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MECHANISM FOR APPORTIONMENT OF JUDICIAL COSTS INCURRED BY THE PARTIES BECAUSE OF TERMINATION OF ADMINISTRATIVE OR CIVIL PROCEEDINGS DUE TO FILING LAWSUIT TO COURT OF INCOMPETENT JURISDICTION

Abstract. *The purpose* is to analyze the mechanism of distribution of court costs incurred by the parties due to the closure of proceedings in an administrative or civil case due to the filing of a lawsuit in a court of improper jurisdiction. **Results.** The article clarifies the concept and purpose of judicial costs in court proceedings. The compensatory, preventive and social function of judicial costs are described. Features and principles of compensation (recovery) of judicial costs are determined. The Supreme Court's practice regarding decisions on the apportionment of judicial costs in the event of the termination of proceedings is analysed. It is concluded that contrary to the provisions of part 5 of article 142 of the Civil Procedure Code of Ukraine on unjustified actions of the plaintiff in the procedural aspect (i. e., actions of filing a baseless lawsuit and actions in a proceeding characterized by abuse of procedural rights), part 9 of article 141 of the Civil Procedure Code of Ukraine is more concerned with improper actions of a party in the substantive aspect, which gave rise to the dispute and can be established only on the basis of the outcome of the dispute settlement (i. e. a decision on the merits of the dispute). The Supreme Court's ratio decidendi on the interpretation of these procedural law provisions is revealed. The article supports the perspective that the incurring of judicial costs is an autonomous type of procedural offence. The focus is on the general rule that the apportionment of judicial costs is allowable only within the limits of the case in which the proceedings are terminated. The provisions of the procedure law on the transfer of a case to the court of first instance, which has jurisdiction to hear such case, if the court of appeal (cassation) terminates the proceedings on the grounds of bringing a lawsuit before a court of incompetent jurisdiction, are analysed. **Conclusions.** In order to ensure that this "mechanism for transferring a case to a court of competent jurisdiction" does provide a solution for the apportionment of judicial costs within a particular case, the author concludes that it should be applied on a mandatory basis along with introducing a rule on the apportionment of the costs as a result of deciding the case on the merits before a court of competent jurisdiction.

Key words: judicial costs, apportionment, compensation, termination of proceedings, case, lawsuit, court, jurisdiction.

1. Introduction

Literature review reveals that judicial costs are considered as the costs incurred by the persons involved in a case and, in cases of their exemption from judicial costs – by the States that they incur in connection with the consideration and adjudication of a particular case. The main purpose of the concept of judicial costs is to reimburse the parties for the costs of the proceedings: payment for legal aid, recovery to

the parties, their representatives, witnesses, specialists, interpreters, experts of expenses, related to relocation, housing, daily subsistence allowance (in case of relocation), compensation for lost earnings or break in traditional occupation, compensation for costs incurred in examining evidence at their location and other actions necessary for the consideration of the case, etc. In addition, they provide some leverage to influence the conduct of participants in the pro-

ceedings and to prevent improper and unfair procedural conduct (Barankova et al., 2011, pp. 439–441). Moreover, some procedural law scholars believe that the name “judicial costs” does not accurately reflect their legal nature and refer to them “costs of civil litigation to be incurred by the parties, third parties with independent claims in action proceedings, applicants and persons concerned in special proceedings for procedural actions on their behalf” (Shtefan, 2005, pp. 236–237). Scholars identify the compensatory, preventive and social functions of judicial costs. The compensatory function is to reimburse costs incurred by the State in civil proceedings, as well as costs incurred by persons who apply to the court or carry out certain procedural actions. The preventive function is to prevent baselessness recourse to the courts and ensure that persons legally concerned in the outcome of a case fulfil their procedural obligations. The social function is to ensure available justice through judicial costs (Vasyliiev, 2008, p. 116).

2. Compensation (recovery) for judicial costs

The compensatory function of judicial costs is exercised through the mechanism for apportionment of judicial costs. The literature review reveals that apportionment of judicial costs is understood as the obligation to recover (compensate) or pay the judicial costs of the other party totally or in part imposed by the court on one party to a litigation. Compensation (recovery) for judicial costs is understood as the return of money paid by a party or a third party for judicial costs. Compensation (recovery) for judicial costs is the result of their apportionment between the parties. It is characterised by features as follows: 1) compensation (recovery) of judicial costs is provided by the party to the litigation (as an exception, in cases provided by law, it may be paid from the State budget); 2) compensation (recovery) of judicial costs may be paid in favour of litigants and third parties, other persons or the state budget (Ustishenko, 2021, pp. 136–137). The apportionment of costs between the parties is based on the general principle that liability for damage is assigned to the person whose act or omission caused the damage (Vasyliiev, 2008, p. 125). Some scholars underline that the civil law principle of full recovery for damages caused (Bohlia, 2005, p. 3), and the general principle of fairness and reasonableness (Bohomol, 2014, p. 236) should be applied in both the recovery of judicial costs to the parties and their apportionment.

3. Interpretation of the provisions of procedural law

However, the purpose of the compensatory function of judicial costs is not achieved

at the termination of proceedings, in particular, because of filing a lawsuit to a court of incompetent jurisdiction. For example, in an administrative case № 810/5133/18 brought by a natural person before the Ministry of Justice of Ukraine, a third person – a private enterprise, for invalidation and annulment of an order relating to the decision on state registration of rights and their encumbrances, in which the court of first instance has terminated the proceedings, since the case has not been subject to the rules of administrative procedure, but recovered legal aid costs from the plaintiff on behalf of a third party, the Supreme Court denied a third person’s claim for judicial costs (legal aid costs) recovery because the courts had not confirmed that the plaintiff’s actions had been unjustified in bringing an action before a court of incompetent jurisdiction (Decision of the Supreme Court composed of the Panel of Judges of the Administrative Court of Cassation of 2 July 2020 in case № 810/5133/18, proceeding № K/9901/8853/20).

Thus, according to the provisions of procedure laws, in the event of the termination of the proceedings, the defendant is entitled to claim recovery for the costs incurred in the proceedings only as a result of the plaintiff’s unjustified actions (part 5, article 142 of the CPC of Ukraine, part 10, article 139 of the APC of Ukraine). However, based on the above principles of full recovery for damages caused, fairness and reasonableness, it is not clear how to address compensation (recovery) to the defendant and to third parties for the costs related to the proceedings, which will be furtherly terminated (in particular, the objective and necessary costs of legal aid; the costs of the parties and their representatives related to arriving at the court; the costs of involving witnesses, specialists, interpreters, experts and examinations; the costs of claiming evidence, examining evidence at their location, providing of evidence; costs of other procedural acts or preparing the case). The law, procedural science and judicial practice do not provide an answer to this question. Given this, the article seeks to study the matter.

In the author’s opinion, the absence of such compensation for judicial costs violates, primarily, the fundamentals of justice, because it forces defendants and third parties, in the absence of their guilt and objective need for this (since the proceedings have not been initiated by them), to bear, among other things, the costs of legal aid and the costs of appearing before a court in a case initiated by the plaintiff, but proceedings thereof are terminated furtherly due to filing a lawsuit in a court of incompetent jurisdiction. On the other hand, if the defendant still has some way to expect compensation

for the costs related to the proceedings (due to the plaintiff's unjustified actions, based on part 5, article 142 of the CPC of Ukraine), the plaintiff has no such right, since compensation for costs incurred by the plaintiff in connection with the proceedings is not regulated by law, if the proceedings are terminated by the Court of Appeal or the Supreme Court on the grounds of filing a lawsuit in a court of incompetent jurisdiction; since part 9 of article 141 of CPC of Ukraine providing for the possibility of recovering judicial costs, irrespective of the outcome of a dispute, from a party for abuse of procedural rights is applied if the dispute arises as a result of improper actions of a party, and it may be applied only on the basis of a decision on the merits that enables to establish the cause of the dispute and improper actions of the parties (defendant or plaintiff, or both) that have led to it, while provided the termination of proceedings it could not be determined by the court, since the court cannot establish the rights and relationship of the parties and the circumstances (legal facts) that gave rise to this legal relationship.

Therefore, it may be concluded that contrary to the provisions of part 5 of article 142 of the CPC of Ukraine which concerns unjustified actions of the plaintiff in the procedural aspect (that is actions of filing a baseless lawsuit and actions in a proceeding characterized by abuse of procedural rights), part 9 of article 141 of the Civil Procedure Code of Ukraine is more concerned with improper actions by a party in the substantive aspect, which gave rise to the dispute and can be established only on the basis of the outcome of the dispute settlement (i. e. a decision on the merits of the dispute).

It should be noted that this issue is connected with the costs related to proceedings, since, when the proceeding is terminated on the grounds that the case should not be considered under the rules of civil procedure, the defendant has the right to recover the amount of court fees not from the plaintiff, but from the State budget of Ukraine (such ratio *decidenti* is given in the decision of the Grand Chamber of the Supreme Court of May 12, 2020 in civil case № 464/104/16-c, proceeding № 14-441cs19).

The rules for the apportionment of costs in case of admission, termination of proceedings or dismissal of proceedings are provided for in part 5 of article 142 of the CPC of Ukraine, according to which, in the event of the termination of proceedings or the dismissal of proceedings, the defendant has the right to claim compensation for costs related to proceedings as a result of the unjustified actions of the plaintiff. Similarly, according to part 9 of article 141

of the CPC of Ukraine, which, in the event of abuse of procedural rights by a party or his/her representative, or if the dispute has arisen as a result of the improper actions by the party, the court may impose judicial costs on such party, entirely or in part, regardless of the outcome of the dispute.

The Supreme Court has already repeatedly argued on the interpretation of these provisions of the procedural law. For example, according to the Supreme Court, composed of the panel of judges of the Second Trial Chamber of the Civil Court of Cassation, in Judgement of January 14, 2021 in Civil Case № 521/3011/18 (proceedings № 61-10254sv20), the systematic interpretation of the provisions of parts 5, 6 of article 142, part 9 of article 141 of the CPC of Ukraine reveals that the plaintiff's unjustified actions as grounds for compensation for the defendant's costs related to proceedings in accordance with part 5 of article 142 of the CPC of Ukraine, are the plaintiff's wilful acting in bad faith which indicate an abuse of procedural rights. In administrative case № 820/4347/17 (proceeding № K/9901/39893/18), the Supreme Court, composed of a panel of judges of the Administrative Court of Cassation, in the decision of November 21, 2018, stated that the very filing of a lawsuit to the court with violation of jurisdiction rules and as a result, termination of the proceeding cannot be sufficient evidence of the plaintiff's unjustified actions. The Grand Chamber of the Supreme Court, in a decision of December 18, 2019 in a civil case № 640/1029/18 (№ proceeding 14-443cs19) did not accept the defendant's argument that the plaintiff's actions were unjustified due to "wilful" bringing a "pointless action before a court of incompetent jurisdiction", since the termination of the proceeding proved neither the absence of a dispute between the plaintiff and the defendant, nor the absence of the subject matter of the dispute, nor the plaintiff's wilful violation of the rules of subject-matter jurisdiction. Therefore, no grounds for charging the plaintiff with the defendant's costs of legal aid are provided by part 5 of article 142 of the CPC of Ukraine. Similar reasons are for compensation for the costs incurred by the parties or third parties in the event of the termination of the proceedings in the absence of the subject matter of the dispute or in the event of *nolle prosequi* (for example, Decision of the Supreme Court composed of the Panel of Judges of the First Trial Chamber of the Civil Court of Cassation of 21 April 2021, in civil case № 199/9188/16-c, proceeding № 61-12504sv20, and Decision of the Supreme Court composed of the Panel of Judges of Economic Court of Cassation of August 30, 2018 on case № 910/23235/17).

Supreme Court Judge A. Hrushytskyi argues that from the perspective of provisions of part 9 of article 141 of the CPC of Ukraine, the concept of “improper” in the Ukrainian language is defined as such that does not comply with certain norms, rules and requirements; does not meet the requirements of proportionality, symmetry, etc., as well as such that does not correspond to the truth, reality; false, wrong; incorrect; that does not lead to the desired results. The application of this provision is not well-established, while the notion of “improper actions by a party” should be interpreted together with the notion of “abuse of procedural rights”. According to Supplementary Decision of the GC SC of 23 October, 2019, administrative case № 815/6171/17, the person filed an administrative lawsuit to the State Registrar for the annulment of the decision and the obligation to perform certain actions in November 2017. At that time, there was no case law to attribute this category of disputes to the civil court jurisdiction, so there is no reason to believe that the plaintiff’s actions in bringing the lawsuit were improper or unjustified. The principle of proportionality in the apportionment of judicial costs may not be applied in case of abuse of procedural rights by a party if the action is denied, judicial costs may be imposed on the defendant (Hrushytskyi, 2019).

According to the Supreme Court in one case, the apportionment of judicial costs is compensatory and is, to a certain extent, the responsibility of each of the parties for acts, including procedural acts, in the course of proceeding (Decision of the Supreme Court composed of the Panel of Judges of the Administrative Court of Cassation of October 20, 2020, case № 520/928/19, proceeding № K/9901/6985/20). Moreover, from the perspective of some scientists, the incurring of judicial costs is an autonomous type of procedural offence (Stoliarov, 2004, p. 11), while the others do not consider apportionment of judicial costs liable (Zhukov, 2014, p. 102).

However, even if the apportionment of judicial costs is recognised as such that entails liability, no grounds for such liability exist in case of the termination of proceedings on the grounds that the case should be considered under the rules of another type of proceedings, in our opinion, it is not possible to accuse the plaintiff of unjustified actions in bringing a claim before a court of incompetent jurisdiction, since it is the court that is required to refuse to initiate proceedings on those grounds, and then acceptance and consideration of such claim (until the time of termination of the proceedings by a higher court) entails the liability of the court primarily. Similarly, it is impossible

to accuse the defendant of having had to go to court as a result of his/her improper actions, since the improper actions can only be established by the outcome of the dispute on the merits. That is to say, the termination of proceedings on grounds of bringing an action before a court of incompetent jurisdiction cannot apply the requirements of part 9 of article 141 and part 5 of article 142 of the CPC of Ukraine (or similar provisions of the APC or EPC of Ukraine) when considering the issue of apportionment of judicial costs. At the same time, the law does not allow to recover judicial costs by bringing an appropriate action (claim for compensation of judicial costs) in another proceeding. Therefore, the only solution is the apportionment of judicial costs within the limits of the case in which the proceedings are terminated.

Formerly, we have already proved the objective need to change the procedural regulatory mechanism for competence in civil proceedings by requiring the court to transfer the case (entirely or in part of plaintiff’s claims) by jurisdiction to another court, eliminating grounds for termination of proceedings such as non-jurisdiction (Koroied, 2014, p. 109). Only last year, in accordance with Law № 460-IX of January 15, 2020, articles 377 and 414 of the CPC of Ukraine were supplemented by corresponding provisions that regulate that in case of the termination of proceedings by the court of appeal (cassation), under para. 1 of part 1 of article 255 of the Code, the court, on the basis of application of the plaintiff, in written proceedings, makes a decision on the transfer of a case to the court of first instance, which has jurisdiction to hear such case, except if several claims subject to different proceedings are joined in one proceeding (or a case is transferred partly to a new consideration or to a further consideration). Similar provisions are contained in articles 319 and 354 of the APC of Ukraine and articles 278 and 313 of the EPC of Ukraine. Moreover, we argue that such mechanism should cover the court of first instance, as it can make a decision on the termination of proceedings on these grounds.

For example, the practical application of articles 377 and 414 of the CPC of Ukraine is the ruling of the Grand Chamber of the Supreme Court of May 12, 2020 in civil case № 464/104/16-c (proceedings thereof was terminated by the Grand Chamber of the Supreme Court), according to which, on the application of the plaintiff, case № 464/104/16-c, on the claim of the Sykhiv District Administration of the Lviv City Council to PERSON_1, PERSON_2, third persons not claiming independent claims regarding the subject matter of the dispute: Lviv Municipal Enterprise Zhytlovyk-C, PERSON_3, about the removal

of the unauthorized enlarged part of the balcony has been transferred to the Lviv District Administrative Court for further consideration. At the same time, before transferring the case to the court of competent jurisdiction, the Grand Chamber of the Supreme Court, in another ruling of May 12, 2020, did not establish that the plaintiff had abused his procedural rights, therefore, denied the defendant's claim for compensation from the Sykhiv District Administration of the Lviv City Council, for the costs of legal aid incurred by PERSON_1 related to proceeding, as a result of the plaintiff's unjustified actions. That is, the issue of apportionment of judicial costs incurred in civil proceedings was decided before the transfer to the court of competent, administrative jurisdiction that deprived the defendant of the opportunity to claim for the compensation of costs incurred as a result of considering the case on the merits before the court of competent jurisdiction.

4. Conclusions

In our opinion, this "mechanism for transferring a case to a court of competent jurisdiction" does generate a solution for the apportionment of judicial costs within a particular case provided this mechanism is applied not voluntarily (at the request of the plaintiff), but on a mandatory basis exclusively, along with introducing a rule on the apportionment of the costs as a result of deciding the case on the merits. Consequently, when a case, after being terminated in one type of proceeding, is brought unconditionally before the court of competent jurisdiction in another type of proceeding, the plaintiff, on the basis of the principle of disposition, will further

decide whether to dismiss the action (leave it pending) or to continue to defend his/her rights before a court of competent jurisdiction. In this case it will be possible to apply the general mechanism for apportionment of judicial costs, that is, the relevant provisions of apportionment of judicial costs, prescribed by procedure law, on adjudication of a case on the merits (article 141 of the CPC of Ukraine) or the rules of apportionment of judicial costs when a proceeding is terminated (in connection with nolle prosequi or amicable agreement) or dismissed (article 142 of the CPC of Ukraine).

Another option to resolve the issue of the apportionment of judicial costs in the event of the termination of proceedings on the above-mentioned grounds, may be a procedural time limit (for example, one month) for the plaintiff from the termination of proceedings on the grounds provided by para. 1 of part 1 of article 255 of the CPC of Ukraine to submit an application under articles 377 and 414 of the CPC of Ukraine on transferring the case to a court of competent jurisdiction. In such a case, the failure of the plaintiff to submit the application within the specified time limit should be considered an abuse of procedural rights (since the plaintiff has initiated proceedings in a court of incompetent jurisdiction and does not wish to continue it in a court of competent jurisdiction to prove the validity of his/her claims and the improper actions of the defendant), which is the ground for apportionment of judicial costs by the court that has terminated the proceeding, considering the provisions of either part 9 of article 141 or part 5 of article 142 of the CPC of Ukraine.

References:

- Barankova, V.V., Bihun, V.A., Komarov, V.V.** (2011). *Kurs tsyvilnoho protsesu [Course of civil proceedings]*. Kharkiv: Pravo (in Ukrainian).
- Bohlia, S.S.** (2005). *Sudovi vytraty v tsyvilnomu sudochynstvi [Judicial costs in civil proceedings]. Extended abstract of candidate's thesis.* Kharkiv (in Ukrainian).
- Bohomol, O.V.** (2014). *Shchodo poriadku rozpodilu sudovykh vytrat u hospodarskomu sudochynstvi [Regarding the order of apportionment of judicial costs in commercial litigation]. Rynkova ekonomika: suchasna teoriia i praktyka upravlinnia – Market economy: modern theory and practice of management, no. 1(1), pp. 235–240* (in Ukrainian).
- Hrushytskyi, A.** (2019). *Vidstuplennia vid pryntsypu proporsionosti pry rozpodili sudovykh vytrat mizh storonamy [Deviation from the principle of proportionality in the distribution of court costs between the parties]. Sudebno-yurydycheskaia hazeta – Judicial-legal newspaper.* Retrieved from: <http://bit.ly/37eLQJt> (in Ukrainian).
- Koroied, S.O.** (2014). *Protseualne zabezpechennia efektyvnosti tsyvilnoho sudochynstva [Procedural ensuring the effectiveness of civil proceedings]. Doctor's thesis.* Kyiv (in Ukrainian).
- Shtefan, M.Y.** (2005). *Tsyvilne protseualne pravo Ukrainy [Civil procedural law of Ukraine]*. Kyiv: In Yure (in Ukrainian).
- Stoliarov, A.G.** (2004). *Sudebnye raskhody kak element sostava grazhdanskoi protseualnoi otvetstvennosti [Legal costs as an element of the composition of civil procedural responsibility]. Extended abstract of candidate's thesis.* St. Petersburg (in Russian).
- Ustushenko, S.E.** (2021). *Sudovi vytraty v tsyvilnomu protsesi Ukrainy [Judicial costs in civil proceedings in Ukraine]. Doctor's thesis.* Odesa (in Ukrainian).

Vasyliiev, S.V. (2008). *Tsyvylnyi protsesy [Civil proceedings]*. Kharkiv: Odissei (in Ukrainian).

Zhukov, A.A. (2014). Raspreделение sudebnykh raskhodov kak mera otvetstvennosti v arbitrazhnom protsesse [Apportionment of judicial costs as a measure of liability in the arbitration process]. *Probely v rossiiskom zakonodatelstve – Gaps in Russian legislation*, no. 2, pp. 100–102 (in Russian).

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МЕХАНІЗМ РОЗПОДІЛУ ЗДІЙСНЕНИХ СТОРОНАМИ СУДОВИХ ВИТРАТ УНАСЛІДОК ЗАКРИТТЯ ПРОВАДЖЕННЯ В АДМІНІСТРАТИВНІЙ АБО ЦИВІЛЬНІЙ СПРАВІ ЧЕРЕЗ ПОДАННЯ ПОЗОВУ ДО СУДУ НЕНАЛЕЖНОЇ ЮРИСДИКЦІЇ

Анотація. *Метою* статті є визначення поняття та призначення судових витрат у судовому процесі, надання характеристики компенсаційної, превентивної та соціальної функцій судових витрат. **Результати.** Визначаються ознаки та принципи компенсації (відшкодування) судових витрат. Здійснюється аналіз судової практики Верховного Суду стосовно вирішення питання розподілу судових витрат у разі закриття провадження у справі. Обґрунтовується, що на відміну від положень ч. 5 ст. 142 ЦПК України, яка стосується необґрунтованих дій позивача саме у процесуальному аспекті (тобто дії з пред'явлення безпідставного позову та дії у процесі, які характеризуються зловживанням процесуальними правами), положення ч. 9 ст. 141 ЦПК України більше стосується неправильних дій сторони в матеріально-правовому сенсі, що призвели до виникнення спору та можуть бути встановлені лише за результатами вирішення такого спору (тобто під час ухвалення рішення по суті спору). Наводяться правові позиції Верховного Суду з приводу тлумачення зазначених положень процесуального закону. Підтримується підхід, згідно з яким спричинення судових витрат є самостійним видом процесуального правопорушення. Наводиться загальне правило, згідно з яким вирішення питання розподілу судових витрат допускається лише в межах тієї справи, провадження в якій закривається. Аналізуються положення процесуального закону про передачу справи до суду першої інстанції, до юрисдикції якого віднесено розгляд такої справи в разі закриття судом апеляційної (касаційної) інстанції провадження у справі з мотивів пред'явлення позову до суду неналежної юрисдикції. **Висновки.** Для того щоб зазначений «механізм передачі справи до суду належної юрисдикції» все-таки забезпечував вирішення питання розподілу судових витрат у межах конкретної справи, автором запропоновано, щоб його застосування відбувалося в обов'язковому порядку з одночасним запровадженням правила про вирішення питання щодо розподілу судових витрат саме за результатами вирішення такої справи по суті в суді належної юрисдикції.

Ключові слова: судові витрати, розподіл, компенсація, закриття провадження, справа, позов, суд, юрисдикція.

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