



ACQUISITION OF REAL ESTATE FROM NON-OWNERS ACCORDING TO THE LAND REGISTRY AND PROPERTY RIGHTS LAW IN BOSNIA AND HERZEGOVINA - transformation of the legal rule on gross negligence into the legal rule on doubt

Original scientific paper

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ABSTRACT

Yugoslav jurisprudence has taken an attitude that in addition to examination of the land registry and ownership state of real estate, it is necessary to verify whether the seller is the actual owner and possessor of real estate. The Law on Land Registries of the FBiH prescribes a radically different way of regulating this legal issue, in the way that prescribes gross negligence as a condition of conscientiousness of the later acquirer. In the process of drafting and passing the new Law on the Property Rights, our legislator realized unenforceability of the legal rule on gross negligence in the Law on the Land Registries, and transformed it into a legal rule on doubt as significantly more responsible relation of the later acquirer, according to off-the-record facts related to a certain real estate. The paper analysed the aforementioned legal rules and the goal of the transformation of legal rules was declared through the essential interpretation of the new Law on the Property Rights of the FBiH. Attitudes and proposals de lege ferenda were taken for proper application of legal rules, which should ultimately result in harmonisation of judicial practice.

Keywords: *Conscientiousness, Gross negligence, Doubt, Legal rules on trust protection, Disputes between book and non-book owners*

INTRODUCTION

When judging the conscientiousness of the acquirer of real estate, former Yugoslav jurisprudence valued the subjective sphere of the later acquirer of real estate in a way that the one who, when acquiring real estate, verified factual state of ownership of real estate, is conscientious, that is, it was not enough for him to only check the land books and cadastre property records and that he was not aware of discrepancy between the real

estate's land registry and non-registry state, but, in order to be conscientious, he had to check and make sure of factual state of real estate, that is, make sure that the seller is the real owner and property owner (Petrovic, 1969). This attitude of the courts derived its justification from the well-known fact of devastation of land registers. Due to the mentioned practice, some authors considered that the principle of trust is applied with so

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many exceptions and therefore can be considered that it was abandoned in the former SFRY (Povlakic, 2014). The matter of acquiring ownership rights to real estate, at the time mentioned, was regulated by the Law on Ownership Legal Relations (in the text: ZOVO) and the Law on Property Legal Relations (in the text: ZOSP), and the mentioned legal regulations were applied until 2002, when the new Law on the Land Registries entered into force, which in completely different and more radical way regulates this legal issue. The new Law on the Land Registries, as previously stated, regulates the acquisition of property rights in a completely different way, including the issue of conscientiousness of the later acquirer of real estate, which is understandable, because it was imposed by the High Representative, and was modelled after the German legislation, but when drafting it, certain facts that are of exceptional importance for drafting of proper and applicable legislation in our area were largely neglected. First of all, our rich legal tradition and deep-rooted legal postulates, which are indispensable when drafting legal regulations, have been neglected. The aforementioned law was adopted under the auspices of the reform of land registry law, and was considered as the beginning of the aforementioned reform. Law on Land Registries of the FBiH existed as the rule *lex specialis* until the adoption of the new Law on the Property Rights, which by superficial analysis points to the conclusion that our legislator returned to the provisions of prior regulations that were regulating this matter and that he abandoned the reform of land registry law. As we have already mentioned, this conclusion can only be reached by superficial analysis of the aforementioned regulation, and doing more substantive and detailed analysis of it, it is evident that our legislator recognized the unenforceability of legal rules of the Law on Land Registries of the FBiH, and transformed and adapted certain legal rules to our areas and to our legal tradition, which undoubtedly continued with the reform of land registry law. One of the basic innovations in the new Law on Property Rights of the FBiH and in relation to the Law on Land Registries of the FBiH is precisely regulation of the issue of conscientiousness of the later acquirer of real estate, by transforming the legal rule on gross negligence from the Law on Land Registries into the legal rule on doubt as significantly more responsible relation of the later acquirer to the fact of the seller's ownership, at the indispensable element of conscientiousness (Mutapcic, 2022). We will talk more about this and about all the aforementioned issues, as research problems of this paper, in its continuation.

THE PRINCIPLE OF CONSCIENTIOUSNESS AND HONESTY IN THE INTERPRETATION OF FORMER YUGOSLAV JURISPRUDENCE

Former Yugoslav jurisprudence, as we stated in introduction, for conscientiousness as an essential fact in every legal obligation relationship, and especially when acquiring ownership rights to real estate, required that the later acquirer of real estate, in order to have the characteristic of conscientious acquirer of real estate, it was not enough to just check the land register and property cadastral records and make sure of the registered title to the seller's property, but he also had to check the property's off-book state, that is, the actual ownership state of property (Petrovic, 1969). The off-book condition of the property must be researched before purchasing the property as it states (Simonetti, 2005). Such obligation of research of the off-book or the ownership state of the real estate, has completely degraded the land registry as the basic record of ownership of real estate. In addition to the fact of devastation and neglect of the land registry, such attitudes of jurisprudence have demotivated new acquirers of ownership rights to real estate to initiate procedures for implementation of acquired ownership rights in the land registry, and for the reason that they were convinced and subjectively certain that there is no possibility of losing such acquired right of ownership of real estate relying on the completeness and accuracy of land registries, and regardless the fact that the entry was not completed in land registry, and for the reason they knew that courts also make condition for examination of the ownership of real estate when acquiring the right of ownership of real estate, and what has resulted in passivity and inertness of the acquirer of ownership right to real estate with regard to carrying out registration of acquired ownership right to real estate. „In older jurisprudence, disputes were very common in which the conflict between the registered and non-registered owner was resolved, whereby priority was generally given to the non-registered owner of real estate, who has a stronger legal basis for acquisition under material law. This is because the acquirer, who was registered in the land register, did not check the off-register state of real estate, which is why he was considered negligent“ (Mutapcic, Brkic, 2015). With court attitudes that in order to conscientiously acquire ownership rights to real estate it is also necessary to research the off-book or the property's ownership state, not only the land registries have been devastated, but also the fundamental principles of land registry law have been degraded, and above all, the principle of trust in land registries as one

of the fundamental principles of land registry law. By doing this, land registries absolutely lost their essential significance, which resulted in the future as well-known fact of non-updated land registries.

LEGAL RULE ON GROSS NEGLIGENCE FROM THE NEW LAW ON LAND BOOKS

The High Representative for Bosnia and Herzegovina, Lord Paddy Ashdown, using the powers deriving from Article V of Annex 10 of the General Framework Agreement for Peace in Bosnia and Herzegovina, on 21 October 2002 issued the decision promulgating entity laws on land registries, and obliged the legislators to adopt the laws in the prescribed form, without any amendments or additions, or additional conditions. He addressed the Parliamentary Assembly of BiH, explaining that economic investments and economic development were his priority (Mutapcic, 2017). The legal rule on gross negligence was created under the influence of German land registry law, primarily due to the principles of abstract tradition, because the registration is causally related only to the real legal relationship, but not to the legal relationship of obligation (Kohler, 2013; Baur, 2009). The aforementioned law was adopted on the model of the German law, but there was an oversight in part that refers to the existence of preconditions for the adoption of a law with such content and to be enforceable at all. This refers primarily to the fact that in Germany land registries fully and truthfully reflect the factual state of real estate, that is, that the property's ownership state is identical to the records and the state in land registries and that the land registries are updated. The above is basic precondition for passing the law with essential content based on the updating of land registries, which is not the case in our country, and that is why such legal regulation is unenforceable in our area. When adopting the aforementioned regulation, the High Representative did not take into account the fact of devastation of land registries, deeply rooted legal postulates and our rich legal tradition, as well as a large number of property rights acquired outside the register, which undoubtedly had to be taken into account in order for new regulation to be enforceable. The aforementioned law provides the legal rule on gross negligence as a condition for the conscientious acquisition of ownership rights to real estate. „Furthermore, the law requires that third parties who acquire rights to real estate must be conscientious and consider the data in the land registry to be accurate (Article 9, paragraph 2).

It follows that conscientious acquisition of rights cannot occur if the inaccuracy of the land registry is known to a third party or is not known due to the gross negligence (Article 9, paragraph 2) “(Waike, 2006). „Gross negligence in this context means that the acquirer of the right has violated the necessary attention that is usual for real estate transactions on a particularly large scale, which means that he did not pay attention to the basic, simplest and obvious postulates “(Heljic, 2006). If the acquirer, both when concluding the legal transaction and when submitting the application for registration in the land registry, acted with gross negligence, then the possibility of conscientious acquisition of rights is excluded. The acquirer will be negligent if he was aware that the land registry state was incorrect or incomplete or if he was not aware of these facts due to gross negligence. Basically, gross negligence represents the subjective sphere of consciousness of the acquirer of ownership rights, according to facts of exceptional importance both in the obligation-legal business and in substantive law, when submitting an application for registration in the land registry. By prescribing gross negligence as a form of responsibility level of the later acquirer according to the facts and the owner's book state of real estate, it radically breaks with the previous judicial practice, which, as already stated, imposed an obligation to examine the real estate's book state and the ownership state of real estate, that is, off-book state. With the entry into force of such law long-lasting legal tradition and deeply rooted legal postulates end radically, because the law predicts the examination of only the book state of real estate, with the condition that if the ownership state of real estate is different from the book, such fact must not be known to the later acquirer or remain unknown to him due to gross negligence. The new Law on the Land Registries brings increased importance of the principle of trust in land registries, and their importance for the security of legal transactions depends on the level of trust (Medic, 2018). Such legal rules, in truth, strengthen the principle of trust in the land registry as one of the fundamental principles of land registry law, but we believe that a certain principle must not be strengthened to the detriment of rich legal tradition as well as the neglect of a large number of non-registry-based property rights. Gross negligence, in principle, can be understood as the lowest level of responsibility of the acquirer of ownership rights, according to book and off-book facts related to the real estate and the previous owner of real estate on which the right is to be acquired.

THE LEGAL RULE ON DOUBT FROM THE NEW LAW ON THE PROPERTY RIGHTS

Seeing the unenforceability of the legal rules in the imposed Law on the Land Registry in 2014, our legislator, passed the new Law on the Property Rights of the FBiH, which regulates the acquisition of property rights in a completely different way. Among other innovations, transformation of the condition of conscientiousness from the legal rule on gross negligence, in the Law on the Land Registries, to the new legal rule on doubt as level of responsibility of the later acquirer toward ownership state of real estate is also important. A superficial analysis of the new Law on the Property Rights of the FBiH would lead to the conclusion that our legislator has given up on the commenced reform of land registry law and has returned to the legal rules provided in earlier laws which were regulating this matter. Since the previous attitude is not correct or accurate, results from the essential analysis of the legal rules in the new Law on the Property Rights and especially because of legal rules on trust protection and legal rules on conscientious behaviour are foreseen as an integrative part of legal rules of declarative registration in the new law on property rights. Previous laws did not prescribe doubt as a level of responsibility of the later acquirer of rights, and it appears as such for the first time only in the new Law on the Property Rights of the FBiH. „The acquirer will be considered honest, in good faith, if, with regard to the information from the land registry, he did not know nor, considering circumstances, has sufficient reason to suspect that the land registry state is not complete or true“ (Josipovic, 2001). With this legal definition and prescription of responsibility level of the later acquirer, there is no doubt that even the appearance of doubt in subjective sphere of the later acquirer excludes conscientious acquisition of rights, and such later acquirer, due to unconscientiousness, cannot invoke the acquisition of ownership rights based on the principle of trust in the land registry.

The reasons that resulted with transformation of the legal rule on gross negligence into the legal rule on doubt.

By regulating the legal rules on the acquisition of ownership rights to real estate and by prescribing doubt as an element that excludes conscientious acquisition, our legislator continued with commenced reform, but when prescribing such legal rules, he bore in mind and took into account our rich legal tradition, deep-rooted legal postulates and the well-known fact of devastated land registries

and why only these legal rules are enforceable in our area, because they were adopted on the basis of indispensable facts regarding the acquisition of ownership rights to real estate, but in our area. In addition to uneven decisions about registration, which generated the appearance of uneven legal understandings in the domain of legal theory (Mulabdic, 2018; Babic et al. 2014. Babic, et al. 2011. Powlakic, 2010. Weike, Tajic, 2005), uneven decisions about the required level of responsibility for off-the-books legal facts can also generate the appearance of uneven legal understandings, not only in the domain of legal theory, but also in the domain of judicial practice, which certainly would not favour the already delayed legal transaction of real estate. Therefore, the identified subject of research is essential for the matter of acquiring rights to real estate, and ultimately for the overall process of reform in this area. With the new Law on Property Rights, the principle of trust in the land registry is closely related to the principle of conscientiousness and honesty, which strengthens the very significance of the land registry, but in a manner acceptable to our area, which was, we can say, neglected and abandoned in the past primarily due to the previous court protection, which allowed off-the-record transactions of real estate. The new Law on Property Rights does not prescribe the obligation to research the off-book ownership state of real estate, but it requires unawareness of the fact of differences in relation to book state, and it requires the absence of any doubts in accuracy and completeness of the land registry state. If a later acquirer of ownership rights to the real estate doubts in accuracy and completeness of the land registry, and as such concluded legal transaction and requested registration of the right in the land registry, such an acquirer would be unconscientious, so primarily, in accordance with the principle of conscientiousness and honesty, the legal transaction itself as well as that carried registration would be worthless. Doubt as an element of conscientiousness is closely related to acting in good faith. „The acquirer was in good faith if, at the time of concluding the transaction, and not even at the time when he requested registration, he did not know, nor, concerning circumstances, had sufficient reason to suspect that item belongs to alienator. In order for the acquirer to be conscientious, it is sufficient to research the land registry state, while there is no obligation to research the off-register state of real estate. In this regard, unawareness of acquired off-book state of real estate is sufficient. The lack of good faith cannot be given to someone, simply because he did not research the off-book state“ (Mulabdic, 2007). The process of finding suitable (implementable)

reform solutions, such as amended solutions of property law, within them certainly the legal rule of doubt, is on the track of already generously invested efforts, primarily financial (Selimovic, Halilcevic 2017; Powlakic, 2014), and is certainly on the track of preserving the land registry model as the only possible direction of reform in this area (Mutapcic, Dapo, Muminovic, 2021). If a dispute arises before the court regarding the conscientiousness of acquisition of ownership rights registered in the land registry by a later acquirer, the fact of conscientiousness will be determined according to the civil procedure standard that prescribes and requires a certain level of attention expected of any reasonable person in such circumstances. A later acquirer will be considered conscientious if, in concluding the legal transaction as well as in submitting the application for registration, he did not know nor had "good reason to suspect" that the item does not belong to the holder he concluded the obligation legal transaction with (VSH, GZ 516/73 from February 28 1973, VSH, Gzz 32/73 from June 14 1973, Simonetti, 2010). If, in such case, court establish that the later acquirer had sufficient reasons to suspect that the item belongs to the alienator, the later acquirer of ownership rights to real estate would be considered unconscionable, and regarding that, he could not acquire the right of ownership due to negligent actions, which are opposite to the principle of conscientiousness and honesty as one of the fundamental principles of land registry and property right. In the end such an entry in the land registry would be invalid because it was entered on the basis of a void legal transaction as the legal basis for acquiring rights, and therefore, at the request of person interested or person who has a legal interest in a specific legal matter, would be erased. The previous land registry state would be established, or the court, considering the claim, would order the land registry office to erase incorrect entry of the defendant and the entry of the plaintiff who has a valid legal basis for entry.

Principle of conscientiousness and honesty related to the principle of trust in land registries

With this setting of legal rules in the matter of acquiring rights to real estate, and considering the well-known fact of devastation of land registries, the legislator demands more responsible attitude of the later acquirer in relation to the Law on the Land Registries, which strengthens the importance of land registries as well as the principle of trust in land registries but in connection with the principle of conscientiousness and honesty as an integrative

part of the legal rules of the new Law on the Property Rights. The legislator also introduces an innovation in this law, and registration is no longer a substantive legal precondition for acquiring ownership rights to real estate, as it entirely was according to the Law on the Land Registries, but instead turn into the function of protection of the right acquired outside the register, because now with the principle of trust in land registries can originally acquire the right of ownership, and in connection with that, there is a loss of the right acquired outside the register that is not registered, which represents a sanction due to non-registration. By prescribing legal rules like this, which in the file essentially transform the importance of registration from the obligation to register to protection of acquired rights in order to exclude possibility of losing rights as a sanction due to non-registration. Non-registered owners are encouraged to register their acquired rights, that generally results with updating of land registries which is the primary goal of the land registry law reform. When a person acquires the right of ownership based on the principle of trust in land registries, it is only important that the acquirer is conscientious, that is, that he acts in good faith, and for conscientiousness, the acquirer is not obliged to examine the off-book condition of the real estate (Medic. 2011).

PROCESS OF FINAL TRANSFORMATION OF PROBLEMATIZED LEGAL RULES

One of the basic innovations in the new Law on the Property Rights of the FBiH is just the waiver of legal rule on gross negligence, which is, as such provided by the Law on the Land Registries of the FBiH, and the prescribing of the legal rule on doubt as significantly greater level of responsibility of the later acquirer according to the ownership legal state of real estate (Mutapcic, 2022). „By annulling the legal rule on gross negligence, as the only form of negligence that excludes possibility of successful appealing to conscientious acquisition, and by prescribing legal solution that prevents conscientious acquisition in circumstances where the later acquirer of real estate had sufficient reasons to suspect that the item belongs to the alienator, the preventive role of notaries or other public officials, in the phase of establishing legal obligations or property rights relations, is even more emphasized, because in that way the possibilities of conscientious acquisition based on the protection of trust in accuracy or completeness of the land registry are significantly reduced“ (Mutapcic, 2022). The later acquirer is required to

be unaware of the ownership state of the estate and that he did not have sufficient reasons to suspect the land registry state, in order to be conscientious both at the time of concluding the legal transaction and at the time of registration application. Although exploring the off-book state of real estate is no longer considered as condition for conscientiousness, by prescribing doubt as a condition for conscientious acquisition instead of gross negligence, the possibility of acquiring ownership rights based on the principle of trust in land registries has been significantly reduced. „In circumstances where the former acquirer of real estate, instead of the status of independent or independent qualified owner, has the status of off-book owner of real estate, then that represents the duty of more responsible relation of the later acquirer of real estate towards off-book legal facts, which is the basic intention of the legislator“ (Mutapcic. 2022). Our deep-rooted legal postulates and our rich legal tradition are protected precisely by prescribing doubt as a level of attention when concluding mandatory legal transactions as well as requesting registration of ownership rights in the land registry because it would not be fair to prescribe legal rules that would ignore or not recognize a large number of property rights acquired off the books and are not recorded in the land registries, primarily because both, the laws and the courts allowed the off-book sale of real estate for a long period of time, and this fact must be taken into consideration when adopting new laws about this matter. The legal tradition of certain people is an indispensable factor when arranging certain legal issue, especially when it comes to the matter of acquiring ownership rights to real estate, because it is a matter that has a centuries-old legal tradition and as such has been incorporated into the mind of citizens in a certain area, and therefore, it is not subject to radical changes. „According to earlier Laws in the matter on the property rights, it was not possible to acquire the right of ownership of real estate from the alienating non-owner. For the first time, the Law on the property rights of the Federation of BiH allowed such possibility to bring the land registry to a state of accuracy and completeness, even at the cost of non-registered owners who acquired this right from a non-resident, but did not register it in the land register, lose their right of ownership if a conscientious third party concludes a valid contract with the formally registered owner and in that way, according to the law itself, acquires the right of ownership by protecting trust in the accuracy to the land registry. It is desirable that non-registered holders of real rights perform registration also because they risk that a conscientious third party will acquire

the right of ownership through the protection of trust in the accuracy to the land registry” (Mulabdic, Mulabdic, 2019). Regarding the acquisition of ownership rights from non-owners, the attitude was taken that it was not allowed, under the justification that no one can transfer more rights than he has to another. As previously stated, the new Law on the property rights introduces a change in this factual situation precisely for the reason of recognition of a large number of property rights acquired outside the books, which existed as such and were allowed even by tacit views of the courts at the time of acquisition.

CONCLUSION

With the adoption of the new Law on the Property Rights of the FBiH, the characteristic of conscientiousness in its essential part of the later acquirer of property rights, underwent changes. With the Law on the Land Registries of the FBiH, the concept of conscientiousness essentially represented acting without gross negligence as level of responsibility of the later acquirer of ownership rights to real estate and according to off-book facts related to a certain real estate, and only the one who acted with gross negligence was considered unconscientious. With the adoption of the new Law on the Property Rights of the FBiH, there is a transformation from the legal rule on gross negligence to the legal rule on doubt as significantly more responsible relation of the later acquirer of real estate towards off-book facts. When passing the new Law on the Property Rights of the FBiH, our legislator bore in mind our rich legal tradition and deep-rooted legal postulates, which are indispensable when passing a certain law. Centuries-old legal tradition, when passing the Law on the Land Registries of the FBiH, was neglected, and that is why a large part of the legal rules of this law was unenforceable. The legal rule on gross negligence in the Law on the Land Registries of the FBiH represents an insufficient level of responsibility of the later acquirer of real estate, and concerning the well-known fact of devastation and non-updating of land registry in our country, and this level of responsibility for off-book facts of the new acquirer of real estate is not in accordance with our centuries-old legal tradition as well as our deeply rooted legal postulates, which are an integral part of our community. If the legal rule of gross negligence is insufficient level of responsibility of the later acquirer also comes from the fact that the courts have allowed, for many years, off-the-record transactions of real estates, and that, too, is one of the basic reasons for land registries not being

the subject matter in an absolutely opposite way to the previous one. All of the above is understandable for the reason that, as stated above, the Law on the Land Registries of the FBiH was imposed law and our legislator had no influence during its creation and adoption, and for this reason, it was omitted to take into account stated facts, which are crucial in the matter of later enforceability of the legal rules in the new law. The Law on the Land Registries of the FBiH existed as *lex specialis* rule until 2014, when our legislator passes new Law on the Property Rights of the FBiH, and with it regulates the above matter in a completely different way and transforms it from a legal rule on gross negligence to a legal rule on doubt as significantly more responsible relation of the later acquirer of real estate. The aforementioned transformation was necessary due to the large number of off-book ownership rights to real estate and the fact that the land registry was not up-to-date, and ignoring the existing large number of off-book ownership rights to real estates would be contrary to our centuries-old legal tradition and a radical end with it, without a transition period of adaptation or transitional legal rules. For these reasons, our legislator recognized that for conscientiousness is not enough that the later acquirer does not act with gross negligence, and therefore he transformed the aforementioned legal rule into a legal rule on doubt, then prescribed, for the later acquirer to be conscientious, he should not even suspect that land registry state is not accurate or complete. Recognizing key issues and regulating them, respecting our legal tradition as well as other essential elements for the legal rules of one regulation to be fully enforceable, our legislator continued with the commenced reform of the land registry right and created a platform with the new Law on the Property Rights of the FBiH that should result with updating of land registries and motivate later acquirers of ownership rights to real estate to carry out registration of ownership rights in land registries. In addition to the transformation of the legal rule on gross negligence into the legal rule on doubt, the legislator has, regarding this, also changed the function of registration in the land registry, from the function of acquiring ownership rights through registration in the land registry, into the function of protecting property rights acquired outside the register and avoiding sanctions for the loss of off-book ownership rights due to non-registration and under the influence of the principle of trust in the land registries of the later conscientious acquirer of real estate.

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