Mg.iur. ***Мария Данилевич****, докторант*
Докторская программа «Юридическая наука»
Балтийская международная академия
Рига, Латвия

Проблематика определения объема обязанностей управляющих при возникновении финансовых конфликтов с собственниками жилых домов

Аннотация. В «Законе об управлении жилыми домами» предусмотрены обязанности управляющих жилыми домами. Также законом предусмотрена обязанность собственников обеспечить процесс управления жилым домом и необходимое финансирование управляющему, чтобы тот мог выполнять свои обязанности.

Данная статья исследует вопрос об обязанности управляющего выполнять предусмотренные законом обязательные действия, в случае, когда управляющий сталкивается с недостаточным объемом финансирования.

Возникающие споры указывают на недостаточное регулирование данного вопроса, что подчеркивает актуальность проблемы.

Цель статьи – рассмотреть, является ли необходимым на законодательном уровне закрепить объем обязанностей управляющего, в случае получения недостаточного финансирования со стороны собственников.

Ключевые слова. Закон об управлении жилыми домами, недостаточное финансирование, управление жилыми домами, обязанности управляющего, управляющий.

The problems of the present research and their pertinence: in the Republic of Latvia the “Law on administration of residential houses” came into force on 1 January 2010. This law provides that legal relations in the process of administration should be also governed by the Civil law, namely, by the provisions of the Section on Authorization contract, but only in those aspects that are not regulated by the “Law on administration of residential houses”.

The “Law on Administration of Residential Houses” lays residential property owners under obligation to ensure the process of residential property administration, and to conclude an Administration contract with an Administrator if such person is assigned to perform the management of a residential property. The same law also establishes the obligation of residential property owners to provide the process of management with necessary financing. However, in practice, disputes often arise between residential property owners and their administrators on whether administrators should perform their duties as required and to carry out mandatory managerial actions in compliance with the law and principles of administration established by law in the situation when necessary financial means are not provided by the residential property owners.

Section 14 of the “Law on administration of residential houses” establishes the obligations of a residential house administrator. According to this section the main responsibility of a residential house administrator is to comply with regulations that govern the process of residential buildings administration, and to follow the principles of administration defined in Section 4 of the same law [1].

According to the principles of administration of residential buildings, the administrator should provide:

- the continuity of the administrative process, selecting the best management practices and costs in proportion with the paying capacity of residential house owners;
- the content and quality of administration should provide the preservation and good quality of the residential property throughout the whole period of its usable life;
- in the process of residential property administration, the administrator

should do all that is necessary to prevent any harm to the health or safety of individuals.

– in the process of fulfilling the administrative task the administrator should do all that is necessary to prevent any harm to the environment.

The goal of research was to contemplate on the need to secure legislatively the scope of duties of residential house administrators when necessary financial means are not provided by the owners.

Analyzing the provisions of the law related to the principles of administration and responsibilities of the administrator in fulfilling the administrative task, it is impossible to make an unambiguous conclusion on whether administrators should continue to perform their duties and ensure implementation of actions established by the law in case of insufficient provision of necessary financing by the residential property owners.

Unremitting dispute on this question indicates the urgency of the problem, and therefore, it needs to be further studied. For this purpose, the question of responsibilities of administrators will be further considered in subsequent publications on example of Estonia as well. Later, in a separate publication, it is planned to carry out a comparative analysis of this problem comparing the situation in all three countries. Such comparative analysis will allow making definitive conclusions concerning the scope of the administrator's duties prescribed by law. These conclusions will also help to understand better how fully the duties of residential house administrators are disclosed in the "Law on administration of residential houses" and identify the need to use the experience of neighboring countries in situations where residential house administrators encounter the problem of insufficient financing. Based on these conclusions, recommendations and/or amendments may be proposed to the "Law on administration of residential houses".

The questions as to what activities residential house administrators should and should not perform continue to remain relevant, and every time such questions arise, they emerge in a new light. The main cause of arising conflicts remains to be the matter of finance. Not infrequently residential house administrators stop performing their duties stipulated not only by the Administration contract, but also by law, justifying their decisions by the insufficient funding on the part of residential house owners.

The process of residential house administration includes certain mandatory actions (Section 6 of the "Law on administration of residential houses"), which become the responsibility of the administrator who signed the Administration contract, and these actions are:

1. The maintenance of the residential house in a good physical condition according to effective regulatory acts which include the following:
   * provision of sanitary care;
   * provision of heating and natural gas, cold water, sewerage services and the removal of domestic waste and refuse;
   * conducting the inspection of the residential house, its equipment and communications; and carrying out its technical maintenance, general servicing and running repairs;
   * providing power supply to the parts of the residential house and the devices located thereof, which are in communal use and joint ownership;
   * ensuring minimal requirements imposed on the residential house, as an object of the environment;
   * fulfilling minimal requirements for the energy efficiency of the residential house.
2. Planning, supervision and organization of administration, which include:
   * developing the working plan of administrative activities, including the plan of activities necessary for the maintenance of a residential house;
   * preparing the draft of the annual budget;
   * establishing the system of financial accounting.
3. Keeping the House book.
4. Conclusion of the contract on the use of land attached to the residential house with the owner of the land.

5. Providing the public and local government institutions with the requested or required information.

All other actions related to the administration of residential houses are not mandatory and are subject to the desire and paying ability of their owners.

As mentioned above, Section 5 of the "Law on administration of residential houses" lays the owners under obligation to ensure the process of administration of their residential property. The owners perform this duty by entering into the Administration Contract [2.]. Concluding such contract, the contracting parties include only the information and conditions provided for in Section 11 of the "Law on administration of residential houses", where in Part 2, Paragraph 8 it is provided that the parties should stipulate the amount of expenditure necessary for the performance of administrative tasks in the Administration Contract. According to Section 10 Part 3, ibid, the responsibility of owners is to ensure proper and sufficient financing of the process of administration. The parties should determine not only the expenditures but also the order of payment separately identifying:

- mandatory expenditure;
- other expenditure;
- remuneration for administration.

The question of how the administrator should act in cases when owners do not provide adequate financing, and when such situations are not regulated by the Administration Contract, remains without a definitive answer. Whether administrators should continue to perform the required actions, or they are automatically released from their duties depends on the status in which they act in relation to the owners.

Section 10 Part 1 of the "Law on administration of residential houses" stipulates that assuming the obligation to carry out the process of administration, in relation to the owners the administrator becomes the provider of services. In this case, the Administration Contract does not assign administrators the right to act in their relations with the third parties on behalf of the owners [3., 579]. All contracts with service providers are concluded directly by owners, therefore, the responsibility for their performance does not lie on the administrator. In this case, the administrator normally provides:

- sanitary servicing – housecleaning, grounds maintaining, deratization and disinfestation, etc.;
- inspection of the residential house, its equipment, facilities and communications;
- maintenance operations and running repairs;
- devising the working plan of administrative activities, including the plan of activities necessary for the residential house proper maintenance;
- drafting the annual budget for the corresponding year;
- financial accounting, including acceptance of payments and settlement of payments;
- keeping the House book;
- providing public and local government institutions with requested or required information.

In practice there are cases where the administrator acts as a functioning deputy or an authorized agent [4.]. In this status administrators can conclude necessary contracts in their own name for the benefit of owners, including the contracts with the suppliers of communal services. However, such contracts do not impose any obligations on the owners [3., 579]. From this follows the need in the conclusion of a separate agreement between the administrator and the owners, according to which, all rights and obligations under the contracts concluded by the administrator in the favor and for the benefit of the owners are transferred to the owners. However, this relationship is also not beneficial for the administrator, because it requires a separate consent of all owners to those contracts, which the administrator may conclude on their behalf. In addition, this form of relationship does not answer the question of how to act (without going through a long trial), in cases where owners do not fulfill their financial obligations. All financial risks are still born by administrators, who are forced to cover them with their own means. They also have to enter a slow process of litigation with the owners in order

to recover financial losses. Administrators become hostages of the situation, when they have to ensure the fulfillment of mandatory actions having taken on this responsibility to the owners, but at the same time, the implementation of those mandatory actions is jeopardized, because the contracting party in the contracts with the third parties is the administrator, not the owners. In the event of termination of relationships, they are terminated with the administrator and not with the owners, but the result is that the owners will not receive the services. In such cases, the common practice is that the owners terminate the Administrative contract with their administrator, and enter into a new administrative contract with a new administrator, not confirming the contracts with the third parties that have already been concluded in their favor by their previous administrator, thus leaving him or her with financial liabilities that are, in fact, the liabilities of the owners. Such cases take place despite the fact that Article 1517 of the Civil Law and the Comments to Article 2293 of the same law provide that if an undisclosed authorized agent has concluded a bilateral agreement in favor of an authorizing agent, has received a full or partial execution of the concluded contract, and the authorizing agent has benefited from this performance, then the authorizing agent accepts automatically the obligation to fulfill the obligations of the authorized agent without the conclusion of a contract renewal [3., 579].

Therefore, a more beneficial situation for the administrator is when he or she provides all the above mentioned services as a service provider, rather than as an authorized person. In this case, the administrator does not enter into contracts with the communal service providers, but provides the above-mentioned services on their own behalf (which services are, although mandatory, not paramount, in contrast, for example, to heat supply service, etc.). Therefore, in this case, the provisions of the Civil Law in the part of Authorization contract do not apply. The content of Authorization contract covers the conclusion of legal transactions or the performance of actions that have legal significance, but are not legal transactions. The content of Authorization contract may not be the actual performance of actions [3., 574]. In cases where administrators act as service providers, they carry out the actions described above. Thus it can be concluded that, in terms of content, these actions are identical to the term "house servicing/executive management" albeit, this term is not mentioned in the law. In the same way the status of the person, managing the maintenance of a residential building is more applicable to a residential house administrator, albeit this term is also not mentioned in the law. [5., 12]. The need to divide and consolidate these terms in the "Law on Administration of Residential Houses" was examined in the paper "Legal necessity to separate the concepts of 'administrator' and 'residential house maintenance manager'".

Another condition occurs when the administrator is entitled to sign agreements on necessary services provision on behalf of the owners. It should be noted that this situation is more common and applicable in practice. In this case, according to the Administration Contract the administrator is assigned the rights to act in relations with the third parties on behalf of the owners.

The "Law on administration of residential houses" does not contain any provisions for the relationships between the parties and for the responsibility of the administrator to perform mandatory house maintenance activities in cases when the owners do not comply with their financial obligations. The duty of the owners to ensure adequate financing is provided in Article 2307 of the Civil Law, and Section 10 of the "Law on residential property" [6.; 7., 4; 8., 6]. The comments on this article [3., 590] provide for the possibility for the Administrator to refuse to perform the assignments for which necessary financing has not been allocated. But this regulation is poorly implemented in practice, in both cases where the manager acts as an indirect agent, or as a direct agent concluding contracts on behalf of the owners.

In cases where the administrator acts as a service provider, taking on the obligation to provide administrative services stipulated by the law, he or she does not become an authorized agent, but, anyway, assumes certain financial risks.

In cases where the manager acts as an indirect agent or undisclosed deputy principal, he bears personal responsibility to the owners and to the third parties.

In relations with the third parties, the administrator must first settle financial obligations, although, as mentioned above, the law provides for the transfer of these obligations to the owners, which in practice leads to lengthy court trials.

However, in all three cases, there arises a controversial issue on the right of the administrator to stop providing mandatory administrative actions, in case of not obtaining necessary financial means from the owners.

Section 14, Part 6 of the "Law on administration of residential houses" contains the provision prohibiting the administrator to use the savings accumulated by the residential house owners for the following purposes:

– for covering losses resulting from the administrator's activities (this may refer to the situation where the administrator instead of spending financial means obtained from the owners on the payment of communal services spends them on other purposes, such as repairs, etc.);
– for settling unfulfilled liabilities of the owners (e.g., to the providers of communal services, etc.).

Having analyzed the rule of law and all said above, we can conclude that in any form of relationship between residential house owners and their administrators and according to the norms of law, all the responsibility for proper administration of a residential house should be borne by its owners, but in practice, the responsibility often rests with the administrator. None of the analyzed administration contracts contained a provision allowing the administrator to immediately terminate the contract in the case of not obtaining the adequate financing from the owners and / or terminate the implementation of mandatory administrative actions until the violations are eliminated. The important role also plays the fact that the owners are not ready to be jointly and severally liable to the third parties for the wrongful acts of other coowners. The law does not hold owners under obligation to create targeted savings to cover debts to communal service providers. The "Law on administration of residential houses" envisages all kinds of savings that the administrator does not have the right to use for any debts coverage. This eliminates the possibility of creating a special savings fund that can be used to cover the debts of the owners. Therefore, at present there arises a situation, when only those companies (private or owned by local governments) can manage residential houses and comply with all obligations that have sufficient financial means of their own. Such companies may invest their own funds and thus provide a continuous process of administration and management even in cases when the residential house owners do not fulfill their financial obligations. They are able to continue until the moment when the conditions of the contract allow them to terminate the relationship with the owners without prejudice to the latter. And conversely, the administrators without sufficient amount of financing are forced either to break the law by not providing the required services, or simply to stop the execution of the contract, or to begin the process of their own insolvency.

Summarizing the foregoing, it should be noted that:

– the "Law on administration of residential houses" is aimed at protecting the interests of residential house owners against administrators, but obligations established by the law for the owners, are inherently declarative, and in practice are transferred completely to the administrators.
– the "Law on administration of residential houses» does not regulate the scope of duties of residential house administrators in case when they do not obtain necessary financial means from the owners, and, consequently, the law does not protect the rights of administrators.

The main results of the present research: Having assessed the current situation, in order to avoid conflicts and lengthy court proceedings, for the best possible pre-trial settlement of disputes between administrators and owners and more precise definition of the administrator's responsibilities in cases of non-receiving necessary financial means from the owners, it is legally necessary to take the following actions:

- at the legislative level to develop a mechanism ensuring the provision of mandatory services in situations where the owners do not provide adequate financial means; and to determine the scope of responsibility of both parties and the consequences for non-compliance with legal norms;
- to identify and secure the notion of "administration" and "residential house servicing / maintenance", and to determine the rights and obligations of "administrators" and "persons performing residential house servicing / management".
- to revise the list of mandatory actions, excluding a number of items, thus allowing "persons performing residential house servicing / management" to fulfill actions of technical maintenance, running repairs and sanitary servicing.

As a result, mandatory administrative actions will be fulfilled directly by administrators who will be under obligation to enter into relevant contracts on behalf of the owners. In turn, the "persons performing residential house servicing / management" will be service providers in relation to the owners without any opportunity to perform mandatory administrative actions;

- to introduce compulsory insurance of civil legal liability of administrators;
- to supplement the "Law on administration of residential houses" with the norm obliging their owners to make savings, which administrators will be able to use for the implementation of mandatory administrative actions, in cases when the owners do not provide necessary financial means. This would help to eliminate the necessity for legal regulation of the scope of responsibilities of residential property administrators in the events of financial conflicts with the residential property owners

References

1. Law of Republic of Latvia „Law On Administration of Residential houses" / 04.06.2009. // Latvian Journal, Nr. 96 (4082), 19.06.2009., „Rapportetur", 14, 23.07.2009. [Entry into force: 01.01.2010.], with amendments.
2. Information and explanation of Economic Ministry of the Republic of Latvia, accessible: https://www.em.gov.lv/lv/nozares_politika/majokli/informacija_un_skaidrojumi/.
3. Torgans, K. „The Civil Law of the Republic of Latvia commentary. Related rights. // Riga: „My Property", 2000 - page 579.
4. The Civil Law of the Republic of Latvia. Part 3. Property right. // 28.01.1937., „Government Gazette", 46, 02/26/1937. [Entry into force: 03.01.1993.].
5. Oša I. „Resedential housing administration". // I. Oša, M. Auders, I. Krauze. // Riga: „Zvaigzne ABC", 2010.
6. Law of Republic of Latvia „Law On Resedential Properties" / 28.10.2010. // Latvian Journal, Nr. 183 (4375), 17.11.2010., [Entry into force: 01.01.2011.], with amendments.
7. Dace Slava, Sanda Geipele. Legal and economic problems of housing management in Latvia, accessible: https:// ortus.rtu.lv/science/lv/publications/14058.
8. Ģirts Beikmanis. Residential houses management according to government regulations, accessible: http://www.rea.riga.lv/component/content/article/10-aktualitasu-arhivs-2012/470-seminara-kvalitativa-maju-parvaldiba-un-energoefektiva-renovacija-finansejuma-risinajumi-atskats.

Summary

The problems of the present research and their topicality. In the Republic of Latvia, the "Law on administration of residential houses" came into force on 1 January 2010. This law provides that legal relations in the process of administration should be also governed by the Civil law, namely, by the provisions of the section thereof on Authorization contract, but only in those aspects that are not regulated by the "Law on administration of residential houses".

The "Law on Administration of Residential Houses" lays residential property owners under obligation to ensure the process of residential property administration, and to conclude an Administration contract with an Administrator if such person is assigned to perform the management of a residential property. The same law also establishes the obligation of residential property owners to provide the process of management with necessary financing. However, in practice, disputes often arise between residential property owners and their administrators on whether administrators should perform their duties as required and to carry out mandatory managerial actions in compliance with the law and principles of administration established by law in the situation when necessary financial means are not provided by the residential property owners.

The goal of research was to contemplate on the need to secure legislatively the scope of duties of residential house administrators when necessary financial means are not provided by the owners.

Analyzing the provisions of the law related to the principles of administration and responsibilities of the administrator in fulfilling the administrative task, it is impossible to make an unambiguous conclusion on whether administrators should continue to perform their duties and ensure implementation of actions established by the law in case of insufficient provision of necessary financing by the residential property owners.

The main results of the research: Having assessed the current situation, in order to avoid conflicts and lengthy court proceedings, for the best possible pre-trial settlement of disputes between administrators and owners and more precise definition of the administrator's responsibilities in cases of non-receiving necessary financial means from the owners, it is legally necessary to take the following actions:

- at the legislative level to develop a mechanism ensuring the provision of mandatory services in situations where the owners do not provide adequate financial means; and to determine the scope of responsibility of both parties and the consequences for non-compliance with legal norms;
- to identify and secure the notion of "administration" and "residential house servicing / maintenance", and to determine the rights and obligations of "administrators" and "persons performing residential house servicing / management".
- to revise the list of mandatory actions, excluding a number of items, thus allowing "persons performing residential house servicing / management" to fulfill actions of technical maintenance, running repairs and sanitary servicing. As a result, mandatory administrative actions will be fulfilled directly by administrators who will be under obligation to enter into relevant contracts on behalf of the owners. In turn, the "persons performing residential house servicing / management" will be service providers in relation to the owners without any opportunity to perform mandatory administrative actions;
- to introduce compulsory insurance of civil legal liability of administrators;
- to supplement the "Law on administration of residential houses" with the norm obliging their owners to make savings, which administrators will be able to use for the implementation of mandatory administrative actions, in cases when the owners do not provide necessary financial means. This would help to eliminate the necessity for legal regulation of the scope of responsibilities of residential property administrators in the events of financial conflicts with the residential property owners.