

Property interests over real estate in Poland – an overview

By

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Whether you intend to live, work, study or set up a business, in Poland you will at some stage come into contact with a real estate issue. It may be that you are intending to rent an apartment, buy a house (or flat), invest in a business, require office space or intend to build a factory or warehouse.

Whatever your plans, it will help you to understand how property interests in Poland operate to appreciate how they could apply to your particular situation. Property rights and interests including the rules for the creation, transfer and ownership of property rights and interests are to be found in Polish statutory provisions, in particular in the Civil Code (*kodeks cywilny*), the Land and Mortgage Registers Act (*ustawa o księgach wieczystych I hipotece*) and in the Land Management Act (*ustawa o gospodarce nieruchomościami*).

The references to articles in relation to property rights refer to the specific provisions of the Civil Code or other statutory regulations. Poland was until 1989 a socialist satellite state but it did manage to retain some private property rights such as freehold ownership. This applied to certain places such as Warsaw which was effectively ‘nationalised’ by government decree in 1946. The result was that all freehold titles in Warsaw came into state ownership. Title to property be it flats, houses or land was subject to a form of long lease, normally for a period of 99 years known as the perpetual usufruct (*użytkowanie wieczyste*) which was as good as freehold ownership. There are other types of title which are known as usufruct (*użytkowanie*), a contractual lease (*dzierżawa*) and a contractual licence (*najem*). Finally there is freehold ownership (*własność*), which is literally the same as freehold title as it is understood in most developed countries.

We shall clarify as straightforwardly as possible the fundamental differences between these various property rights within a Polish context and explain how and in what way these rights can be acquired, transferred and exploited.

Freehold title (*Własność*)

Freehold title in Poland can be acquired by anyone (minors can also acquire legal title if represented by a statutory representative, usually a parent) as long as the transaction is concluded before a notary, the consideration is paid, title is registered with the relevant land and mortgage registry and as long as there are no other restrictions preventing title from being transferred. Owners of real estate can be individuals, companies, public or private entities, with each having equal rights.

The main requirement is legal personality. It can be jointly owned with no restriction on the number of co-owners. There is no concept of 'beneficial joint tenancy' as in UK property law whereby title devolves to a surviving co-owner on death of any joint owner. Each co-owner or joint owner is entitled to manage and dispose of their specific share of the property which passes to their successors in title on death.

Dispositions of freehold interests in land cannot be made in writing alone. All transactions and dispositions of land which result in the transfer of ownership must be in the form of a notarial deed executed before a notary. It is not sufficient for a notary to simply certify a signature on a document purporting to transfer or dispose of an interest in real estate. The actual transfer must itself be in the required form. The notary will ensure that all relevant formalities are complied with, such as capacity to enter into the transaction and where one of the parties is a non-Pole, that the required permit (if applicable) to acquire real estate is in order.

EU nationals and members of EEA countries do not presently need a permit to purchase real estate in Poland (save for certain 'protected' properties mentioned in the EU Accession Treaty such as agricultural land, forestry and second homes). Nationals of countries outside this area such as nationals of the USA, Japan or India, for example, will still require a permit from the Ministry of Internal Affairs (MSW) in order to acquire real estate in Poland. This applies to individuals as well as companies where more than 50% of the share capital is owned by a non-EU entity.

It is not presently clear what the position will be post-Brexit with regard to UK citizens or companies. Our considered view is that nothing will change from the present 'EU' status but there is at present no indication from the Polish authorities what the landscape will look like in the future. Where an MSW permit to acquire real estate is required, the process is relatively straightforward although time-consuming. It can also be costly in that the vendor of the land knows that the buyer requires a permit (a conditional notarial agreement should be concluded beforehand) and therefore 'hikes' the purchase price accordingly. The permit is for a specific property; should the sale fall through prior to completion, the non-EU purchaser will have to start the entire purchasing process again. This may not be so problematic where the property is, say, a private flat for personal use, but if it is land earmarked for a business investment or development, the delay can be costly and disruptive.

Once the transaction is concluded, all relevant stamp duties (amounting to 2% of the transaction value) and the notary's fee (between 3% and 0.25% depending on the sale price needs to be paid to the notary. The amount to be paid is based on the value of the transaction and the specific percentages are found in the Ordinance of the Minister of Justice (*rozporządzenie ministra sprawiedliwości z dnia 28 czerwca 2004 r.*). The first 3,000 zł attracts a fee of 100 zł, between 3,000 zł and 10,000 zł the fee is 100 zł + 3% of the value above 3,000 zł, between 10,000 zł and 30,000 zł the fee is 310 zł plus 2% of the value above 10,000 zł, between 30,000 zł and 60,000 zł the fee is 710 zł plus 1% of the value above 30,000 zł, between 60,000 zł and 1,000,000 zł the fee is 1010 zł plus the 0.4% of the value above 60,000 zł, between 1,000,000 zł and 2,000,000 zł the fee is 4,770 zł plus 0.2% of the value above

1,000,000 zł and where the value is 2,000,000 zł and above the fee is 6,770 zł plus 0.25% of the value above 2,000,000 zł but capped at 10,000 zł.

Title will then be registered in the Land and Mortgage Register (*księga wieczysta*). Each district court (*sąd rejonowy*) has a Land and Mortgage Register section. The registration database is kept in individual files for each recorded freehold title and the effect is that this process can occasionally take some time, usually between one and two months. It is not unusual for the process to take far longer.

For the sake of completeness it is useful to understand that there are two types of land registers in Poland: (1) the Land and Mortgage Register (*księga wieczysta*) which provides details of the legal status of a particular property or plot of land. These registers are normally held by the local [regional] courts and the information regarding status of particular entries can also be obtained through a computerised central information system; and (2) Land Register (*ewidencja, rejestr gruntów*) which describes the physical aspects of the plot of land, its size, designation (eg industrial, residential, agricultural) and the occupier of the land. These records are kept by the local district governor (*starosta*) and are generally used for reference purposes only, as the information recorded is not conclusive in all circumstances of the detailed information contained on file. One of the exceptions is the perpetual usufruct where the transfer to a buyer is recorded in the Land and Mortgage Register and such transfer is conclusive evidence. The information on record is, however, determinative as regards the use of the land, the tax rate to be assessed for the land and its classification (eg agricultural land, soil class, forestry, industrial, residential etc) as per the Land and Mortgage Register.

Finally, bear in mind that the notary, (although a lawyer by training) is not a legal representative for either party in the real estate transaction. The buyer and seller should each engage their own lawyer as the notary's role is to ensure that the identities of the parties are correct and that the transaction accords with legal regulations. The transaction document must be in the form of a properly executed notarial deed, which will enable the parties to be certain that they have each received what they bargained for.

Perpetual Usufruct (*Użytkowanie wieczyste*)

The perpetual usufruct is a curious concept which stems from Roman Law. According to art. 232 of the Civil Code, a perpetual usufruct is a disposable interest in land. It is effectively a sub-species of freehold as it is literally a freehold title for a fixed 99 year period. It is akin to a fixed-term long lease. It may be extended for a further period of 40 and 99 years, as long as the request for an extension does not affect an important or protected public interest and the request for an extension is made in the final five years of the original term. The term cannot be less than 40 years and it is not, as its name suggests, 'perpetual' in nature – it has a fixed lifespan before it reverts back to the original owner. It is a property right which can only be transferred by notarial deed (written form is insufficient), it can be charged, sold and left by will. Any extension of a perpetual usufruct must similarly be executed by

notarial deed. Although art. 238 of the Civil Code and art. 71 of the Land Management Act provide for the payment of an annual fee throughout the term, the agreement itself will specify whether a lump sum consideration or an annual fee is paid.

The Perpetual usufruct applies only to land, not to houses and flats, and is one of the most common forms of title to the land found in major cities in Poland. It may only be created over land owned by the state or a local authority and once created, the reversionary owner (state or local authority) cannot encumber the property or sell it to any other entity or person except the holder of the perpetual usufruct. Effectively, the holder of the perpetual usufruct has a legal pre-emptive right to acquire the freehold if ever sold. The purchaser of the perpetual usufruct becomes the legal owner once the transferred right is registered with the Land and Mortgage Register.

Another important consideration is the status of the buildings and structures constructed on land subject to a perpetual usufruct. Once constructed, any building or structure becomes the property of the holder of the perpetual usufruct and can be registered in the Land and Mortgage Register. This situation needs to be contrasted with the contractual lease (*dzierżawa*) where the leaseholder will not have title to the building or structure erected on the land even if made at their cost and expense. Legal title to any such building will be with the owner of the land.

Usufruct (*Użytkowanie*)

The usufruct is a form of property interest effective against any third party (including the owner) which can be created for a fixed period or even for life. It is a form of ‘personal-contractual’ licence, the purpose of which is to allow the user to enjoy the property and to extract profits and benefits from the land. It is commonly used in agricultural land transactions although it is not restricted to agriculture. The right cannot be disposed of or assigned by the user as it is a purely ‘personal’ right which expires automatically after 10 years of non-use. It also expires automatically on the death of the user. There is no minimum or maximum term. In contrast to the perpetual usufruct, the usufruct is a ‘personal’ property right which is non-transferable. The usufruct grants the holder with the right to use the property, to exploit it and to collect income derived from it. The agreement creating the usufruct must be in written notarial form. Its existence can be recorded in the Land and Mortgage Register, but it must be noted that it cannot be sold, charged or disposed of in any other way including by will. The usufruct can be granted to an individual or a company. This is not a right which is particularly useful in a commercial context as it has limited scope for value generation. In addition, buildings or structures brought onto the land become the property of the owner and not the user.

The Contractual Lease (*Dzierżawa*)

A very common and important property right used in commercial projects, property developments and exploitation of farmland is the contractual lease (*dzierżawa*) which is a contractual right to use and exploit the leased property. The agreement for the contractual lease must be in writing where the term is over one year and does not need to be in notarised form. The contractual lease has a maximum

contractual term of 30 years. A contractual lease entered into for a period longer than 30 years is deemed, under the Polish Civil Code, to be concluded for an indefinite period of time. Where either party decides to give notice of termination, the notice period will depend on the frequency of the rental payments made. Anecdotally, we know of a transaction where the investor required a longer (more than 30 years) guaranteed term to safeguard its investment. The solution was a 'triple *dzierżawa*' where the parties agreed to three consecutive thirty year terms. It should be noted that even in a commercial context, the contractual lease cannot be transferred or assigned without the consent of the owner. To avoid future uncertainty, this matter should be addressed in the original contract so that the 'value' in the asset can be realised commercially.

There are other matters which should be considered by a party investing in a contractual lease. For example, the contractual lease will not ordinarily be considered a chargeable asset by a bank or lending institution. It will more likely than not be impossible to raise finance on the back of it or get a lender to agree to finance a project where one of the main assets is the contractual lease. If an investor takes a long contractual lease of land with the intention of constructing buildings such as offices or warehouses on the site, the rule in Poland is that the building and structures, even if paid for by the contractual lessee, will belong to the owner of the land. This is important to understand as this eventuality should be regulated in the original agreement between the contracting parties which should cater for the lessee's permission to use the building or structure. In addition, the cost of the construction works should be factored into any transaction either as a reduction of the lease payments or some form of financial reimbursement at the end of the term. Remember to keep all your invoices!

The contractual lease cannot be sub-let (or assigned) without the consent of the head landlord and if the landlord sells the freehold, then the new owner is bound by the terms of the contractual lease where it is concluded for a fixed term with a certified expiry date which is recorded by a notary. The contractual lessee will also need to be in occupation of the property in order not to be deprived of their interest in the contractual lease. Another matter to note in an agricultural context is that under art. 695 of the Civil Code where agricultural land is leased out for a period of over three years or has been used for a period in excess of ten years, then the tenant acquires a pre-emptive right to purchase the land in the event of its sale by the owner.

The rent payable under a contractual lease can be in monetary form (cash) or any other form of consideration. For example an arrangement can be entered into whereby the rent is paid in the form of profits or a share of the profits derived from the property (art. 693 of the Civil Code). Unless specified in the agreement (which is the norm), rent is paid half-yearly in arrears. Note that the landlord is entitled to terminate the contractual lease for cause where the tenant falls into arrears for two full rental periods, although the practice is to give the tenant one month's further notice of an intention to terminate.

The Contractual Licence (Najem)

The contractual licence which is a personal interest in and right to use the demised property or premises. It is frequently used when renting a house or an apartment and may only be concluded for a period of up to ten years. It must be in written form where the term exceeds one year and is not required to be in the form of a notarial deed. A contractual licence entered into for a period exceeding ten years automatically transforms into a licence of indefinite duration (after the expiry of the ten-year term) and can be terminated on notice by either party. What is considered 'reasonable notice' will depend on the manner and timing of the rental payments. Thus, for example, where the agreement provides for monthly rental payments, the agreement may be terminated by giving one month's notice, preferably in writing. The landlord may also terminate the agreement where the contractual licensee falls behind with two rental payments although the landlord should provide written notice of such intention coupled with one final chance to make good the arrears.

The provisions of the Civil Code (art. 681) provides that a licensee of these premises is obligated to effect minor repairs and maintenance of the premises during the agreed term. These minor repairs and maintenance will apply to floors and flooring, windows, doors, painting walls and flooring (varnish) as well as make repairs to the technical installations such as lighting, heating and water. The provision of gas, electrics and other form of mains supplies fall within the landlord's obligations.

Conclusion

These five property interests are the most commonly used in business and daily life in Poland. Of these, only freeholds and perpetual usufruct need to be created by notarial deed. A written document signed before a notary will not suffice. In addition, if you are appointing a lawyer, friend or company representative to act on your behalf in this type of transaction, then that individual will require a power of attorney which in itself must be in the form of a notarial deed recognised by Polish law. From a UK perspective, a specific power or general power of attorney drawn up by and signed before a solicitor or commissioner for oaths will not suffice. There are notaries (some are even Polish speaking) in the UK and this document should be executed before one. In order to be valid in Poland, the foreign notarial deed will then need to be 'apostilled' (the Foreign and Commonwealth Office can do this in the UK) and then translated into Polish by a Polish sworn translator. A helpful notary will most probably have one or two useful contacts in this regard.

Anyone buying or selling an interest in land should also note that where the transaction is concluded before a notary, then the consideration or purchase price is not within the scope of a notary's service. The notary may ask if the parties have concluded the 'financial aspect' of the transaction but will not actually get involved in the negotiation process itself. The notary will however take from the parties, (the parties agree between themselves who is to pay or what each respective share of the fees is) (1) their fees for the transaction, (2) the stamp duty (to be remitted to the appropriate Tax Office) and (3) title registration fees (to be remitted to the appropriate Regional Court).

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10 February 2020