NOTES ON JURISPRUDENCE: THE LEASE OF STATE PRIVATE PROPERTY AND ITS INTUITU PERSONAE NATURE*

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Abstract

Starting from a case of the jurisprudence of the Cluj Court of Appeal, this study probes into the different aspects of the contract of lease for lands pertaining to the State's private domain (that is, under the Local Council's management) through which the lessees, in consideration of certain special criteria, procure the right to employ the land for a fixed term of 99 years, in order to build individual housing units. The fundamental issue that needs to be addressed is whether the lesser can one-sidedly increase the rent due to the fact that a third party buyer, to whom the initial lessee sold the building, failed to comply with the special conditions that led to the initial abatement of rent. It is reasonable to assume that such a decision would be illegal taking into account that the lease contract has a civil nature and not an administrative one (as a result the lesser cannot unilaterally alter the contract) and, on the other hand, the fact that this type of contract does not retain its *intuitu personae* nature throughout its period of enforcement (considering the provisions under art. 41 of Law no. 50/1991 on construction permits), even though that attribute was essential at the moment when the contract was concluded.

Keywords: state private property, contract of lease, public authorities, abatement of rent, administrative contract, civil contract.

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1. Introduction

The starting point for this study is a case[1] from our recent jurisprudence, case concluded by the Cluj Court of Appeal according to Decision no. 2522/2010. The factual background is mentioned above.

By means of a lease contract concluded in 2001, between the Cluj-Napoca Local Council (as lessor) and a natural person (as lessee), the latter obtained the right to use, for a fixed term of 99 years, a land that was included in the private domain of the City of Cluj-Napoca. The same contract also bound the lessee to erect specific buildings on the property (buildings that, essentially, were to serve his own private interest and not the public interest), in accordance with the specifications and based on the construction permit to be issued by the relevant authorities. All such works, including the linkup to the utilities networks in the area had to be performed exclusively by the lessee. Moreover, the rent was set for the entire time span of 99 years and the whole amount had to be paid in five annual installments.

Another important aspect to be taken into account is that, according to a decision of the Local Council, the lease provided an abatement of rent for people belonging to certain categories (e.g. employees of the City Hall, young married couples under the age of 35), up to 95% of the total amount of the rent, and the lessee fulfilled the criteria mentioned above.

Subsequently, in order to enforce the terms of the contract, the lessee obtained the required construction permit and urban development certificate in order to build a duplex house (a house divided into two units). The contract was not preceded by a public auction but was allocated directly to the lessee for that specific purpose: "in order to build a duplex-house". Also, the lessee paid the whole amount of the rent for the fixed term of 99 years. After the construction was completed (the building consisted of two apartments), the lessee sold to a third party one of the apartments, transaction which was made by a deed. According to an express provision of the sale-purchase contract, the lessee transferred alongside with the property right over the apartment a quota of the lease rights over the land.

After the conclusion of the sale-purchase contract, the buyer filed an application addressed to the Cluj-Napoca Local Council, requesting that the Council adopts a decision by which to ratify the transfer of the rights he obtained through the lease contract. The Council addressed the request by adopting the decision but it was clearly stated that since the new owner of the apartment did not fit the criteria that led to the abatement of rent, he had to pay the remaining 95% of the initial rent.

The buyer filed an administrative complaint against that decision. The court of first instance dismissed the action on the grounds that, taking into account the *intuitu personae* nature of the lease contract, the right to enjoy the abatement of rent cannot be passed on to a third party. Therefore, it is only natural that the buyer be bound to

1 This, however, is not a unique case as the courts in Cluj-Napoca have yet to rule in many similar cases.

pay the rent as it was initially set. The Cluj Court of Appeal, judging the appeal, by Decision no. 2522/2010, ruled in favor of the plaintiff (buyer-transferee), deeming that the lease is a civil contract and not an administrative one, such a contract being *intuitu personae* only as far as its conclusion is concerned and not also subsequently during its performance. Therefore, the exemption from paying 95% of the rent is transferable, and for that reason the contested provision was set aside.

As it can be easily deduced from the factual background as described above, the legal controversies stem from the question whether the rights of the lessee, rights that originate from a lease contract in which the other contracting party is the local public authority, can be transferred. Obviously, the conclusion of this debate rests entirely on the *intuitu personae* nature of the contract. For a detailed analysis of this matter, we shall begin by addressing the issue of the legal nature of the contract for lease of goods as an administrative contract, in its traditional meaning (section 2), then we will continue with the legal analysis of the lease contract described in this specific case (section 3) and finally, we will formulate our brief conclusions with regard to the case under review (section 4).

2. The lease contract in its "traditional" meaning: administrative contract

In the case at hand, by the decision against which the complaint was filed, the lesser basically made an unilateral alteration to the lease contract by increasing the amount that the new lessee had to pay as rent, simultaneously accepting the conveyance of rights made by means of a sale-purchase agreement. Or, in order to conclude if the unilateral alteration brought to the lease is legal or not, we must first establish its legal nature: administrative contract or civil contract? Firstly, however, in order to have something to which to compare the lease to, we will proceed to a double analysis: (1) on the one hand, that of the legal nature of the lease contract for the private property of the State, starting from its legal definition; (2) on the other hand, the consequences (effects) resulting from deeming a legal transaction as an administrative contract.

2.1. The definition of the property lease contract – a subcategory of administrative contracts

In accordance with the definition[2] provided by article 2 section 1(c) second thesis of Law no. 554/2004, the specific object of an administrative contract is: (a) to capitalize on public property, (b) performing public interest works (c) or performance of public services. The common denominator of all the conjunctures in which an administrative contract is formed is the idea of a public interest (Richer, 2004, p. 65) that needs to be protected through creating and later on, enforcing such a contract.

2 Art. 2 line 1 of Law no. 554/2004 "[…] are considered to be administrative acts, within the terms of this law, the contracts formed by public authorities with the purpose of capitalizing public property, carrying out public services, completing works of public interest; special laws can stipulate other types of contracts for which any related case will be heard by the administrative courts."

The inference that administrative contracts are also formed in order to serve the public interest is apparent in art. 1 of Law no. 219/1998 on leases [3], which mentions "activities and public services of national or local interest" or "the obligation of capitalizing goods, activities or public services". Further, the regulations that are in effect concerning the lease of goods (Government Emergency Ordinance no. 54/2006) clearly reinforce this idea[4].

A lease contract is somewhat of a "hybrid legal act", a "mixed act"[5] that can be placed halfway between a unilateral instrument and a contract, if we are to cite an already famous quotation from the French doctrine (Madiot, 1971). Basically, this *sui generis* contract represents an agreement between the lesser and the lessee[6], agreement that represents the foundation on which another normative administrative act is based – the specifications (Chapus, 1999, pp. 467-476); this is the mechanism that allows the administrative contract to be unilaterally altered or discharged if and when the public interest demands it. We will note therefore that public interest has to be taken into account when the contract is concluded, but it must also be a constant part of its enforcement. This is why the contracting parties are not – and cannot be – equal from a legal standpoint: always, by its very nature, the lease contract implies that the lesser has more rights than the lessee. In other words, the lesser holds special prerogatives, resulting from "the exorbitant clauses" of the contract[7]. Those provisions are not specific to civil contracts, either because they would be illicit or because, traditionally, the contracting parties do not intend to use them (Vedel, 1956).

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3 See also Law no. 219/1998, that has been revoked, considering the fact that when the contract was concluded this was the law in effect.

4 The contract of lease for goods belonging to public property (lease contract) represents the contract concluded in a written form through which a public authority (lesser) transferred, for a fixed term, to another person (lessee), the right and the obligation to use an asset from the public property in exchange for paying an amount of money as rent (art. 1 line 2).

5 The theory of the administrative contract was elaborated at the end of the 19th century in order to allow public authorities to have a say in business matters without getting directly involved (in the era when economic liberalism dogma was all pervasive the State was very reluctant to get involved in such activities). Therefore, the State preferred rather to entrust such ventures to individuals by means of public service leases, administrative contracts basically (Vlachos, 1993, p. 183). The purpose of creating this type of contracts was to conciliate the public interest with the private one, of the lessee. In general, the civil contract was not an option, as the public interest could not be served by means of an inflexible agreement, and neither was the administrative contract, that was disadvantageous to the lessee, his rights being extremely precarious. And, though for a long period the public administration had the possibility to choose between a civil contract and an administrative one (Vedel, 1973, pp. 228-229), currently it has this option only if a text of law acknowledged it expressly; otherwise, the administrative legal regime is mandatory.

6 The meeting of two wills and the understanding to enter into a contract is a necessary prerequisite because a simple exchange of agreements preceding the issuance of an unilateral act does not automatically transform it into a contract (Bruère, 1996, p. 1715).

7 In general, these clauses reflect the presence or the requirements of general interest in the convention concluded (Dupuis *et al.*, 2007, p. 431).

2.2. The consequences of defining a legal transaction as an administrative contract

Out of all these consequences, two are relevant to the case at hand and those are: (a) that referring to the nature of the right obtained by the lessee and (b) that which refers to the *intuitu personae* nature of this contract.

a) Once a lease contract whose purpose is to capitalize on public property is concluded, the lessee obtains a real administrative right over that specific good. It is a real right – a dismemberment of the public property right, somewhat similar to the *ususfructus* under private law, as basically it is made up of two prerogatives: *usus* and *fructus*, as the lessee has the right but also the obligation to capitalize the asset belonging to the public domain. It is, however, a precarious right (with regard to its existence and its content), because its existence revolves around the public interest: the administration can unilaterally revoke the lease, in which case the lessee loses the real right he had over the leased immovable property or to alter it, which leads to the adjustment of the initial content of the lessee's right.

Hence, according to a well-known idiom, the lease does not entail abandonment (Chapus, 1999, p. 472): the lesser has to ensure that the public interest is being served throughout the enforcement of the contract.

b) One of the most important aspects of a lease contract is its *intuitu personae* nature, as the contract is concluded taking into account certain criteria that are satisfied by the person of the lessee (the ability to capitalize the public property by completing works of public interest or carrying out public services) in order to satisfy the public interest.

(i) On the one hand, this nature of the contract must always exist when the contract is concluded, specifically when the public auction takes place (or any other form of competition) so that the public authority can opt for the best offer. Thus, obviously, the only factor that will influence the decision of the administration is the potential lessee's capacity to serve the public interest; the contracting party will be the one that makes the best offer.

(ii) For the entire period in which the contract is being enforced, the distinctive traits that the natural person possessed at the beginning must be retained. This requirement derives from the fact that "the subletting of the lease contract is strictly forbidden" (and, *a fortiori*, the transfer of such a contract), prohibition clearly stated by the art. 28 (6) of Law no. 219/1998 which imposes that every lease contract stipulates an interdiction to sublet.

The reason behind this interdiction to sublet or to transfer to a third party is one that has already been emphasized: the lessee has to keep the characteristics that determined the administration to select him as contracting party throughout the term of the contract. Otherwise, the public interest would not prevail as chances are that the lessee is no longer the person best qualified to guarantee the protection of the public interest. Moreover, the principles that guide the public auction could easily be circumvented if the winner assigned his right to another person whom he outclassed at the public auction or to a person who did not even take part in the auction.

3. A "pseudo-lease": the lease to serve a private interest, regulated by Law no. 50/1991

Taking into consideration the fact that in the case up for discussion, the lesser unilaterally altered the lease contract long after it was concluded, we need to establish if this is an administrative contract, in which case the lesser would have the special right to unilaterally modify the terms of the agreement. In order to do so (1) we must first ascertain the legal nature of the lease contract (2) afterwards, that of the lessee's right (3) in order to eventually determine whether it is an *intuitu personae* right or not.

3.1. The legal nature of the lease contract: civil instrument

In order to establish whether the contract concluded in the analyzed situation is an administrative one we must first determine if the guidelines that define this category of agreements are applicable.

Or, it is worth reminding that a traditional lease contract must serve the public interest. It cannot be alleged that this was the goal of forming the contract under review. No such interest is served by leasing land to a natural person, based on the fact that he is an employee of the Cluj-Napoca City Hall (*intuitu personae* nature), in order to build a house meant for personal use. On this assumption, we are lead to conclude that "the public authority places itself rather voluntarily in the position of a private person, concluding common law contracts" (Debbasch, 1998, p. 304).

Therefore, the contract is actually a lease meant to provide for a private interest[8], a contract by which the private domain of the city of Cluj-Napoca is being capitalized and which represents only a cheap replica of the lease contract in its traditional meaning. The name is the only characteristic that the two types of contracts have in common.

As a result, as the contracting parties are bound through a contract and as this contract is obviously not an administrative one since it does not come within the purview of art. 2 (1) of Law no. 554/2004, *per a contrario*, this agreement can only be of a civil nature and thus, its validity and legal consequences must be determined in accordance to Law no. 50/1991 and art. 969 of the Civil Code.

On the other hand, we must take notice of the fact that after concluding such a contract, completing the building and paying the whole amount of the rent, the lesser lost any power he had over the land. Such a lease would be equivalent to abandonment. This can only come to reinforce the conclusion that was already drawn: this contract is not a real lease contract.

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8 Thereby, the purpose of the contract in question was to serve the personal interest of the lessee, that of building a house on the private domain of the State. The house for which the construction permit was issued was used only for the personal benefit of the lessee. In contrast to the finding in this particular case also relevant is the definition given by German law to administrative contracts: a contract by means of which a legal relation relevant for the public law domain is established, modified or set aside (Maurer, 1994, pp. 362-363; Autexier, 1997, p. 258). Yet another reason for which the contract under scrutiny cannot be an administrative one is because the legal relation created is rather relevant for private law.

3.2. The nature of the lessee's right: civil, not administrative right

As the contract represents a lease meant to serve a private interest (or a contract for lease of constructions as the Law no. 51/1991 defines it) it must be stressed that this contract will be enforced by applying different principles than those applicable to the lease contract in its traditional meaning.

Therefore, the lessee's right is a real civil right (and not an administrative one) which shares most of its traits with the superficies right – the dismemberment of the private property right.

a) It is a real right, and not a personal one, because, on the one hand, it regards strictly the asset (the land) – *jus in rem*, and not the lessee as a person (*jus in personam*). On the other hand, it must be brought to notice that, ever since 1864, when our Civil Code came into effect, our civil law was unfavorable to perpetual personal rights, as art. 1415 abolished the existing ones, more specifically the "embatic" ("besman") and "emfiteoza"[9]. Therefore, a personal right with a fixed term of 99 years cannot be accepted in the present legal framework. As a result, the lessee's right is a dismemberment of the private property right over the land belonging to the city of Cluj-Napoca.

b) It is a stable civil right, not a precarious one, because, since the public interest is not served through this contract and the contracting parties did not establish otherwise, a civil contract cannot be unilaterally altered or discharged. Considering this, we cannot regard this right as being a precarious one.

3.3. The intuitu personae nature of the lease contract

It has to be reemphasized that, in the case at hand, initially, one of the deciding factors that led to the conclusion of the contract was the fact that the lessee was an employee of the Cluj-Napoca City Hall; thus, the *intuitu personae* nature of the contract and of the lessee's right is beyond controversy.

However, this *intuitu personae* nature of the contract in question, though it undoubtedly existed when the contract was formed, was not retained throughout its enforcement. Some of the aspects most relevant in this matter are as follows:

a) Art. 41 of Law no. 50/1991 explicitly allows the transfer of the lessee's right alongside with the transfer of the property right over the building. Unlike the "common

9 Art. 1415 of the Civil Code: "The hereditary leases, that are presently in effect, named emfiteoza, or embatic (besman) are maintained. They will be regulated by the laws in force at the moment when they came into existence (line 1). From now on, they can no longer be constituted (line 2)". However, art. 1415 line 2 is no longer in effect as through art. 7 of the Law for agrarian reform from 14 July 1921, published in the Official Monitor no. 82 from 17 July 1921, the land over which such rights were constituted were expropriated and given to the ones that had an embatic or emfiteoza right. In other words, by the effect of the law the embatic, a personal right, became a property right. This judicial nature of the right is not, however, unanimously accepted as some authors (Hamangiu *et al*., 2002, p. 311) considering the "emfiteoza" right to be a real right (as initially they were perpetual and later were reduced to a maximum of 99 years), transferable.

law" pertinent to administrative contracts, the conveyance of the rights resulting from a lease contract is tolerated.

b) The contract does not stipulate that the property is rendered incapable of transfer. In case the lesser would have desired only for the lessee to enjoy the abatement of rent, he could have easily used such a temporary inalienability clause. Moreover, the lesser could have made certain, through the terms of the contract, that he has the option to withdraw or to repurchase in case the lessee transferred his right over the public domain. Since such a clause was not included in the contract, the "common law" must be applied: the goods must be in a perpetual motion.

c) Furthermore, the provisions of Law no. 219/1998 on leases (the normative act in effect at the moment of the conclusion of the contract) in reference to the prohibition to sublet cannot be invoked either. While art. 1 (2) of Law no. 219/1998 sets down the rule that a lease contract can have a fixed term of up to 49 years, the contract under review was supposed to be in force for 99 years, commencing with the date of the Local Council Decision by which the contract was formed (in the year 2001). This clearly indicates that the local administration intended for the special law to be applied to the contract (Law no. 50/1991) and not for the common law on leases (Law no. 219/1998).

4. Brief conclusions

Having set the general terms of the discussion, we can proceed to summarize our conclusions:

a) As a result of the formation of the lease contract, the private property right of the city of Cluj-Napoca was dismembered: the city (through the Local Council) retained a sort of a bare ownership (for 99 years) while the real civil right[10] is assigned to the lessee. This right that was strengthened by carrying out all the tasks (erecting the building for which the building permit was granted and the complete payment of the rent) has two fundamental distinctive traits:

(i) It is a real right that emerges (in contrast to the right of tenancy, a personal right, which emerges and is enforced gradually) when the contract is formed, and was reinforced when the construction was completed and the rent was fully paid.

(ii) It is transferable, according to art. 41 of Law no. 50/1991, especially if we consider the fact that the lesser did not incorporate in the contract a temporary inalienability clause.

b) The lessee sold to a third party not only the property right over the apartment but also a quota of the rights stemming from the lease contract, a perfectly valid and legal operation. The buyer, when the contract of sale was concluded, paid the price which included the value of the apartment and the value of the superficies right (attached to the acquired property).

10 This civil right is basically identical to the superficies right with the sole difference that this right has a fixed term of 99 years while the superficies right lasts only as long as the building exists.

Hence, the real right obtained by the lessee through the lease contract was transferred to the buyer by means of the sale contract.

c) After the sale contract was formed, the Local Council decided to impose on the buyer a higher amount as rent, as *quid pro quo* for the fact that the Council had acknowledged that the rights from the lease had been transferred. This decision can have one of two meanings: (i) either this decision alters unilaterally the initial contract or (ii) a quota of the land is being re-leased to the buyer. Regardless the decision, it contravenes legal provisions.

(i) The contract under review is not an administrative one that can be altered unilaterally by the lesser, but it is a civil one that can only be revoked by mutual agreement or in cases determined by law (art. 969 (2) Civil Code). The initial lessee did not consent to the dissolution of the contract and the law in effect at that time (Law no. 50/1991) did not stipulate that the contract is rescinded if the rights are transferred. Moreover, art. 41 of Law no. 50/1991 even regulates a case in which the lease right over the land is transferred: when the right over the construction is assigned.

(ii) Furthermore, to impose an additional rent to the new lessee is illegal as the lesser does not have anything more to give in return to the lessee. After the lease was concluded, the city was left only with a partial property right and thus cannot transfer another leasehold over the same land. Therefore, by increasing the rent, the Local Council is trying to lease again the same land without previously having set aside the initial contract. The lesser, in order to be able to impose a new rent and conclude a new contract, should have firstly revoked the rights of the initial lessee.[11] Nevertheless, the Council did nothing in this respect and even more, did nothing about the contract of sale. In other words, the Local Council imposed a rent for a right that belonged to another person.

Only if the lease right had been a personal one, that should have been acquired gradually by the lessee, the decision of the Local Council could have been explained, at least in theory. It could have been argued that the lessee was given the lease right only until he transferred it to another person and considering that the lesser did not meet the criteria to benefit from the abatement of rent, it was only rational for him to pay the whole amount of the rent. However, from a legal point of view, this hypothesis is fundamentally wrong.

(iii) Once the contract is concluded and enforced, it loses its *intuitu personae* nature. This is the only logical conclusion since art. 41 of Law no. 50/1991 tolerates the possibility of transferring the rights resulting from the lease contract.

In case of a "traditional" administrative lease, the passing away of the lessee leads inevitably to the lapse of the contract[12]. However, in the case at hand, if the lessee had

11 This would have also been illegal, as a party can not partially terminate a civil contract if this was not allowed by a legal provision or a contractual claim. However, we discussed this possibility because only in this situation the Local Council would have had full rights over the land and, at least theoretically, the new lease contract would have an object.

12 The typical situation that best exemplifies this is that of the lease for a pharmacy. It is implied that the lessee must be, when the contract is concluded and later on, a pharmacist.

passed away, his lease rights would have been passed to his heirs alongside with the property right over the construction and the Local Council would have been unable to adjust the rent even though the successors would not have met the criteria that compelled the authorities to diminish the amount of the rent.

In conclusion, as long as the legal provisions do not differentiate between an *inter vivos* and a *mortis causa* conveyance, neither should we.

d) Without resuming the controversies that surround the implementation of art. 1 (6) of Law no. 554/2004, it is beyond doubt that when the contract of sale was concluded, the lease right became part of the civil circuit. It is therefore obvious that from that moment on the authority that issued the act cannot unilaterally alter or revoke it without a legal provision or a contractual clause that specifically allows it.

e) In conclusion, we must emphasize the consequences that will ensue from declaring legal the decision of unilaterally altering the amount of the rent. As the contract of sale has two objects (the property right over the apartment and a quota of the lease rights) the loss of the second right would mean that the buyer is being partially evicted and could rescind the contract (the apartment is not worth the price he paid for both rights). Taking into account the retroactive effects of the termination of the contract (which is considered to have never existed), the Local Council would have to revoke its decision (as it is illegal to impose an increased rent as long as the lessee is an employee of the City Hall and should benefit from an abatement). In these circumstances, in order to avoid similar situations, the initial lessee would find himself incapable of selling the apartment to third parties. However, this *de facto* inalienability represents a transgression of the legal provisions described above, of the Law no. 50/1991 and of the general principles applicable to the civil circuit.

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