Gfv.XI.30.Nr.236/2008/6

In the name of the Hungarian Republic:

The Supreme Court of the Hungarian Republic as a review court, in the application for review under serial number. 19 brought by the applicant against the final judgment on the action for payment of compensation brought by the applicant ***CS. Bt.*** *(…), represented by dr. Tibor Paróczai, lawyer (…) against the defendant* ***K-i Vagyonkezelő és Szolgáltató Zrt.*** *(…) before the Tatabányai Városi Bíróság (City Court of Tatabánya) under Nr.7.G.21.852/2005, and decided on appeal on 17th January 2008 by the Komárom-Esztergom Megyei Bíróság (Komárom-Esztergom County Court) as court of second instance under No. 2.Gf.40.017/2007/12, delivered – without public hearing – the present*

j u d g m e n t :

The Supreme Court upholds the final judgment No. 2.Gf.40.017/2007/12 of the Komárom-Esztergom County Court.

It orders the applicant to pay the defendant within 15 days HUF 60,000 (sixty thousand forint) as review procedure costs and to pay the State - upon demand of the competent tax authority - HUF 273,600 (two hundred and seventy-three thousand six hundred forint) as review procedure fees.

No further appeal shall lie against this judgement.

S t a t e m e n t o f r e a s o n s

According to the facts established in the final judgment, there existed a relationship for transporting feed between the applicant and the defendant's predecessor. In this context, the defendant's predecessor transported layer feed on several occasions to the applicant. No objections were raised concerning the quality of the feed until 23rd September 1999. However, since the feed transported on 23rd and 25th September 1999 contained crude ash, calcium, sodium, acid and pericid, it was unfit for feeding, hence had no value. According to the expertise, the applicant suffered material damage of HUF 6,863,117 because of the defective feed.

The applicant did not pay several transport bills from the defendant's predecessor; therefore, the defendant's predecessor

brought an action against the applicant. The applicant (as defendant in that procedure), by document lodged at the court on 7th May 2003, brought a counter-claim seeking an order for the payment of HUF 13,862,928 by the applicant in that case. Although he later confirmed in writing that this document was not a counterclaim, the request for an order for payment was due to an administrative mistake. Thereafter, in his preparatory pleading lodged on 13th September 2004, he stated that he intended to offset his claim for compensation against the applicant's claim.

The court, after having heard the experts and the witnesses, dismissed the action brought by the defendant's predecessor in its final judgment, on the grounds that on the one hand the feed delivered on 23rd and 25th September 1999 had no value, and on the other hand found the applicant's claim for offsetting founded.

The applicant then filed another action on 28th October 2005, seeking an order for the payment of HUF 4,560,058 plus interest. In support of his claim, he submitted that it has been found in the previous procedure that, due to faulty performance on the part of the defendant's predecessor, he suffered material damage of HUF 6,863,117, of which HUF 2,303,059 had been recovered by way of offsetting. In that procedure, he sought compensation for residual injury.

The court of first instance, the City Court of Tatabánya, upheld the action brought in the proceeding No. 7.G.21.852/2005 and ordered the defendant to pay HUF 4,560,058 plus default interest due from 3rd January 2000, and the costs of the proceedings. The court of second instance, the Komárom-Esztergom County Court, on appeal brought by the defendant, overturned the judgment by its judgment No. 2.Gf.40.032/2006/4, and dismissed the action of the applicant as being time-barred, and ordered the applicant to pay the costs of the proceedings to the defendant.

On application for review brought by the applicant, the Supreme Court, by its order No. Pfv.VII.20.516/2007/7, set the final judgment aside and ordered the court of second instance to initiate new proceedings and give a new ruling. In the reasoning of the order, it prescribed that: the County Court shall examine the documents brought by the applicant in the previous proceeding from the aspect of whether they satisfy the formal notice for the enforcement of the claim. The Supreme Court found it necessary to examine in particular the deeds of 7th May 2003 and 13th September

2004, since these documents are capable of interrupting the limitation period, even without bringing a counterclaim, as the defendant could be informed through these documents that the applicant maintained all claims.

In the new procedure, the parties maintained their submissions. In addition, the applicant submitted that, on 7th June 2004 in writing and on 25th June 2004 by registered letter, he called on the defendant to perform.

The defendant contested receiving the call to perform. According to his logbook, at the time of the supposed receipt of that letter (30th June 2004), he received only one letter from the applicant, which was not a call to perform but contained his observations on the minutes of the hearing.

The Komárom-Esztergom County Court overturned the judgment of the court of first instance and dismissed the action by its judgement No. 12 delivered in repeated proceeding. It ordered the applicant to pay to the defendant the costs of the proceedings within 15 days, composed of HUF 250,000 as lawyer's fee and HUF 274,000 procedural fee, and to pay to the State HUF 273,600 as the procedural fee not yet paid pursuant to his right to fee deferral.

According to its reasoning, in the repeated proceedings it was not contested that the limitation period concerning his claim for compensation was to commence as of February 2000.

The obligee may bring a claim of warranty for material defects within six months from the time of performance, pursuant to section 308 (1) of the Civil Code. According to section 310 of the Civil Code, besides a warranty claim, he can claim for damages arising from defective performance in accordance with the compensation rules. In this case, the limitation period is 5 years according to section 324 (1) of the Civil Code.

With regard to the fact that the applicant brought his action 5 years after February 2000 and that the limitation period was not suspended in the view of the Supreme Court, the court – complying with the order of the Supreme Court – had to examine whether any of the documents in the previous proceedings or the written notice to perform made by the applicant was capable of interrupting the limitation period.

The court of second instance referred to section 327 (1) of the

Civil Code, according to which the limitation period shall be interrupted by the written notice to perform, by the enforcement of the claim against the obligor in court procedures, by the amendment of the obligation by agreement – including settlement agreement – or by obligor's acknowledgement of the debt. The court also referred to Resolution No. GKT.72/1973, which states that to interrupt the limitation period, it is sufficient if the written notice contains facts, on the grounds of which the obligor can identify the claims against him. The Resolution states that the notice shall be considered appropriate not only when the claim is clearly and unambiguously apparent (legal title and sum, or otherwise detailed), but also whenever the notice does not contain such details; however, on the basis of the submitted information, the obligor can identify the legal relationship and the facts underlying the claim.

The court of second instance found that the written notice under section 327 (1) of the Civil Code must be addressed to the obligor (in the present case to the defendant). The notice is a declaration addressed to him.

The notice is to be distinguished from the enforcement of the claim in court procedures, which interrupts the limitation period, and which is addressed to the court. Resolution No. GKT. 72/1973 provides guidance expressly on the content of the written notice addressed to the obligor. It is clearly not applicable for the enforcement of the claim in court procedures, since the claim, the counterclaim or the request for set-off must be unambiguous. In these circumstances, the court of second instance found that all documents and notices addressed to the other party, although not detailed but discernibly referring to the claim, as well as the enforcement of the claim, counterclaim or request for set-off in court procedures, on condition that they satisfy the requirements of procedural law, are capable of interrupting the limitation period.

In the view of the court of second instance, the written notice of 17th June 2004, submitted in the proceedings on appeal, satisfies the requirements set out in section 327 (1) of the Civil Code and Resolution No. GKT. 72/1973; however, the applicant could not prove that he had sent the notice to the defendant. The postal proof annexed to the submitted letter gives evidence of sending a postal item to the defendant, but not to its content. The defendant's

logbook does not record the receipt of this postal item at that time. The applicant sent his observations on the minutes of the hearing of 7th May 2003 to the court at the same time, which indicates the likelihood that the same document had been sent to the defendant as well (as shown in his logbook). Having all this in mind, the court of second instance did not find that the written notice interrupted the limitation period.

Moreover, the court of second instance examined whether the claim for damages, several times referred to in the previous proceeding, is capable of interrupting the limitation period. In that regard, it found that the document perceived as a counterclaim on 7th May 2003, as it is not a written notice for performance addressed to the defendant or cannot be seen as the enforcement of the claim in court procedures, pursuant to the applicant's declaration, it is not capable of interrupting the limitation period. Neither is the claim for damages brought by the applicant during the proceedings on 13th September 2004 a declaration addressed to the defendant, since the document does not contain any request for payment, and expressly refers to the fact that he intends to enforce a claim against the defendant up to the amount of the outstanding claims of the defendant (applicant in those proceedings). As an enforcement of the claim in a court procedure, it is capable of interrupting the limitation period, but only up to the amount of the claim to be enforced in the procedure (Court Decisions 1990.67.), thus it could not interrupt the limitation period concerning the claim for the remainder of the damages. In these circumstances, the court of second instance found that the applicant's claim is time-barred, and therefore overturned the judgment delivered by the court of first instance on the basis of section 253 (2) of the Code of Civil Procedure, and dismissed the action.

The applicant brought an application for review against the final judgment and sought setting that judgment aside and upholding the judgment of the first instance. In his view, the court of second instance held without any basis that his claim was time-barred. Regarding its substance, he cited unreasonable assessment of evidence (section 206 (1) of the Code of Civil Procedure) and the misapplication of section 327 (1) of the Civil Code.

In his opinion, the decision delivered by the court of second instance in the new proceeding is also unfounded, and contravenes

the findings stated in the Resolution No. GKT.98/1973 of the Supreme Court.

The Supreme Court underlined in the statement of reasons of the order setting aside the judgment that the applicant had already detailed in his statement of opposition that he would not pay for the feed, because due to the seriously defective nature of the feed he suffered damage, which he seeks to enforce against the supplier. In his observations submitted on 7th May 2003 in the previous proceedings, the defendant requested that the applicant be ordered to pay, beyond the amount enforced through set-off, altogether HUF 11,090,343 plus VAT. Concerning the document, he indeed noted on 30th June 2003 that the drafting was erroneous, since he did not intend to bring a counterclaim at the time, the letter only made reference to the fact that he intended to seek enforcement of the amount later. The document drafted on 7th May 2003 was sent to the defendant of the present case, who interpreted it as a counterclaim, and sought its dismissal; the subsequent withdrawal of the counterclaim was understood as abandoning the action. In his opinion, the abovementioned document – regardless of how it is qualified legally – was clearly suitable for communicating an intent equivalent to a notice. Moreover, the applicant in the present proceedings underlined, in his document drafted on 1st September 2004 and addressed to the court, that he seeks compensation for his damages plus interest; this document was also delivered to the defendant in the present proceedings.

According to Resolution No. GKT.72/1973 of the Supreme Court, a notice capable of interrupting the limitation period is characterised by communicating the fact that the obligee is not willing to waive his right. The communication shall contain all data on the basis of which the obligor can identify which legal relationship or facts and which claims are in question. In his view, further characteristics of the notice can be established by analogy to Resolution No. GKT.98/1973, where the Supreme Court stated that notifying the impleading to the impleaded party shall interrupt the limitation period. The Supreme Court pointed out that, in order to interrupt the limitation period, it is not necessary that the notification is addressed to the obligor; it may be addressed to the court, provided that the obligor is kept informed. Taking that into consideration, the conclusion of the court of second instance that a notice, or a document equivalent in content, addressed not directly to the defendant is not capable

of interrupting the limitation period, is – in the view of the applicant – unfounded. The declarations made by applicant in the previous proceedings concerning the applicant's intention or application to order the defendant of the present proceeding to pay – beyond the amount of the set-off – damages, had been transmitted to the defendant, therefore interrupted the limitation period. The applicant's claim is therefore not time-barred.

The defendant requested in his counter-application for review to uphold the final judgement.

There is no basis for the review application, as the final judgment does not violate the law indicated in the application for review.

In the final judgment, the court of second instance stated appropriately with regard to the underlying law and Resolution No. GKT.72/1973 and in accordance with the established case-law that the applicant did not interrupt the limitation period either by written notice, or by enforcement of the claim in a court procedure.

The applicant did not contest in his application for review that he could not prove that he had transmitted the written notice drafted on 14th June 2004 to the defendant. The court of second instance also stated correctly that neither the document submitted on 7th May 2003, nor the claim for damages brought in the proceedings on 13th September 2004 can be understood as a written notice for performance addressed to the defendant. As to the document of 7th May 2003, the applicant himself declared that its submission was due an administrative mistake. Neither does the claim for damages mentioned in the proceedings on 13th September 2004 qualify as a written notice; it can be understood as a mere signal that the applicant was going to seek enforcement of his claim for damages in a later phase. This is also suggested by the declaration stating that for the time being he sought only the set-off up to the amount claimed by the applicant.

With regard to all the above, the court of second instance concluded correctly that this declaration amounted to the enforcement of the claim in a court procedure, which is capable of interrupting the limitation period, but still only up to the amount claimed in the action. Beyond that amount, the applicant did not enforce the claim against the defendant, not even through a call for performance.

The applicant's legal reasoning that the documents addressed to the court and communicated to the defendant may be understood –

through analogy to Resolution No. GKT.98/1973 – as a written notice for performance, is erroneous. According to the Supreme Court, the Resolution referred to cannot be applied to the present case by analogy. The applicability of Resolution No. GKT 98/1973 is based on the circumstance that the duly lodged request for impleading contains information on the basis of which the impleaded party may learn the claims against him, and the request for impleading concerning that claim becomes evident to him. A request for impleading with such a content satisfies the requirements of "written notice for performance" under section 327 (1) of the Civil Code. However, it can only produce the legal effect of interrupting the limitation period whenever the request for impleading addressed to the court is notified to the impleaded party.

According to the Supreme Court, a written notice that is capable of interrupting the limitation period of a claim, as an addressed declaration shall – as far its content is concerned – not indicate an eventual future intention, but shall expressly call on the obligor to perform the precisely indicated claim in question. The documents addressed by the applicant to the court and examined in the final judgment do not satisfy this requirement, since they indicate merely the intention of the applicant, that in the future he might seek enforcement of this claim against the defendant. This letter of intent does not constitute a written notice capable of interrupting the limitation period, in the absence of a call on the obligor to perform.

In the light of the grounds set out above, the court of second instance stated correctly that the documents submitted by the applicant were not capable of interrupting the limitation period, thus correctly came to the legal conclusion that the applicant's claim was time-barred. According to section 325 (1) of the Civil Code, lapsed claims shall not be enforceable in a court procedure; therefore the court dismissed the action in its final judgment correctly.

Since the final and binding judgment conforms to the law, it was upheld by the Supreme Court in accordance with section 275 (3) Code of Civil Procedure.

According to section 78 (1) of the Code of Civil Procedure, applied appropriately by the Supreme Court under section 270 (1) of the Code of Civil Procedure, the Supreme Court ordered the applicant who applied unsuccessfully for review, to pay the litigation costs

of review on the basis of the value of review and the lawyer's fee to the defendant. The defendant's costs incurred in the review procedure were established with regard to section 3 (2), (5) and (6) of Decree 32/2003 (VIII.22.) of the Minister of Justice on lawyer's fees established in court procedures. It also took into consideration that the review case was heard without public hearing. VAT was added to the calculated amount pursuant to section 4/A (1) of the decree of the Minister of Justice referred to.

The litigation fees of review under section 50 (1) of Act XCIII of 1990 (amended) on fees not yet paid by the applicant due to his eligibility for fee deferral, are to be paid by the applicant on demand to the State according to section 13 (2) of Decree 6/1986 (VI.26.) of the Minister of Justice applied in accordance with section 64 of the Act on fees.

Budapest, 30th October 2008

Dr. Judit Török (signed), President of the Chamber

Váradi Károlyné dr. (signed), Judge Rapporteur

Dr.Katalin Murányi (signed), Judge