Constitutional judgment 3-2-1-59-04

JUDGMENT
OF THE SUPREME COURT EN BANC

No. of the case	3-2-1-59-04
Date of judgment	18 March 2005
Composition of court	Chairman Tõnu Anton and members Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Julia Laffranque, Jaak Luik, Jüri Põld, Harri Salmann, Tambet Tampuu and Peeter Vaher
Court Case	Action of the AS DESINTEGRAATOR against the Republic of Estonia for 441 000 kroons
Disputed judgment	Judgment of the Tallinn Circuit Court of 12 December 2003 in matter no. 2-2/1281/2003
Complainant and type of appeal	Appeals in cassation of the AS DESINTEGRAATOR and the Republic of Estonia
Date of hearing	11 January 2005
Persons participating in the hearing	Representatives of the AS DESINTEGRAATOR sworn advocates Paul Varul and Mikk Lõhmus; representatives of the Chancellor of Justice, Deputy Chancellor of Justice-Adviser Aare Reenumägi and acting adviser Arnika Kalbus; representative of the Ministry of Justice adviser Kaupo Paal

DECISION

1. To satisfy the appeal in cassation of the Republic of Estonia and to dismiss the appeal in cassation of the AS DESINTEGRAATOR.

2. To annul the judgments of the Tallinn City Court of 25 June 2003 and of the civil chamber of the Tallinn Circuit Court of 12 December 2003 and to render a new decision dismissing the action of the AS DESINTEGRAATOR against the Republic of Estonia for 411 000 kroons.

3. To order that the AS DESINTEGRAATOR pay 34 680 kroons of legal costs in favour of the Republic of Estonia.

FACTS AND COURSE OF PROCEEDING

1. the AS DESINTEGRAATOR is a legal successor of inter-holding organisation “Scientific and Production Pool Desintegraator” (hereinafter “the TTK Desintegraator”) and its organisations. the TTK Desintegraator

owned living quarters at Vindi 8 and Pinna 19, Tallinn. On 4 June 1992 the Supreme Council of the Republic of Estonia passed the Republic of Estonia Re-nationalisation and Privatisation of Property of Co-operative, State Co-operative and Non-profit Associations Act (hereinafter "the Re-nationalisation Act"), pursuant to which the entitled subjects for the purposes of the Re-nationalisation Act were the organisations of the National Union of Estonian Consumers' Associations, non-profit mass organisations, inter-holding organisations, as well as co-operative and non-profit organisations and the associations thereof, to whom state property had been given without charge, and the new organisations formed by way of reorganising the latter or buying the property of the latter. Pursuant to the same Act the determination of organisations subject to compulsory re-nationalisation and privatisation was within the competence of the Government of the Republic. By its regulation no. 258 of 2 September 1992 the Government of the Republic approved the list of obligated subjects of re-nationalisation and privatisation, which refers also to the TTK Desintegraator and the organisations thereof. Being an obligated subject, the TTK Desintegraator made an inventory, which resulted in the conclusion of the Central Inventory Committee, that neither the balance sheet of the TTK Desintegraator nor the balance sheets of its organisations contained property subject to re-nationalisation and privatisation, and that they have not received property or funds from the state without charge. On 20 January 1996, the Act to Amend the Privatisation of Dwellings Act and the "Republic of Estonia Re-nationalisation and Privatisation of Property of Co-operative, State Co-operative and Non-profit Associations Act" entered into force, establishing § 3(1^1) of Privatisation of Dwellings Act (hereinafter "the PDA"), pursuant to which the obligated subjects of re-nationalisation and privatisation were obliged to privatise the living quarters owned by them, irrespective of whether state property had been transferred to them without charge. the AS DESINTEGRAATOR refused to return the living quarters it owned. By its judgment of 2 December 1997 the Tallinn Administrative Court declared the activities of the AS DESINTEGRAATOR, consisting in refusal to privatise the dwellings located at Vindi street 8, Tallinn, totally illegal. By its ruling of 17 August 2000 the Tallinn Administrative Court imposed a fine on the AS DESINTEGRAATOR for the failure to comply with the judgment of the Tallinn Administrative Court of 2 December 1997, as the company had not privatised the living quarters located at Vindi street 8, Tallinn. In January and February of 2001, the AS DESINTEGRAATOR privatised all the living quarters it owned in the residential buildings located at Vindi street 8 and Pinna street 19.

2. On 26 August 1999 the AS DESINTEGRAATOR filed with the Tallinn City Court an action against the Republic of Estonia, requesting the order of payment of 345 000 kroons for compensation of damage caused by expropriation of dwelling no. 23 in Vindi street 8. In its application for the increase of the amount of claim, submitted on 4 March 2003, the AS DESINTEGRAATOR requested that the Republic of Estonia be ordered to pay 411 000 kroons. According to the reasons of the action, pursuant to the report of appraisal of the dwelling, approved on 28 October 1998, the privatisation price of dwelling no. 23 of Vindi street 8 was 21 690 privatisation voucher (hereinafter "the PV") kroons, whereas pursuant to expert assessment of the OÜ Ehitusekspert, prepared in July 2002, the market value of the dwelling at 8-23 Vindi street at the time of privatisation (11 January 2001) was 411 000 kroons. The latter amount should be considered a fair compensation, for the purposes of § 32(1) of the Constitution, for the expropriation of the dwelling at 8-23 Vindi street. By its Judgment of 25 June 2003 the Tallinn City Court satisfied the action partly and ordered that the defendant pay in favour of the plaintiff the compensation of 179 234 kroons.

The city court argued that upon awarding fair compensation one has to proceed from the usual value of things. As the dwelling in 8-23 Vindi street was expropriated on 11 January 2001, the value of the dwelling on 11 January 2001 is of importance in this matter. The market value of the referred dwelling on 11 January 2001 was 250 000 kroons, bearing in mind that the dwelling was encumbered with a residential lease contract. Furthermore, it has to be taken into account that under the law the plaintiff was entitled to and exercised the advantage of paying for the privatised land in the PV-s only. Considering the share of the living quarter located at 8-23 Vindi street among all the dwellings belonging to the plaintiff, the latter received the income of 35 800 kroons due to the possibility to pay in the PV-s for the privatised land. Deducting from the market value of the dwelling at the time of privatisation (250 000 kroons) the expropriation, brokerage and formalisation expenses (20 000 kroons), which are included in the price upon calculating market value, the 21 690 PV-s converted into kroons (14 966 kroons) received upon privatisation

of the dwelling, and the income received from the benefit of the right of pre-emption upon privatisation of land (35 800 kroons), the total amount to be compensated for to the plaintiff is 179 234 kroons.

3. The AS DESINTEGRAATOR and the Republic of Estonia filed appeals with the Tallinn Circuit Court against the city court judgment. The AS DESINTEGRAATOR requested that the judgment be amended and a new judgment rendered ordering that the Republic of Estonia pay the amount of 411 000 kroons to the AS DESINTEGRAATOR. The Republic of Estonia requested that the judgment be annulled and a new judgment, dismissing the action, rendered. By its judgment of 12 December 2003 the circuit court upheld the judgment of the city court.

The circuit court argued that when the law obligates a legal person in private law to privatise also the property not received from the state without charge, this can be regarded as expropriation of a person's property against the person's will, which, according to the Constitution, may take place only in the public interest, in the cases and pursuant to procedure provided by law, and for fair and immediate compensation. An obligated subject of expropriation is entitled to receive fair compensation at the time of completion of expropriation, the latest. In the case of a dispute property may be expropriated only after entering into force of a pertinent court judgment and receipt of compensation indicated in the judgment. Fair compensation must be calculated on the basis of usual value, as defined in the Law of Property Act (hereinafter "the LPA"). The usual value of the dwelling under dispute was ascertained by expert assessment of 22 July 2002. According to the expert assessment, on 11 January 2001 the average market value of the dwelling located at 8-23 Vindi street, as an occupied dwelling, was 250 000 kroons. Taking into account the encumbrance on the dwelling upon calculating the market value thereof, as well as the deduction of expropriation, brokerage and formalisation expenses from the amount of compensation, was justified. Also, upon calculating the amount of compensation it was necessary to take into account the income received upon privatisation of the dwelling in the PV-s as converted into the valid currency. In addition, other compensations, including the benefit of the obligated subject upon privatisation of land, had to be deducted from the value of the property. Although the issues of awarding fair compensation have been insufficiently regulated in the Privatisation of Dwellings Act, in the Procedure for Privatisation of Dwellings approved by a Regulation of the Government of the Republic of 1 July 1993, and in the Guidelines for Determining the Estimated Privatisation Value Coefficients of Residential Buildings, it is impossible to agree that in addition to the PV-s, received upon the privatisation of the dwelling, the plaintiff should be entitled to additional compensation only if the court initiates a constitutional review proceeding by not applying § 7(1) of the PDA. The plaintiff claims additional compensation from the state, and that is why the satisfaction of the plaintiff's claim is not in conflict with § 7(1) of the PDA.

4. The AS DESINTEGRAATOR and the Republic of Estonia filed appeals in cassation against the judgment of the Tallinn Circuit Court.

By its judgment of 21 May 2004 the Civil Chamber of the Supreme Court referred the matter to an *ad hoc* panel, composed of the members of the Civil and the Administrative Law Chambers, for hearing. The matter was transferred because of the fact that the Civil Chamber of the Supreme Court did not consent to the opinion of the Administrative Chamber of the Supreme Court, expressed by the latter in its judgment of 20 June 2003 in matter no. 3-3-1-51-03 (RT III 2003, 24, 239). In the referred matter the Administrative Law Chamber pointed out that if a person is of the opinion that expropriation was unlawful, the person must contest the expropriation and not allow unlawful damage to be caused. If a person finds that the payable compensation is not fair, the amount of the compensation should be contested on time.

By its ruling of 13 October 2004 (RT III 2004, 15, 185, § 26) the *ad hoc* panel of the Civil and the Administrative Law Chambers of the Supreme Court refused to hear the appeals in cassation of the AS DESINTEGRAATOR and the Republic of Estonia, and referred the matter to the Supreme Court *en banc* for hearing.

The *ad hoc* panel was of the opinion that as the decision part of the judgment of the Tallinn Administrative Court of 2 December 1997, concerning the privatisation of dwellings located at 8-23 Vindi street, did not

point out that the privatisation obligation should be carried out for the charge established in the Privatisation of Dwellings Act, it was justified that the AS DESINTEGRAATOR came to a conclusion that it was entitled to claim fair compensation also after the obligation to privatise had been fulfilled.

The amount of compensation payable to obligated subjects of privatisation of dwellings arises from the Privatisation of Dwellings Act. If an Act establishes the amount of compensation, which is smaller that the compensation arising from § 32 of the Constitution, a court can not fail to apply the Act and order the payment of compensation on the basis of the Constitution, without initiating a constitutional review proceeding concerning pertinent norms. The provisions of the Privatisation of Dwellings Act may not guarantee fair compensation to an obligated subject of re-nationalisation upon expropriation of living quarters, which the latter has built out of its own funds. Thus, the regulation of the Privatisation of Dwellings Act in the wording in force at the time of privatisation of the dwelling under discussion may violate the fundamental right established in the second sentence of § 32(1) of the Constitution. To examine this doubt the matter should be heard by the Supreme Court *en banc*.

CLAIMS AND OPINIONS OF THE PARTICIPANTS IN THE PROCEEDING

5. In its appeal in cassation the AS DESINTEGRAATOR requests that the judgment of the circuit court be changed and the action satisfied in its entirety.

The AS DESINTEGRAATOR is of the opinion that the compensation to obligated subjects of re-nationalisation for expropriation, provided for in the Privatisation of Dwellings Act, is not in conflict with § 32(1) of the Constitution.

The issues of awarding fair compensation have been insufficiently regulated in the Privatisation of Dwellings Act, in the Procedure for Privatisation of Dwellings approved by a Regulation of the Government of the Republic of 1 July 1993, and in the Guidelines for Determining the Estimated Privatisation Value Coefficients of Residential Buildings, nevertheless, this does not render these provisions unconstitutional. From legal point of view it is possible to award the plaintiff a fair compensation for the expropriation of the dwelling located at 8-23 Vindi street on the basis of § 32(1) of the Constitution, without declaring the regulation of the Privatisation of Dwellings Act unconstitutional. If the legislative power has not passed and Act to regulate an issue, the provisions of the Constitution must be adhered to.

A fair compensation for the purposes of § 32(1) of the Constitution is the usual value of the expropriated thing, i.e. the average local market price. Upon determining a fair compensation the privatisation price of the dwelling located at 8-23 Vindi street, already paid to the AS DESINTEGRAATOR in the PV-s, should be taken into account and deducted from the market price of the dwelling located at 8-23 Vindi street. Upon determining a fair compensation the benefit to obligated subjects of re-nationalisation to pay in full for the land privatised by a right of pre-emption in privatisation vouchers, established in § 19(6) of the PDA and in § 22^3(6) of the Land Reform Act, can not be taken into consideration. Already before the privatisation of the dwelling located at 8-23 Vindi street the AS DESINTEGRAATOR had used the PV-s, acquired from its shareholder the AS EKE Invest under a sale/purchase contract, for privatisation of land by a right of pre-emption, and that is why it could not use the benefit prescribed by the Privatisation of Dwellings Act and the Land Reform Act.

6. In its appeal in cassation the Republic of Estonia requests that the judgment of the circuit court be annulled and a new judgment rendered, dismissing the action of the AS DESINTEGRAATOR, because the plaintiff has already received fair compensation for the dwelling located at 8-23 Vindi street. In the administrative matter related to this dispute the AS DESINTEGRAATOR has contested neither the obligation to privatise the living quarters located at 8 Vindi street on the basis of and pursuant to the procedure provided for in the Privatisation of Dwellings Act, nor the charge.

The Republic of Estonia is of the opinion that the extent of compensation upon privatisation of living quarters of obligated subjects of re-nationalisation and privatisation, provided for in the Privatisation of

Dwellings Act and established by the legislator, is a fair compensation in the context of ownership reform, and is in conformity with § 32(1) of the Constitution.

Fair compensation payable in the course of ownership reform does not have to equal the market value of the expropriated thing today. Although, as a rule, a fair compensation amounts to the market value of the expropriated thing, upon expropriation carried out in the context of ownership reform the peculiarities of the reform must be taken into consideration when determining a fair compensation. The fact that the property had been acquired during the Soviet period, as well as the personal contribution of tenants in creating dwellings fund have to be taken into consideration. In order to determine a fair compensation the value of the thing under expropriation must be calculated as of the time when the expropriation was announced, that is as of the time when the Expropriation Act entered into force. Receiving profit due to the rise of market value of property as a result of refusal to privatise on time is contrary to the principle of fairness.

Even if the amount of compensation prescribed to an obligated subject of re-nationalisation by the Privatisation of Dwellings Act is not, in the present case, in accordance with the fair compensation provided for in § 32(1) of the Constitution, the fair compensation can not be awarded solely on the basis of § 32(1) of the Constitution, without declaring the regulation of the Privatisation of Dwellings Act unconstitutional. It is necessary to establish the grounds for compensation payable upon expropriation in the Privatisation of Dwellings Act, it is insufficient to resort only to the direct regulation established in the Constitution. For the uniform application of law it will be necessary to clarify several issues, which have arisen during the judicial dispute, such as the time serving as the basis for determining the amount of compensation for expropriation and taking into consideration the compensation prescribed by law. Awarding of fair compensation by courts would not guarantee uniform application of law and is not understandable to the addressees of law. Proceeding from the principle of uniform application of law it is not possible, in the present case, to decide on the amount of compensation without bringing the Acts into conformity with the Constitution.

7. On behalf of the Riigikogu the Economic Affairs Committee of the Riigikogu submitted its opinion to the Supreme Court. The Economic Affairs Committee is of the opinion that the contested provisions of the Privatisation of Dwellings Act are in conformity with the Constitution.

The provisions of the Privatisation of Dwellings Act, pursuant to which, upon privatisation, an obligated subject of re-nationalisation acquires the money, the PV-s and everything else referred to in the Act, received from the persons who privatise property, and is entitled to pay in full for the land privatised by a right of pre-emption, guarantee – as a rule – the fair compensation for expropriated property, prescribed by § 32 of the Constitution. If, in a concrete case, the court comes to a conclusion that the exercise of the possibilities for compensation, provided by law, does not guarantee a fair compensation, a judge can, in exceptional cases and for guaranteeing a fair compensation, bearing in mind the aim of completing the ownership reform, award additional compensation directly on the basis of the Constitution. When calculating the additional compensation the following should be born in mind: the fair compensation (the market value of a dwelling as of the time when an opportunity to fulfil the privatisation obligation presented itself) and the amount the obligated subject of re-nationalisation would have received if all possibilities for compensating, prescribed by law, had been used.

In the present matter, bearing in mind the spirit of the Privatisation of Dwellings Act and the nature of the privatisation situation, the necessity of direct application of the Constitution can be doubted.

8. The Chancellor of Justice is of the opinion that § 8(1) and subsections (3), (4) and (6) of § 19 of the Privatisation of Dwellings Act are in conflict with § 11 of the Constitution in conjunction with § 32(1) to the extent that the existing regulation does not meet the conditions of reservation by law, stipulated in the second sentence of § 32(1) of the Constitution.

Privatisation, under the Privatisation of Dwellings Act, of those residential buildings and dwellings that an obligated subject of privatisation has not received from the state without charge, amounts to expropriation without owner’s consent, and pursuant to the second sentence of § 32(1) of the Constitution this may be

carried out only in the cases and pursuant to procedure provided by law, and for fair and immediate compensation. The conditions of reservation by law, stipulated in the second sentence of § 32(1) of the Constitution, are fulfilled to the extent that concerns allowing expropriation only in the cases and pursuant to procedure provided by law, and the requirement that the public interest be adhered to. Nevertheless, the regulation of the Privatisation of Dwellings Act is in conflict with the second sentence of § 32(1) of the Constitution to the extent that it does not guarantee fair and immediate compensation to a person upon expropriation of his or her property.

A fair compensation for the purposes of the second sentence of § 32(1) of the Constitution could be guaranteed by a fair proceeding for determination of compensation, and a compensation related to the actual value of property. Upon deciding the issues of the nature and amount of a fair compensation it should be possible to take into account the facts of each case. The contested sections of the Privatisation of Dwellings Act do not provide for a compensation for the cases where it is manifest that the means stipulated will not guarantee a fair compensation. Also, the procedure for awarding fair compensation has not been regulated. In summary, the issues related to awarding fair compensation have been regulated insufficiently. Ideally, a regulation compatible with the second sentence of § 32(1) of the Constitution must guarantee fair compensation to persons without a recourse to the courts. It is not obligatory that the amount of compensation be equal to the actual value of property, yet it must be related to that. Upon calculating and awarding a fair compensation all legal rights that a person will enjoy or has enjoyed as a result of an expropriation proceeding and which can be expressed in monetary terms, should be taken into consideration.

Furthermore, § 14 of the Constitution, establishing the general right to organisation and procedure, gives rise to the obligation of the state to establish a procedure pursuant to which a person could claim fair compensation for expropriated property. The conflict with § 14 of the Constitution lies first and foremost in the fact that the state has failed to fulfil the organisational obligations, necessary for the exercise of rights.

9. The Minister of Justice is of the opinion that on the basis of the materials of this case it can not be argued with certainty that the compensation awarded for the privatisation of the dwelling under discussion was unfair for the purposes of § 32 of the Constitution.

A fair compensation, for the purposes of the Constitution, is the average local market value of the thing that the owner of property has lost because of expropriation. In this context it is necessary to assess the difference between compensation prescribed upon expropriation (the market value of privatisation vouchers and of the possibility to acquire certain property with these) and the average local market price of the expropriated property. Upon assessing the market value of property the decisive question is as of what time the market value of property subject to transfer should be assessed.

The Minister of Justice argues that the market value of the dwellings transferred by the AS DESINTEGRAATOR should be determined as at the time when the obligation to privatise arose in regard to the AS DESINTEGRAATOR. The Minister of Justice is of the opinion that the obligation arose at the moment when the entitled subjects of privatisation of dwellings submitted their applications for the privatisation of the dwellings. What is also to be taken into account upon adjudicating the matter is that the legislation regulating ownership reform offered the obligated subjects of re-nationalisation essential benefits, such as payment of the selling price of the land under privatisation fully in privatisation vouchers that have essential market value. The fact that the AS DESINTEGRAATOR delayed with fulfilling the obligation to privatise and was passive in the use of benefits prescribed by law, does not render the Privatisation of Dwellings Act unconstitutional. It can not be claimed on the basis of the materials of the case that the compensation payable for the privatisation of the dwelling under discussion was unfair.

The Minister of Justice argues that § 32(1) of the Constitution does not give rise to a right to claim compensation. Proceeding from the principle of legal clarity the conditions of expropriation and compensation payable for that should be determined by law as clearly as possible, so that the addressees of the norms could have a clear understanding of the possibilities to realise the rights related to expropriation. § 32(1) of the Constitution does not fulfil the referred conditions. As the Act states exactly how much

compensation a person obligated to expropriate will receive, the direct application of Constitution is not possible. An interpretation to the contrary would create a situation wherein the owners do not know whether they must contest a provision providing for transfer, or whether they may rest assured that compensation will be awarded directly on the basis of the Constitution. Pertinent constitutional provision does not provide to an owner of property sufficient protection against arbitrary actions of the state. It is for the same reason that awarding compensation in the concrete case is not possible.

PERTINENT PROVISIONS

10. § 8(1) of the Privatisation of Dwellings Act (RT I 1993, 23, 411; … RT I 2004, 53, 370) establishes the following:

"(1) Dwellings shall be privatised with public capital bonds, vouchers issued upon compensating for unlawfully expropriated property, money, and working years or employment shares in the property of a collective farm or inter-holding organisation who is an obligated subject of re-nationalisation, entered into a public capital bond. The purchaser may pay for the same dwelling with one or several referred payment means. The procedure for settlement upon the use of different payment means shall be established by the Government of the Republic."

§ 19(3), (4) and (6) establish the following:

"(3) The obligated subject of re-nationalisation shall acquire the money received from privatisation of dwellings in the ownership of the obligated subject of re-nationalisation.

(4) An obligated subject shall retain the public capital bonds, working years entered into a bond and vouchers issued upon compensating for unlawfully expropriated property, received upon privatisation of a dwelling in the ownership of the obligated subject of agricultural reform and re-nationalisation.

(6) An obligated subject of agricultural reform or re-nationalisation may purchase the property referred to in § 28(3) of the Privatisation Act with the public capital bonds received upon privatisation of dwellings. Pursuant to an agreement with the entitled subject an obligated subject of agricultural reform may use the received public capital bonds for compensating for communised property. An obligated subject of re-nationalisation may pay for the land privatised with the right of pre-emption in full in privatisation vouchers received from privatisation of dwellings."

§ 22^3(3) of the Land Reform Act (RT 1991, 34, 426; … RT I 2004, 38, 258) establishes the following:

"(3) Upon privatisation of land, a purchaser may pay up to one-half of the selling price in privatisation vouchers unless otherwise provided by subsections (4), (5), (6) and (61) of this section. Payment for land may be made in privatisation vouchers during the term provided by law."

§ 22^3(6) of the Land Reform Act establishes the following:

"An obligated subject of the Republic of Estonia Re-nationalisation and Privatisation of Property of Co-operative, State Co-operative and Non-profit Associations Act (RT 1992, 24, 337; RT I 1993, 11, 173; 1996, 2, 28; 1997, 13, 210; 1999, 27, 386) and a legal successor of an obligated subject of the Republic of Estonia Agricultural Reform Act may in addition to the portion specified in subsection (3) of this section also pay the remainder of the selling price of land to be privatised by a right of pre-emption in privatisation vouchers to the extent of the amount accrued to the obligated subject or a company which belongs to the same group of companies as the obligated subject in the course of privatisation of dwelling."

OPINION OF THE SUPREME COURT EN BANC

11. To adjudicate the present matter the Supreme Court *en banc* shall examine firstly, whether the privatisation of the dwelling located at 8-23 Vindi street can be regarded as expropriation for the purposes of

the second sentence of § 32(1) of the Constitution (I). Secondly, the Supreme Court *en banc* shall deal with the terms “pubic interest” and ”fair compensation”, established in the second sentence of § 32(1) of the Constitution (II). Next, the Supreme Court *en banc* shall analyse whether the compensation to the obligated subjects of re-nationalisation for expropriation of dwellings, provided for by the legislator, meets the conditions of “fairness” and “immediateness”, arising from the second sentence of § 32(1) of the Constitution (III). Finally, the Supreme Court *en banc* shall give its opinion concerning the appeals in cassation submitted (IV).

I.

12. § 32 of the Constitution establishes the right of ownership as a fundamental right. § 32(1) of the Constitution guarantees protection against expropriation as an aspect of the right of ownership. Pursuant to the first sentence of § 32(1) of the Constitution the property of every person is inviolable and equally protected. Nevertheless, the principle of inviolability of property and equal protection, expressed like that, is not an unlimited one. Pursuant to the second sentence of § 32(1) of the Constitution property may be expropriated without the consent of the owner only in public interest, in the cases and pursuant to procedure provided by law, and for fair and immediate compensation. On the basis of the third sentence of § 32(1) of the Constitution everyone whose property is expropriated without his or her consent has the right of recourse to the courts and to contest the expropriation, the compensation, or the amount thereof.

13. Expropriation means total or partial deprivation of the owner of a subjective right guaranteed by § 32 of the Constitution. Whereas it is irrelevant whether, as a result expropriation, the state or some other person becomes the owner of the property. A situation where the state obligates the owner to transfer his or her property to third persons also amounts to expropriation. This is the opinion reached by the Constitutional Review Chamber of the Supreme Court on 12 April 1995 in matter no. III-4/1-1/95 (RT I 1995, 42, 655), pointing out that if the Privatisation of Dwellings Act puts an obligation on a co-operative organisation as an obligated subject of re-nationalisation to privatise also the property not received from the state without charge, this actually amounts to expropriation of the property of the co-operative organisation. The Constitutional Review Chamber of the Supreme Court repeated the same opinion on its judgment of 8 November 1996 in matter no. 3-4-1-2-96 (RT I 1996, 87, 1558).

14. Pursuant to the wording of § $3(1^1)$ of the Privatisation of Dwellings Act, in force as of 20 January 1996, the following are also objects of privatisation: a dwelling, which is in the ownership of an obligated subject of re-nationalisation and privatisation (hereinafter “obligated subject of re-nationalisation”) referred to in § 2(3) of the Re-nationalisation Act and was in the ownership of the latter at the time when the pertinent Act entered into force; a dwelling, which has been transferred from the ownership of the obligated subject of re-nationalisation to a legal person who is the legal successor thereof, or to a new legal person formed in the course of the reform of obligated subjects of re-nationalisation. According to the first sentence of § 2(3) of the Re-nationalisation Act it is the Government of the Republic who shall determine the organisations, who are the obligated subjects of re-nationalisation, and shall approve a list of such organisations. By its Regulation no. 258 of 2 September 1992 the Government of the Republic approved the list of obligated subjects of re-nationalisation and privatisation, which included the TTK Desintegraator and the organisations thereof, i.e. the legal predecessors of the AS DESINTEGRAATOR. The TTK Desintegraator, as an obligated subject, made an inventory, as a result of which the Central Inventory Committee reached the conclusion that the TTK Desintegraator had not received any property or other financial assets from the state without charge. Irrespective of that, under § 3(11) of the PDA, which entered into force on 20 January 1996, the TTK Desintegraator was obligated to privatise the dwellings which were in its ownership.

On the basis of the referred judgment of the Constitutional Review Chamber of the Supreme Court the Supreme Court *en banc* is of the opinion that the fact that the obligation was imposed on the TTK Desintegraator – the legal predecessor of the AS DESINTEGRAATOR – to privatise the dwellings, which were in its ownership at the moment of entering into force of the Re-nationalisation Act and which had not been received from the state without charge, amounted to obligating the TTK Desintegraator to expropriate

its property, and that the privatisation of the dwelling located at 8-23 Vindi street on 11 January 2001 amounted to expropriation of the property of the AS DESINTEGRAATOR.

II.

15. Expropriation as total or partial deprivation of property of persons who have the fundamental right to ownership, established by § 32 of the Constitution, constitutes a very intensive restriction of the right of ownership for which the Constitution provided for qualified reservations by law. Although, pursuant to the second sentence of § 32(1) of the Constitution property may be expropriated without the consent of the owner in the cases and pursuant to procedure provided by law, the Constitution itself makes the constitutionality of such expropriation dependent on additional conditions. Firstly, property may be expropriated in the cases and pursuant to procedure provided by law only in the public interest; secondly, this may be done for fair and immediate compensation.

16. In part V of the referred judgment of 8 November 1996, the Constitutional Review Chamber of the Supreme Court argued that although, generally, the obligation of a private-law person to give away his property can not be conceived as promoting public interests, in the case of expropriation of living quarters the general and individual interest are interwoven. The Chamber pointed out that: "Public interest is first and foremost expressed in the necessity of ownership reform. The ownership reform was planned and provided for by the Supreme Council. The fact the Riigikogu has, by adopting two laws, expressed its unambiguous legislative will to expropriate living quarters, refers to a weighty public interest."

According to § 2(1) of the Privatisation of Dwellings Act the objective of the Act is to give natural and legal persons a possibility to acquire the living quarters they rent or unoccupied living quarters, and thus to guarantee better maintenance and preservation of residential buildings. The Supreme Court *en banc* is of the opinion that privatisation of dwellings also serves the objectives of solving the social problems arising during transition to market economy and remedying the economic injustice caused by the Soviet system, enabling the tenants of living quarters to become the owners of the dwellings they rent for the PV-s, obtained in compensation for the time worked under Soviet regime and/or in compensation for unlawfully expropriated property. Thus, the dwelling located at 8-23 Vindi street was expropriated (through imposing the duty to privatise on the AS DESINTEGRAATOR) in the public interest.

17. Pursuant to the Constitution expropriation must, in addition to serving the public interest, be carried out for fair and immediate compensation. The Administrative Chamber of the Supreme Court found in its judgment of 20 June 2003 in matter no. 3-3-1-51-03 (RT III 2003, 24, 239) that the second sentence of § 32(1) of the Constitution creates an obligation for the state to guarantee, upon expropriation provided for by the state, the payment of fair compensation to the owner of the property under expropriation. The fair compensation may also be paid by a third person, for example the person who acquires the expropriated property. If the compensation payable is not sufficient, the state has violated the constitutional guarantee of ownership. Pursuant to the reasons of the referred judgment of the Constitutional Review Chamber of the Supreme Court of 8 November 1996, the requirement of immediate compensation has been observed if the person receives the compensation by the time of completion of expropriation, the latest.

18. The Supreme Court has repeatedly examined the issue of fairness of compensation in its judgments. In the judgment of 12 April 1995, referred to above, the Constitutional Review Chamber of the Supreme Court came to the conclusion that upon expropriation the fair compensation is the usual value of the thing under expropriation, which – pursuant to § 29(2) of the Law of Property Act, in force until 30 June 2002 – is the average local market price of the thing (as of 1 July 2002 a similar provision is in force – pursuant to § 65 of the General Part of the Civil Code Act the usual value of an object is the average local selling price (market price) thereof). The *ad hoc* panel of the Supreme Court, composed of the members of the Civil and the Administrative Law Chambers, in its ruling of 13 October 2004 in the present matter (RT III 2004, 15, 185), referred to the referred judgment of the Constitutional Review Chamber of the Supreme Court, thus upholding the view that a fair compensation upon expropriation of property is the usual value of a thing, i.e.

the average local selling price (market price). In the above referred judgment of 20 June 2003 the Administrative Law Chamber of the Supreme Court pointed out that although, generally, the market price of a thing constitutes the fair compensation, a smaller compensation may also be in conformity with the second sentence of § 32(1) of the Constitution if, due to exceptional circumstances, a full compensation would be unjust.

19. The Supreme Court *en banc* is of the opinion that the fair price of a thing under expropriation need not necessarily be equal to the usual value, i.e. the market price of a thing. The Supreme Court *en banc* admits that although, as a rule, the market price of a thing is to be considered the fair compensation, a smaller compensation may be constitutional, too, if full compensation is not justified because of the circumstances of expropriation. In order to legally assess a compensation the interests of an individual must be weighed against the public interest. In the present case it is necessary to take into account the peculiarities of privatisation of dwellings as expropriation in the course of ownership reform.

20. The Supreme Court *en banc* considers it necessary to point out that in the implementation practice of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "the European Convention on Human Rights") the protection of the right of ownership upon expropriation does not mean the obligation to compensate for the full market value of the object under expropriation, either.

21. On 13 March 1996, when ratifying the European Convention on Human Rights, the Republic of Estonia made a reservation to Article 1 of the first protocol to the Convention, concerning the protection of property. In part VI of the above referred judgment of 8 November 1996 the Constitutional Review Chamber of the Supreme Court argued the following: "The reservation admits that Estonia, having just restored its independence, is unable to carry out "wide economic and social reforms" in full conformity with the Convention. According to Article 64 of the Convention it was indicated in the reservation that § 1 of Protocol 1 was not extended to reform Acts enumerated in the reservation. Pursuant to the spirit of the reservation the Estonian state admitted the need to complete the undertaken ownership reform, and the possibility that the reform was not in full conformity with the universally recognised principles of protection of ownership embodied in the Convention. The Convention Ratification Act is effective and the reservation has been recognised as acceptable by the State Parties. […] To admit an inconsistency does no mean a possibility to ignore the requirement that laws must be in conformity with the Constitution." Pursuant to § 2 of the "Convention for the Protection of Human Rights and Fundamental Freedoms (Amended by Protocols no. 2, 3, 5, 8) and its Additional Protocols no. 1, 4, 7, 9, 10 and 11 Ratification Act", the referred reservation includes, inter alia, the wording of the Privatisation of Dwellings Act in force at the time of entering into force of the Ratification Act. At the time of entering into force of the Ratification Act, the Privatisation of Dwellings Act regarded the dwellings owned by the obligated subjects of re-nationalisation, provided for in § 2(3) of the Re-nationalisation Act, as objects of privatisation.

This does not mean, though, that the implementation practice of the European Convention on Human Rights must not be taken into account upon interpreting the Constitution. That is why the Supreme Court *en banc* considers it necessary, upon interpreting the "fair compensation" referred to in the second sentence of § 32(1) of the Constitution, to examine the pertinent practice of the European Court of Human Rights.

22. Article 1 of the first protocol to the European Convention on Human Rights, guaranteeing the protection of possessions, does not contain the term "fair compensation". Nevertheless, the second sentence of Article 1 of the first protocol to the European Convention on Human Rights establishes that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. According to the implementation practice of the Convention, interference with free enjoyment of property must, in addition to pursuing a legitimate aim "in the public interest", also be in conformity with the principle of proportionality. This means that upon interfering into the right to freely possess one's property there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised (*James and Others v. the United Kingdom, 21.02.1986, A98, paragraph 50*). The compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it

does not impose a disproportional burden on the applicants (*James and Others v. the United Kingdom, 21.02.1986, A98, paragraph 54*). Upon assessing the compensation standard the European Court of Human Rights has held that the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportional interference into the right of ownership, and that a total lack of compensation can be considered justifiable under the Convention only in exceptional circumstances (*James and Others v. the United Kingdom,A98, 21.02.1986, paragraph 54; Holy Monasteries v. Greece, 09.12.1994, A310-A, paragraph 71*). The European Court of Human Rights has repeatedly underlined that although expropriation of property for a compensation in the amount not reasonably related to its value would normally constitute a violation of Article 1 of the first protocol to the Convention, the Article does not guarantee the right to compensation in the amount of market value in all circumstances. For example, legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value (*James and Others v. the United Kingdom, 21.02.1986, A98, paragraph 54; Lithgow and Others v. the United Kingdom, 08.07.1986, A102, paragraph 121*). In such a case the compensation in smaller amount must be reasoned.

For example, in *Lithgow and Others v. the United Kingdom* the European Court of Human Rights pointed out that the standard of compensation required in a nationalisation case may be different from that required in regard to other takings of property, such as expropriation of land in the public interest. That is why in determining a fair balance between the public interest and the private interests concerned both the nature of the property taken and the circumstances of the taking must be taken into account (*Lithgow and Others v. the United Kingdom, 08.07.1986, A102, paragraph 121*). The Court underlined that “nationalisation is a measure of a general economic nature in regard to which the State must be allowed a wide margin of appreciation” (*Lithgow and Others v. the United Kingdom, 08.07.1986, A102, paragraph 143*).

Imposing an obligation on the obligated subjects of re-nationalisation to privatise the dwellings they own is, similarly with nationalisation, a measure of general economic nature, which differs, for example, from expropriation of land in the public interest.

Thus, pursuant to the practice of the European Court of Human Rights, the compensation payable upon expropriation must be reasonably related to the value of property, and extraordinary failure to compensate for or compensation in the amount smaller than market value must be reasoned.

23. On the basis of the aforesaid the Supreme Court *en banc* considers it necessary to examine whether in the present case the fact that the AS DESINTEGRAATOR was paid smaller compensation than the market value for the expropriation of its property was justified, i.e. whether the compensation for the expropriation of dwellings, provided for by the legislator in the Privatisation of Dwellings Act and the Land Reform Act to obligated subjects of re-nationalisation, is in conformity with the requirement of “fairness” arising from the second sentence of § 32(1) of the Constitution, and whether the compensation has been “immediate” for the purposes of the second sentence of § 32(1) of the Constitution.

III.

24. First of all, the Supreme Court *en banc* shall analyse the issue of whether the disputed regulation, which provided for the PV-s as compensation for the owners of dwellings under expropriation and for a possibility to privatise land on favourable conditions, meets the requirement of “fairness” established in the second sentence of § 32(1) of the Constitution.

25. In the context of adjudicating the matter the Supreme Court *en banc* considers it important to bear in mind that the expropriation under discussion took place due to ownership reform. In its judgment of 16 September 2003 in matter no. 3-4-1-6-03 (RT III 2003, 27, 269, § 22), the Constitutional Review Chamber of the Supreme Court pointed out that the Principles of Ownership Reform Act expressed political will to effect restitution to the extent and in ways that would not cause new injustices and would be within the

state's economic means. Pursuant to the judgment the compensating must not be too burdensome on the taxpayer and must not prevent the making of expenses necessary for the society. The Supreme Court *en banc* is of the opinion that the same principle must be adhered to upon realisation of the second objective of the ownership reform – upon privatisation of state property and property of co-operative, state co-operative and non-profit associations.

26. Naturally, the aforesaid does not mean that the state should be allowed, with reference to the need to economise public assets, to impose the realisation of one of the objectives of ownership reform – guaranteeing a possibility to natural persons to acquire the dwellings they use on the basis of residential lease contracts – fully on the obligated subjects of re-nationalisation who, for the purposes of the Re-nationalisation Act, have built the dwellings out of their own funds. Nevertheless, the Supreme Court *en banc* is of the opinion that the legislator is entitled to weigh whether it is fair and justified that the state be obligated to compensate for the dwellings, expropriated from obligated subjects of re-nationalisation, according to the market value thereof. The Supreme Court *en banc* argues that upon deciding on the fairness of compensation payable upon expropriation of co-operative property the legislator may take into account the exceptional nature of such property and the specific time context in which the property was created.

27. L. Tõnisson, the representative of the Riigikogu, pointed out at the hearing of the Constitutional Review Chamber of the Supreme Court of 29 March 1995, concerning matter no. III-4/1-1/95, that upon establishing the provision of the Privatisation of Dwellings Act pursuant to which the property under privatisation shall also include the property and the increment of property of the obligated subjects of re-nationalisation, obtained from contributions, membership fees and other payments of the members and shareholders thereof, the legislator proceeded from the assumption that it was impossible to ascertain which part of the property of a co-operative organisation belonged to the state and which part to the organisation, and therefore the co-operative ownership should be regarded as a mixture of the two forms of ownership (the minutes of the hearing of the Constitutional Review Chamber of the Supreme Court of 29 March 1995, pp 2-3).

28. As a rule, the tenants of the dwellings of co-operative, state co-operative and non-profit organisations were the members of these organisations. The legislator considered the working years of persons who had worked in such organisation also worth compensating for in the form of the PV-s on the basis of Acts regulating the ownership reform, and treated these persons equally with those persons whose employer had been the state. The co-operative, state co-operative and non-profit organisations managed themselves under the conditions of lack of free competition and – very often – with direct and indirect support of the state. Imposing an obligation to privatise on such organisations was justified, among other things, with the fact that one of the sources of the property of such organisations was the work contribution of the members thereof (and thus, in many cases, of the tenants of the dwellings).

29. Weighing the interests of the obligated subjects of re-nationalisation against the public interest, the legislator established a regulatory framework pursuant to which an obligated subject of re-nationalisation shall receive the PV-s paid by persons privatising the dwellings as compensation, and also a right to privatise land on favourable conditions. The legislator considered this to be fair compensation for the dwellings privatised by co-operative, state co-operative and non-profit organisations.

30. The Supreme Court *en banc* is of the opinion that as the property, which is the object of the present dispute, was acquired by the TTK Desintegraator, the legal predecessor of the AS DESINTEGRAATOR, during the Soviet period and in the context of economic relationships totally different as compared to market economy, compensating for the difference between the market price of the dwelling located at 8-23 Vindi street, and the PV-s received for the dwelling and the value of the legal right received under § 19(6) of the PDA and § 22^3(6) of Land Reform Act, would give the AS DESINTEGRAATOR unjustified income at the expense of public funds.

31. The Supreme Court *en banc* points out that upon determining the amount of fair compensation for dwellings privatised in the course of ownership reform, that is for re-nationalised dwellings for the purposes of the Re-nationalisation Act, the legislator made the value of such dwellings in the PV-s dependent on the

market value thereof. In relation to privatisation of the dwelling located at 8-23 Vindi street the AS DESINTEGRAATOR has received 21 690 PV kroons. This amount is related to the market value of the dwelling located at 8-23 Vindi street, because pursuant to the "Guidelines for Determining the Coefficients of Estimated Values upon Privatisation of Dwellings", approved by Regulation no. 198 of the Government of the Republic of 1 July 1993 (RT I 1993, 46, 641), issued on the basis of § 7(1) of the PDA, the indicators showing the useful value of a dwelling (depreciation, level of maintenance and other functional indicators) shall be assessed upon determining the privatisation value thereof.

32. The market value of the dwelling located at 8-23 Vindi street – a movable – was increased by the right of the owner of the dwelling, provided for in the Land Reform Act and the Apartment Ownership Act, to privatise on favourable conditions the legal share of the land under privatisation, belonging to the flat, under residential building and belonging thereto. In addition to constructional features, the market value of the dwelling located at 8-23 Vindi street depends also on the location of 8 Vindi street. The legal predecessor of the AS DESINTEGRAATOR – the TTK Desintegraator – had incurred expenses only for the acquisition of the building of Vindi 8, and not for acquisition for use of the land under the building, because it is known that during the Soviet regime the owner of a building acquired the land for use without charge. Thus, it would be unjustified to compensate to the AS DESINTEGRAATOR the share of market value of the dwelling as an immovable, arising from the land under the building and the location thereof, which at the present time is calculated into the market value of a dwelling.

33. Upon assessing the fairness of the compensation payable to the AS DESINTEGRAATOR it has also to be taken into account that the PV-s are a special means of payment, the value of which is not confined to the amount of money the owner thereof receives from the sales of the PV-s at a given moment. Namely, on the basis of § 29(1) of the Privatisation Act the PV-s can be used for payment for assets obtained on the basis of the Privatisation of Dwellings Act, the Privatisation of Legal Share of a Residential Building in Common Ownership Act, the Land Reform Act and the Non-Residential Premises Privatisation Act, until 1 July 2006.

34. After the above referred judgment of the Constitutional Review Chamber of the Supreme Court of 12 April 1995, declaring § 3(1) of the PDA invalid to the extent that it considers, for the purposes of the Act, a residential building or a dwelling of a co-operative organisation to be an object of privatisation, irrespective out of whose funds these have been built, the legislator amended the PDA with § $3(1^1)$, pursuant to which the objects of privatisation shall include, inter alia, a dwelling in the ownership of an obligated subject of re-nationalisation and privatisation, established in § 2(3) of the "Republic of Estonia Re-nationalisation and Privatisation of Property of Co-operative, State Co-operative and Non-profit Associations Act", and was in the ownership thereof at the time when the latter Act entered into force. This regulation eliminated the unjust obligation to privatise the dwellings built after the beginning of ownership reform. By the same amendment the third sentence was added to § 19(6) of the PDA, by which an obligated subject of re-nationalisation was given the right to use the PV-s received for privatisation of dwellings to pay the total selling price of land to be privatised with a right of pre-emption. By an amendment of 19 January 1997 the same benefit was established in § 22^3(6) of the Land Reform Act.

At the sitting of the Riigikogu the amendment enabling payment of 100% of the selling price of land to be privatised with a right of pre-emption in the PV-s (instead of the 50% allowed so far) was justified with the very need to give fair compensation to those obligated subjects of re-nationalisation who privatise dwellings built out of their own funds (see the first reading of the "Republic of Estonia Re-nationalisation and Privatisation of Property of Co-operative, State Co-operative and Non-profit Associations Act" Amendment Act. Monday, 18 December 1995, VIII composition of the Riigikogu. Shorthand notes, Volume V, 1995, p 1132). In the above referred judgment of 8 November 1996, the Constitutional Review Chamber of the Supreme Court pointed out that as for the compensation offered in the course of privatisation of dwellings, the Riigikogu has, after the judgment of the Constitutional Review Chamber of the Supreme Court of 12 April 1995, acted in accordance with the spirit of the judgment and has sought and found additional possibilities for payment for dwellings under expropriation, and that the Supreme Court is of the opinion that the possibility of an obligated subject of privatisation of dwellings to use the PV-s accrued for privatisation of land with a right of pre-emption can be regarded as the increase of the price of the PV-s.

35. According to the non-disputed facts the AS DESINTEGRAATOR has privatised land on favourable conditions on the basis of the third sentence of § 19(6) of the PDA and § 22^3(6) of the Land Reform Act. The Supreme Court *en banc* is of the opinion that the fact that the AS DESINTEGRAATOR did not use the PV-s received for the privatisation of the dwelling located at 8-23 Vindi street for privatisation of land does not give a reason to claim that in relation to privatisation of the dwelling located at 8-23 Vindi street the AS DESINTEGRAATOR has not been able to exercise the right to privatise land on favourable conditions. The state give the AS DESINTEGRAATOR the right to privatise land on favourable conditions on the basis of law, in return for the obligation to privatise dwellings, including the obligation to privatise the dwelling located at 8-23 Vindi street. If the AS DESINTEGRAATOR had privatised the dwelling located at 8-23 Vindi street without delay, after the third sentence of § 19(3) of the PDA entered into force (on 20 January 1996), it could have used the PV-s accrued for the dwelling located at 8-23 Vindi street for privatisation of land.

36. The legislator has a wide discretion for the protection of public interests upon transforming ownership relationships in the course of a wide-scale reform. The legislator is entitled to decide on essential expropriations and establish special means of compensation, fair from the aspect of transformation of relationships, which do not need to guarantee total compensation of market value to the owner of property. In the present case the legislator, after having weighed the matter, has came to the conclusion that a fair compensation to co-operative, state co-operative and non-profit organisations for the dwellings subject to expropriation through fulfilling the obligation to privatise would be payment in the PV-s, supplemented with a possibility to pay the full selling price of land to be privatised with a right of pre-emption in the PV-s. The Supreme Court *en banc* has no reason to doubt the result of the weighing.

37. The AS DESINTEGRAATOR has received the PV-s in the amount related to market value of the dwelling under dispute, and has been able to exercise the right, given by law in return for the fulfilment of the obligation to privatise the dwellings it owned (thus, also the dwelling located at 8-23 Vindi street) to use the PV-s accrued for privatisation of dwellings for privatisation of land. The regulations of the Privatisation of Dwellings Act and the Land Reform Act guaranteed such mechanisms, providing for a fair compensation to the AS DESINTEGRAATOR for privatisation (expropriation) of the dwelling located at 8-23 Vindi street. If the state were to compensate to co-operative, state co-operative and non-profit organisations, either in money or combination of money and other benefits, for the market value of dwellings under privatisation, it would be in conflict with the objectives of the ownership reform and the result achieved would be unfair to the society in general.

38. The Supreme Court *en banc* is of the opinion that as the AS DESINTEGRAATOR acquired the PV-s, paid by the person privatising the dwelling located at 8-23 Vindi street, without delay, and under § $3(1^1)$ of the PDA, which entered into force on 20 January 1996, also acquired the right to privatise land on favourable conditions, this amounts to immediate compensation for the purposes of the second sentence of § 32(1) of the Constitution.

39. Bearing in mind the aforesaid the Supreme Court *en banc* is of the opinion that § 8(1) and § 19(3), (4) and (6) of Privatisation of Dwellings Act, and § 223(6) of Land Reform Act are not in conflict with the second sentence of § 32(1) of the Constitution.

IV.

40. As the AS DESINTEGRAATOR has received fair and immediate compensation for the dwelling located at 8-23 Vindi street, the Supreme Court *en banc* shall satisfy the appeal in cassation of the Republic of Estonia, and shall dismiss the appeal in cassation of the AS DESINTEGRAATOR. The Supreme Court *en banc* shall annul the judgments of the Tallinn City Court of 25 June 2003 and of the civil chamber of the Tallinn Circuit Court of 12 December 2003, and shall render a new judgment in the matter, dismissing the action of the AS DESINTEGRAATOR claiming 411 000 kroons from the Republic of Estonia on the

grounds set out in the judgment.

41. The arguments of the AS DESINTEGRAATOR concerning taking into account the value of a dwelling encumbered with a residential lease contract and calculating the expropriation, brokerage and formalisation expenses related to the sale of a thing into the selling price shall be ignored due to the reasons set out in the judgment.

42. The Supreme Court *en banc* is of the opinion that the argument of the appeal in cassation of the Republic of Estonia, that the action of the AS DESINTEGRAATOR should be dismissed because the AS DESINTEGRAATOR had not appealed against the court judgment declaring the refusal of to privatise the dwellings located at 8 Vindi street illegal, is erroneous.

In the administrative case related to the present dispute the Tallinn Administrative Court has, in its judgment of 2 December 1997, analysed the obligation to privatise the dwellings located at 8- Vindi street, and has declared the activities of the AS DESINTEGRAATOR, consisting in refusal to privatise dwellings, totally illegal, and the court has found that the AS DESINTEGRAATOR must review the matter, take a new decision and perform necessary acts. In the statement of reasons of the judgment the administrative court has argued, inter alia, that on the basis of a complaint it can review the legality of the refusal of the AS DESINTEGRAATOR to privatise, but it can not take a decision to privatise. That is why it may be justified that the AS DESINTEGRAATOR concluded that after fulfilling the obligation to privatise it was entitled to demand for a bigger compensation than that provided for in the Privatisation of Dwellings Act, and in the case of a dispute claim it in another court proceeding.

43. As the Supreme Court *en banc* renders a new judgment without referring the matter back to a lower court for a new hearing, it will be necessary, adhering to § 60(1) and (11) and § 61(1)1) of the Code of Civil Procedure, to change the division of legal costs.

In its appeal in cassation the Republic of Estonia requested that the court order that the AS DESINTEGRAATOR pay the legal costs of the Republic of Estonia. The same application had been submitted to the Tallinn City Court (application no. 234). Pursuant to the payment order included on page 226 of the court file of the Tallinn City Court the Republic of Estonia has paid to its representative for legal assistance the sum of 21 240 kroons, and pursuant to the bank statement included on page 385 of the court file the sum of 18 408 kroons. Pursuant to the payment order included on page 119 of the court file of the Tallinn City Court the Republic of Estonia has paid 4130 kroons for the conduct of expert assessment ordered by the court. Upon appealing against the judgment of the Tallinn City Court of 25 June 2003 the Republic of Estonia has paid the state fee of 10 000 kroons. The Republic of Estonia was released from payment of security on cassation on the basis of § 57(4) of the Code of Civil Procedure.

According to § 46(2) of the Code of Civil Procedure legal costs are costs essential to proceedings, which include, pursuant to § 52(1) of the Code of Civil Procedure, fees for experts, and pursuant to § 52(4) of the Code, costs for legal assistance.

The AS DESINTEGRAATOR shall be ordered to pay the state fee of 10 000 kroons paid by the Republic of Estonia. Proceeding from § 61(1)1) of the Code of Civil Procedure the court shall order that the AS DESINTEGRAATOR pay the costs of the legal assistance in an amount equal to up to five per cent of the value of the dismissed part of the action, that is 20 550 kroons, in favour of the Republic of Estonia as the defendant. Also, the AS DESINTEGRAATOR shall be ordered to pay the 4130 kroons paid for the conduct of expert assessment. The AS DESINTEGRAATOR shall be ordered to pay to the Republic of Estonia the legal costs in the total amount of 34 680 kroons.

Dissenting opinion of justice Jüri Põld
joined by justices Tõnu Anton, Indrek Koolmeister,
Julia Laffranque and Harri Salmann

1. I find that the understanding of the majority of the Supreme Court *en banc* of the application of § 19(6) of the Privatisation of Dwellings Act and of § 22^3(6) of the Land Reform Act in regard to the dwelling located at 8-23 Vindi street, is arbitrary. In paragraph 35 of the judgment the majority of the Supreme Court *en banc* argued the following:

a) In relation to privatisation of the dwelling located at 8-23 Vindi street the AS DESINTEGRAATOR has been able to use the right to privatise land on favourable conditions, irrespective of the fact that it did not use the PV-s, accrued from the privatisation of the dwelling, for privatising land.

b) If the AS DESINTEGRAATOR had privatised the dwelling under dispute without a delay after the third sentence of § 19(6) of the Privatisation of Dwellings Act entered into force (20 January 1996), it would have been able to privatise land with the PV-s accrued from the privatisation of the dwelling.

In my opinion § 19(6) of the Privatisation of Dwellings Act and § 22^3(6) of the Land Reform Act speak clearly and unambiguously of a possibility of the obligated subjects of re-nationalisation to pay for the land to be privatised with the right of pre-emption in privatisation vouchers received from privatisation of dwellings (provisions quoted in paragraph 10 of the judgment). Under such regulation, payment for a dwelling under expropriation in the PV-s may constitute a fair compensation if the person has an actual possibility to use the PV-s, accrued from privatisation of dwellings, for privatising land with the right of pre-emption.

In this civil matter there is no dispute over whether the AS DESINTEGRAATOR privatised land before privatising the dwelling located at 8-23 Vindi street or other dwellings located in the same building. Thus, there is neither a dispute over the fact that the land was not privatised for the vouchers received for the dwellings privatised. Upon application of the referred provisions of the Privatisation of Dwellings Act and the Land Reform Act, it is important that the AS DESINTEGRAATOR acquired the PV-s used for the privatisation of land in another way and before the privatisation of the dwellings.

The reasoning of the Supreme Court *en banc* that if the AS DESINTEGRAATOR had privatised the dwelling under dispute without a delay after the third sentence of § 19(6) of the Privatisation of Dwellings Act entered into force (20 January 1996), it would have been able to privatise land with the PV-s accrued from the privatisation of the dwelling, exceeds the limits of § 19(6) of the Privatisation of Dwellings Act and of § 22^3(6) of the Land Reform Act. What is essential in this context, is the fact that the AS DESINTEGRAATOR contested in an administrative court the obligation to privatise the dwellings located in the building of 8 Vindi street, and that the administrative court declared the refusal to privatise illegal only on 2 December 1997, by its judgment in matter no. 3-125/97 (paragraphs 1 and 43 of the judgment).

Due to the aforesaid, the fact that the AS DESINTEGRAATOR privatised land for the PV-s can not possibly be related to the expropriation of the dwelling located at 8-23 Vindi street, and the PV-s accrued from the privatisation of the dwelling can not constitute a fair compensation.

2. Bearing in mind the above facts and the interpretation of § 19(6) of the Privatisation of Dwellings Act and § 22^3(6) of the Land Reform Act by the majority of the Supreme Court *en banc*, there is no need for me to dispute with the majority of the Supreme Court *en banc* over in regard to whom and under which considerations may fair compensation upon expropriation be smaller than the market value, and whether and how the right to privatise land on favourable conditions is related to the market value of property under expropriation. In this relation I only want to point out the following:

1) I agree with the Supreme Court *en banc* that upon expropriation the market value of property is the measure of fair compensation, and under exceptional circumstances the fair compensation may be smaller

than the market value of property (paragraphs 18 and 19 of the judgment);

2) § 8(1) of the Republic of Estonia Ownership Act, passed on 13 June 1990 and repealed on 1 December 1993, established that “In the Republic of Estonia all forms of ownership are equal before the law.” Subsection (2) of the same section stipulated that “The Republic of Estonia shall guarantee the inviolability of property and the possibility of every owner to exercise the right of ownership.”;

3) pursuant to § 32 of the Constitution of 1992, the property of every person is equally protected and expropriation is possible only for fair compensation. The Constitution of the Republic of Estonia Implementation Act provided for exceptions to certain provisions of the Constitution. The Implementation Act did not provide for any reservations to § 32 of the Constitution in relation to ownership reform Acts. A reservation concerning ownership reform Acts was made upon accession to the European Convention on Human Rights, and the reservation only pertains to issues enumerated in the reservation concerning the jurisdiction of the European Court of Human Rights and is not related to the Constitution;

4) the opinion that compensating for the market value of the property expropriated in the course of reform is beyond the economic possibilities of the society must not be based on assumptions, it should be based on economic calculations.

Dissenting opinion of
justice Jaak Luik

I consent to the opinion expressed in the judgment of the Supreme Court *en banc* that the obligation of a co-operative organisation to privatise a dwelling, not received from the state without charge, amounts to expropriation for the purposes of the second sentence of § 32(1) of the Constitution. Nevertheless, my dissenting opinion concerning the awarding of fair compensation for the expropriation of the dwelling located at 8-23 Vindi street is based on the very opinion. Firstly, I shall express my understanding of fairness and of fair compensation (I), and after that I shall try to substantiate my understanding of a fair compensation in this concrete dispute (II).

I.

1. Without trying to define the concept of fairness, and refraining from analysing different theories, yet being aware of the general usages of the term, I can argue that in all its meanings the term fairness expresses a measure of value judgment. One of the gauges is an evaluation – “fair” or “unfair”. When judging a phenomenon, situation or condition, which is important and meaningful for the society as a whole or for some of its institutions or individuals, a value (fair) or the opposite thereof (unfair) is attributed to it. On the basis of the aforesaid, though, indirect definition, it is clear that it is impossible to impose fairness through law. At the same time, fairness can be characterised as the objective (the idea) of law, which embraces also the principles of creation, implementation and application of law. Proceeding from the Constitution, fairness (fair law) is a requirement of the order of values, which is manifested in and can be measured by the extent to which rights and freedoms are guaranteed, different forms of realisation of the principle of equal treatment, effective judicial protection of the rights which have been violated and the aspirations for peace of law. Being a characteristic of a society based on the rule of law, fairness reflects the surplus value attributed to law as a value. If constitutional institutions are not capable of creating such surplus value, we can not speak of a state based on the rule of law, instead we can speak of a state based on the rule of statutes.

2. Fairness as an idea means the lack of injustice. So far no society has achieved such an ideal state in any sphere of communal life, and in this sense fairness will always be a relative notion. One of the measures for guaranteeing the normal functioning of a society is expropriation – depriving a person, against his will, of an object, including a thing, which is the object of rights. In this context general interest is manifested in some common good. Such taking is unjust in regard of the person. By allowing for expropriation of property,

against the will of the owner, in the cases and pursuant to procedure provided by law and in the public interest, the Constitution does recognise unfairness in interfering with private interests, but at the same time establishes the obligation to pay fair and immediate compensation, as a measure to remedy the injustice (§ 32(1) of the Constitution).

Pursuant to the spirit of the requirement of qualified reservations by law, established in § 32(1) of the Constitution, expropriation as an essential restriction of the right of ownership can be constitutional only if there are no other choices. Proceeding from the same constitutional provision the law must establish both the grounds and procedure (proceeding) for expropriation and for determination and payment of compensation. For clarity, two aspects of fair compensation could be differentiated. These are: the means of payment (money or some other exchange value) and amount of compensation.

2.1. I can see no constitutional alternative to compensation for expropriation in money. It is through money that other possible exchange values (things which are objects of rights) can be made commensurable; being a unit of account, money enables to express the amount of damage in general terms; being an exchange value, money is universal. It is self-evident that the parties to an expropriation proceeding may agree upon the use of some other compensation value.

2.2. The relationship in public law that is created upon expropriation puts the owner at a disadvantage: he will lose his property or a part thereof. Material damage can be measured with the help of average local selling price (market price). However, the term “fair”, used in § 32 of the Constitution, indicates at the measure of value judgment of the amount of compensation. That is exactly why it can be assumed that depending on the circumstances of taking of property and on the value judgment of these circumstances a concrete amount of compensation may be smaller or bigger than the market price.

3. Perhaps it would be possible to establish a flexible expropriation Act, enabling to take into account and evaluate all possible circumstances. Yet, the problem lies in the fact that it is impossible to impose mandatory value judgments and the price thereof by law. Certainly, the majority of expropriation cases are of standard character, and the compensation payable on the basis of law is fair in the opinion of a person.

3.1. As a rule, the compensation for expropriation should include, in addition to the market value of a thing, also a compensation for the interference with the freedom of ownership, in the amount that a society can afford to pay. If, for example, as a result of expropriation a person is forced to terminate his economic activities, the fair compensation should presumably include the expected profit of a certain period. Let me bring another example. If, together with the land, a family is deprived of its home, where the predecessors have lived and farmed for centuries, then such rights have no market value and such loss can not be compensated to the family in monetary terms. Yet, by paying a price much higher than the market price the state can still show appreciation for the role and place of the people in the preservation of the nation and culture. With these examples I only wanted to illustrate that upon the expropriation of comparable things there may exist circumstances, which give rise to a constitutional necessity to treat individuals and legal persons differently upon determining the amount of fair compensation.

3.2. I am of the opinion that compensation for expropriation may be lower than the market price of the thing only if the person knowingly places himself at a disadvantage. For example, by buying in plots of land under and adjacent to a road to be constructed. I am of the opinion that fair compensation can not presumably include a profit earned at the expense of the society.

4. Due to the fact that the possibilities of reflecting values in Acts are limited, the second sentence of § 32(1) of the Constitution provides for the right to contest the compensation for expropriation and the amount thereof in the courts. Upon adjudicating such a dispute a court does not create new law, instead a court shall state what is fair compensation (just law) taking into account all circumstances of the concrete expropriation case. The assessment by court is the objective and impartial measure of fairness. Thus, the principle of direct application of Constitution could be formulated as the power of the court to determine, independently from law, a fair compensation for expropriation. The application of this principle will ensure effective protection

of the freedom of ownership even when the state has failed to guarantee the general fundamental right to organisation and procedure, established in § 14 of the Constitution. Neither will it be necessary to initiate a constitutional review proceeding each time when a court is of the opinion that an Act does not allow to award a fair compensation for expropriation.

II.

5. The judgment of the Supreme Court *en banc* reflects the opinion that the compensation received for the dwelling was immediate and fair. Also, the opinions of the Constitutional Review Chamber of the Supreme Court expressed in the judgments of 12 April 1995 (RT I 1995, 42, 655) and of 8 November 1996 (RT I 1996, 87, 1558) concerning the issues of public interest and fair and immediate compensation for expropriation, were reassessed. The reasons set out in the judgment of the Supreme Court *en banc* are not in conformity with my understanding of fair compensation.

5.1. Proceeding from the judgments of the Supreme Court of 12 April 1995 and 8 November 1996, the fact that one private subject is obligated to give away his property to another private subject can not be regarded as pursuing the public interest; and upon expropriating, in the course of ownership reform and on the basis of the Privatisation of Dwellings Act and the Re-nationalisation Act, from the obligated subjects of re-nationalisation the property it has not received from the state without charge, a fair compensation – according to the Constitution – is the usual value of a thing (average local market prince). By agreement of the parties the compensation may consist in the possibility to pay in privatisation vouchers for the land privatised with the right of pre-emption. In the case of a dispute the property may be expropriated only after a pertinent court judgment has entered into force and the amount awarded by the judgment has been received. But if the property has nevertheless been expropriated before the dispute is settled or the amount awarded by the court judgment is received, § 32(1) of the Constitution entitles everyone whose property is expropriated without his or her consent to have a recourse to the courts and to contest the expropriation, the compensation, or the amount thereof. The Tallinn Administrative Court did not take this view into account when it declared in its judgment of 2 December 1997 that the refusal of the plaintiff to privatise the dwellings located at 8 Vindi street was totally illegal (paragraph 1 of the judgment of the Supreme Court *en banc*).

By providing for expropriation by law the legislator did, indeed, guarantee the tenants of dwellings an equal opportunity to privatise the living quarters they used, irrespective of the form of ownership, but at the same time the legislator failed to take into account the opinion of the Supreme Court judgments of 12 April 1995 and 8 November 1996 that compensation for expropriation should be calculated on the basis of the usual value of a thing (dwelling). Thus, from the point of view of fairness, the legislator treated fairly the tenants of the dwellings owned by the state and other organisations, but treated unfairly the plaintiff (legitimate expectation that the state will take the opinions of the Supreme Court judgments into account).

5.2. According to the judgment of the Supreme Court *en banc* the reservation to the European Convention on Human Rights includes the wording of the Privatisation of Dwellings Act, which was in force at the time when the Ratification Act entered into force. At the time of entering into force of the Ratification Act, the Privatisation of Dwellings Act regarded the dwellings owned by the obligated subjects of re-nationalisation, provided for in § 2(3) of the Re-nationalisation Act, as objects of privatisation (paragraph 21 of the judgment of the Supreme Court *en banc*). The judgment of the Constitutional Review Chamber of the Supreme Court of 8 November 1996 did not require that the pertinent provisions of the Privatisation of Dwellings Act and the Re-nationalisation Act be in full conformity with the Constitution, yet it stated that upon expropriating property, which an obligated subject of re-nationalisation had not received from the state without charge, the state must guarantee fair compensations for the purposes of § 32(1) of the Constitution. Upon direct application of the Constitution the reservation made upon ratifying the Convention is irrelevant. Nevertheless, the opposite can be concluded from the reasons of the judgment of the Supreme Court *en banc* . I am of the opinion that the realisation of one of the social policy obligations of the state (privatisation of dwellings to tenants) in the course of ownership reform could be taken into account upon determining the

amount of compensation for expropriation, and not upon the choice of means of compensation.

5.3. Pursuant to § 19(3) of the Privatisation of Dwellings Act the obligated subject of re-nationalisation shall acquire the money received from privatisation of dwellings in the ownership of the obligated subject of re-nationalisation. Thus, the law treats the obligated subjects of re-nationalisation who have received property from the state without charge and the subjects who have not received property from the state without charge, equally. According to the Constitution, the subjects who can be differentiated on the basis of such characteristics, have different legal status. In the former case the obligation to privatise dwellings does not amount to expropriation for the purposes of the Constitution, in the latter case it does. Equal treatment within the context of the referred circumstances is unfair in regard to the plaintiff.

6. Summing up the aforesaid and bearing in mind, first and foremost, the failure of the state to fulfil the requirement of immediateness of compensation for expropriation, it would have been fair if the amount of compensation had been determined on the basis of the market value of the dwelling as at the time of privatisation. Compensation for expropriation should have been calculated and paid in money (paragraphs 2.1. and 2.2. above). In addition to what the Tallinn City Court and the Tallinn Circuit Court took into account upon determining the amount of compensation, I would have paid attention also to the importance of the dwelling for the business of the plaintiff (paragraph 2.2. above). If the main activities of the plaintiff were not related to immovable property business, the fair compensation could also have been smaller than the amount indicated in the court judgments (paragraphs 2 and 3 of the judgment).
