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Joanna Wiak
Maria Curie-Skłodowska University in Lublin
ORCID: 0000-0001-9012-0708
joanna.wiak@poczta.umcs.lublin.pl

Selected Problems of Deposit in the Contract of Leasing of Premises

Wybrane problemy kaucji w umowie leasingu lokalu

SUMMARY

This article covers an analysis of selected problems of the deposit in the leasing contract on the grounds for Article 6 of the Act of 21 June 2001 on the protection of occupants' rights, the municipal housing stock and the amendment of the Civil Code. The initial research focuses on the notion and purpose of the deposit. The key issue is the consideration of the basis for the application of this legal act to the contract of leasing of a premises. The author assumed a thesis on its application, which may be supported both by the linguistic, systemic and teleological interpretation. The fundamental issue is also the determining of the legal nature of the deposit. The correct determination of this nature has significant legal consequences for the parties to a contract of leasing. This is a multi-faceted issue that should be dealt with on a case by case basis. The deposit is certainly a kind of collateral for claims of a tangible nature and its payment is a condition precedent to the conclusion of a leasing contract. The article also discusses the regulations on the object secured by the deposit and prohibitions on charging it. Due to the character (nature) of the leasing relationship, they are applicable to the premises leasing contract with significant modifications.

Keywords: civil code; contract of leasing; collateral for claims; Act on the protection of occupants' rights, the municipal housing stock and the amendment of the Civil Code; deposit; premises; occupant

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THE NOTION AND PURPOSE OF THE DEPOSIT UNDER THE ACT ON THE PROTECTION OF OCCUPANTS' RIGHTS, THE MUNICIPAL HOUSING STOCK AND THE AMENDMENT OF THE CIVIL CODE

The term "deposit" means the payment of a specific monetary sum of a refundable nature, which constitutes security of the creditor's interests in case of non-performance or improper performance of the obligation by the debtor[1]. Thus, its aim is to protect the economic interests of the creditor.

The institution of deposit has been regulated in Article 6 of the Act of 21 June 2001 on the protection of occupants' rights, the municipal housing stock and the amendment of the Civil Code[2]. The Act stipulates that the entering into a contract of tenancy may be made dependent on the payment by the tenant of a security deposit covering the amounts due under the lease, payable to the landlord on the day of emptying the premises (Article 6 (1) APOR). It shall not exceed twelve times the monthly rent for the premises concerned, calculated at the rate applicable on the date of conclusion of the contract of tenancy (Article 6 (2) APOR). The deposit shall not be charged if the contract covers the tenancy of a replacement or social housing or is concluded in connection with the exchange of premises, and the tenant has obtained a refund of the deposit without any indexation (Article 6 (3) APOR). On the other hand, the indexed deposit shall be repaid in the amount of the monthly rent applicable as of the day of the repayment of the deposit and its multiplication factor, but not less than the sum charged (Article 6 (3) APOR). It shall be refunded within one month from the date of emptying the premises or acquiring its ownership by the tenant, after deduction of the amounts due to the landlord (Article 6 (4) APOR). In the light of Article 6f APOR, it is not permissible to lay down the obligations and rights of the parties with regard to the deposit differently than the manner prescribed by the legislature.

THE ISSUE OF BASES FOR THE APPLICATION OF THE PROVISIONS OF APOR TO THE CONTRACT OF LEASING

The contract of leasing is widely used in practice. It is a dynamically developing instrument that primarily forms an alternative to the credit or loan. At the same time, it bears some resemblance to the tenancy or lease agreements[3]. The object of

[1] Cf. judgement of the Supreme Administrative Court of 31 October 1995, SA/Wr 92/95, LEX No. 27032; I. Heropolitańska, *Prawne zabezpieczenia zapłaty wierzytelności*, Warszawa 2018, p. 435.

[2] Consolidated text Journal of Laws 2019, item 1182, hereinafter: APOR.

[3] See especially: K. Kopaczyńska-Pieczniak, [in:] *Kodeks cywilny. Komentarz*, t. 3: *Zobowiązania. Część szczególna*, red. A. Kidyba, Warszawa 2014, p. 677 ff.; *eadem*, [in:] *Kodeksowe umowy handlowe*, red. A. Kidyba, Warszawa 2018, p. 354 ff.

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the contract of leasing is usually mobile property. However, it is becoming more and more applied for real properties or components thereof, including premises[4].

The key issue in terms of deposit in the contract of leasing of premises is the consideration on the grounds for the application of the Act of 21 June 2001 on the protection of occupants' rights, the municipal housing stock and the amendment of the Civil Code to the leasing contract. This legislative act governs the rules and forms of protection of the rights of tenants and the principles of managing the municipal housing stock (Article 1 APOR). As an implementation of Articles 75 and 76 of the Polish Constitution[5], it establishes a protective system for occupants[6]. The norms under the Act on the protection of occupants' rights, the municipal housing stock and the amendment of the Civil Code are of a semi-imperative nature. They do not affect the provisions of other laws regulating the protection of tenants' rights in a more favourable manner for the tenant (Article 3 (3) APOR).

The Act applies to all categories of occupants. At the same time, it defines this term very broadly. This is so since the definition of occupant includes both a tenant and a person using the premises (either a residential premises or a studio serving an artist to conduct business in the field of culture and arts) on the basis of another legal title (Article 2 (1) (1) and (4) first sentence APOR). According to the judgement of the Supreme Court of 26 July 2004[7], the scope of the term "occupant" within the meaning of the Act on the protection of occupants' rights, the municipal housing stock and the amendment of the Civil Code, does not cover only those who use the premises without a legal title or have the right of: ownership of the real estate or the building in which the premises are located; perpetual usufruct (long-term leasehold) of the land on which the building is located together with the premises; separate ownership of the premises. All other persons using the premises under any legal title are occupants within the meaning of Article 2 (1) (1) APOR. This means that this legal act applies to the user of the premises or entity who uses the premises under a leasing contract, as such a person undoubtedly belongs to the broadly defined category of occupants.

Despite such a broad definition of the entities who are occupants, the Act on the protection of occupants' rights, the municipal housing stock and the amendment of the Civil Code, apart from the regulations concerning all categories of occupants, contains also provisions which explicitly refer to the tenancy contract. Therefore,

[4] See the statistics by Związek Leasingu Polskiego (Polish Leasing Union), http://leasing.org.pl [access: 10.10.2019].

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

[6] J. Panowicz-Lipska, [in:] *System Prawa Prywatnego*, t. 8: *Prawo zobowiązań – część szczegółowa*, red. J. Panowicz-Lipska, Warszawa 2011, p. 72; Z. Radwański, J. Panowicz-Lipska, *Zobowiązania – część szczegółowa*, Warszawa 2017, p. 118.

[7] V CA 1/04, LEX No. 503242.

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a question arises as to the possibility and legal basis for the application of these provisions to the contract of leasing. The mutual normative relationship of these contracts results from Article 709[17] of the Civil Code[8], according to which the provisions on tenancy shall be applied *mutatis mutandis* to the contract of leasing with regard to: 1) the financing party's liability for defects in tangible items resulting from the circumstances for which this party is responsible; 2) the rights and obligations of the parties in the event of a third party pursuing claims against the beneficiary concerning tangible items; 3) the user's and the third party's liability towards the financing party in the event that the tangible item has been granted by the user to this third party for use; 4) establishing a collateral for the leasing instalments and additional benefits due to the financing party; 5) return of the items after once the leasing is terminated; and 6) improvements made to the items by the user. It is doubtful whether such reference is made only within the code regulation or specific regulations on tenancy, especially tenancy of premises. Therefore, it is controversial to apply *mutatis mutandis* the following provisions to the contract of leasing of premises: Article 6 APOR (concerning deposit), Article 6e (1) APOR (which governs the issues related to the return of the premises) and Articles 6d and 6e (2) APOR (governing the issues of improvements made by the tenant), which explicitly regard the tenancy contract. In particular, the scholars in the field are unanimous, without providing any supporting arguments, that the institution of deposit concerns only the tenancy contract[9].

However, the thesis on applying the above provisions to the leasing of premises seems justified. First of all, the very title of the Act on the protection of occupants' rights, the municipal housing stock and the amendment of the Civil Code indicates its close relationship with the Civil Code. Moreover, it is the systemic interpretation which is decisive. The Civil Code regulation regarding the tenancy of premises is fragmentary[10], it contains only basic constructs. Only the provisions on the tenancy of premises from other legal acts combined make up the full regulation in this respect. In particular, the scholarly opinion emphasizes that Articles 6a to 6g APOR complement the code regulation of rights and obligations of the parties to

[8] Act of 23 April 1964 – Civil Code (consolidated text Journal of Laws 2019, item 1145), hereinafter: CC.

[9] As proposed by E. Bończak-Kucharczyk, *Ochrona praw lokatorów i najem lokali mieszkalnych. Komentarz*, Warszawa 2017, p. 277; J. Chaciński, *Ochrona praw lokatorów. Komentarz*, Warszawa 2013, p. 66; A. Doliwa, *Prawo mieszkaniowe. Komentarz*, Warszawa 2015, p. 198; J. Zawadzka, [in:] *Ustawa o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie Kodeksu cywilnego. Komentarz*, red. K. Osajda, LEX/el. 2019, commentary on Article 6, thesis 6; K. Zdun-Załęska, *Ustawa o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie kodeksu cywilnego*, Warszawa 2014, p. 54.

[10] See J. Zawadzka, *op. cit.*, p. 72 ff.; Z. Radwański, J. Panowicz-Lipska, *op. cit.*, p. 118 ff.

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the relationship of tenancy[11]. As a consequence, we may state that the reference contained in Article 709[17] CC relates also to the provisions on tenancy contained in statutes of a special nature as compared to the Civil Code, including the Act on the protection of occupants' rights.

The application of Article 6 APOR to the leasing of premises is also reasonable in view of teleological interpretation. The deposit makes it possible to secure the economic interests of the landlord, securing the payment of amounts due for the tenancy. The purpose of this construct and the resemblance of the contract of leasing to the tenancy contract justifies the admissibility of securing the economic interests of the financing party in the event of the user being in arrears in the payment of leasing instalments and the payment for additional services provided by the financing party.

LEGAL CHARACTER OF THE DEPOSIT

The deposit is a type of collateral to secure claims of a property nature[12]. In the literature, it is usually considered separately from the tenancy contract[13]. Therefore, it should be qualified in the same manner in the leasing contract. However, the basis for paying the deposit is decisive here, which can be either a contract of leasing or a separate agreement of the parties. In the first case, the deposit is an additional stipulation (*accidentiale negotii*) of the leasing contract. In the second, various legal constructs can be used, for example, the payment of the deposit may be based on a clause in the preliminary contract of leasing (Article 389 CC). In practice, the parties often enter into a so-called deposit agreement that is ancillary to the leasing contract[14]. It secures claims arising from another legal relationship, with the exceptional feature that the creation of the relationship of leasing is conditional upon the performance of the deposit agreement.

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[11] As proposed by J. Zawadzka, *op. cit.*, commentary on Article 6, thesis 27.

[12] As proposed by J. Panowicz-Lipska, *op. cit.*, p. 83; M. Olczyk, *Problematyka kaucji mieszkaniowej*, „Transformacje Prawa Prywatnego" 2004, nr 3–4, p. 10. Z. Radwański and J. Panowicz-Lipska (*op. cit.*, p. 256) note that the deposit is most closely related to the model collaterals in kind regulated in the Civil Code.

[13] As proposed by Z. Radwański, J. Panowicz-Lipska, *op. cit.*, p. 257; I. Heropolitańska, *op. cit.*, p. 435; K. Krzekowska, M. Malinowska-Wójcicka, *Ochrona praw lokatorów i mieszkaniowy zasób gminy. Komentarz*, LEX/el. 2019, commentary on Article 6; M. Olczyk, *Problematyka kaucji…*, p. 10; J. Zawadzka, *op. cit.*, commentary on Article 6, thesis 14. On the other hand, J. Chaciński (*op. cit.*, p. 66) considers the deposit only as an additional element of the tenancy contract (*accidentiale negotii*).

[14] On the ancillary nature of collaterals, see M. Pyziak-Szafnicka, [in:] *System Prawa Prywatnego*, t. 1: *Prawo cywilne – część ogólna*, red. M. Safjan, Warszawa 2012, p. 845 ff.; and the analysis regarding the ancillary nature of the deposit in M. Olczyk, *Problematyka kaucji…*, p. 7 ff.; and the doubtful claims presented by J. Zawadzka, *op. cit.*, commentary on Article 6, thesis 17.

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Against this background, the legal nature of payment of the deposit, independent on the type of the basis for its payment, is clearly visible. If there is a basis for the payment of deposit, the payment constitutes a condition precedent for the conclusion of the contract of leasing as defined in Article 89 CC (Article 6 in conjunction with Article 6f APOR)[15]. This means that the contract of leasing only has legal effects once the user has paid the deposit. It is also a positive condition because it leads to the creation of a specific (listed in the Civil Code) legal relationship between the financing party and the user and, as a rule, a specific relationship between the user and the seller of the property (which includes to a limited extent the rights and obligations arising from the seller's liability for defects in the premises – Article 709^8 § 2 CC)[16].

Where the payment of the deposit constitutes a condition precedent to the conclusion of the contract of leasing, the construct of this payment becomes problematic. The wording used by the legislature: "the conclusion of a tenancy contract may be made conditional on the payment of deposit of the tenant" raises interpretative doubts. It is unclear whether the payment of deposit, where stipulated, constitutes a formative right, right or rather obligation of the user. Moreover, doubts arise as to whether in connection with the payment of the deposit it is the financing party's obligation or right to conclude the contract of leasing. The will of the parties is conclusive here.

There are no obstacles for the parties to decide that the payment of the deposit by the user constitutes a formative right, the exercise of which leads to the creation of a relationship of leasing. In doing so, the user causes by his action, "without the financing party's participation", the creation of this relationship[17]. On the part of the financing party, the payment of deposit does not have a corresponding correlate in the form of a legal obligation to conclude a contract of leasing. The financing party is not entitled to claim the payment of deposit. It is only obliged to accept the payment thereof. It is also permissible to grant the user the right to pay a deposit. In such a situation, apart from the financing party's obligation to accept the payment, its obligation to conclude the contract of leasing, functionally related to this right, becomes due. On the other hand, the user is entitled to conclude a contract of leasing. The parties may also impose on the user an obligation to pay the

[15] Cf. J. Panowicz-Lipska, *op. cit.*, p. 83; Z. Radwański, J. Panowicz-Lipska, *op. cit.*, p. 114; J. Chaciński, *op. cit.*, p. 66; M. Olczyk, *Ustawa o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie kodeksu cywilnego. Komentarz do zmian wprowadzonych ustawą z dnia 17 grudnia 2004 r. o zmianie ustawy o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie kodeksu cywilnego oraz o zmianie niektórych ustaw*, LEX/el. 2005, commentary on Article 6, thesis 3; K. Zdun-Załęska, *op. cit.*, p. 55; F. Zoll, M. Olczyk, M. Pecyna, *Ustawa o ochronie praw lokatorów, mieszkaniowym zasobie gminy i zmianie kodeksu cywilnego. Komentarz*, Warszawa 2002, p. 98. See different deliberations by J. Zawadzka, *op. cit.*, commentary on Article 6, thesis 17 ff.

[16] Cf. K. Kopaczyńska-Pieczniak, [in:] *Kodeks cywilny…*, p. 619; *eadem*, [in:] *Kodeksowe umowy…*, pp. 303–304.

[17] See A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej*, Warszawa 2018, p. 159.

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deposit. This obligation is correlated with the financing party's right to demand the deposit to be paid.

The above suggests that the financing party is always obliged to accept the deposit. It is, therefore, logically justified to claim that the parties cannot grant the financing party only the right to conclude a contract of leasing.

The construct of the payment of deposit as a condition precedent has a significant impact on the question of contractual liability of the parties since the rules resulting from Article 471 CC ff. are only applicable in the event of an infringement by the parties to their duties. However, one cannot rule out that, in the event of incorrect exercise of a particular right of one party, when applying Articles 361 and 363 CC, that party will be obliged towards the other party to remedy the damage caused.

Going back to the legal nature of the deposit agreement, it is an unnamed contract, i.e. a contract which has not been regulated by the legislature in any legal act[18]. Article 6 APOR does not use the term "deposit agreement". It does not contain a regulation regarding exclusively this contract, but it also addresses other bases for its payment. In essence, it only points to the possibility of establishing security in the form of a deposit, exposing its essential legal shape[19]. The deposit agreement, as being closely connected with leasing, it has a commercial-law nature at least on the part of the financing party. It is, therefore, necessary to take into account the normative and non-normative features of commercial contracts[20].

In the remaining part, the characteristics of the deposit agreement stem from the fact that its performance (payment of the deposit) constitutes a condition for concluding the contract of leasing and serves to secure the overdue leasing instalments and additional benefits of the user. Its legal nature also depends on the structure of the payment as a condition precedent. This is an obligating contract[21]. In doing so, it leads to a certain disposal, namely the very (actual) payment[22]. This is not contrary to its obligating character. This means that it is not subject to qualification as a double-effect (obligation and disposal) agreement, due to the fact that its purpose and immediate result is not the assignment, encumbrance or termination of an existing property right[23]. The deposit agreement is at least unilaterally obligating

[18] Cf. A. Kidyba, *Prawo handlowe*, Warszawa 2018, p. 781. For more on the notion of unnamed contracts, see e.g. W.J. Katner, [in:] *System Prawa Prywatnego*, t. 9: *Prawo zobowiązań – umowy nienazwane*, red. W.J. Katner, Warszawa 2015, p. 1 ff. and the literature and case-law referred to therein.

[19] Cf., as regards the contract of bank deposit, M. Bączyk, [in:] *System Prawa Prywatnego*, t. 9, p. 715.

[20] See A. Kidyba, *op. cit.*, pp. 782–789 and the literature referred to therein.

[21] In the classification of legal actions into dispositive, obligating or dual-effect ones is based on the criterion of effects the legal action exerts on the assets of the entity who makes the declaration of will – A. Wolter, J. Ignatowicz, K. Stefaniuk, *op. cit.*, p. 331.

[22] See *ibidem*, p. 328.

[23] Cf. *ibidem*, p. 327.

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one, because the financing party is obliged to accept the payment of the deposit and to return it after emptying the premises due to the termination of the relationship of leasing[24]. As a rule, the financing party is obliged to conclude the contract of leasing, unless the payment of the deposit by the user takes the normative form of a formative right. It has the nature of a bilateral obligation when the user becomes obliged to pay the deposit. The deposit agreement lacks the characteristics of reciprocity as it contains no equivalence between services of the parties (Article 487 § 2 CC). It is an act made for valuable consideration because, as a result of the payment of the deposit, both parties obtain a specific property gain in the form of concluding the contract of leasing. It is a legal incremental agreement for both parties because its implementation by one of them creates an increment in the assets of the other[25]. It is characterised by its causal nature. The specificity of the deposit entails the need to distinguish two legal grounds (reasons) for the property accrual. The first stems from the fact that the payment of deposit is a condition for concluding the contract of leasing. It is either the very conclusion of the leasing contract (where the payment of the deposit constitutes a formative right vested in the user) or the claim for its conclusion (when, in this respect, the financing party is responsible for this). The second one is related to the security function of the deposit payment. The reason for this is to secure overdue leasing instalments and additional performances of the user. Given the forms of the legal cause of legal increment[26], we deal with *causa obligandi vel acquirendi* on both parts of the relationship. If the user is obliged to pay the deposit, the payment means the act of legal increment *solvendi causa*, as a result of which the user is exempt from the obligation imposed on him. Referring to sometimes distinguished additional causes: *causa cavendi* (securing cause) and establishing cause[27], the form of the legal basis for legal increment for both parties

[24] Other view is presented by K. Krzekowska and M. Malinowska-Wójcicka (*op. cit.*, commentary on Article 6), who definitely claim that the deposit agreement is of a mutually obligating nature.

[25] See A. Wolter, J. Ignatowicz, K. Stefaniuk, *op. cit.*, p. 328.

[26] The established scholarly opinion traditionally distinguishes between the three typical forms of the grounds (cause) of legal increment: 1) *causa obligandi vel acquirendi* – the purpose is to acquire a right or other advantage by the entity who makes the legal increment, namely to increase its assets; 2) *causa solvendi* – serves to exempt the entity who makes the legal increment, that is to say, to reduce this entity's liabilities; 3) *causa donandi* – the legal increment takes place without reciprocal consideration, that is, free of charge. Such view is presented, among others, by S. Grzybowski, [in:] *System Prawa Cywilnego*, t. 1: *Część ogólna*, red. S. Grzybowski, Wrocław 1985, pp. 505–506; W. Czachórski, A. Brzozowski, M. Safjan, E. Skowrońska-Bocian, *Zobowiązania. Zarys wykładu*, Warszawa 2009, p. 139; Z. Radwański, A. Olejniczak, *Prawo cywilne – część ogólna*, Warszawa 2017, p. 239; A. Wolter, J. Ignatowicz, K. Stefaniuk, *op. cit.*, pp. 335–336; K. Zaradkiewicz, [in:] J. Rajski, W.J. Kocot, K. Zaradkiewicz, *Prawo kontraktów handlowych*, Warszawa 2007, p. 46.

[27] As proposed by Z. Radwański, [in:] *System Prawa Prywatnego*, t. 2: *Prawo cywilne – część ogólna*, red. Z. Radwański, Warszawa 2008, pp. 196–197; Z. Radwański, A. Olejniczak, *op. cit.*, p. 240; K. Zaradkiewicz, *op. cit.*, p. 46. *Causa cavendi* has also been distinguished by J. Mojak and J. Widło (*Polskie prawo kontraktowe. Zarys wykładu*, Warszawa 2005, p. 32). Doubts as to the distinction between

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is, of course, *causa cavendi*. *Causa* is not only a condition for the validity of the deposit agreement, but it must be covered by its contents, otherwise this action will not materialise. This agreement is always of a substantively causal nature (there is a dependence of the legal increment on the *causa*) and formally causal nature (it is necessary to disclose the *causa* in the content of the contract)[28] – Article 6 (1) APOR. The established scholarly opinion uniformly assumes that the deposit agreement is actual, i.e. it comes into effect through payment made by the user[29].

The basis for payment has affects the consequences of forming the deposit in a manner contrary to Article 6 APOR. If it is a contract of leasing or a preliminary contract, pursuant to Article 58 § 3 CC, the provision on the deposit is null and void. Where the basis for payment is a deposit agreement, then Article 58 § 1 CC. The above results in invalidity of this agreement. In the literature, this issue is considered in connection with setting the sum of the deposit in an amount higher than allowable (Article 6 (1) second sentence APOR), but without taking into account the possible grounds for its payment[30]. In such a case, it is not about invalidity of the "entire" legal transaction (contract of leasing, preliminary agreement, deposit agreement) under Article 94 CC[31]. This provision contains a regulation regarding a prohibited (unlawful) condition. Scholars in the field note that an event is against to a statute usually when its occurrence (or non-occurrence) is subject to a prohibition formulated in a specific legal norm: when the occurrence or non-occurrence of a given event would mean a breach of a specific legal norm[32].

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those two types of causes boil down to the fact that they may characterise the economic purpose of a legal increment act, but they do not make it easier to determine their legal basis, which is a comprehensive characterised by the following *causae*: *obligandi vel acquirendi*, *solvendi* and *donandi* – see the solutions proposed by Z. Radwański, [in:] *System Prawa Prywatnego*, t. 8, p. 196 ff.

[28] A. Wolter, J. Ignatowicz i K. Stefaniuk (*op. cit.*, p. 338), apart from the group of substantively and formally causal actions, distinguish also the following types of legal actions: 1) substantively causal, but formally abstract – their validity depends on the correctness of the *causa*, which need not be disclosed in the content of the legal action; 2) substantively abstract – the lack of correctness of the *causa* does not affect the validity of the legal action; 3) formally abstract – there is no indication in the statute whether the legal action is substantively abstract or not.

[29] As proposed by Z. Radwański, J. Panowicz-Lipska, *op. cit.*, p. 257; A. Szpunar, *Glosa do uchwały SN z dnia 5 maja 1999 r., III CZP 6/99*, OSP 2000, nr 7–8, poz. 113, poz. 113, p. 379; J. Zawadzka, *op. cit.*, commentary on Article 6, thesis 14.

[30] The application of Article 58 § 1 CC in such a case is advocated by R. Dziczek (*Ochrona praw lokatorów. Dodatki mieszkaniowe. Komentarz. Wzory pozwów*, Warszawa 2015, p. 84) and J. Zawadzka (*op. cit.*, commentary on Article 6, thesis 23 ff.), but the latter expressly rules out the application of Article 58 § 3 CC.

[31] The application of Article 94 CC is expressly rejected by M. Olczyk (*Ustawa o ochronie praw lokatorów…*, commentary on Article 6, thesis 3) and J. Zawadzka (*op. cit.*, commentary on Article 6, thesis 25).

[32] As proposed by K. Mularski, [in:] *Kodeks cywilny*, t. 1: *Komentarz. Art. 1–449[11]*, red. M. Gutowski, Warszawa 2016, p. 636. See also the discussion by R. Strugała, [in:] *Kodeks cywilny. Komentarz*, red. E. Gniewek, P. Machnikowski, Warszawa 2017, p. 253.

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Therefore, there is no need to look for a broader set of arguments to justify the non-application of Article 94 CC, e.g. in the form of a contradiction with the purpose of the Act on the protection of occupants' rights, the municipal housing stock and the amendment of the Civil Code, which raises doubts in the light of Article 6 APOR, is supposed to protect only the tenant (the user)[33].

OBJECT OF COLLATERAL

The essence of the deposit is that the conclusion of the contract of leasing may be made conditional on the payment by the user of a deposit to secure the leasing instalments and additional services to which the financing party is entitled on the date when the premises are to be vacated. Unlike for leasing, the tenancy contract does not serve to secure any leasing payments. It is intended to protect the economic interests of the financing party in case the user is in arrears only with the payment of leasing instalments and for additional services, which results from the scope of reference under Article 709^{17} CC. This is so since this provision provides for that the rules on tenancy shall apply *mutatis mutandis* to the collateral for leasing remuneration instalments and additional services payable to the financing entity.

The leasing remuneration differs considerably from the rent. The payment due to the landlord is of a periodic nature. The legislature does not specify its minimum or maximum amount. The rent may be either monetary or non-monetary (Article 659 § 2 CC). On the other hand, the leasing remuneration is of a monetary nature. Its minimum amount is specified in Article 709^{1} CC – it must be equal to the price or remuneration for the purchase of the premises from the seller. It is a one-off, divisible service, performed in parts (instalments).

Additional payments of the user should be understood as those payments whose value is not reflected in the leasing remuneration. They are related to the financing party's provision of certain performances related to leasing. They should be classified as expenditure not required by law[34]. The obligation to make such expenditures may be imposed on the financing party only through an agreement between the parties. Only in such a situation will the deposit secure, for example, the so-called "charges independent of the owner (financing party)", by which the legislature

[33] As proposed by J. Zawadzka, *op. cit.*, commentary on Article 6, thesis 26; F. Zoll, M. Olczyk, M. Pecyna, *op. cit.*, p. 99.

[34] The expenditure relating to the leased object shall be borne by the user. These include ensuring the implementation of the usual operating activities relating to the leased object, the burden of ownership or possession of the property held (Article 709^{7} § 1 and 2 CC). The financing entity is not obliged to make any expenditure, except those made in connection with the fulfilment of the obligation of care of the property. On the other hand, the financing entity is obliged to cover the expenditure made by the user in order to improve the leased object (Article 676 in conjunction with Article 709^{17} CC).

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understands the operating fees for the supply of energy, gas, water and sewage, waste and liquid waste collection (Article 2 (2) (8) APOR). The same applies to the operating costs of common parts of the property.

The leasing deposit, unlike in the tenancy contract, does not secure the financing party's compensation claims (e.g. for damage caused in the premises or for non-contractual use of it in the case of late return of the premises)[35] due to the fact that the object secured is only overdue leasing instalments and additional payments of the user.

PROHIBITION OF CHARGING A DEPOSIT, RELATED TO THE PROVISION OF REPLACEMENT, COMMUNAL OR EXCHANGE PREMISES

The issue in question entails problems with interpretation of Article 6 (2) APOR. Starting from Article 6 (2) (1) APOR, this provision should be understood as meaning that the deposit is not charged in connection with the provision of replacement premises by the financing party, the replacement premises being understood as the premises located in the same place as the existing premises, equipped with at least the same technical equipment and similar room area. This condition is deemed to be fulfilled if there is 10 m^2 of the total area of rooms per member of the household, and in the case of a single-person household – 20 m^2 (Article 2 (1) (6) APOR). The above waiver applies in a situation where there is a need to repair the premises. In such a case, the user is obliged to vacate the premises and move to the replacement premises at the expense of the financing party for a period not exceeding one year. After the expiry of this period, the financing party is obliged to make available to the user the repaired premises under the existing legal relationship. However, the leasing remuneration cannot be increased (Article 10 (4) APOR).

Moreover, when the premises needs to be vacated due to the necessity of demolition or renovation of the building, the financing party may terminate the contract of leasing not later than one month in advance, at the end of the calendar month (Article 11 (2) (4) APOR). In such a case, at the request of the user, the financing party is obliged to provide a replacement premises. An appropriate claim should be submitted by the financing party without undue delay (promptly) from the moment of termination of the contract, unless the parties agree otherwise. According to the

[35] As regards securing the amounts due for a tenancy contract, see J. Panowicz-Lipska, *op. cit.*, p. 83; J. Chaciński, *op. cit.*, p. 67; A. Doliwa, *op. cit.*, p. 199; A. Gola, L. Myczkowski, *Ochrona praw lokatorów. Dodatki mieszkaniowe. Komentarz*, Warszawa 2003, p. 35; M. Olczyk, *Ustawa o ochronie praw lokatorów…*, commentary on Article 6, thesis 2; J. Zawadzka, *op. cit.*, commentary on Article 6, thesis 27; K. Zdun-Załęska, *op. cit.*, p. 54; F. Zoll, M. Olczyk, M. Pecyna, *op. cit.*, p. 97; judgement of the Regional Court of Olsztyn of 14 January 2015, IX Ca 719/13, LEX No. 1868079.

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view established in the case-law of the Supreme Court, "promptly" in typical situations, if nothing else follows from the circumstances, means no later than within two weeks[36]. If the said right is not exercised, the claim shall expire. Otherwise, the financing party is obliged to enter into a new lease agreement with the user under which the user will purchase the premises from a specific seller.

It follows from the above that the Act on the protection of occupants' rights, the municipal housing stock and the amendment of the Civil Code modify the rules on the financing party's liability under the statutory warranty. Under Article 709^8 § 1 CC, the financing party is liable for defects in the premises caused by circumstances the financing party is responsible for. This also applies to the user's right to terminate the contract of leasing without notice periods in the event of defects that put human health at risk (Article 682 in conjunction with Article 709^{17} CC). On the other hand, under Article 10 (4) and Article 11 (9) APOR, the financing party is obliged to provide replacement premises, regardless of whether the financing party is responsible for the occurrence of the defects specified in these provisions. They refer to the occupant, and not only to the tenant, and thus directly apply to the contract of leasing.

As regards the prohibition of charging the deposit due to the conclusion of an agreement on communal housing premises[37] set out in Article 6 (2) (1) APOR, it should be stated that it does not apply to the leasing relationship. This is justified both by the essence of such premises and of the leasing contract.

However, Article 6 (2) (2) APOR is suitable for use in leasing. This means that the deposit is not charged if the contract is being concluded in connection with the exchange of premises and the user has obtained a refund of the indexed deposit. This relates to a lease agreement containing a clause providing for an obligation to finance the exchange of the property for another one (a new one) during the leasing relationship. In this case, the financing party is obliged to re-acquire the premises from the same specific seller.

[36] See, among others, the resolution of the Supreme Court of 30 December 1988, III CZP 48/88, OSN 1989, No. 3, item 36.

[37] Communal housing premises should be understood as a premises fit for residential purposes due to the equipment and technical condition, whose room area per household member using it may not be less than 5 m^2 and 10 m^2 for a single-person household. However, the premises may be of a reduced standard (Article 2 (1) (5) APOR). See also e.g. Article 14 APOR, which states, first of all, that the obligation to provide communal housing premises rests with the competent commune on the basis of a court judgement ordering that the premises be vacated.

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CONCLUSION

The institution of deposit, governed by the Act on the protection of occupants' rights, the municipal housing stock and the amendment of the Civil Code, causes a number of interpretative problems in relation to the tenancy contract which are even more profound in application to the contract of leasing. The main question is that the scholars in the field, without taking into account the content of Article 709^{17} CC are unanimous that the deposit is only applicable in the tenancy contract.

The fundamental issue was also the legal nature of the institution. This is a multi-faceted issue that should be dealt with on a case by case basis. The correct determination of the nature of the deposit affects the rules on contractual liability of the parties, as well as the legal consequences of shaping it in an unlawful manner. The deposit is certainly a kind of collateral for claims of a tangible nature and its payment is a condition precedent to the conclusion of a leasing contract.

The regulations concerning the object secured by the deposit and the prohibitions on charging it are applicable to the contract of leasing with significant modifications in view of the property (nature) of this legal relationship.

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STRESZCZENIE

Artykuł obejmuje analizę wybranych problemów kaucji w umowie leasingu lokalu na gruncie art. 6 ustawy z dnia 21 czerwca 2001 r. o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie Kodeksu cywilnego. Wstępne badania koncentrują się na pojęciu i celu kaucji. Zagadnienie kluczowe stanowi rozważenie podstaw stosowania powyższego aktu prawnego do umowy leasingu lokalu. Autorka przyjęła tezę o jego zastosowaniu, za czym przemawia zarówno wykładnia językowa, systemowa, jak i celowościowa. Kwestię podstawową stanowi też ustalenie charakteru prawnego instytucji kaucji. Prawidłowe jego określenie powoduje znaczące konsekwencje prawne dla stron umowy leasingu. Jest to zagadnienie wielopłaszczyznowe, które powinno być rozpatrywane w odniesieniu do konkretnego przypadku. Niewątpliwie kaucja stanowi rodzaj zabezpieczenia wierzytelności o charakterze rzeczowym, a jej zapłata – warunek zawieszający zawarcie umowy

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leasingu. Rozważaniom poddano również unormowania dotyczące przedmiotu zabezpieczenia kaucji oraz zakazów co do jej pobierania. Ze względu na właściwość (naturę) stosunku leasingu znajdują one zastosowanie do umowy leasingu lokalu z istotnymi modyfikacjami.

Słowa kluczowe: kodeks cywilny; umowa leasingu; zabezpieczenie wierzytelności; ustawa o ochronie praw lokatorów, mieszkaniowym zasobie gminy i o zmianie Kodeksu cywilnego; kaucja; lokal; lokator

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