes some doubts. As it was rightly emphasised by the Supreme Court, encumbrances on company assets in cases referred to in art. 313

[24] Z. Ziembiński, *Logika praktyczna*, 16th ed. (Warsaw: Wydawnictwo Naukowe PWN, 1993), 222–33.

[25] Ziemianin, Kuniewicz, *Prawo cywilne*, 44–46.

[26] Kacprzak, Krzynówek, Wołodkiewicz, *Regulae Iuris*, 18.

[27] Judgement of the Supreme Court dated November 23, 1997, file ref. no. II PK 57, OSNCAP 2006, no. 1–2, item 4.

[28] Act of 26 June 1964 (Polish Labour Code), Journal of Laws of 2016, item 1666 as amended [hereafter LC].

[29] P. Zimmerman, *Prawo upadłościowe i naprawcze. Komentarz*, 2nd ed. (Warsaw: Wydawnictwo C.H. Beck, 2012), 690.

paras. 3 and 4 BRL are not extinguished. Some rights resulting from administrative decisions, for example building permits, are not transferred to the acquirer.[30] As a result, primary acquisition is subject to justifiable exceptions. *A fortiori*, if some administrative decisions are facultatively or obligatorily transferred to the acquirer of an undertaking, the more so the new acquirer should be bound by a duty to pay overdue benefits to the employees. If this solution were adopted, the defendants would be obliged to settle their debt with the lessor.

By analogy, it should be noted that the rights of an annuitant (art. 313 para. 3 BRL) can be juxtaposed with the right to annuity (art. 342 para. 1 point 1 BRL), which is systematised in the first category of satisfaction, just like the payment of remuneration to employees which is part of bankruptcy proceedings. In consequence, the legislator adopted a similar hierarchy of values in the system of law regarding the remuneration of employees and some exceptions that fall within the scope of art. 313 para. 3 BRL. It seems doubtful though, in the light of the principles of social justice and the principle of equality before the law (art. 2 and art. 32 of the Polish Constitution, respectively[31]), whether the qualification of undertaking acquisition as primary acquisition is a sufficient criterion for employees' remuneration to be treated differently than stipulated in the exceptions provided in art. 313 paras. 3 and 4.

In summary, some objections arise with respect to the unambiguity of undertaking acquisition solely in the course of primary acquisition. The key resolution in the case at hand corresponds with the unique case of undertaking disposal in the course of bankruptcy proceedings which are intended to liquidate the estate of the insolvent person.

VII

Under art. 317 para. 2 BRL,[32] the acquirer of an entire insolvent undertaking assumes the totality of rights by way of a single legal transaction. The extinguishment of the bankrupt legal entity, which in this case is a capital company, leads one to adopt the notion of the acquirer's universal legal succession of a bankrupt undertaking. Despite the lack of a provision of the law that would address such legal effects, the disposal of the undertaking of a bankrupt capital company gives rise to events

[30] Ibid., 692.

[31] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws, No. 78, item 483 as amended.

[32] S. Gurgul, *Prawo upadłościowe i naprawcze. Komentarz*, 2th ed. (Warsaw, Wydawnictwo C.H. Beck, 2011, 992–99.

that are typical of legal succession under universal title. As aptly observed by the Supreme Court, the deletion of a company from the company register is possible also when there remain unsatisfied liabilities of the company although the whole of its estate has been sold.[33]

Based on the judgement of March 19, 2004,[34] the Supreme Court correctly emphasised that although, as a rule, the very acquisition of an undertaking is not sufficient to assume that the acquirer becomes a legal successor of the disposing entity, and legal succession of a legal person who ceases to exist should derive from an explicit provision of the law, in the case when the legal entity of the seller of an undertaking ceases to exist, the absence of such a provision does not preclude the assumption of legal succession by the acquirer of clearly identifiable assets of the undertaking. Furthermore, the Supreme Court accurately invoked a judgement dated April 25, 2012,[35] in which the construct of limited universal succession was used, that is one applicable to specific assets. The court presumed universal succession of a bank stock company, i.e. the complainant, which had benefited from the transfer of the organised part of the undertaking which was part of the estate of the divided company. It is also justified to claim that negation of universal succession in its entirety is at conflict with the principle of proportionality between the debtor and the creditor. The removal of a company from the company register, under art. 8 BRL, does not constitute an impediment for declaration of bankruptcy. *A fortiori*, there are reasons to employ the so-called limited universal succession.

To sum up, the arguments invoked above do demonstrate the unique nature of bankruptcy proceedings. On the other hand, the lack of an explicit provision regulating acknowledgement of universal succession should not be automatically interpreted as an acquisition of an undertaking by way of singular succession.

VIII

The following decision of the Supreme Court is highly commendable.

The Supreme Court correctly reasoned that the validity of the contested provision must not be entirely conditional upon the amount of benefits delivered so far under a lease agreement. The Supreme Court advanced an important argument, contrary to

[33] Decisions of the Supreme Court: dated December 18, 1996, file ref. no. I CZ 73/01, OSNC 2002, no. 3, item 35; dated January 8, 2002, file ref. no. I CKN 752/99, OSNC 2002, no. 10, item 13; dated September 20, 2007, file ref. no. II CSK 240/07, unpublished.

[34] Judgement of the Supreme Court dated March 19, 2004, file ref. no. IV CK 692/03, unpublished.

[35] Judgement of the Supreme Court dated April 25, 2012, file ref. no. II CSK 356/11, published in *Biuletyn Sądu Najwyższego* 9 (2012), item 6.

the position of the Regional Court, that in order to formulate an allegation of abuse of law it is not necessary to define a specific principle of social intercourse which is infringed by the formulation of the allegation. The assessment whether a particular behaviour constitutes exercise of a right or whether it can be regarded as abuse of a subjective right should be done in consideration of all circumstances of a given case. Despite conformity of the interpretation with the current state of law, certain objections can be raised. The attitude of both the defendants and the claimant in the case at hand was questionable in respect of the norms of social intercourse. The claimant demonstrated nonfeasance by failing to contact the defendants for 5 years. As a result he received an equivalent of the leased items, nearly twice their value.

Legal instruments should oblige not only debtors but also creditors to exhibit due care. A manifestation of the well-interpreted principle of proportionality in respect of potential nonfeasance of the creditor is evident, among others, in art. 252 §1 BRL, whereby a claim which is submitted without observing the time limit is accounted for only in plans for division of the bankrupt estate made after it is acknowledged. *De lege ferenda*, the limitation of a recovery claim to return the leased thing should prevent one from asserting one's claim concerning non-contractual use. As it was correctly argued by the Regional Court in Włocławek in the context of limitation (judgement dated November 28, 2013): "Only if performance of an action or assertion of a claim did not have any functional relationship with the object of an entrepreneur's business activity, we would have to concede that this is not an activity of an economic nature or a claim associated with business activity."[36]

Furthermore, the importance of abuse of the subject right should induce the legislator to develop an equivalent of art. 5 CC, not only in the general part but also in some specific provisions of the bankruptcy and reorganisation law. This corresponds with both public interest and the interest of parties to a case, enhancing legal culture. In should be remarked that bankruptcy and reorganisation law is located within the area of civil law,[37] which surprisingly does not address rules originating in art. 5 CC.

Legal succession of a seller of an undertaking is a major factor in accepting the presented gloss. It transpires from the Supreme Court judgement under our scrutiny that in the case when the legal entity of a seller of an undertaking ceases to exist, the lack of an explicit provision of law does not preclude the assumption of legal

[36] M. Kryszkiewicz, „Przedsiębiorca nie ma co liczyć na taryfę ulgową," *Gazeta Prawna* 46 (2014), accessed March 7, 2014, http://prawo.gazetaprawna.pl/artykuly/782496,przedsiebiorca-nie-ma-co-liczyc-na-taryfe-ulgowa-przed-sadem.html; judgement of the Regional Administrative Court in Włocławek dated November 28, 2013, file ref. no. VII Pa9/14.

[37] H. Dolecki, *Postępowanie cywilne. Zarys wykładu*, 6th ed. (Warsaw: Wolters Kluwer, 2015), 26.

succession by the buyer of the undertaking, a transaction encompassing the clearly identifiable elements of the seller's estate. The acquirer becomes a legal successor of the seller the moment the latter loses its legal entity.

It must be stressed that the sale of an undertaking in the course of bankruptcy proceedings constitutes a unique case of selling an undertaking which in selected cases justifies a different status of acquisition. *De lege ferenda*, with respect to the case in point and analogous ones, the tendency of the presented judicial decision should be upheld remembering to exercise caution in using an extensive interpretation. Excessive interference of the legislator leading to a great deal of burden placed on the acquirer of an undertaking would not only infringe the principle of primary acquisition in bankruptcy proceedings but also constitute a considerable limitation of the principle of optimisation, especially in relation to the maintenance the integrity of an undertaking as a whole (art. 2 BRL).

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A GLOSS FOR THE JUDGEMENT OF THE SUPREME COURT DATED NOVEMBER 23, 2012, FILE REF. NO. IV CSK 598/12

Summary

The presented gloss discusses the judgement file ref. no. IV CSK 598/12 dated November 23, 2012, issued by the Supreme Court concerning the possibility of recognizing the acquirer of a bankrupt undertaking as its legal successor, and the impact of the amount of contractual payments made to date on the validity of a decision issued in connection with the amount of remuneration for the non-contractual use of the leased thing. The Supreme Court underscores that the disposal of an undertaking of a bankrupt company in the course of bankruptcy proceedings with a winding-up option gives rise to events appropriate for universal succession. The position indicating lack of effect of legal succession on the part of the acquirer concerns the case of acquisition of a bankrupt undertaking which retains its legal existence after bankruptcy proceedings are over. However, this does not apply to the special situation connected with the disposal of an entire undertaking of the company in the course of completed bankruptcy proceedings. The Supreme Court found that in assessing the validity of the contested contractual provision, the extent of the contractual performances made to date in the form of lease payments, cannot play a decisive role. The disproportion in payments cannot be contravene the principles of social intercourse. The presented gloss accepts the arguments of the judgement of the Supreme Court; however, attention is drawn to the principle of proportionality between creditors and a debtor, as well as the import of Article 5 of the Civil Code.

Key words: disposal of an undertaking; legal succession; principles of social coexistence; bankruptcy.

Translated by Tomasz Pałkowski

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