

The impact of housing cooperative bankruptcy on the status of persons entitled under ownership rights to premises. Selected comments on a change in the Supreme Court's position

Wpływ upadłości spółdzielni mieszkaniowej na sytuację osób uprawnionych z tytułu własnościowych praw do lokali. Uwagi o zmianie stanowiska Sądu Najwyższego

Влияние банкротства жилищного кооператива на статус лиц, имеющих право собственности на помещения. Комментарии к изменению позиции Верховного суда

Вплив банкрутства житлового кооперативу на статус осіб уповноважених з титулів власності на приміщення. Коментар щодо зміни у висновку Верховного Суду

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Summary: The article presents an extremely important shift in the judiciary by Poland's Supreme Court as regards the assessment of the consequences of the transformation of the cooperative ownership right to a residential unit into the right of independent ownership of a residential unit in the wake of the housing cooperative's bankruptcy proceedings. Originally, the Supreme Court held that a mortgage that encumbered the cooperative's real estate at the time of the transformation encumbers *ex lege* the resulting right of the independent ownership of a residential unit. Not until 2019 did the Supreme Court abandon this controversial position, and the ultimate change in its judiciary is supported with a wide array of critical underlying motives. The author approves of the recently adopted judicial trajectory, yet with a proviso that the resolution of problems it pertains to be not left to the judiciary only, as it requires the definitive intervention of the legislator.

Key words: Supreme Court, mortgage, housing cooperative bankruptcy, ownership rights to premises

Streszczenie: Artykuł prezentuje niezwykle istotną zmianę w orzecznictwie Sądu Najwyższego odnoszącą się do oceny skutków przekształcenia własnościowego prawa do lokalu w prawo odrębnej własności lokalu w trakcie postępowania upadłościowego spółdzielni mieszkaniowej. Pierwotnie Sąd Najwyższy uznawał, że hipoteka, która w chwili przekształcenia obciążała nieruchomości spółdzielni, z mocy prawa obciąża powstałe prawo odrębnej własności lokalu. Dopiero w 2019 r. Sąd Najwyższy odstąpił od tego kontrowersyjnego stanowiska, podnosząc szereg ważkich racji w tym zakresie. Autorka aprobuje najnowszą linię orzecniczą, zastrzegając jednak, że rozstrzyganie tego rodzaju problemów nie powinno być pozostawione judykaturze, lecz wymaga jednoznacznej interwencji ustawodawcy.

Słowa kluczowe: Sąd Najwyższy, hipoteka, upadłość spółdzielni mieszkaniowej, własnościowe prawa do lokalu

Резюме: В статье представлено чрезвычайно важное изменение в судебной практике Верховного суда, касающееся оценки последствий преобразования права собственности на помещения в право отдельной собственности на помещения в ходе процедуры банкротства жилищного кооператива. Первоначально Верховный суд постановил, что ипотека, обременяющая имущество кооператива на момент преобразования, обременяет возникшее право отдельной собственности на помещения в силу закона. Только

в 2019 году Верховный суд отошел от этой противоречивой позиции, выдвинув в этой связи ряд важных обоснований. Автор одобряет последнюю линию судебной практики, оговаривая, однако, что решение подобных проблем не должно быть оставлено на усмотрение судебной власти, а требует прямого вмешательства законодателя.

Ключевые слова: Верховный суд, ипотека, банкротство жилищного кооператива, права собственности на помещение

Резюме: У статті представлено надзвичайно важливу зміну судової практики Верховного Суду щодо оцінки наслідків трансформації права власності на приміщення в окреме право власності на приміщення під час провадження у справі про банкрутство житлового кооперативу. Спочатку Верховний Суд постановив, що іпотека, яка на момент перетворення обтяжувала майно кооперативу, в силу закону обтяжує виникле право окремої власності на приміщення. Лише у 2019 році Верховний Суд відійшов від цієї спірної позиції, висуваючи з цього приводу низку вагомих причин. Авторка схвалює новітню судову практику, але з застереженням, що вирішення подібних проблем не повинно бути покладено на суд, а потребує однозначного втручання законодавця.

Ключові слова: Верховний Суд, іпотека, банкрутство житлового кооперативу, право власності на приміщення

Introduction. Bankruptcy of the housing cooperative

The provisions of the Constitution of the Republic of Poland address the fundamental role of dwelling for every human being. On the one hand, dwelling ensures the satisfaction of the basic existential needs; on the other, it preconditions the pursuit of higher-level needs.¹ The public authorities' concern in this respect is regulated under Article 75 (1) of the Constitution,² according to which the authorities shall pursue a policy conducive to satisfying the citizens' needs for a dwelling. In particular, they shall counteract homelessness, support the development of social (community) housing and support citizens' actions aimed at securing their own dwelling.

The law offers an unusually wide array of measures that the state can use to meet the citizens' housing needs. However, it cannot go unnoticed that despite the changes taking place in how ownership functions in Poland, and irrespective of the growing popularity of independent ownership of residential units (apartments), housing cooperatives remain a key player on the Polish real estate market. Hence, the legal forms of entitlement to ownership, usage and disposal of cooperative residential units, in particular the cooperative right to residential units and the cooperative ownership right to residential units, constitute a vital part of Poland's legal framework. These ownership rights do not constitute ownership *per se* as they are

¹ For an extensive elaboration of this issue, see: M. Bednarek, *Prawo do mieszkania w konstytucji i ustawodawstwie*, Warszawa 2007, along with the literature cited therein.

² Constitution of the Republic of Poland, act of 2 April 1997, Journal of Laws [Dziennik Ustaw] no. 78, item 483 as amended.

closely dependent on the legal powers of the housing cooperative. In fact, these ownership regulations are only applicable *because* these cooperatives operate.

Notwithstanding the above, cases are known in which a housing cooperative goes bankrupt – for a variety of reasons – with far more significant consequences than lost profits.³ Therefore, the question arises as to whether the current legal regulations sufficiently implement the standard outlined in Article 75 (1) of the Constitution⁴ in the event of bankruptcy of this type of entity.

1. Effects of the bankruptcy of a housing cooperative on the rights to residential units

To achieve the protective purpose of the right to a dwelling, the legislator provided special solutions for cases when a housing cooperative sells a premise, or a share in a premise, during bankruptcy proceedings. In the case of the cooperative right to a residential unit, the solutions depend on who the purchaser of a premise, or of the share in a premise, is. If the land together with a premise is purchased by a housing cooperative, the legal status of the entitled persons practically does not change: they remain entitled to the cooperative right to a residential unit, except that they become a member of the new cooperative, which has acquired the right to the land together with the ownership right to the premise, or a co-ownership share in the premise. Granting the cooperative right to a residential unit, or accepting claims for creating this right, is vested in the buying cooperative (Article 16 (2) of the Act on Housing Cooperatives – hereinafter: AHC⁵).⁶ However, if the purchaser of a premise, or a share in a premise, is an entity other than a housing cooperative,⁷ the cooperative

³ P. Księżak, *Losy hipoteki obciążającej nieruchomości spółdzielni mieszkaniowej w razie upadłości spółdzielni – glosa – II CSK 541/13*, Monitor Prawniczy 2015, no. 16, p. 882.

⁴ The importance of Articles 75-76 of the Constitution of the Republic of Poland for the interpretation of the provisions of the Act on Housing Cooperatives is noted by J. Pisuliński, *Glosa do postanowienia [Sądu Najwyższego] z 26.6.2014 r. II CSK 543/13*, Państwo i Prawo 2015, no. 6, pp. 129-130.

⁵ Act of 15 December 2000 on Housing Cooperatives, i.e., Journal of Laws of 2018 item 845 as amended (hereinafter: AHC).

⁶ As rightly pointed out by K. Pietrzykowski, *Spółdzielnie mieszkaniowe. Komentarz*, 9th ed., Warszawa 2018, p. 184, the legal effect described in Article 16 (2) of the AHC ensues in each case when a land with a premise is transferred to another housing cooperative, thus not only in the case of the cooperative's liquidation, bankruptcy, or enforcement proceedings. An apparently contrastive view is held by E. Bończak-Kucharczyk, *Spółdzielnie mieszkaniowe. Komentarz*, 4th ed., Warszawa 2018, pp. 463-464.

⁷ The judicature recognizes that the transfer of the developed real estate of a housing cooperative in which the cooperative right to a residential unit is in force is only permissible in the wake of liquidation,

right to a residential unit is transformed into the tenancy right under the provisions of the Act on the Protection of Tenants' Rights, the Communal Housing Resource, and the amendment to the Civil Code (Article 16 (1) AHC). As rightly pointed out in the jurisprudence, this latter solution raises considerable doubts, given the significantly lower durability of the tenancy rights in comparison with the cooperative right to a residential unit.⁸ Equally controversial is that under this status quo the interests of the cooperative's creditors and the purchaser of the premise are secured at the expense of persons holding the cooperative right to residential units.⁹

The legal status of persons who hold the cooperative ownership rights to residential units in the case when their cooperative's real estate is under liquidation, bankruptcy or enforcement proceedings is regulated by Article 17¹⁸ of the AHC. This provision also differentiates between the legal consequences of the sale of a premise, or a share in a premise, depending on the legal status of the purchaser. If the buyer of the premise or its share is another housing cooperative, each shareholder is still entitled to the cooperative ownership right to a residential unit, but they need to file a claim to be admitted to the buying cooperative as shareholders (Article 17¹⁸ (2-3) of the AHC).¹⁰ A different case emerges when a purchaser of

bankruptcy, or enforcement proceedings (also see Judgment of the Administrative Court in Gdańsk of 19 November 2015, V ACa 490/15, LEX no. 2041881). This standpoint is advocated for by A. Stefaniak, *Prawo spółdzielcze. Ustawa o spółdzielniach mieszkaniowych. Komentarz*, 14th ed., Warszawa 2018, p. 457; P. Hoffman, M. Tabor-Gruszfeld, *Spółdzielnie mieszkaniowe. Komentarz do nowelizacji*, Warszawa 2018, p. 191. In contrast, E. Bończak-Kucharczyk, *Spółdzielnie mieszkaniowe...*, pp. 462-463 cautiously expresses doubts as to whether a cooperative can enforce a transfer of a premise with residential units to which it previously granted cooperative rights to the shareholders. An overtly different standpoint is represented by B. Swaczyna, *Hipoteka umowna*, Warszawa 2007, pp. 127-128.

⁸ A. Jedliński, *Lokatorskie prawo do lokalu (nowe elementy konstrukcji prawnej)*, Przegląd Sądowy 2004, no. 3, p. 134; S. Gurgul, *Zakończenie upadłości spółdzielni mieszkaniowej*, Monitor Prawniczy 2006, no. 19, p. 1021; P. Zakrzewski, *Status prawny członka spółdzielni mieszkaniowej w spółdzielczych stosunkach lokatorskich*, Warszawa 2010, pp. 475-476.

⁹ S. Gurgul, *Upadłość spółdzielni mieszkaniowej – przekształcenie spółdzielczego prawa do lokalu (domu) – cz. I*, Monitor Prawniczy 2011, no. 7, pp. 351-352; idem, *Upadłość spółdzielni mieszkaniowej, dewelopera i towarzystwa budownictwa społecznego. Komentarz*, Warszawa 2012, pp. 119-120; K. Pietrzykowski, *Spółdzielnie mieszkaniowe...*, p. 183.

¹⁰ In the context of enforcement proceedings, it is true that Article 1000 (4.2) of the Code of Civil Procedure (hereinafter: CCP) rules that the cooperative rights and cooperative ownership rights to residential units are – upon the final adjudication of ownership – transformed into the right of tenancy, the right of independent ownership of a residential unit or ownership of a single-family house, respectively. However, the legal effects of Article 2 of the CCP does not apply if the purchaser (through enforcement) is a housing cooperative. For this view, see especially S. Gurgul, *Upadłość spółdzielni mieszkaniowej, dewelopera...*, p. 126; P. Hoffman, M. Tabor-Gruszfeld, *Spółdzielnie mieszkaniowe. Komentarz...*, pp. 192-197. Also see highly insightful explorations of the legal regulations in force until 15 January 2003 by I. Kunicki, *Wpływ egzekucyjnej sprzedaży nieruchomości spółdzielni mieszkaniowej na spółdzielcze prawa do lokali*, Rejent 1997, no. 2, pp. 57-70.

a premise or its share is an entity other than a housing cooperative. In this case, the cooperative ownership right to residential units is *ex lege* transformed into the right of independent ownership of each residential unit, or ownership of a single-family house (Article 17¹⁸ (1) of the AHC).¹¹ In all these cases, the purpose of the regulation is to guarantee that the legal status of a person holding the ownership right to a residential unit is not subject to pejoration in the wake of the property transfer.¹² This is primarily so because the scope of privilege under the cooperative right to a residential unit approximates that of the property owner.¹³ This fact cannot remain without influence on the adopted legal solutions, nor on the interpretation of the provisions – an issue to be addressed later in this article.

In addition, it should be noted that Article 541 of the AHC makes it possible to submit applications for conversion of the weaker rights to the cooperative residential units into the stronger rights, also during liquidation or bankruptcy proceedings,

¹¹ Resolution of the Supreme Court of 21 December 1974, III CZP 31/74, OSNC 1975, no. 9, item 128; Resolution of the Supreme Court of 9 December 2010, III CZP 100/10, OSNC 2011, no. 6, item 70; Decision of the Supreme Court of 27 February 2014, II CSK 353/13, LEX no. 1477435. A. Sikorska-Lewandowska, *Powstanie odrębnej własności lokalu z mocy prawa*, Rejent 2019, no. 7, pp. 101–103 argues that creating independent ownership of a residential unit requires a recorded declaration in the land and mortgage register. The register entry of the purchaser of the property or its share enables the court competent in the land and mortgage registry to accept a request for making a relevant land and mortgage register entry for the right of the independent ownership of a residential unit acquired pursuant to Article 17¹⁸, or for a relevant amendment in the current register in the case of the limited property right.

It must be kept in mind that the legislator does not regulate legal consequences of a case in which, despite bankruptcy proceedings, no one acquires a premise in which there are residential units encumbered with cooperative ownership or other cooperative rights of the shareholders. For more on this issue, see K.P. Sokołowski, *Los spółdzielczego własnościowego prawa do lokalu po likwidacji spółdzielni mieszkaniowej*, Rejent 2012, no. 9, pp. 104–114; E. Bończak-Kucharczyk, *Spółdzielnie mieszkaniowe...*, pp. 52–539; K. Pietrzykowski, *Spółdzielnie mieszkaniowe...*, pp. 253–254; K. Królikowska, in: *Komentarze Prawa Prywatnego*, vol. 6a. *Prawo spółdzielcze i mieszkaniowe. Komentarz*, ed. K. Osajda, Warszawa 2018, pp. 1080–1081; A. Sikorska-Lewandowska, *Powstanie odrębnej własności...*, p. 99. These authors suggest that in such a case the cooperative ownership right to a residential unit be transformed *ex lege* into the right of independent ownership of a residential unit, or into the ownership of a single-family house.

¹² M. Bednarek, *Dobijanie spółdzielczych własnościowych praw do lokali*, Dziennik Gazeta Prawna, 26 June 2015, <https://prawo.gazetaprawna.pl/artykuly/879389,dobijanie-spoldzielczych-wlasnosciowych-praw-do-lokali.html> [access: 1.08.2022], p. D6; P. Księżak, *Losy hipoteki...*, p. 882; R. Strzelczyk, *Komentarz [do postanowienia Sądu Najwyższego z 27 lutego 2014 r., II CSK350/13, Lex nr 1683584]*, Rocznik Orzecznictwa i Piśmiennictwa z Zakresu Prawa Spółdzielczego 2016, vol. 6, pp. 299–300 (though this latter author does not seem consistent in his standpoint); J. Kaczmarek, *Komentarz [do postanowienia Sądu Najwyższego z 27 lutego 2014 r., II CSK 349/13, Lex nr 1477433]*, Rocznik Orzecznictwa i Piśmiennictwa z Zakresu Prawa Spółdzielczego 2016, vol. 6, p. 313.

¹³ A. Jedliński, *Własnościowe prawo do lokalu jako ograniczone prawo rzeczowe. Zagadnienia konstrukcji prawnej*, Państwo i Prawo 1998, no. 4, p. 45.

addressed respectively, to the cooperative property's receiver or trustee. Consequently, persons with cooperative rights or cooperative ownership rights may acquire residential ownership before the liquidation or bankruptcy proceedings are complete (Article 17¹⁴ (1) of the AHC).¹⁴ Therefore, in this respect, the status of the holders of cooperative rights was ameliorated *vis-à-vis* the cooperative's creditors' legal status.

2. Mortgages on the cooperative property and the transformation of the cooperative ownership right to a residential unit pursuant to Article 17¹⁸ of the AHC

The discussion held above serves as an introduction, necessary for outlining the context for explorations of an extremely interesting, and at the same time, highly socially significant legal problem. This problem surfaces in the jurisprudence of the Supreme Court issued in relation to transformations of cooperative ownership rights to residential units into stronger rights, effected through the course of a housing cooperative bankruptcy proceedings in such specific circumstances as mortgage on the land and a premise encumbered with ownership rights to its residential units.

For the past few years, the jurisprudence of the Supreme Court has repeatedly expressed the view that both in the case of the transformation of the cooperative ownership right to a residential unit into the independent ownership right to this unit pursuant to Article 54¹ of the AHC in conjunction with Article 17¹⁴ of the AHC and in conjunction with Article 86(2) of the Bankruptcy Law (hereinafter: BL¹⁵),¹⁶ as well as pursuant to article 17¹⁸ of the AHC,¹⁷ the mortgage which at the

¹⁴ E. Bończak-Kucharczyk, *Spółdzielnie mieszkaniowe...*, pp. 464-465; K. Królikowska, in: *Komentarze Prawa Prywatnego*, vol. 6a, pp. 912-913.

¹⁵ Act of 28 February 2003 – Bankruptcy Law, consolidated text: Journal of Laws of 2019 item 498 as amended (hereinafter: BL).

¹⁶ Decisions of the Supreme Court: of 14 January 2011, II CSK 361/10, LEX no. 1027166; of 27 February 2014, II CSK 350/13, LEX no. 1683584; II CSK 351/13, LEX no. 1477434; II CSK 355/13; II CSK 356/13. This view is shared by R. Strzelczyk, *Komentarz [do postanowienia Sądu Najwyższego...*, pp. 298-302; E. Bończak-Kucharczyk, *Spółdzielnie mieszkaniowe...*, pp. 465-466; R. Dżiczek, *Spółdzielnie mieszkaniowe. Komentarz. Wzory pozwów i wniosków sądowych*, 8th ed., Warszawa 2018, pp. 379-380; A. Stefaniak, *Prawo spółdzielcze...*, p. 492.

¹⁷ Decisions of the Supreme Court: of 27 February 2014, II CSK 349/13, LEX no. 1477433; II CSK 353/13, LEX no. 1477435; II CSK 354/13; II CSK 357/13; II CSK 358/13; II CSK 359/13, LEX no. 147558; II CSK 360/13; of 26 June 2014, II CSK 530/13; II CSK 531/13; II CSK 532/13; II CSK 533/13; II CSK 534/13; II CSK 535/13; II CSK 536/13; II CSK 537/13, LEX no. 1678859; II CSK 538/13; II CSK 540/13; II CSK 541/13, LEX no. 1491324; II CSK 542/13; II CSK 543/13, LEX no. 1745609; II CSK 544/13;

moment of the transformation encumbered the cooperative's real estate, shall by law encumber the resulting right of independent ownership of a residential unit. The Supreme Court has argued that the transformation does not concern the sale of a component, or of the entire enterprise of a bankrupt cooperative in exchange for payment of its equivalent, but the expiry of the ownership right to a residential unit. The purpose of the transformation is not to monetize the bankrupt cooperative's assets and provide funds to satisfy its creditors, nor does the mortgagee enjoy the right to satisfy the value of the expired right from the price obtained from the sale of the encumbered real estate. At the same time, the Supreme Court held that in such circumstances the regulations of the bankruptcy law concerning the acquisition of rights during bankruptcy proceedings - that is without encumbrances (Article 313 (1-2) of the Bankruptcy Law, Article 317 (2) of the Bankruptcy Law) - do not apply.

The position presented consistently in dozens of Supreme Court's judgements been met with widespread criticism from the jurisprudence¹⁸ and evoked scarce voices of support.¹⁹ In this context, it is necessary to observe with satisfaction that there has been a significant shift in the Supreme Court's position on the matter, evident in its jurisprudence of 2019. Starting from the Decision of 21 March 2019,²⁰ a different judicature trajectory began to emerge for cases when the transformation of the cooperative right to a residential unit into the ownership right takes place in connection with the acquisition of a premise or its share by an entity that is not a housing cooperative (Article 17¹⁸ of the AHC).²¹ It is therefore worthwhile to systematize the argumentation used to support the claim that for the cases under analysis, the adjudicated *ex lege* ownership right to a residential unit is not encumbered with mortgage (or more precisely that no blanket mortgage is created both on the parent property and the new one).²²

II CSK 545/13; II CSK 546/13; II CSK 547/13; II CSK 549/13; II CSK 550/13, LEX no. 1487086; of 26 October 2017, II CSK 869/16, LEX no. 2419013.

¹⁸ A. Damasiewicz, *Glosa do postanowienia SN z dnia 26 czerwca 2014 r., II CSK 550/13*, 2013 [LEX database]; J. Pisuliński, *Glosa do postanowienia...*, pp. 123-131; P. Książak, *Losy hipoteki...*, pp. 882-884. This criticism was endorsed by K. Pietrzykowski, *Spółdzielnie mieszkaniowe...*, p. 255.

¹⁹ See especially R. Strzelczyk, *Losy hipoteki na nieruchomości spółdzielni mieszkaniowej w przypadku zbycia jej przedsiębiorstwa w postępowaniu upadłościowym*, Nowy Przegląd Notarialny 2014, no. 4, pp. 32-33.

²⁰ Decision of the Supreme Court of 21 March 2019, II CSK 77/18, LEX no. 2652241.

²¹ Also see the following Decisions of the Supreme Court: of 3 April 2019, II CSK 91/18, OSNC 2020, no. 1, item 1; of 18 April 2019, II CSK 137/18, LEX no. 2650245; of 19 June 2019, II CSK 298/18; of 21 March 2019, II CSK 77/18; of 8 October 2020, II CSK 769/18; of 28 January 2021, II CSK 445/20; of 19 April 2021, II CSK 493/20.

²² In order to clarify the context for our discussion, it is necessary to point out that the previously expressed viewpoint that the transformation of ownership rights to residential units pursuant to Articles 17¹⁴ and

In its Decision of 21 March 2019, the Supreme Court pointed to a few arguments supporting its position. Firstly, the Court reminded that the precondition for blanket mortgage is that there is a previously set mortgage encumbering the property at the time of its partition due to transfer.²³ At the same time, the Court pointed out that, pursuant to Article 17¹⁸ of the AHC, if a premise or its share is transferred in the course of bankruptcy proceedings to an entity that is not a housing cooperative, the cooperative ownership right to a residential unit shall be transformed into the right of independent ownership of a residential unit or into ownership of a single-family house. Therefore, as it was rightly pointed out in the jurisprudence, the acquisition of property by a purchaser who is not a housing cooperative must logically precede the transformation of the cooperative ownership right to a residential unit into the right of independent ownership of a residential unit. These events are separated by a “logical (juridical) second”²⁴: they do not occur simultaneously. As evident from the overt content of Article 313 (1-2) and Article 317 (2) of the BL, in the case of transfer of a property component of the bankrupt entity, or of an entity under bankruptcy proceedings, the mortgage encumbering that entity’s parent property expires.²⁵ This expiry occurs a “logical second” earlier than the legal effect in the form of the transformation of the cooperative ownership right to a residential unit into the right of independent ownership of a residential unit.²⁶ Thus, the ownership of a residential unit is established on a component of the “partitioned”, unencumbered property. Adopting a contrary view would lead to the conclusion that blanket mortgage encumbers only the transferred, partitioned property elements, yet it expires for the parent property as a whole.²⁷

17¹⁸ of the AHC is not an acquisition understood pursuant to Article 313 (1-20) or Article 317 (2) of the BL - which would guarantee the acquisition of the ownership right to a residential unit without encumbrances - deserves unconditional recognition. This viewpoint seems in line with numerous rulings by the Supreme Court, e.g., Decisions listed in footnotes 16 and 17 herein; Decisions of the Supreme Court of 21 March 2019, II CSK 77/18, LEX no. 2652241; of 3 April 2019, II CSK 91/18, OSNC 2020, no. 1, item 1; of 18 April 2019, II CSK 137/18, LEX no. 2650245; of 19 June 2019, II CSK 298/18. For a contrastive view, see: S. Gurgul, *Upadłość spółdzielni mieszkaniowej, dewelopera...*, p. 126.

²³ Decision of the Supreme Court of 21 March 2019, II CSK 77/18, LEX no. 2652241.

²⁴ J. Pisuliński, *Glosa do postanowienia...*, p. 125. The jurisprudence features opinions that the construction of the “juridical second” leads to a peculiar curiosity when applied in practice (T. Nowakowski, *Hipoteka łączna na nieruchomościach lokalowych powstałych w wyniku przekształcenia spółdzielczego prawa do lokalu – glosa do postanowienia Sądu Najwyższego z 18.04.2019 r.*, II CSK 137/18, *Glosa* 2020, no. 2, p. 64). Nonetheless, this objection is hardly tenable since the foundations of legal reasoning behind the concept of “juridical second” as serving to correctly determine temporal succession have successfully been applied in practice since Roman law.

²⁵ J. Pisuliński, *Glosa do postanowienia...*, p. 126. For a similar view, see: P. Książak, *Losy hipoteki...*, p. 883.

²⁶ *Ibidem*.

²⁷ *Ibidem*.

The wording of Article 241 (2) of the LMRA cannot be ignored in this case, either.²⁸ According to this regulation, in cases of where the cooperative ownership right to a residential unit is transformed into the ownership right to property in the form of a residential unit, a mortgage registered in the land and mortgage register becomes a mortgage on the residential unit. Thus, the legislator provides for a certain permanence of mortgage encumbrance, but not as regards the mortgage encumbering the housing cooperative's property, but the one encumbering the cooperative ownership right to a residential unit. Consequently, the jurisprudence indicates that *prima facie* it is not possible that the mortgage on the housing cooperative's property can at the same time begin to encumber the newly partitioned residential unit.²⁹ Moreover, one cannot exclude a case in which the property was previously encumbered with cooperative ownership rights to residential units, and only later mortgage was created. In a parallel way, it is conceivable that the mortgage encumbering the cooperative ownership right to a residential unit was created earlier than the mortgage encumbering the parent property. Approval of the original standpoint adopted by the Supreme Court would lead to the conclusion that the property right created later (mortgage) encumbers the right created as a result of the transformation of the right created earlier (cooperative ownership right to a residential unit), without any participation of persons who were entitled to the unencumbered cooperative ownership rights to a residential unit.³⁰

Moreover, it should be kept in mind that a key principle of cooperative law is that a cooperative shareholder cannot be held liable for the cooperative's liabilities (Article 19 (3) of the AHC).³¹ This principle implies that a cooperative's creditor may not execute any enforcement on the assets of the cooperative shareholder, while the cooperative's liabilities may be covered by the shares declared by the members. The consequence of the latter option is that the members may not (until the expiry of their membership) demand the return of the amounts paid for the shares, and if these payments were used to cover the liabilities of the cooperative, the members have no right to claim them back under any circumstances.³² Accepting the assumption that a person who had their unencumbered cooperative ownership right

²⁸ Act of 6 July 1982 on Land and Mortgage Registers, consolidated text: Journal of Laws of 2019 item 2204 (hereinafter: LMRA).

²⁹ P. Księżak, *Losy hipoteki...*, p. 883. For a similar view, see: M. Bednarek, *Dobijanie spółdzielczych własnościowych praw...*, p. D6.

³⁰ P. Księżak, *Losy hipoteki...*, p. 883.

³¹ A. Damasiewicz, *Glosa do postanowienia SN...*; J. Pisuliński, *Glosa do postanowienia...*, p. 127.

³² Judgments of the Supreme Court: of 23 November 2004, I CK 198/04, LEX no. 358823; of 9 May 2012, V CSK 234/11, LEX no. 1232629.

to a residential unit transformed into a mortgaged independent ownership right to a residential unit would lead to encumbrerment of other entities (not only the cooperative shareholders) with the cooperative's liabilities, though no explicit legal basis for such an action can be indicated.³³

Finally, it is impossible to ignore an extremely important argument relating to the symmetry of legal solutions. It is difficult to provide a good reason to explain why in cases where the parent real estate is purchased by a housing cooperative, the cooperative ownership rights to residential units remain unencumbered (and the mortgage encumbering the parent real estate expires), while in cases where the purchaser is not a housing cooperative, the mortgage encumbering the parent real estate expires, but the independent ownership rights to residential units created in place of the cooperative ownership rights remain encumbered. As a result of the transfer of the cooperative property, an entity that previously held the unencumbered cooperative ownership right to a residential unit acquires a formally stronger right - the independent ownership right of the residential unit. Yet, this transformed right is encumbered with the mortgage previously created on the cooperative real estate. Economically speaking, adopting this interpretative approach would imply numerous cases of lost rights to residential units.³⁴ Endorsing the previously highlighted *ratio legis* behind Article 17¹⁸ (1) of the Act on Housing Cooperatives, which prevents a pejoration of the legal status of the entity holding the cooperative right to a residential unit, eliminates this kind of incomprehensible differentiation.³⁵

Nonetheless, when justifying the position adopted in its Decision of 21 March 2019, the Supreme Court emphasised that Article 76 (1) of the LMRA is applicable in the event of partition of the mortgaged real estate property, so it applies in cases where the rights to the property components, as derivative of the right to the whole property, are extracted from the previous, non-partitioned right to the property as a whole. Meanwhile, Article 17¹⁸ (1) of the AHC does not rule that the existing right to the parent property is partitioned, but that the cooperative ownership rights to residential units are transformed into the independent ownership rights to residential units.³⁶ The acquisition of the ownership right to the entire property by those entitled to its residential units is, in this case, primary in nature, in the sense that it is independent of the rights to which the previous owner of the property was entitled. The independent ownership rights to residential units are derived from the existing cooperative ownership rights to these units, and from the ownership rights

³³ Decision of the Supreme Court of 21 March 2019, II CSK 77/18, LEX no. 2652241.

³⁴ *Ibidem*.

³⁵ A. Damasiewicz, *Glosa do postanowienia SN...*; P. Książak, *Losy hipoteki...*, p. 884.

³⁶ For a similar view, see: K. Królikowska, in: *Komentarze Prawa Prywatnego*, vol. 6a, p. 1077.

of the cooperative in general.³⁷ This analytical pathway was pursued by the Supreme Court in its Decision of 18 April 2019,³⁸ where it is argued that the transformation referred to in Article 17¹⁸ of the AHC is a case of transformation of subjective rights. In place of the limited property rights, a new right with a different content is created. In other words, the cooperative right does not expire but is transformed. If so, this legal solution cannot be qualified as a partition of real estate property, as regulated under Article 76 of the LMRA.

Noteworthy is another important argument supporting the new judicial trajectory, featured in the Supreme Court's Decision of 3 April 2019.³⁹ Investigating the legal status of a creditor of the bankrupt cooperative, the Court emphasised that a creditor obtaining the mortgage encumbering a cooperative property is aware that the value of that property, and consequently the value of the collateral, is decreased by the value of the cooperative ownership rights to residential units, which enjoy legal priority over the rights of the creditor. For this reason, the actual value of a security interest in a housing cooperative's property encumbered by the cooperative ownership rights is hard to determine.⁴⁰

Summing up, it is more than justifying in endorsing⁴¹ the view expressed by the Supreme Court in its recent judgements, which emphasizes that the role of Article 17¹⁸(1) of the AHC is to ensure that in cases of transfer of the housing cooperative's parent property through liquidation, bankruptcy or enforcement proceedings, the

³⁷ Decision of the Supreme Court of 21 March 2019, II CSK 77/18, LEX no. 2652241. For similar views in the literature of the subject, see: A. Damasiewicz, *Glosa do postanowienia SN...*; S. Gurgul, *Upadłość spółdzielni mieszkaniowej, dewelopera...*, p. 127. However, this position is critically approached by T. Nowakowski, *Hipoteka łączna...*, pp. 64-65, who argues that in the analysed cases, residential units are extracted from the partitioned property, while the division provisioned under Article 76 (1) of the LMRA applies to *any and all* changes in the substance of the real estate property leading to the partition of its constitutive components.

³⁸ Decision of the Supreme Court of 18 April 2019, II CSK 137/18, LEX no. 2650245.

³⁹ Decision of the Supreme Court of 3 April 2019, II CSK 91/18, OSNC 2020, no. 1, item 1.

⁴⁰ S. Rudnicki, *Hipoteka jako zabezpieczenie wierzytelności*, 2nd ed., Warszawa 2006, p. 42; S. Gurgul, *Zakończenie upadłości...*, p. 1022; B. Swaczyna, *Hipoteka...*, pp. 124-125; S. Gurgul, *Upadłość spółdzielni mieszkaniowej - przekształcenie...*, p. 352; idem, *Upadłość spółdzielni mieszkaniowej, dewelopera...*, p. 124; A. Sikorska-Lewandowska, *Powstanie odrębnej własności...*, p. 98.

⁴¹ This view has found recognition in the jurisprudence as manifest in the following works (among others): M. Kučka, *Hipoteka w przypadku upadłości spółdzielni mieszkaniowej. Glosa do postanowienia Sądu Najwyższego z 3 kwietnia 2019 r. (II CSK 91/18)*, *Monitor Prawa Bankowego* 2020, no. 4, pp. 56-68; K. Królikowska, *Komentarz do art. 17¹⁸*, in: *Ustawa o spółdzielniach mieszkaniowych. Komentarz*, ed. K. Osajda, 5th ed., Warszawa 2021 [Legalis database]; M. Sekuła-Leleno, *Hipoteka obciążająca nieruchomości spółdzielni mieszkaniowej w razie upadłości spółdzielni - glosa do postanowienia Sądu Najwyższego z 8.10.2020 r., II CSK 769/18*, *Glosa* 2021, no. 2, pp. 52-55. For a contrastive view, see T. Nowakowski, *Hipoteka łączna...*, pp. 62-67.

legal standing of a person who is entitled to a cooperative ownership right to a residential unit cannot undergo pejoration.⁴²

3. Mortgages on the cooperative property and the transformation of the cooperative ownership right to a residential unit pursuant to Article 17¹⁴ in conjunction with Article 54¹ of the AHC

The analysis of the judicature of the Supreme Court as regards the transformation of the cooperative ownership right to a residential unit into the independent ownership right to a residential unit under circumstances set out in Article 17¹⁸ of the AHC cannot be automatically extrapolated to the assessment of transformations under Article 17¹⁴ in conjunction with Article 54¹ of the AHC. This state of affairs was explicitly indicated in the Supreme Court's Decision of 21 March 2019, stating that "the analysed case may be evaluated differently from the cases regulated by Article 17¹⁴ of the AHC, pursuant to which a person entitled the cooperative ownership right to a residential unit may, in accordance with the wording used by the legislator, demand the transfer of their ownership of the residential unit, instead of the transformation of their right in to the independent ownership right [...]. Opposite viewpoints may also be affected by the observation that the acquisition of the independent ownership of a residential unit pursuant to Article 17¹⁴ of the AHC results from a legal transaction to which the entitled person is a party and is not instituted by law."⁴³ This observation demarcates a wide area for further considerations.

The procedure specified in Article 17¹⁴ (1) of AHC provides the entity holding the cooperative ownership right to a residential unit with a on option to submit (on meeting the conditions specified in the Act) a claim for the transfer of ownership of a residential unit. One is justified in sharing the view that the entitled persons obtained a statutory right of option to acquire ownership of a residential unit as a formative power, the exercise of which gives rise to a claim for the transfer of the ownership of a residential unit.⁴⁴

In order to clarify the context for further discussion, it should be noted that the view expressed repeatedly in the Supreme Court's judicature that the creation of the

⁴² Decision of the Supreme Court of 21 March 2019, II CSK 77/18, LEX no. 2652241.

⁴³ Ibidem.

⁴⁴ A. Bieranowski, *Realizacja uprawnień z art. 17¹⁴ ustawy o spółdzielniach mieszkaniowych a małżeńska wspólność majątkowa*, Rejent 2008, no. 12, pp. 21-23; K. Królikowska, in: *Komentarze Prawa Prywatnego*, vol. 6a, p. 1045.

independent ownership of a residential unit, which is part of the housing cooperative's assets, and then its transfer to a person who previously held the cooperative ownership right to a residential unit, or more precisely the transformation of the cooperative ownership right to a residential unit into the independent ownership right, does not represent a form of sale of the bankrupt's assets under bankruptcy proceedings. First of all, asset sale under bankruptcy proceedings requires payment of a price for the object or right that is transferred to the purchaser, and the proceeds obtained thereby are used to satisfy the bankrupt's liabilities.⁴⁵ Obviously enough, in the case of exercising the right provisioned by Article 17¹⁴ of the AHC, the equivalent of the cooperative right to a residential unit or the independent ownership of a residential unit is not transferred to the bankruptcy assets, and the resultant payments, if any, are practically ignorable.

The above remark allows us to verify the adequacy of the statutory definition of the essence of the agreement specified under Article 17¹⁴ (1) of the AHC. For in this case, the legislator uses the term *transfer of the ownership of a residential unit*, which could suggest that factually it is only about the creation of the independent ownership of a residential unit and its consequent transfer to the entitled party. However, this interpretation would be incomplete, to say the least. In essence, what happens in these cases is that the cooperative ownership right to a residential unit, the cooperative right to a utility property unit or to a single-family house in a housing cooperative is *transformed into the right to independent ownership of a residential or (other property) unit or of a single-family house*. The execution of the claim results in the expiry of the cooperative right that originally encumbered the cooperative's property, and in the creation in its place of a right with more intense content, and then its consequent transfer to the holder of the right that expired.⁴⁶

The interpretation of the case at hand in terms of rights transformation is further supported not only by the overt content of Article 17¹⁴ of the AHC, which refers only to cases in which the entitled person holds the cooperative ownership right to a residential unit but also by the wording of the already mentioned Article 24¹ (2) of the LMRA in conjunction with Article 45 (3) of the AHC, according to which in cases of the transformation of the cooperative ownership right to a residential unit into the property ownership right, the land, and mortgage register

⁴⁵ See e.g., Decisions of the Supreme Court: of 14 January 2011, II CSK 361/10, LEX no. 1027166; II CSK 364/11, LEX no. 785547; of 27 February 2014, II CSK 349/13, LEX no. 1477433; II CSK 361/13, LEX no. 1475159; of 21 March 2019, II CSK 77/18, LEX no. 2652241; of 3 April 2019, II CSK 91/18, OSNC 2020, no. 1, item 1; of 18 April 2019, II CSK 137/18, LEX no. 2650245; of 19 June 2019, II CSK 298/18.

⁴⁶ Decisions of the Supreme Court of 14 January 2011, II CSK 361/10, LEX no. 1027166; II CSK 364/11, LEX no. 785547.

kept for the cooperative ownership right to residential units is transformed into the land and mortgage register for the real estate property. Consequently, the mortgage entered in the land and mortgage register for the cooperative ownership right to a residential unit encumbers the real estate property in the form of a residential unit. Article 45 (1) of the AHC expressly provides that upon the conclusion of an agreement on the transfer of the ownership of a residential unit to which a shareholder, or a person who is not a shareholder, holds the cooperative ownership right to a residential unit, or the cooperative right to a utility property unit, including the cooperative right to a garage (parking lot), the mortgage created on such limited property rights shall encumber the real estate arising on concluding the agreement on the transfer of the ownership of the property item.

From the point of view adopted in this article, the difference outlined above is far more than just a semantic nuance. As already mentioned, from the legal and economic points of view, the transformation of the ownership right to a residential unit into the independent ownership right to a residential unit is a completely different legal transaction if compared to a (typical) creation of the independent ownership of a residential unit and its consequent transfer to another person in circumstances where the property is not encumbered with the ownership rights to residential units. The value of the property encumbered with the independent ownership right to a residential unit is significantly lower (and from the market point of view it is virtually none) than the value of unencumbered property. This observation returns us to the issue of whether the transformation of the cooperative ownership right to a residential unit into the independent ownership right constitutes a case of partition of the real estate property as provisioned by Article 76 LMRA, regardless of whether it occurs *ex lege* (as already discussed), or results from agreement.

Until recently, the judicature⁴⁷ and the literature of the field⁴⁸ have recognized that the creation of the independent ownership right to residential units represents a typical case of the real estate partitioning, and this qualification applies to both its legal and economic dimensions. For that reason, pursuant to Article 76 (1) of the LMRA, it was assumed that each partition of real estate by establishing independent

⁴⁷ First and foremost, see the following Resolutions of the Supreme Court: of 21 December 1974, III CZP 31/74, OSNC 1975, no. 9, item 128; of 25 June 1991, III CZP 55/91, OSNC 1992, no. 3, item 40; of 8 December 2017, III CZP 77/17, OSNC 2018, no. 12, item 113; Decisions of the Supreme Court: of 13 April 2005, IV CK 469/04, LEX no. 277376; of 9 December 2015, II CSK 22/15, LEX no. 197719; of 20 May 2016, II CSK 527/15, LEX no. 2052447.

⁴⁸ Among others, see: G. Bieniek, *Odrębna własność lokali w budynkach spółdzielni mieszkaniowych po 31 lipca 2007 r. (cz. II)*, Rejent 2007, no. 12, p. 19; T. Czech, *Księgi wieczyste i hipoteka. Komentarz*, Warszawa 2014, p. 965; Ł. Przyborowski, in: *Księgi wieczyste i hipoteka. Komentarz*, ed. J. Pisuliński, Warszawa 2014, p. 857; J. Pisuliński, *Glosa do postanowienia...*, p. 126.

ownership on at least one property unit within the mortgaged parent property previously owned by a cooperative, and consequently, transferring the ownership of this unit to another person results in creation of blanket mortgage on the extracted property and its non-partitioned part.⁴⁹ If, according to *opinio communis*, the regulation under Article 76 (1) of the LMRA concerns an act of physical partitioning of real estate property,⁵⁰ interpreting the creation of the independent ownership of a property unit in terms of real estate partitioning must lead to the corollary conclusion that this partitioning leads to the creation of the blanket mortgage that encumbers this independent ownership of an extracted property unit.

This interpretation is supported directly by the wording of Article 76 (4) the LMRA, according to which *in the event of partitioning of real estate that consists in the creation of the independent ownership of property units* or extraction from the real estate property of an independent real estate with a single-family house, the purchaser of the extracted real estate property unit may demand that the mortgage be divided in proportion to the value of the real estate unit created through the partition. However, if the method of mortgage partitioning has been specified in the mortgage deeds, and recorded in the land and mortgage register, the partitioning takes place according to the provisions of the mortgage deeds.⁵¹ Thus, the quoted provision explicitly assumes that the creation of the independent ownership of a residential unit constitutes a partition of the real estate, which justifies the conversion of the mortgage encumbering the parent property into the blanket mortgage encumbering the parent property and the extracted property item. Moreover, Article 76 (5) of the LMRA rules that in the case of partitioning of real estate property, the mortgage encumbering the real estate shall not encumber the real estate created by the partitioning, when the new property items are extracted through a claim filed in the land and mortgage register prior to the creation of mortgage.

⁴⁹ See the judicature cited in footnotes 16 and 17 above.

⁵⁰ Among others, see: J. Wasilkowski, *Hipoteka łączna*, *Demokratyczny Przegląd Prawniczy* 1947, no. 9, p. 11; A. Oleszko, *Podział nieruchomości obciążonej a wpis hipoteki łącznej z urzędu*, *Rejent* 2004, no. 5, pp. 11-12.

⁵¹ The above mentioned wording of the regulation was enforced as of 20 February 2011 by the Act of 26 June 2009 amending the Act on Mortgages, Land and Mortgage Registers and certain other acts (Journal of Laws no. 131, item 1075). Originally, it was assumed that successively extracted property units become subject to blanket mortgage; for more details, see: J. Ignatowicz, *Glosa [do uchwały Sądu Najwyższego z dnia 28 października 1993 r., III CZP 145/93]*, *Orzecnictwo Sądów Polskich* 1994, no. 7-8, pp. 362-363. For more detail on the partitioning of mortgage under Article 76 (4) of the LMRA, see: K. Pałka, *Podział zabudowanej nieruchomości obciążonej hipoteką (uwagi na tle znalezionego art. 76.4 u.k.w.h.)*, *Monitor Prawa Bankowego* 2011, no. 4, pp. 48-55.

However, the literal interpretation of the regulation at hand raises serious reservations. It is worth reminding that mortgage covers the real estate together with its appurtenances and remains on the real estate as a whole until the debt it secures expires (Article 84 of the LMRA). Further changes to the property do not affect the legal position of the mortgagor.⁵² Hence, pursuant to Article 76 (1) (1) of the LMRA, in the event of the partitioning of real estate property, the mortgage encumbering the real estate shall encumber all the property items created through the partitioning (*ex lege* blanket mortgage).⁵³ As underlined by the Supreme Court, in the case of mortgage, there is no change in its content, but only – as dictated by the creditor’s interest – a transformation consisting in the legal adaptation of the collateral to the situation after the partitioning of the mortgaged real estate.⁵⁴ In such cases, the mortgage previously encumbering a given property item is transformed into the mortgage which, encumbering new items created through the partitioning, serves to secure the same interest as *ex lege* blanket mortgage. The institution of a statutory blank mortgage is intended to protect the mortgagor against actions connected with the partitioning of the real estate under the mortgage that would not require the mortgagor’s direct consent. Taking into consideration the above *ratio legis* behind blanket mortgage, it is pointed out that the legal event that leads to the creation of blanket mortgage is the partitioning of the mortgaged real estate property, i.e. a physical partition of the real estate made through an agreement, court judgment or by law, which results in the creation of two or more real estate property items out of the original real estate property previously mortgaged.⁵⁵

When we apply the above mentioned qualities and characteristics of *ex lege* blanket mortgage to cases where the cooperative ownership right to a residential unit is transformed into the independent ownership right (both in the case of transformation provided for under Article 17¹⁸ of the AHC as well as in the case of claim enforcement under Article 17¹⁴ (1) of the AHC), it becomes obvious that in such cases the rights to the particular property items are not derivable from the previously applicable right to the property as a whole. On the contrary, in such cases the

⁵² Among others, see Resolution of the Supreme Court of 20 March 2003, III CZP 1/03, OSNC 2004, no. 1, item 3.

⁵³ It is worth noting here that the regulation provisioned under Article 76 (1) of the LMRA does not apply to cases where real estate property is encumbered with the cooperative right to a residential unit; this view is also advocated for by T. Czech, *Księgi wieczyste...*, p. 968.

⁵⁴ Resolution of the Supreme Court of 14 July 1994, III CZP 85/94, OSNC 1995, no.1, item 3.

⁵⁵ *Ibidem*; Decisions of the Supreme Court: of 8 March 2007, III CSK 356/06, LEX no. 278687; of 11 February 2016, V CSK 375/15, LEX no. 2004221; of 19 October 2016, V CSK 128/16, LEX no. 2166390; of 23 February 2017, V CSK 382/16, LEX no. 2661752; of 24 January 2018, I CSK 230/17, LEX no. 2483683; of 3 April 2019, II CSK 91/18, OSNC 2020, no. 1, item 1.

cooperative ownership right to a residential unit is subject to transformation into the independent ownership right to a residential unit. A potential legal continuity of the collateral is to be sought not in the relation between the whole property and the independent ownership of a particular property item, but between the cooperative ownership right to a residential unit and the independent ownership of a residential unit. This continuity is provided for directly by the land and mortgage laws already mentioned. In turn, the property and the mortgage partitioning resulting from Article 17¹⁴ of the AHC has its roots not in the property ownership rights, but in the encumbrance of the property with a limited property right in the form of the cooperative ownership right to a residential unit. The encumbrance of the cooperative property with the cooperative ownership right to a residential unit, on the one hand, and with mortgage, on the other, represents independent, but in fact convergent encumbrances on the property. Hence, undoubtedly, the mortgage encumbering the parent property is not the mortgage encumbering the cooperative ownership right to a residential unit. However, pursuant to Article 24¹ of the LMRA, only the latter kind of mortgage may encumber the newly created property ownership.

Moreover, it cannot go unnoticed that treating the transformation of the right to a residential unit pursuant to Article 17¹⁴ of the AHC in terms of the real estate property partitioning, as provisioned under Article 76 (1) of the LMRA, leads to an economic and legal differentiation in the status of persons who transformed their rights by means of an agreement concluded with a receiver against those persons whose rights were transformed pursuant to Article 17¹⁸ of the AHC, even if these events were separated in time by only a factual second. Moreover, this interpretation deprives persons with the cooperative ownership rights of legal protection, as it imposes on them the burden of obligations secured by the mortgage on the cooperative property, even though a creditor obtaining security interest on property encumbered by cooperative ownership rights to residential units must possess awareness of the illusory value of this security. If the cooperative ownership right to a residential unit is entered into the land and mortgage register before the mortgage, there can be no doubt that the mortgage cannot be exercised to the detriment of this right (*argumentum ex* Article 249 (1) of the Civil Code in conjunction with Article 12 (1) of the LMRA). From the wording of Article 11 of the LMRA - which rules that a limited property right to real estate recorded in the land and mortgage register has a priority over a right not recorded in the register - it could be inferred that the holder of the cooperative ownership right to a residential unit who failed to record his right in the register is deprived of protection. However, this is not the case, because numerous procedural regulations prove a completely opposite status

of persons entitled to the cooperative ownership right to residential units (Article 1000 (4) of the Code of Civil Procedure, Article 17¹⁸ of the AHC). Finally, the *ratio legis* of the regulation set forth in Article 17¹⁴ in conjunction with Article 54¹ of the AHC in conjunction with Article 86 of the BL cannot be ignored. Similarly, to the institution under Article 17¹⁸ of the AHC, the purpose of this latter provision is to protect the rights of persons entitled to the cooperative right to a residential unit when their housing cooperative is subject to bankruptcy proceedings: it is to guarantee that their legal status will not undergo pejoration. This fact becomes particularly conspicuous when one realizes that should the receiver be not notified of a claim to create the independent ownership of a residential unit, and to transfer it to the person who was entitled to the cooperative ownership right to a residential unit, and in the course of bankruptcy proceedings a sale of the real estate from the cooperative's assets encumbered with cooperative ownership rights to residential units to an entity other than a housing cooperative took place, the cooperative ownership right to a residential unit would have been *verba legis* transformed under Article 17¹⁸ (1) of the AHC into the independent ownership of a residential unit devoid of mortgage encumbrance.

To conclude, in the case under analysis, priority should be given to the systematic and teleological interpretation of law and judicature over the literal one. The former interpretation leads to a conclusion that the provisions of Article 76 (1) of the LMRA refer to cases where mortgage is established on property that is not encumbered with limited property rights, and then the property is subject to partitioning, e.g. by establishing separate ownership of at least one residential unit. Consequently, the exercise of the claim under Article 17¹⁴ of the AHC does not exhaust the conditions for the partitioning of property as provisioned under Article 76 (1) of LMRA, and therefore, there are no grounds for registering blanket mortgage to encumber the ownership right to a residential unit as created under Article 17¹⁴ of the AHC together with the parent property.

Conclusions

The social significance of housing cooperatives and the constitutional guarantee of the right to a dwelling requires that the interpretation of the provisions of the Bankruptcy Law, the Code of Civil Procedure, the Act on Housing Cooperatives, and other regulations consider the need to balance the interests of the housing cooperatives' creditors and the persons entitled to the cooperative ownership rights to residential

(and related property) units. The tension evident in the Supreme Court's judicature demonstrates that it is possible to effectively defend each of the solutions outlined and discussed above. Nonetheless, it is argued here that satisfactory results are available using a handful of interpretative approaches, yet the key vitality of the problems under scrutiny lends support to the conclusion that solving them should not be left solely to the judicature but requires a definitive intervention of the legislator.

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