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**Objective liability for removal of trees
or shrubs without the required permit
in the light of recent judicature views**

**Odpowiedzialność obiektywna
za usuwanie drzew lub krzewów
bez wymaganego zezwolenia w świetle
najnowszej orzecznictwa**

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Abstract

The provisions of the Act on Nature Conservation treat the removal of trees and shrubs without the required permit as an administrative tort sanctioned by an administrative fine in the amount of a triple fee paid for the removal with the permit of the competent authority. This is the objective liability to which not the guilt but only the fact of removal of a tree (shrub), and the lack of the permit are significant. The administrative fine is imposed automatically, without

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considering the individual circumstances of the particular case. No possibilities to omit to impose the fine, such as state of necessity, or to adjust its amount are taken into account. In the general opinion this is excessive restriction of ownership right and the imposed sanction is seen as disproportionate in relation to the infringed good, as the amount of fines is considerable. This state of affairs makes the cases of removal of trees and shrubs frequently heard by the courts. On 1 July 2014 the Constitutional Court declared that article 88 section 1 point 2, and article 89 section 1 of the Act on Nature Conservation were inconsistent with article 64 section 1 and 3 in relation to article 31 section 3 of the Constitution.

Key words: Removal of trees or shrubs; objective liability; administrative fine; liability for administrative tort

Streszczenie

Przepisy ustawy o ochronie przyrody traktują usuwanie drzew i krzewów bez wymaganego zezwolenia jako delikt administracyjny, za który grozi administracyjna kara pieniężna w wysokości trzykrotnej opłaty za usunięcie po otrzymaniu zezwolenia właściwego organu. Odpowiedzialność ta ma charakter zobiektywizowany, do jej przypisania nie jest istotna wina podmiotu, a jedynie fakt usunięcia drzewa (krzewu) oraz braku zezwolenia. Administracyjna kara pieniężna wymierzana jest niejako automatycznie, bez uwzględniania indywidualnych okoliczności w konkretnej sprawie. Nie brane są pod uwagę żadne możliwości odstąpienia od wymierzenia kary, takie jak m.in. stan wyższej konieczności, ani miarkowania kary. W powszechnej opinii stanowi to nadmierne ograniczenie prawa własności, a wymierzonej sankcji zarzuca się nieproporcjonalność w stosunku do naruszanego dobra, jako że wysokość kar jest niebagatelna. Taki stan rzeczy sprawia, że przypadki wycinania drzew i krzewów są częstym przedmiotem spraw rozpoznawanych przez sądy. Dnia 1 lipca 2014 r. Trybunał Konstytucyjny uznał, że przepisy art. 88 ust. 1 pkt 2 oraz art. 89 ust. 1 ustawy o ochronie przyrody są niezgodne z art. 64 ust. 1 i 3 w związku z art. 31 ust. 3 Konstytucji RP.

Słowa kluczowe: Usuwanie drzew lub krzewów; odpowiedzialność obiektywna; administracyjna kara pieniężna; delikt administracyjny

1. General remarks on provisions concerning removal of trees or shrubs without the required permit

Legal regulations concerning the issue of removal of trees and shrubs have been evoking emotions and controversy for many years. It has been also frequently discussed in numerous scientific works on the ground of civil and administrative law. The reason may be found in the general opinion that punishment for the removal of trees or shrubs without the required permit, however reasonable from environmental point of view, is commonly seen more as a restriction of ownership right to real estate, not as the instrument of nature conservation law. The purpose of this article is to present some views concerning problematic issues concerning objective liability for the removal of trees and shrubs without the permit, expressed in judicature within the recent few years, as well as to signalize changes related to the latest verdict of the Constitutional Court.

As far as the legal status of trees is concerned, it is determined on the ground of civil law. In accordance with the article 48 of the Civil Code of 23 April 1964¹, trees and other plants are the components of soil from the moment they are planted or sown. That means they are owned by the owner of the land. The normative construction of ownership right is expressed in article 140 of the Civil Code, as enabling the owner to use a thing, in particular to collect benefits and other incomes of a thing, and to dispose of it. As it is claimed by representatives of science of law², to use a thing means possess a thing, collect benefits, transform it, consume and destroy it. The ownership right is, without doubts, the broadest right to a thing, effective *erga omnes*. However, what should be noted, is not the absolute right³. Its borders are indicated in the article 140 of the Civil Code and these are determined by the acts of law, the principles of social community and the socio-economic purpose of the right.

The act of law that concerns borders of ownership right to the trees in the light of nature conservation, is the Act of 16 April 2004 on Nature Conservation⁴. According to the general rule included in provisions of the

¹ Journal of Laws of 2014, item 121, consolidated text.

² J. Ignatowicz, K. Stefaniuk, *Prawo rzeczowe*, Warszawa 2012, p. 66–67.

³ W. Pańko, *O prawie własności i jego współczesnych funkcjach*, Katowice 1984, p. 64.

⁴ Journal of Laws of 2013, item 627, consolidated text.

article 83 section 1 of this act, removal of trees and shrubs from real estate requires a prior permit of a village mayor or mayor of a town or a president of a city. However, there are some situations where the permit is not required, as exceptions to the rule. They are expressed in the article 83 section 6, such as the tree is younger than 10 years old, or it grows on plantation. The permit is given on the motion of the holder (possessor) of real estate (with the owner's consent) or the owner of devices indicated in the article 49 paragraph 1 of the Civil Code, when the trees or shrubs endanger these devices' work. In other words, these entities (holder of real estate and owner of transferring devices) are obliged to obtain the permit, if they want to cut down the tree (shrub), and that is not covered by any exclusion of article 83 section 6 of the Act on Nature Conservation. The authority giving the permit also determines amount of a fee for removal of trees (shrubs). It is dependent on the kind of a tree and circumference of the trunk. In the article 86 the Legislature indicates cases where the fee is not charged, for example, where the permit is not required or in case of reconstruction of public roads and railways.

If the obliged entity removes a tree or a shrub without the permit, this action is punishable by the administrative fine. What is more, the fine is imposed even in the situation when the removal with the permit would be free of charge, according to article 86 of the Act on Nature Conservation, which means that only objective fact of lack of the required permit is significant⁵. The Legislature does not indicate distinctly on whom the administrative fine for the removal a tree or a shrub without the permit is imposed. However, it is claimed in judicature statements that only the entity obliged to apply for the permit can bear such liability (the holder of real estate and the owner of transfer devices)⁶. I agree with the statement that, what is indeed forbidden is not the removal of trees (shrubs), but removal without obtaining the prior permit to do so⁷. That is why such sanction in general seems to be an adequate measure as a consequence for

⁵ W. Radecki, *Możliwość złagodzenia skutków kary pieniężnej wymierzonej za usunięcie drzewa bez wymaganego zezwolenia*, Nowe Zeszyty Samorządowe 2012, No 5, LEX 156933/2.

⁶ E.g. judgment of the Voivodeship Administrative Court in Poznań of 18 August 2009, II SA/Po 263/09. Source: <<http://orzeczenia.nsa.gov.pl/doc/D6DB499319>>; judgment of the Supreme Administrative Court of 21 February 2012, II OSK 2320/10, Legalis 537921.

⁷ B. Rakoczy, *Usuwanie drzew i krzewów*, Warszawa 2013, p. 158.

infringement of law by not fulfilling the obligation to apply for the permit in accordance with legal provisions. This, whether the current shape of the sanction, which is the administrative fine, stipulated in provisions of articles 88–89 of the Act on Nature Conservation, is adequate or not, still remains a matter of discussion. In the opinion of representatives of the science of law, administrative character of this sanction allows to conclude that removal of trees and shrubs, as one of three administrative torts indicated in the article 88 section 1 of the Act on Nature Conservation, causes administrative liability in the first place (also civil – because of ownership right infringement in some cases, and criminal – because of commission of the offence in some cases)⁸. In general, the administrative fines are the instruments of administrative liability in environmental law. This should be just signaled as it is not the exact topic of this article.

The issue of the administrative fine, as the repressive and preventive measure, evokes numerous doubts and disputes. In relation to removal of trees and shrubs it is questionable from the economic standpoint, as the amount of money to be paid as the penalty is frequently very high (e.g. 101 897, 70 zł⁹; 425 651, 61 zł¹⁰; 87 364, 29 zł¹¹). From my point of view, not only the amount of fine, but also the fact that the authority does not deliberate on any circumstances affecting the removal, should be taken into consideration. Applying legal provisions concerning the removal of trees and shrubs is not an easy task in practice. That is why there is a wide scope of cases being recognized by courts.

⁸ B. Rakoczy, *op. cit.*, p. 154; W. Radecki, *Ustawa o ochronie przyrody. Komentarz*, Warszawa 2008, p. 266.

⁹ Judgment of the Voivodeship Administrative Court in Gliwice of 18 June 2012, II SA/G1 969/11, Legalis 640697.

¹⁰ Judgment of the Supreme Administrative Court of 21 February 2012, II OSK 2323/10, Legalis 537921.

¹¹ Judgment of the Supreme Administrative Court of 9 February 2012, II OSK 2262/10, Legalis 473951.

2. The character of liability for the removal of trees or shrubs without the required permit in the light of recent judicature views

The character of liability for the removal of trees or shrubs without the required permit can be concluded by analyzing the premises of this liability. There are two circumstances indicated in the article 88 section 1 of the Act on Nature Conservation: removal of a tree (shrub), and failure to obtain the required permit. These two elements, action and omission, should appear together. Such a simple mechanism of liability for administrative torts, which is independent of guilt, is recognized as objective liability¹². No other circumstances, besides the two premises mentioned above, are taken into consideration while imposing the administrative fine on the liable entity.

Basing the liability for the removal of trees or shrubs without the required permit on the principle of objective liability means that the sufficient ground for imposition of sanction is a specific behaviour of the perpetrator contrary to the legal norm. In order to burden with liability it is sufficient to indicate the causal connection between behaviour of a particular person and committing a tort in the form of removal of trees or shrubs. It is, therefore, clear that the responsibility for the commission of this tort is based on the idea of the unlawfulness of the act¹³.

The provisions of article 88 section 1 point 2, and article 89 section 1 of the Act on Nature Conservation do not provide for the possibility of waiving the imposition of the administrative fine for the tree removal without the required permit or the possibility to adjust its amount. The Legislature does not provide the possibility of individualizing the amount of the fine depending on the circumstances of the act or the financial situation of the holder. The character of decision in this matter is strict and excludes any discretion of the authority. Nevertheless, some statements have been elaborated on the ground of judgments of administrative courts. It was

¹² W. Radecki, *Prawna ochrona przyrody w Polsce, Czechach i Słowacji. Studium prawnoporównawcze*, LEX 112714.

¹³ Judgment of the Voivodeship Administrative Court in Kielce of 12 November 2013, II SA/Ke 780/13, LEX 1426814.

claimed in the judgment of the Regional Administrative Court in Szczecin in 2012, that exemption of a holder from liability was conditioned by proving that they had not known about the removal of a tree by a third party, and at the same time they could have not prevented this action¹⁴. In other words, the holder cannot bear liability if somebody removed the tree (shrub) without their knowledge and they could not stop it. Therefore, knowledge and possibility of prevention are the factors of liability existence. On the other hand, lack of them is the circumstance releasing a holder from liability¹⁵.

The aforementioned judgment of the Regional Administrative Court in Kielce¹⁶ solved a disputable issue concerning possibility of omission of imposing the administrative fine on the basis of the regulation of article 5 of the Civil Code. This is the general clause forbidding taking advantage of one's right that would be contrary to socio-economic purpose of the right or the principles of social community. The Court decided that the Act on Nature Conservation did not allow to waive imposing the fine, by indicating article 5 of Civil Code. Applying this provision would lead to a situation where a person would be exempted from paying the administrative fine, although there was no possibility of such exemption in provisions of administrative law. The clause of article 5 (abuse of the right) was an element of civil law and could be considered in administrative cases only when specific provisions of administrative law would recall it. Applying this article by the authority as the basis of decision causing redemption of administrative fine was infringement of law¹⁷.

Analysis of judgments of administrative courts shows that one of the indicated reasons of complaint to a court, is the state of need. However, in the judgment it is admitted that the state of necessity cannot justify such a tort as the removal of trees or shrubs without the required permit¹⁸. According to the Court, although state of necessity belongs to the circumstances excluding unlawfulness, by virtue of article 26 of the Penal Code of 6 June

¹⁴ Judgment of the Voivodeship Administrative Court in Szczecin of 9 February 2012, II SA/Sz 374/11, LEX 1116488.

¹⁵ B. Rakoczy, *op. cit.*, p. 160.

¹⁶ Judgment of the Voivodeship Administrative Court in Kielce of 12 November 2013, II SA/Ke 780/13, LEX 1426814.

¹⁷ *Ibidem*.

¹⁸ Judgment of the Supreme Administrative Court of 23 July 2008, II OSK 819/07, Source: <<http://orzeczenia.nsa.gov.pl/doc/6DD2007ECA>>

1997¹⁹, and to the exemptions of liability for some civil torts by virtue of article 424 of the Civil Code, the Act on Nature Conservation does not contain provisions of state of necessity as a premise excluding unlawfulness of the administrative tort. Therefore, the institution of the state of necessity will only have normative significance in administrative matters, in which it is introduced into the regulation of specific acts of administrative law²⁰.

In the reasons for judgment of the Regional Administrative Court in Poznań, on 5 June 2013²¹, it was stated that the administrative fines were the interference in a sphere of entity's rights. Although they were imposed on entities that infringe law, they should have been adequate to the manner and consequences of these violations and, in the process of applying sanctions the authority should have considered public interest, as well as private interest, which was appropriate for the rule of law. The problem seemed to be the question whether these two interests were well balanced. In the opinion of the court that formed a judgment in the abovementioned case, the imposition of the administrative fine in the amount of a triple fee for the removal of the tree was an appropriate sanction for the perpetrator of an unlawful action, which was infringement of the article 83 section 1 of the Act on Nature Conservation, by the failure to obtain a permit for trees removal and pay the required fee²².

The aforementioned remarks lead the Author to a conclusion that administrative liability for the removal of trees or shrubs should be based on the assumption that there are some circumstances envisaged by law when it is possible to evade liability, even if the act fulfills the conditions of a tort. Such situations are independent of the holder's will, e.g. the tree is sick or dying, it endangers the safety of the people, it was damaged by the forces of nature. Moreover, the sanction should be differentiated depending on whether the tree at the moment of the removal was alive or dead. In some indicated cases the liability for not applying for the permit and removing a tree (shrub) should not be imposed in such an automatic way as it is stipulated in provisions of the Act on Nature Conservation. Maybe

¹⁹ Journal of Laws of 1997, No 88, item 553 with amendments.

²⁰ Judgment of the Supreme Administrative Court of 23 July 2008, II OSK 819/07, Source: <<http://orzeczenia.nsa.gov.pl/doc/6DD2007ECA>>

²¹ IV SA/Po 261/13, Legalis 743833.

²² *Ibidem*.

such legal status would be accomplished in the future, regarding the fact that new verdict has been recently given by the Constitutional Court.

3. Objective liability for the removal of trees or shrubs without the required permit in view of Constitutional Court

In the judgment of the Regional Administrative Court in Gdańsk on 31 March 2011²³ it was mentioned that the Constitutional Court expressed its view on the administrative fines before. The Constitutional Court indicates that if the provisions impose any obligation on natural person or legal entity, there should also be a provision determining the consequences of failure to fulfill the obligation²⁴. The lack of appropriate sanction causes the provision to become dead, and a failure to fulfill this obligation will be a common situation. The Constitutional Court claims that the administrative fine is the state's authoritative interference into an entity's financial rights. However, at the same time the Court highlights that such interference is a sanction for unlawful behaviour of an entity²⁵. Nevertheless, the Legislature's freedom in the introducing administrative fines is not unlimited. It has been also noticed that the Constitution requires from the Legislature to respect basic principles of the Polish constitutional system with the rule of law principle as priority, and to respect entity's rights. While determining the sanction for violation of law, the Legislature must respect, in particular, the equality principle and the proportionality principle. Therefore, sanctions that are certainly inadequate or irrational, or disproportionately onerous cannot be applied²⁶.

On 1 July 2014 the Constitutional Court recognized the case of five joined complaints, which subject was the amount of the administrative fine for removal of trees or shrubs without the required permit²⁷. As a result,

²³ II SA/Gd 898/10, Legalis 383072.

²⁴ *Ibidem*.

²⁵ *Ibidem*.

²⁶ *Ibidem*.

²⁷ Source: <<http://trybunal.gov.pl/s/sk-612/>>

the Court decided that article 88 section 1 point 2, and article 89 section 1 of the Act on Nature Conservation were not compliant with the Constitution of Republic of Poland of 2 April 1997²⁸, because they infringed the article 64 section 1 and 3, with relation to the article 31 section 3 of the Constitution. These are provisions concerning the possibility of restricting constitutional rights and freedoms (in this case the ownership right), which can be restricted only in indicated situations (such as necessity resulting from security and public order, environmental protection), only in indicated form (act of law), and only to indicated borders (restrictions cannot infringe the essence of freedoms and rights).

Unfortunately, the wide and complex analysis of the latest verdict of the Constitutional Court on the case being a subject of this article is not possible, as long as the reasons for judgment are not available yet. The Constitutional Court stated that the mechanism of obligation of gaining by real estate holder the permit of appropriate authority to remove a tree or a shrub was an adequate measure of nature conservation²⁹. Nevertheless, the Legislature infringed the ownership right, as well as exceeded the constitutional borders of proportionality with relation to administrative sanctions. Two remarks in this scope should be questioned: 1) the shape of liability principle as a consequence of infringement the statutory prohibition of removal trees or shrubs without the permit, that is objective liability, 2) the scale of repression while determining the amount of fine for this act³⁰. According to the Constitutional Court, fines are too onerous because the amount to pay is a triple fee for the removal with the permit, and they are imposed automatically and strictly, regardless of the circumstances. The Legislature does not consider any other circumstances, just the fact of removal, so the sanction is imposed even if the holder cut the tree that was damaged by the nature or was causing danger to life or health of real estate users.

²⁸ Journal of Laws of 1997, No 78, item 483 with amendments.

²⁹ Source: <<http://trybunal.gov.pl/rozprawy/komunikaty-prasowe/komunikaty-po/art/6928-wysokosc-kary-pienieznej-za-usuwanie-drzew-lub-krzewow-bez-wymaganego-zezwozenia/>>

³⁰ *Ibidem*.

4. Closing remarks

What seems not to be foreseen by the Legislature is the fact that high amounts of the administrative fines cause problems with enforcing them. Imposing the fine in thousands of zlotys repeatedly causes total insolvency of liable entity. In practice, very often the tree growing on a private real estate is removed just because it has been destroyed by the thunderstorm or it disturbs a normal functioning of other plants or buildings. The value of such a tree is not proportionate in comparison with the amount of the imposed fine. In my opinion the authority imposing the administrative fine should firstly examine the purpose of the removal. Such high fines can also give results contrary to the Legislature's intention and lead to circumvention of law.

Taking everything into account, provisions of the article 88 section 1 point 2, and the article 89 section 1 of the Act on Nature Conservation do not fulfill the premises of proportionality³¹. As a consequence, by virtue of latest judgment of the Constitutional Court on 1 July 2014 they will not be binding in 18 months. What should be noticed, is that the aforementioned judgment was not unanimous³². One of the judges expressed *votum separatum*, claiming that questioned provisions were compliant with the Constitution and did not interfere excessively in ownership right. That shows that the issue of punishment for the removal of trees or shrubs without the required permit is still controversial and there are many aspects that are still problematic for both authorities applying law and real estate holders. Soon there should be elaborated legal provisions taking into account individualized approach to the issue of removal of trees and shrubs without the required permit.

³¹ Source: <<http://trybunal.gov.pl/rozprawy/komunikaty-prasowe/komunikaty-po/art/6928-wysokosc-kary-pienieznej-za-usuwanie-drzew-lub-krzewow-bez-wymaganego-zezwozenia/>>

³² Judgment of the Constitutional Court of 1 July 2014, SK 6/12, LEX 1480456.

Bibliography

Ignatowicz J., Stefaniuk K., *Prawo rzeczowe*, Warsaw 2012.

Pańko W., *O prawie własności i jego współczesnych funkcjach*, Katowice 1984.

Radecki W., *Możliwość złagodzenia skutków kary pieniężnej wymierzonej za usunięcie drzewa bez wymaganego zezwolenia*, Nowe Zeszyty Samorządowe 2012, No 5, LEX 156933/2.

Radecki W., *Ustawa o ochronie przyrody. Komentarz*, Warsaw 2008.

Rakoczy B., *Usuwanie drzew i krzewów*, Warsaw 2013.

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