The Relationship of the Owners of the Apartment Building

Maksim A. Permyakov [1, a,*]

[1] Post-Graduate, Far Eastern Federal University, Vladivostok, Russia

[2]Dept. of Civil law, the Far Eastern branch of the Russian State University of Justice, Khabarovsk, Russia

*corresponding author

Keywords: Common property, Apartment building, Ownership rights, Civil law community, Agreement between owners

Abstract: The article discusses the relationship between the owners of premises in an apartment building. Comparing the provisions of the legislation on shared ownership and common shared ownership of the property of an apartment building, the author identified legislation gaps. Analyzing the current legislation of foreign countries, as well as modern doctrine allows to conclude that it is necessary to introduce the institution of agreements of owners of apartment buildings. At the initial stage, such agreements may take the form of a Charter adopted by the developer and existing along with the project. For already built houses, legislative changes are needed to fill the gaps in the law.

1. Introduction

Part 2 of Article 35 of the Constitution of the Russian Federation establishes the right to own property and exercise ownership powers, both independently and jointly with other individuals. Clause 1 of Article 244 of the Civil Code of the Russian Federation, repeating the Constitution, establishes that property owned by two or more persons belongs to them on the basis of common property.

For many years, relations of common ownership have been subjected to theoretical and practical comprehension, but the law is, unfortunately, far from perfect.

For striking example, we can take a look at paragraph 41 of the "Concept for the development of civil legislation of the Russian Federation" which states that rule of paragraph 1 of Article 244 of the Civil Code of the Russian Federation gives a false idea of the existence of a common shared property right on a par with the right of ownership as such, and not as the legal regime of the thing more than one person [1].

Relations arising in connection with a common property emergence can be divided into internal and external. Furthermore, if external relations, as a rule, are classical absolute legal relations with a plurality of subjects on the side of the owner, then internal relations are not yet sufficiently developed and require deep study and comprehension [2].

Of particular interest are questions of organizing internal relations of owners of the common property of an apartment building.

Firstly, in Russia, the majority of the population lives in apartment buildings, which indicates the undoubted relevance of the study. Secondly, both Russian and world jurisprudence face a fundamental problem: necessity to apply special rules to relations between share owners of an apartment building (Germany, Italy) or general rules on shared ownership (Switzerland, Austria).

Reference [3] points out that countries such as Switzerland and Austria have proven the possibility of using classical civil law institutions (shared ownership) to resolve a relatively new phenomenon – ownership by floor, which is an advantage due to traditional clarity. Thus, real housing needs, for the satisfaction of which a special institute of floor ownership was created, can also be satisfied with the help of classical civil constructions.

The question of the possibility of using in domestic realities the classical construction of common shared ownership for ownership by floor seems debatable. To answer it, it is necessary to resolve the issues of the correlation of domestic common ownership and floor ownership rights, and compare the results with similar legislation in countries with progressive institutions of floor ownership.

  DOI: 10.25236/icmeem.2019.071

2. Correlation of General Rules on Common Shared Property and Special Rules on Shared Ownership of Common Property

As mentioned earlier, the legislative definition of common property goes back to understanding it as the ownership belonging to several persons at the same time (paragraph 1 of Article 244 of the Civil Code of the Russian Federation).

Within the meaning of paragraph 1 of Article 245 of the Civil Code of the Russian Federation, the shares of participants in common property are recognized equal, unless otherwise provided by law or contract. By virtue of Part 1 of Article 37 of the Housing Code of the Russian Federation, a share in the right to common property is proportional to the size of the area of the premises belonging to a particular owner. Thus, a rule is established by law that allows determining the size of a share in common property attributable to each of the co-owners.

Paragraph 3 of Article 245 of the Civil Code of the Russian Federation provides for the right of the co-owner to increase the share in case of making inseparable improvements to property in share ownership.

Since the share in the right to common property is established by law, it is impossible to increase it by virtue of the general rule of Article 245 of the Civil Code of the Russian Federation. However, the issue of reimbursement to the co-owner of the costs of maintaining the common property of the apartment building incurred by him or herself in the interests of all owners of the premises is controversial.

Thus, the Supreme Court of the Russian Federation in its determination of April 28, 2015 No. 301-EC15-4285 refused to reimburse the co-owners for the costs of repairing common house property, referring to the fact that the defendants are financed from the state budget, and therefore in a contractual relationship they can enter through the procedure provided for by law on public procurement, which in this case was not done.

The determination of October 16, 2018 No. 78-kg18-45 refused to reimburse expenses for the repair of common property with the reference to the fact that if one of the co-owners bears the costs of maintaining the common property, he will not be entitled to recover them from the other co- owners, if they object to this either if such expenses are necessary for the preservation of property.

At the same time, the Arbitration Court of the Far Eastern District, in a resolution of February 2, 2016 No. F03-6261/2015, concluded that the prosecutor's office is obliged to reimburse the money spent on the overhaul of the building within the limits of its share in the total property of the building, determined in proportion to the premises.

By Appeal of the Ayano-May District court of the Khabarovsk Kray of October 08, 2018 it was recovered unjust enrichment from the owner of an apartment in an apartment building as part of the money spent by the administration of the municipality (that was the owner of several apartments) for roof repairs. The court referred to the administration's performance of a public law obligation to maintain the municipal housing stock, a civil law obligation to maintain the property owned, and a housing law to bear the burden of maintaining common house property. However, the court did not discuss the necessity to bear such costs.

The stated above allows us to say that in the absence of clear legislative mechanisms for reimbursing expenses to a person incurred for the maintenance of common property, the resolution of such issues is complicated and difficult to predict, which fetters the participants of civil-law transactions in actions and creates obstacles to the effective use of their property.

The general rule of share ownership, established by Article 249 of the Civil Code of the Russian Federation, states that each participant in shared ownership is obligated to participate in the maintenance of common property in proportion to his share. A similar provision contains articles 39, 158 of the Housing Code of the Russian Federation, pointing the maintenance of common property.

Reference [5] points to disputes related to the refusal of owners to bear the costs of maintaining common property. In these cases, the owners of non-residential premises support their position by the fact that they do not use the services for maintaining common areas in an apartment building (heating, electricity for common areas) due to the fact that they have their own entrance to the non- residential premises.

Despite the stated position, prevailing in legal literature, as well as paragraph 31 of the Rules for the maintenance of common property in an apartment building, approved by Decree of the Government of the Russian Federation of August 13, 2006 No. 491, indicating that the fee is set the same for all owners of premises, as well as paragraphs 12, 37 of the decision of the Plenum of the Supreme Court of the Russian Federation dated 06.27.2017 No. 22, which clarified that the owners of premises are obliged to bear the burden of maintaining common house property regardless of the actual use, practice allows various approaches to the possibility of establishing a different payment for owners of certain premises.

Thus, the appellate ruling of the Altai Regional Court of April 3, 2013 recognized the establishment of different fees for owners of residential and non-residential premises located in an apartment building, since such differentiation was introduced by decision of the owners meeting.

The approval of this approach is not safe, due to the fact that the owners of the premises, having a majority of votes, may receive the right to artificially inflate or undercharge the size of fees for owners of premises of other functional purposes. Such approach was also rejected by the Supreme Arbitration Court of the Russian Federation in the determination of December 05, 2012 No. BAC-15456/12.

The decision of the Supreme Court of the Russian Federation of May 22, 2018 identifies the characteristics by which the premises can be recognized as autonomous, and the owner is no longer required to maintain common house property: built-in and attached premises, technologically separate from the apartment building, accepted into service as an independent construction project having separate entrances, not having any constructive connection with the living quarters of a residential building, not connected with them either functionally or technologically; they have their own load-bearing walls, their own roof, individual heating, water supply, sewage, energy, ventilation systems.

By virtue of Article 246 of the Civil Code of the Russian Federation, the consent of all co- owners is required to dispose of common property (paragraph 1). A similar rule is formulated for common property in part 3 of article 36 of the Housing Code of the Russian Federation, which stipulates the need to obtain the consent of all owners of the premises of an apartment building to reduce the size of common property through reconstruction.

A literal interpretation of part 3 of article 36 of the Housing Code of the Russian Federation allows us to conclude that the owners of an apartment building do not have the right to reduce the land plot under the apartment building, in the case when such a decrease is not due to the reconstruction of the apartment building [4].

The Ministry of Economic Development of the Russian Federation in a letter dated 05.18.2016 No. OG-D23-6115 also indicates that it is impossible to divide the land on which the apartment building is located.

It seems that this restriction is justified in no way, and cannot serve the development of civil-law transactions, and in particular the space-saving construction and the rational use of land.

According to the general rule established by paragraph 2 of Article 247 of the Civil Code of the Russian Federation, each co-owner has the right to provide him or herself with a part of the common property in proportion to his/her share (paragraph 2 of Article 247 of the Civil Code of the Russian Federation). There is no clear answer to the question about the possibility of applying this provision to relations on the ownership and use of communal property.

Reference [6] claims that a participant in share ownership of the shared property of an apartment building does not have the right to demand that a part of the common property be allocated to his possession and use, commensurate with his/her share.

References [7, 8], on the contrary, argue that the law does not prohibit the provision for the sole ownership and use of part of the common property.

3. Litigation Practice: Approaches

Litigation practice contains several approaches for this dispute. The first approach is based on the inadmissibility of applying the provisions of paragraph 2 of Article 247 of the Civil Code of the Russian Federation to relations on the use of communal property. This conclusion was reached, in particular, by the Federal Arbitration Court of the Volga Region in the Decree of November 27, 2008 in case No. A12-4506/08.

The second approach is that the granting of sole ownership and use of common property is possible with a decision of the general meeting of owners (Resolution of the Arbitration Court of the Volga Region dated July 25, 2016 No. F06-10807 / 2016, decision of the Supreme Court of the Russian Federation dated August 07, 2018 No. 303-EC18-3328 and decision dated April 26, 2018 No. 304-EC17-10944).

In accordance with the third approach, the owner of the premises in an apartment building has the right to use part of the common property even in the absence of a decision of the general meeting, if this does not violate the mandatory norms and rules, as well as the rights and legitimate interests of other owners and third parties (ruling of the East Siberian Arbitration Court District of November 7, 2014 in case No. A33-17011 / 2013).

The most reasonable seems to be the second approach, involving necessity of the general meeting to make the decision regarding providing a particular owner with a part of the common property for use.

However, it is worth considering the position of A.V. Nikitin that the provisions of paragraph 3 of part 2 of article 44 and part 1 of article 46 of the Housing Code of the Russian Federation imply a decision to provide common property to third parties, and not to co-owners [8]. It seems that this gap is caused only by insufficiently high-quality legal techniques of the legislator, which, however, does not mean that the gap is not needed to be eliminated.

The provisions of Article 250 of the Civil Code of the Russian Federation, which provides for participants in share ownership the pre-emptive right to purchase a selling share, shall not apply to the relations of shared owners of the common property of an apartment building. This circumstance was, among other things, indicated in the Letter of Rosreestr dated 12.12.2018 No. 14-12405-GE/18. The justification of this prohibition "for all cases" may be called into question. So, recently included in the number of independent real estate objects, parking spaces have long existed as a share in the right to parking, their serving nature is obvious. In such circumstances, there is some concern about the situation in which excessively free circulation of parking spaces will not allow apartment owners in an apartment building to become an owner of a parking space located in this

building [9, 13, 14].

In addition, for small apartment buildings, the right of pre-emptive purchase could become relevant, which would allow one owner to take over the entire house, transfer one of the apartments in the house to his children, which would balance average social status of residents.

The "other side of the coin" of the preemptive right is the involuntary termination of the right to common shared property.

The general rule of shared ownership provides for the payment of compensation to the co-owner by a court decision, in cases where his share is insignificant, cannot be really allocated and he does not have a significant interest in using common property (paragraph 4 of Article 252 of the Civil Code of the Russian Federation).

For floor by floor ownership Article 293 of the Civil Code of the Russian Federation also provides a special rule, according to which the court, upon the suit of the local government, can decide to sell the living quarter with payment of the proceeds to the owner, in cases where the owner does not use this living quarter for the intended purposes, systematically violates the rights and interests of neighbors, mismanages housing, allowing its deterioration, while not responding to warnings of the local government.

However, the deprivation of rights on the basis of Article 293 of the Civil Code of the Russian Federation is an inapplicable and very complex process [10]. In addition, the fact that local authorities have the right to sue, but not the owners whose rights are violated, makes this institution even less effective.

Thus, the differences in the legal regulation of common shared ownership and common shared ownership of common property in an apartment building are significant. Moreover, the provisions of floor by floor ownership should be recognized as underspecified. Table 1 confirms this conclusion.

Table 1 Comparison of the legal regulation.

Feature	Shared Ownership	Floor ownership
Shares size	Equal	Proportional to the area of occupied premises

Permanent improvements of common property	Share to be increased	No specific standards defined; court practice does not contain sole conclusion
Participation in maintenance	In proportion to the share	Practice allows deviations from the principle of participation in the maintenance in proportion to the share
Disposal of common property	With the consent of the owners	With the consent of the owners, but for the land plot there is no rule
Provision for use to an individual owner	Possible	No specific standards defined; court practice does not contain sole conclusion
Pre-emptive right to purchase	Provided	Not provided
Compulsory deprivation of common ownership	Provided with significant limitations	Provided with significant limitations

4. Correlation of General Rules on Common Shared Ownership and Special Rules on Floor by Floor Ownership in Different Countries

In Western Europe – the cradle of floor ownership, this institution in its modern interpretation took shape in two forms: “genuine” and “non-genuine”.

The countries of the non-genuine form (Germany, Italy, Spain) proceed from the need to apply special rules to floor ownership, since, unlike common shared ownership, the subject owns the right to premises (primary) and the right to shared property in an apartment building, which is secondary; the owner is primarily interested in his premises.

Genuine form countries (Switzerland, Austria), on the contrary, proceed from the possibility of applying the classical rules of common shared ownership to relations to floor ownership.

Moreover, the legal regulation of each of these countries is more similar, despite the various forms of organization of the institute, than the legal regulation of Germany and Russia, which in the professional literature also belongs to a number of countries with genuine floor ownership [3].

Definition of common property in paragraph 5 § 1 of the Law on Housing Property and the Right to long Term Residence (hereinafter – LHP) it reveals that the common property is, first of all, the land plot, as well as parts, accessories and equipment of the building that are not individually owned or owned by third parties. Importantly that the right to own a land plot, is also called the basis of the right of ownership of the premises, in Clause 4 of the paragraph.

In Switzerland, “floor property” is considered a special kind of common property, since the land plot with all the buildings and all its component parts located on share owned by the participants in these relations, deprived of the opportunity to become sole owners of any of these parts [11].

In Russian legislation and in the people’s minds, a land plot does not constitute the primary basis of floor ownership. A vivid illustration is the fact that today a large number of apartment buildings have land plots not registered properly.

The lack of understanding of the land plot as the basis of the right of common shared ownership of the common property of an apartment building is a fundamental difference between the Russian law and order and the law of other countries, and on the contrary makes the these legal systems so close, despite the different forms of organization of floor ownership.

Since Russia, as noted above, is referred to as “genuine” floor property, in this paper we will regard German special rules for the floor property, as a standard of genuine form.

German civil law provides for a more flexible procedure for the owners interaction. Thus, the general rules can be changed by agreement of the parties.

By virtue of paragraph 1 of § 12 of the LHP, the negotiability of the right to the premises may be

limited by the need to obtain the consent of other house owners.

Owners can divide the ownership of the land in such a way that each share is associated with an individual right of ownership of a certain room in the building that is or should be built on this land (paragraph 1 of § 8 of the LHP).

Paragraph 4 § 5, paragraph 1 § 10, paragraph 1 § 15 of the LHP provides for the possibility for owners of premises in an apartment building to conclude agreements on all issues that are established in this Law, with the exception of those for which an agreement is expressly prohibited by law. Moreover, such agreements are binding on successors (paragraph 2) and are referred to in the German literature as the "constitution of the community" [12].

Paragraph 1 of § 15 of the LHP establishes the right of the owners to demand the sale of the premises with payment of the proceeds to the co-owner who has seriously violated the accepted coexistence procedure. Moreover, such a right cannot be limited by agreement (paragraph 4).

The effectiveness of the institution of co-owners agreement is illustrated in Table 2.

Table 2 Effectiveness of the institution of co-owners agreement.

Law uncertainties	Solution in German law
Reimbursement of expenses to the owner for the improvement of common property	The agreement, if it is not expenses beyond the maintenance or repair of common property
Differentiated approach to the obligation of individual owners to participate in the maintenance of common property	The general rule, similar to the Russian legal act, but settlement by agreement is not prohibited.
land plot reduction	According to the agreement rules
Provision of part of the common property	According to the agreement rules
Pre-emptive right	According to the agreement rules
Expulsion of shareholder	According to the agreement rules

5. Conclusion

To sum up, we can point out that Russian legal system is faced with the task of implementing and adapting the institution of agreements of co-owners of apartment buildings in order to most effectively solve the problems that are not settled by the legislator.

It seems that at the initial stage such agreements may take the form of a Charter adopted by the real estate developer and existing along with the project. For already built houses, legislative changes are needed to eliminate the gaps in the law indicated above, or the possibility of a double interpretation. In particular, such changes are necessary in terms of the right of owners to sue provided for in Article 293 of the Civil Code of the Russian Federation, in terms of the pre-emptive right to purchase parking spaces, or premises in so-called small.

In order to harmonize existing legislation, the following changes are proposed:

- to supplement the provisions of the housing code with an indication that any co-owner has the right to improve common property without the consent of the other co-owners, leaving the right to recover from them reimbursement of expenses for such improvement if such improvements are necessary to preserve the common property, and delay in order to reaching a common agreement will increase the costs;
- part 3 of Article 36 of the Housing Code of the Russian Federation shall be supplemented with an indication that the owners of an apartment building have the right to allocate another land plot from the land plot under the apartment building, while each of the land plots formed must be no less than the standard size established by the land legislation;
- to supplement the interrelated provisions of paragraph 3 of part 2 of article 44 and part 1 of article 46 of the Housing Code of the Russian Federation by indicating the possibility to transfer for sole use part of the common house property by decision of the general meeting of

the owners of the apartment building.

References

[1] Council under the President of the Russian Federation on the codification and improvement of civil legislation (2009). The concept of development of the Civil legislation of the Russian Federation. Moscow: Statute.

[2] Tarasenko, Yu. A. (2011). On the nature of relations between subjects of common shared ownership. In M. A. Rozhkova (Ed.), Real rights: statement of the problem and its solution: Collection of articles (pp. 150–161). Moscow: Statute.

[3] Sukhanov, E. A. (2010). Housing (floor) property in European law and order. In V. V. Vitryansky, and E. A. Sukhanov (Eds.), Basic Problems of Private Law. Collection of articles to the anniversary of the doctor of legal sciences, professor Alexander L. Makovsky (pp. 297–317). Moscow: Statute.

[4] Gorodov, O. A. (2015). Commentary on the Housing Code of the Russian Federation. Moscow: Prospect.

[5] Zvezdina, T. M. (2018). The burden of the costs of maintaining common property in an apartment building. Jurist, no. 5, pp. 25–30.

[6] Fogel, V. A. (2002). Features of the exercise of the right of common shared ownership of the common property of an apartment building. Jurist, no. 12, pp. 24–27.

[7] Strembelev, S. V. (2010). Management of the common property of an apartment building: legal aspects: monograph. Moscow: Walters Clover.

[8] Nikitin, A. V. (2018). Some aspects of the provision for use of the common property of an apartment building. Family and housing law, no. 6, pp. 41–45.

[9] Permyakov, M. A. (2019). Parking spaces in apartment buildings: statement of the problem. Eurasian Law Journal, no. 3, pp. 267–268.

[10] Kirichenko, O. V., and Nakushnova, E. V. (2019). Rights and obligations of citizens - owners of residential premises in apartment buildings: a training manual. Moscow: Justicinform.

[11] Meier-Hayoz, A., and Rey, H. (1988). Berner Commentary on Swiss Private Law. Swiss Civil Code, vol. IV: The Property Right. 1st Division: The Property. 5. Subband: Real Estate IV – The Condominium. Preliminary Remarks and Art. 712a - 712t ZGB, no. 31, pp. 535–579.

[12] Ageenko, A. E. (2018). Civil-law regime of floor-by-floor (housing) property: a comparative legal study. In A. M. Shirvindt, and N. B. Shcherbakov (Eds.), Experiments of civilized research: a collection of articles (vol. 2, pp. 6–45). Moscow: Statute.

[13] Zelentsov, A. B., Dolinskaya, V. V., Frolova, E. E., et al. (2017). Comparative analysis of regulatory instruments and the trend towards the harmonization of proprietary regulation in the civil law of member states of BRICS. Journal of Advanced Research in Law and Economics, vol. 8, no. 5, pp. 1641–1649.

[14] Dudin, M. N., Frolova, E. E., Belikova K. M., et al. (2016). Particularities of legal regulation and harmonization of proprietary rights legislation in the RSA, Brazil and China. Journal of Advanced Research in Law and Economics, vol. 7, no. 5, pp. 1026–1036.