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The Polish real estate leases in legal and practical terms

BY

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Abstract

The article analyzes the issue of the risk of entering into a lease agreement as a phenomenon that deters Landlords from renting out apartments. The reasons for the aforementioned phenomenon are presented, as well as statistics on the current share of the so-called vacancy rate in the Polish real estate market are cited. Juxtaposed are the rights of the Tenant and the Landlord, among others, based on the provisions of the Act of June 21st, 2001 – Tenants Rights, Municipal Housing Stock and the Civil Code Amendment Act (Journal of Laws 2022.1360 of 2022.06.29). A survey was conducted to provide information on how potential Landlords perceive the various issues relating to entering into a lease agreement. The occasional lease agreement as a kind of remedy is discussed, and the risks associated with entering into a lease agreement are analyzed. An attempt was made to answer the question: *should the Tenant really be equated with the weaker party to the lease agreement?*

Keywords: building law, rent, let, lease, Tenants' rights

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Introduction

Currently, many apartments remain unoccupied. At the same time, plenty of people are struggling, making repeated attempts to meet their housing needs. This relationship is controversial, because analyzing the facts presented, the solution to the problem seems to be trivially simple. It is, therefore, necessary to consider what factor is responsible for the refraining of Property Owners from entering into a lease agreement with potential Tenants. The answer is extremely simple. The reason is the provisions of the Act of June 21st, 2001 – Tenants Rights, Municipal Housing Stock, and the Civil Code Amendment Act (Journal of Laws 2022.1360 of 2022.06.29). The cited legal act provides broad protection of Tenants' rights. Landlords who refrain from renting out their apartments take the position that the statutorily granted scope of protection for the rights of Tenants is too broad. The law protects the interests of the Tenant relatively extensively, while it is difficult to come to similar conclusions when analyzing the rights of Landlords.

1. ACT OF JUNE 21ST 2001 – TENANTS RIGHTS, MUNICIPAL HOUSING STOCK, AND THE CIVIL CODE AMENDMENT ACT

Poles keep off from renting out apartments for fear of possible undesirable actions by Tenants, which most often include rent arrears or destruction of property. Act of June 21st 2001 – Tenants Rights, Municipal Housing Stock, and the Civil Code Amendment Act provides the Tenant with a wide range of rights. Among other things, the provisions of the aforementioned Act protect the Tenant from excessive rent increases. This is confirmed, for example, by Article 9 para. 1b of the aforementioned Act, according to which *an increase in rent or other charges for the use of the premises, with the exception of charges independent of the Owner, may not be made more frequently than every 6 months* [6]. The subject of controversy is Article 32 of the aforementioned Act. However, in order to explain the reason for this, it is necessary to first focus attention on the content of Article 11 para. 2 point 2, which deals



with the termination of the lease relationship in a situation in which the Tenant is in default of rent payment [6]. Article 32 of the Act in question, in turn, stipulates that *in the event of termination of the lease to a Tenant paying regulated rent, the obligation to provide that Tenant with replacement housing and to cover the costs of moving is the responsibility of (...) the relevant municipality* [6]. The application of this provision in practice and the reason for the controversy surrounding it will be explained later in the article.

2. THE CLAIM PROCEDURE

A simple lease agreement, although popular, is controversial due to the long and complicated eviction process. To begin a discussion of the procedure, it would be appropriate to start with an analysis of the already cited Article 11 para. 2 point 2 of Act of June 21st, 2001 – Tenants Rights, Municipal Housing Stock and the Civil Code Amendment Act, which stipulates that (...) *the Owner may terminate the legal relationship if the Tenant is in arrears with the payment of rent (...) for at least three full payment periods despite giving him written notice of the intention to terminate the legal relationship and setting an additional one-month period for payment of overdue and current balance dues* [6]. In practice, this provision means that the Landlord cannot really take any steps to recover the property for a period of three months. He does not have the right to change the locks, force the Tenant to leave the premises, or remove his belongings. Admittedly, in the indicated state of facts, the Tenant is not acting in accordance with the law, for one is violating the law by committing a delay in the payment of rent. However, one does not commit a crime. Instead, the examples of potential behavior of the Landlord indicated earlier should be equated with a crime. This is a violation of domestic peace under Article 193 of the Criminal Code, the commission of which is punishable by a fine, restriction of liberty, or even imprisonment for up to a year [4]. The Tenant - although dishonest - has the right to stay undisturbed in the premises covered by the lease.

According to the cited provision, the Landlord gains the right to terminate the contract only in the event of non-payment of rent for three months. The Landlord is also under the obligation, which is extremely important from the point of view of the issue under consideration, to set an additional deadline for the payment of both overdue and current debts. This period lasts for one month. If the dishonest Tenant remains passive in the face of the summons, then the contract is terminated with one month's notice. It is worth noting that the Tenant is given prior written notice of the intention to terminate the legal relationship. After the termination of the contract, the Landlord may take legal action by filing a petition for enforcement proceedings. However, it is necessary to point out that the power to order eviction is vested exclusively in the Court. Thus, there is a risk of protracted court proceedings leading to a judgment. Once such a judgment is obtained, it is transferred to the bailiff. However, the case still does not become a simplified one. This is because it is obligatory to designate for the Tenant a replacement unit from the municipal resource. The Landlord should also bear in mind that Tenants are covered by the so-called *protective period*, which prohibits evicting them *on the pavement*

between November 1 and March 31. Even if the Court orders an eviction, it cannot be carried out within the aforementioned periods in the absence of the Tenant's possession of substitute housing. Interestingly, eviction was also not possible during the COVID-19 pandemic restrictions.

The legal solutions discussed above definitely protect the Tenant from homelessness, while at the same time seeking to ensure the right to meet his housing needs. However, the legitimacy of the procedure presented is questionable, as it puts the Landlord at an extreme disadvantage.

3. CASE LAW OF THE POLISH CONSTITUTIONAL TRIBUNAL ON THE RIGHTS OF LANDLORDS AND TENANTS

The issue of the rights and obligations of Landlords and Tenants is repeatedly addressed by the Polish Constitutional Tribunal in its rulings. In the judgment of October 18th, 2017 (ref. K 27/15), the subject of the case law turned out to be Article 144 of the Act of June 17th, 1966 on Administrative Enforcement Proceedings. Pursuant to its content, *the enforcer (...) shall call on the occupants (...) of the premises to leave the premises (...) and, in the event of resistance, shall take appropriate steps to apply direct coercion* [5]. The Polish Constitutional Tribunal unanimously rules that this provision contradicts particular provisions of the Polish Constitution, i.e. the principle of inherent dignity (Article 30), the right of the family to assistance from the state (Article 71 para. 1), and with the state's obligation to meet housing needs (Article 75 para. 1) by *failing to include regulations guaranteeing minimum protection from homelessness for those who are unable to meet their housing needs on their own* [7].

On March 21st, 2019 The Senate of the Republic of Poland passed a resolution to bring to the Sejm a draft Act on amending the Act on Enforcement Proceedings in Administration and certain other laws. At that time, the purpose of the proposed law was indicated as the adjustment of the legal system to the aforementioned judgment. In this draft, attention was paid to the issue of the scope of protection of the Tenant and the Landlord. Quoting the justification of that resolution: *eviction proceedings should be shaped in such a way as to ensure, on the one hand, the effective realization of the creditor's demands, and on the other hand, to realize the protection of the debtor, while ensuring respect for his personal dignity. It is the duty of the legislator to introduce appropriate mechanisms to balance these conflicting goals* [3].

It is worth noting that work on adapting legislation to the needs of society in the indicated area is still ongoing. On January 20th of this year, the Parliament received a government bill covering the streamlining of activities concerning the initiation and conduct of administrative enforcement and increasing its efficiency [10]. The law was passed in March this year. (Journal of Laws 2023 item 556).

4. SCOPE OF PROTECTION OF THE LEASE AGREEMENT.

There is no doubt that the current wording of the law is the reason for Landlords' refraining from entering into lease agreements. The law was formulated in such a way and not in another way, which is justified by the need to choose which of the key rights occupies a higher place in the hierarchy - the right to meet housing needs vested in the Tenant or the right of ownership that the Landlord has. The legislature is obliged to enact legislation that allows the interests of both Tenants and Landlords to be respected. This is definitely not a simple task, since these interests, as already mentioned, are in conflict.

It is worth emphasizing that the right to meet housing needs is a value of indisputable importance to a person's existence. This is because Article 79(1) of the Constitution of the Republic of Poland stipulates that *public authorities shall pursue a policy conducive to satisfying the housing needs of citizens, and in particular shall prevent homelessness, support the development of social housing, and support the activities of citizens aimed at obtaining their own housing* [1]. The second paragraph of the Constitution contains a reference to the law defining the protection of Tenants' rights. Subsequently, Article 25 para. 1 of the Universal Declaration of Human Rights states that *Every person has the right to a standard of living corresponding to the health and well-being of himself/herself and his/her family, including food, clothing, housing, medical care, and necessary social services, as well as the right to security in the event of unemployment, sickness, incapacity, widowhood, old age, and other causes of loss of livelihood due to circumstances beyond his/her control* [2].

On the other hand, the property right of ownership is of crucial importance to the lessor. It is worth noting that it is also regulated in the Constitution of the Republic of Poland, specifically in Article 64, where para.1 states that *Everyone has the right to property (...)* [1]. It is necessary to point out here that the Constitution, as the highest legal act in force in the state, clearly distinguishes between the right to property and other property rights [8]. In the already cited situation of rent arrears by the Tenant, the Landlord is deprived of the ability to dispose of his property. At the same time, he does not receive his due rent, so he suffers financial losses.

5. OCCASIONAL LEASE. WHY IS IT WORTH IT?

In Polish legislation, it is possible to rent real estate under one of three agreements. These include 1) ordinary lease agreement, 2) occasional lease agreement, and 3) institutional lease agreement. The occasional lease is a kind of security against the lengthy process of claiming and, most importantly, against the risk of significant financial losses for the Landlord. Simply put - this agreement is a safeguard in case the Tenant undertakes fraudulent practices. Most often they come down to defaulting on payments. Admittedly, a standard lease agreement is characterized by less formalism. However, it is worth noting that the formalism

characteristic of the occasional lease results in a much broader protection of the Landlord's rights.

One of the worst solutions is concluding a lease agreement for an indefinite period, in which utility bills are paid by the Landlord. The Landlord is then left in a situation where *he has no right to cut off the utilities in the apartment occupied by the dishonest Tenant* [11]. Then the dishonest Tenant may actually live at the expense of the property Owner for a relatively long time.

It is worth noting that according to Article 19a para. 1 of the Act of June 21st, 2001 – Tenants Rights, Municipal Housing Stock, and the Civil Code Amendment Act, *an occasional lease agreement is an agreement for the lease of a residential unit (...) concluded for a fixed term, not exceeding 10 years* [6]. This provision is extremely important, as it deprives the dishonest Tenant of the opportunity to live for a long time at the expense of the Landlord avoiding termination, as the agreement expires after a certain period. With a fixed-term contract, as a rule, notice periods also do not apply.

The main advantage of the occasional lease should be equated with a much faster process of recovery of the premises by the Landlord than in the case of an ordinary lease agreement. Article 19a in para. 2 of the aforementioned Act indicates the mandatory attachments that must be included in the agreement, i.e. a statement by the Tenant in the form of a notarial deed, in which the Tenant submits to execution and undertakes to vacate and hand over the premises on the date indicated in the demand to vacate the premises. Right from the start, this agreement provides additional security in the form of verification of the agreement by a notary. The Tenant is also obliged to indicate the address of other premises where he will be able to live in the event of enforcement of the obligation to vacate the premises. The statement mentioned above provides a guarantee that the Tenant will move out. Otherwise, there will be grounds for execution of eviction of the Tenant. Importantly, the eviction then applies to all persons residing in the premises to which the agreement applies. It is also necessary to include a statement from the Owner of the replacement premises, in which the latter agrees to allow the Tenant to live in his property after the expiration of the term for which the contract was concluded.

There is also a noticeable difference in the aspect of the municipality's granting of the so-called temporary units, which, as already indicated, is associated with a prolongation of the process of recovery of the apartment by the Owner. With occasional tenancy, *thanks to the notarized declaration of Tenants that they have a replacement unit, there is no need for the municipality to designate a temporary unit, as is the case with an ordinary lease* [12].

6. HOUSING SITUATION IN POLAND

6.1. VACANT BUILDINGS RATE IN THE POLISH REAL ESTATE LEASES MARKET

When discussing the issue of tenancy, it is worth referring to the problem of access to housing by analysing the National Census. According to the Report on the Preliminary Results of the National Population and Housing Census 2021, *unoccupied dwellings*

accounted for 12.1% of all dwellings; among the total number of buildings with dwellings, on the other hand, the share of buildings that were unoccupied on 31 March 2021 was 10.4% [9]. It can therefore be stated quite generally that one in ten dwellings is in fact a vacant building. There is no legal definition of a vacant building but it is considered to be a *building or premises that is not occupied or otherwise used, i.e. simply standing empty* [14]. The presented state of fact is due, among other things, to the reluctance of Landlords to possibly rent out their dwellings. A wide group makes the decision to buy a flat with a view to its subsequent use by children. The other part of the population, on the other hand, opts for so-called short-term rentals - especially in locations attractive from the point of view of tourism [13]. Vacant buildings do not bring any profit to their Owners for many years. With the decision to enter into a rental agreement, the problem of meeting housing needs could be visibly de-escalated. This would also involve financial benefits of the Owner coming from the benefit due under the lease, i.e. rent.

6.2. NO LEASE TAX AS A PROSPECT TO MITIGATE THE PROBLEM

It is necessary to indicate that the lease is subject to tax. From 2023 onwards, tax on private rental is determined exclusively on a flat rate basis. In the case of this form of taxation, the taxpayer pays a lump sum during the year in the amount of 8.5% of income up to the amount of PLN 100,000 and 12.5% of income on the excess over the amount of PLN 100,000 [15]. It should be emphasised that income tax in the case of occasional lease must be paid in the same way as in the case of the traditional form of lease previously known as private lease. Although the occasional tenancy is by definition a short-term lease, it might be a beneficial modification to set a time limit after which the tenancy would not be subject to the aforementioned tax. For example, only occasional tenancies concluded for a period of up to one year would be subject to income tax. The elimination of financial burdens such as income tax could contribute to a more favourable attitude of Landlords to concluding lease agreements. Consequently, there would be an increase in the supply of flats that are standing empty.

7. ASSESSMENT OF THE LEGAL POSITION OF THE PARTIES TO THE LEASE AGREEMENT

In order to confirm the aforementioned assumptions, a short questionnaire was carried out using a form made available on the Internet and an interview with Ms. Urszula Gębska - Owner of the real estate agency FOLDER Nieruchomości based in Rzeszów.

7.1. OBSERVATIONS BY THE OWNER OF ONE OF THE REAL ESTATE AGENCIES IN RZESZÓW ON THE BASIS OF MANY YEARS' EXPERIENCE IN THE SUBJECT OF RENTAL AGREEMENTS

Estate agents are approached by clients who own a flat bought for investment purposes. They often have concerns about renting out their flat, fearing dishonest Tenants who may either damage their property or occupy the property without paying. We reassure clients that it is possible to secure a tenancy by signing an

occasional tenancy agreement, which allows for the removal of nuisance Tenants at the expiry of the lease. As a real estate agent, I have many years of experience in renting out flats and am able to obtain information about a potential Tenant that will positively affect the interests of the Landlord. The very fact of informing those interested in renting about the Landlord's use of the occasional tenancy institution makes it possible, at an early stage, to eliminate people who do not want to agree to this rental formula. Landlords remain loyal for many years to the real estate agent with whom they have found cooperation satisfactory.

Importantly, under the occasional tenancy agreement, the Tenant is required to sign an enforcement bond before a notary. This security allows the Landlord, after the expiry of the lease, to take swift legal action if the Tenant does not want to vacate the premises in which they have been living. The Landlord in such a situation can approach the court with the notarised enforcement clause and then hand the document to the bailiff, who carries out the removal of the dishonest Tenants. In this case, there is no protection period for the persons being moved out, as they have declared at the conclusion of the occasional tenancy agreement that they have a substitute accommodation.

Interview with Ms. Urszula Gębska - Owner of the real estate agency FOLDER Nieruchomości based in Rzeszów (own research)

7.2. QUESTIONNAIRE ON THE ANALYSIS OF THE ASSESSMENT OF THE LEGAL POSITION OF THE PARTIES TO THE RENTAL AGREEMENT

A total of 103 respondents took part in the survey. It included questions designed to analyse the public's perceptions of the parties to rental agreement. The survey served to answer the question of *how the public assesses the legal position of the Landlord as a party to the rental agreement and, correspondingly, how they assess the legal position of the Tenant.*

In order to give an idea of the public's opinion on the assessment of the legal position of the parties to a rental agreement, I will cite the results of the survey. Respondents were asked to rate using a scale from 1 to 5, where: 1 meant that the rights of the Landlord are significantly limited in relation to those of the Tenant, 2 - the Landlord has a narrower catalogue of rights under the lease agreement than the Tenant, 3 - the legal position of the Landlord as a party to the lease agreement is very similar to that of the Tenant, 4 - the legal position of the Landlord as a party to the lease is slightly better than that of the Tenant, 5 - the legal position of the Landlord as a party to the lease agreement is better than that of the Tenant. The vast majority, 75.5%, of respondents say that the law sides with the Tenant.

Only less than 10% of respondents claiming that the law does not side with the Tenant.

102 odpowiedzi

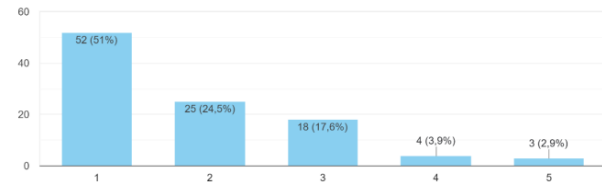


Fig. 1. How do you assess the Landlord's legal position as a party to the tenancy agreement? (own research)

103 odpowiedzi

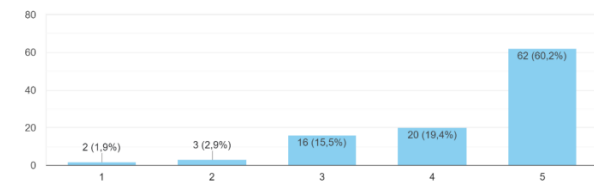


Fig. 2. How do you assess the Tenant's legal position as a party to the tenancy agreement? (own research)

The results quoted so far are reflected in the study presented in Fig. 2. Assuming an analogous scale to Fig. 1, i.e., where: 1 means that the rights of the Tenant are significantly limited in relation to those of the Landlord, 2 - the Tenant has a narrower catalogue of rights under the lease agreement than the Landlord, 3 - the legal position of the Tenant as a party to the lease is very similar to that of the Landlord, 4 - the legal position of the Tenant as a party to the lease is slightly better than that of the Landlord, 5 - the legal position of the Tenant as a party to the lease is better than that of the Landlord; also indicates that the legal position of the Tenant in the lease is assessed as significantly better. As with Figure 1, only a dozen percent of Respondents believe that the legal position of the Landlord and the Tenant is similar. **Less than 10 percent of Respondents say that the Tenant's rights are significantly limited compared to those of the Landlord.**

Conclusions

The fact that the provisions of the Law on the Protection of the Rights of Tenants, the Housing Stock of the Municipality, and Amendments to the Civil Code apply to an ordinary lease agreement results in broad protection of the Tenant's rights. The occasional lease agreement, on the other hand, in a way centralizes the position of the Landlord as a party to the agreement. The Polish rental housing market is developing, and with this development the awareness of both Tenants and Landlords is expanding [12]. The rental agreement entered into in the form of an ordinary lease agreement, and actually the consequences associated with it, deter many Landlords from renting out their premises. Certainly, the vision of concluding an agreement with a dishonest Tenant, and consequently not being able to enjoy their property while incurring financial losses due to rent arrears, is an effective deterrent to Landlords. Although the current wording of the legislation takes into account and respects both the rights and obligations of both parties, the Polish Constitutional Tribunal has repeatedly taken a position on the described issue. The solution to the indicated

problem would be a possible amendment of the current legislation in such a way that the legal situation of both parties is equalized. However, it will be necessary to point out that it is an extremely difficult task for the Legislator to provide provisions on the rental agreement that ensure the avoidance of conflicts and misunderstandings.

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