Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

11 November 2020*

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Regulation (EU) No 1215/2012 – Jurisdiction, recognition and enforcement of judgments in civil and commercial matters – Article 24, point 1 – Exclusive jurisdiction in matters relating to rights *in rem* in immovable property – Article 7, point 1(a) – Special jurisdiction in matters relating to a contract – Legal action brought by a co-owner seeking an order that another co-owner cease the use, for touristic purposes, of immovable property subject to co-ownership)

In Case C-433/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 21 May 2019, received at the Court on 6 June 2019, in the proceedings

Ellmes Property Services Limited

v

SP,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, R. Silva de Lapuerta (Rapporteur), Vice-President of the Court, C. Toader, M. Safjan and N. Jääskinen, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Ellmes Property Services Limited, by M. Rettenwander, Rechtsanwalt,

– SP, by A. Bosio, Rechtsanwalt,

– the European Commission, by M. Wilderspin and M. Heller, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 June 2020,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of point 1 of Article 24 and point 1(a) of Article 7 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1).

2 The request has been made in proceedings between Ellmes Property Services Limited and SP concerning the use of immovable property subject to co-ownership.

Legal context

EU law

3 Article 4(1) of Regulation No 1215/2012 provides:

'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

4 Point 1(a) of Article 7 of that regulation provides:

'A person domiciled in a Member State may be sued in another Member State:

(1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

…'

5 Point 1 of Article 24 of that regulation is worded as follows:

'The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

(1) in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

…'

Austrian law

6 Paragraph 2 of the Wohnungseigentumsgesetz (Law on the ownership of apartments), in the version applicable to the dispute in the main proceedings, states:

'(1) Co-ownership is the right *in rem*, granted to the joint owner of real property or to a partnership of owners, exclusively to use property subject to co-ownership and to dispose of it alone. …

(2) Properties subject to co-ownership are apartments, other independent premises and parking places for motor vehicles (properties suitable for co-ownership), over which co-ownership has been established. An apartment is a structurally closed and, in the perception of the public, independent part of a building of a nature and size capable of satisfying people's individual housing needs. Other

independent premises are structurally closed and, in the perception of the public, independent parts of a building whose nature and size is of considerable commercial importance, for example an independent business space or a garage. …

…

(5) A co-owner is a joint owner of real property who has co-ownership of a property subject to co-ownership situated thereon.

…'

7 Paragraph 3 of that law provides:

'(1) Co-ownership can be established based on

1. a written agreement between all joint owners (co-ownership agreement) …

…'

8 Paragraph 16 of that law provides:

'(1) The co-owner has the right to use the property subject to co-ownership.

(2) The co-owner is entitled to make changes to his or her property subject to co-ownership (including changes in designated use) at his or her own expense, provided that

1. The change does not damage the building nor interfere with the legitimate interests of the other co-owners …

2. Where such a change also affects the common parts of the real property, that change must also be customary or serve an important interest of the co-owner. …'

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 Ellmes Property Services is a company established in the United Kingdom. That company and SP are co-owners of an apartment building in Zell am See (Austria).

10 Ellmes Property Services is the owner of an apartment in that building which was designated for residential purposes. It uses that apartment for touristic purposes by regularly renting it out to holidaymakers.

11 By an action for a cessation order brought before the Bezirksgericht Zell am See (District Court, Zell am See, Austria), SP sought the cessation of that 'touristic use', on the ground that it is contrary to the designated use of that building and arbitrary, failing any consent on the part of the other co-owners, with the result that such use interferes with SP's right of co-ownership. As regards the jurisdiction of that court, SP relied on the exclusive jurisdiction provided for in the first subparagraph of point 1 of Article 24 of Regulation No 1215/2012.

12 Ellmes Property Services contested the local and international jurisdiction of that court.

13 By order of 5 November 2018, that court declined jurisdiction, holding that the dispute before it concerned a private-law use agreement between the co-owners concerned and did not directly affect the legal position of those co-owners with regard to a right *in rem*.

14 The Landesgericht Salzburg (Regional Court, Salzburg, Austria), hearing the matter on appeal by SP, varied that order by order of 30 January 2019, dismissing the objection of lack of jurisdiction raised by Ellmes Property Services. According to that court, the designated use of a property subject to co-ownership is based on a private-law agreement of the co-owners in the form, as a rule, of a co-ownership agreement. The designation of such property for a specific use and the adherence to the use thus defined are among the absolutely protected rights *in rem* of co-owners.

15 Ellmes Property Services brought an appeal on a point of law (*Revision*) against the latter order before the Oberster Gerichtshof (Supreme Court, Austria).

16 The referring court takes the view that the action in question may fall under exclusive jurisdiction under the first subparagraph of point 1 of Article 24 of Regulation No 1215/2012 or, alternatively, special jurisdiction under point 1(a) of Article 7 of that regulation.

17 In that regard, the referring court states that, according to the case-law of the Austrian courts, each co-owner may bring an action for an abstention or cessation order against a co-owner who, arbitrarily and without the consent of all the other co-owners or without a final court order replacing that authorisation, carries out changes to his or her co-ownership property, including to its designated use. It also states that such an action does not concern matters relating to management in respect of which the association of all co-owners has legal personality and that the designation of a property subject to co-ownership as an apartment or as business premises is based on a private-law agreement between all co-owners, which is usually laid down in a co-ownership agreement. It states that use for touristic purposes of a property subject to co-ownership with designated use for residential purposes is a change in the designated use of that property. It adds that the designated use of a property subject to co-ownership and the adherence to the use thus defined form part of the absolutely protected right of each co-owner.

18 In that context, the referring court notes that, under Austrian law, co-ownership, as the right of a co-owner exclusively to use property subject to co-ownership, constitutes a right *in rem* protected against interference by third parties and by the other co-owners. It also notes that, under Austrian law, the co-owners enter into a contractual relationship voluntarily by virtue of the co-ownership agreement.

19 In those circumstances the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is the first alternative in the first subparagraph of [point 1 of Article 24] of Regulation [No 1215/2012] to be interpreted as meaning that actions brought by a co-owner seeking to prohibit another co-owner from carrying out changes to his property subject to co-ownership, in particular to its designated use, arbitrarily and without the consent of the other co-owners, concern the assertion of a right *in rem*?

(2) If the first question should be answered in the negative:

Is [point 1(a) of Article 7] of [Regulation No 1215/2012] to be interpreted as meaning that the actions referred to [in the first question] concern contractual obligations to be performed at the location of the property?’

Consideration of the questions referred

The first question

20 By its first question, the referring court asks, in essence, whether point 1 of Article 24 of Regulation No 1215/2012 must be interpreted as meaning that an action by which a co-owner of immovable property seeks to prohibit another co-owner of that property from carrying out changes, arbitrarily and without the consent of the other co-owners, to the designated use of his or her property subject to co-ownership must be regarded as constituting an action 'which has as its object rights *in rem* in immovable property' within the meaning of that provision.

21 As a preliminary point, it should be recalled that, according to settled case-law, the jurisdiction provided for in Article 4 of Regulation No 1215/2012, namely that the courts of the Member State in which the defendant is domiciled are to have jurisdiction, constitutes the general rule and that it is only by way of derogation from that general rule that that regulation provides for rules of special and exclusive jurisdiction for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Member State (judgment of 5 December 2019, *Ordre des avocats du barreau de Dinant*, C-421/18, EU:C:2019:1053, paragraph 24 and the case-law cited).

22 Article 24 of that regulation provides for rules of exclusive jurisdiction, in particular in proceedings which have as their object rights *in rem* in immovable property, which, as a derogation from that general rule, must be interpreted strictly (see, to that effect, judgment of 10 July 2019, *Reitbauer and Others*, C-722/17, EU:C:2019:577, paragraph 38).

23 As regards the exclusive jurisdiction of the courts of the Member State in which the property is situated, provided for in point 1 of Article 24 of Regulation No 1215/2012, it must also be recalled that an independent definition must be given in EU law to the phrase 'in proceedings which have as their object rights *in rem* in immovable property', in order to ensure its uniform application in all the Member States (judgment of 14 February 2019, *Milivojević*, C-630/17, EU:C:2019:123, paragraph 97 and the case-law cited).

24 That jurisdiction does not encompass all actions concerning rights *in rem* in immovable property, but only those which both come within the scope of that regulation and are actions which seek, first, to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein and, secondly, to provide the holders of those rights with protection for the powers which attach to their interest (judgment of 10 July 2019, *Reitbauer and Others*, C-722/17, EU:C:2019:577, paragraph 44 and the case-law cited).

25 In that context, the Court has also ruled that it is not sufficient that the action concerns a right *in rem* in immovable property or that the action has a link with immovable property in order to give rise to the jurisdiction of the court of the Member State in which the property is situated. On the contrary, the action must be based on a right *in rem* and not on a right *in personam* (judgment of 10 July 2019, *Reitbauer and Others*, C-722/17, EU:C:2019:577, paragraph 45 and the case-law cited).

26 Furthermore, according to settled case-law, the difference between a right *in rem* and a right *in personam* lies in the fact that the former, existing in corporeal property, has effect *erga omnes*, whereas the latter can be claimed only against the debtor (judgment of 16 November 2016, *Schmidt*, C-417/15, EU:C:2016:881, paragraph 31 and the case-law cited).

27 In the present case, the dispute in the main proceedings concerns the question whether the courts of the Member State in which an immovable property subject to co-ownership is situated have jurisdiction to hear an action by which a co-owner seeks an order that another co-owner cease the

use of an apartment for touristic purposes, on the ground that that use is not consistent with that provided for in the co-ownership agreement relating to that immovable property, namely use for residential purposes.

28 In that regard, it is apparent from the order for reference that Paragraph 2(1) of the Law on the ownership of apartments provides that co-ownership is the right *in rem*, granted to the joint owner of real property or to a partnership of owners, exclusively to use property subject to co-ownership and to dispose of it alone.

29 According to the referring court, under Austrian law, the designated use of immovable property subject to co-ownership, which stems from a private-law agreement between all co-owners generally taking the form of a co-ownership agreement, and the adherence to the use defined by that agreement form part of the absolutely protected right of each co-owner. Furthermore, that court states that co-ownership is a right *in rem* protected against interference by third parties and by the other co-owners.

30 In the light of those factors, it appears that an action for a cessation order such as that at issue in the main proceedings is akin to an action seeking to provide the co-owners of immovable property with protection for the powers which attach to their interest, in particular as regards the designated use of that immovable property, which is provided for in the co-ownership agreement.

31 However, in order to determine whether such an action is based on a right *in rem* in immovable property within the meaning of point 1 of Article 24 of Regulation No 1215/2012, it is necessary to examine, as follows from the case-law cited in paragraph 26 above, whether the designated use of immovable property subject to co-ownership provided for in a co-ownership agreement, in this case use for residential purposes, has effect *erga omnes*.

32 As the Advocate General observed, in essence, in point 45 of his Opinion, that would be the case if a co-owner could rely on that designated use not only against the other co-owners, but also against persons who cannot be regarded as parties to that agreement. It is for the referring court to carry out the necessary verifications in that respect.

33 In the light of all the foregoing considerations, the answer to the first question is that point 1 of Article 24 of Regulation No 1215/2012 must be interpreted as meaning that an action by which a co-owner of immovable property seeks to prohibit another co-owner of that property from carrying out changes, arbitrarily and without the consent of the other co-owners, to the designated use of his or her property subject to co-ownership, as provided for in a co-ownership agreement, must be regarded as constituting an action 'which has as its object rights *in rem* in immovable property' within the meaning of that provision, provided that that designated use may be relied on not only against the co-owners of that property, but also *erga omnes*, which it is for the referring court to verify.

The second question

34 Should the referring court conclude that the designated use of immovable property subject to co-ownership provided for by a co-ownership agreement cannot be relied upon *erga omnes* and that, therefore, it cannot base the jurisdiction of the Austrian courts on point 1 of Article 24 of Regulation No 1215/2012, those courts could, however, have jurisdiction under point 1(a) of Article 7 of that regulation. Accordingly, it is necessary to reply to the second question.

35 By its second question, the referring court asks, in essence, whether point 1(a) of Article 7 of Regulation No 1215/2012 must be interpreted as meaning that, where the designated use of immovable property subject to co-ownership provided for by a co-ownership agreement cannot be relied upon *erga omnes*, an action by which a co-owner of immovable property seeks to prohibit

another co-owner of that property from carrying out changes, arbitrarily and without the consent of the other co-owners, to that designated use must be regarded as constituting an action 'in matters relating to a contract', within the meaning of that provision. If so, the referring court seeks to ascertain whether the place of performance of the obligation on which that action is based is the place where the property is situated.

36 It should be recalled that the conclusion of a contract is not a condition for the application of the rule of special jurisdiction provided for, in matters relating to a contract, in that provision (judgment of 5 December 2019, *Ordre des avocats du barreau de Dinant*, C-421/18, EU:C:2019:1053, paragraph 25 and the case-law cited).

37 It is nevertheless essential, for that provision to apply, to identify an obligation, since the jurisdiction of the national court under that provision is determined by the place of performance of the obligation in question. Thus, the application of that rule presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based (judgment of 5 December 2019, *Ordre des avocats du barreau de Dinant*, C-421/18, EU:C:2019:1053, paragraph 26 and the case-law cited).

38 Furthermore, the Court has already held that co-ownership of an apartment building is established through voluntary acquisition of an apartment together with ownership shares of the communal areas of the property, so that an obligation on the co-owners in respect of the co-ownership must be regarded as a legal obligation freely consented to (judgment of 8 May 2019, *Kerr*, C-25/18, EU:C:2019:376, paragraph 27, and order of 19 November 2019, *INA and Others*, C-200/19, not published, EU:C:2019:985, paragraph 27).

39 In addition, the fact that a co-owner was not a party to the co-ownership agreement concluded by the initial co-owners has no effect on the application of point 1(a) of Article 7 of Regulation No 1215/2012 to a dispute relating to that obligation. By becoming and remaining co-owner of a property in a building, each co-owner agrees to be subject to all the provisions governing the property concerned and the decisions adopted by the general meeting of the co-owners of property in that building (judgment of 8 May 2019, *Kerr*, C-25/18, EU:C:2019:376, paragraph 29, and order of 19 November 2019, *INA and Others*, C-200/19, not published, EU:C:2019:985, paragraph 29).

40 In the present case, it should be noted that, according to the referring court, under Austrian law, the co-owners are, on account of the co-ownership agreement, in a contractual relationship freely consented to.

41 It follows that point 1(a) of Article 7 of Regulation No 1215/2012 must be interpreted as meaning that, where the designated use of immovable property subject to co-ownership provided for by a co-ownership agreement cannot be relied upon *erga omnes*, an action by which a co-owner of immovable property seeks to prohibit another co-owner of that property from carrying out changes, arbitrarily and without the consent of the other co-owners, to that designated use must be regarded as constituting an action 'in matters relating to a contract', within the meaning of that provision.

42 As regards the question whether the place of performance of the obligation on which that action is based is the place where the property is situated, it should be recalled that, under point 1(a) of Article 7 of Regulation No 1215/2012, matters relating to a contract may be assessed in the courts of the place of performance of the obligation in question, namely the obligation corresponding to the contractual right on which the claimant's action is based (judgment of 16 November 2016, *Schmidt*, C-417/15, EU:C:2016:881, paragraph 39).

43 In the present case, the action brought by SP seeks to oblige Ellmes Property Services either to use its property subject to co-ownership in accordance with the designated use provided for in the co-ownership agreement or to cease carrying out changes to that use.

44 It is apparent from the order for reference that the obligation to adhere to the use defined by that designation forms part of the absolutely protected right of each co-owner. It seems that that obligation is thus intended to ensure the peaceful enjoyment of the property subject to co-ownership by the owner of that property. Subject to verification by the referring court, that obligation relates to the actual use of such property and must be performed in the place in which it is situated.

45 Such a conclusion meets the objective of predictability of the rules of jurisdiction laid down by Regulation No 1215/2012, since a co-owner bound by a co-ownership agreement stipulating such a designated use may, when he or she arbitrarily and unilaterally changes that designated use, reasonably expect to be sued in the courts of the place where the immovable property concerned is situated.

46 Furthermore, bearing in mind the close connection between those courts and the dispute in the main proceedings, it appears that they are best placed to hear that dispute and that an attribution of jurisdiction to those courts is such as to facilitate the sound administration of justice.

47 In the light of all the foregoing considerations, the answer to the second question is that point 1(a) of Article 7 of Regulation No 1215/2012 must be interpreted as meaning that, where the designated use of immovable property subject to co-ownership provided for by a co-ownership agreement cannot be relied upon *erga omnes*, an action by which a co-owner of immovable property seeks to prohibit another co-owner of that property from carrying out changes, arbitrarily and without the consent of the other co-owners, to that designated use must be regarded as constituting an action 'in matters relating to a contract', within the meaning of that provision. Subject to verification by the referring court, the place of performance of the obligation on which that action is based is the place where the property is situated.

Costs

48 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Point 1 of Article 24 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an action by which a co-owner of immovable property seeks to prohibit another co-owner of that property from carrying out changes, arbitrarily and without the consent of the other co-owners, to the designated use of his or her property subject to co-ownership, as provided for in a co-ownership agreement, must be regarded as constituting an action 'which has as its object rights *in rem* in immovable property' within the meaning of that provision, provided that that designated use may be relied on not only against the co-owners of that property, but also *erga omnes*, which it is for the referring court to verify.**

2. **Point 1(a) of Article 7 of Regulation No 1215/2012 must be interpreted as meaning that, where the designated use of immovable property subject to co-ownership provided for by a co-ownership agreement cannot be relied upon *erga omnes*, an action by which a co-owner of immovable property seeks to prohibit another co-owner of that property from carrying out changes, arbitrarily and without the consent of the other co-owners, to that designated use must be regarded as constituting an action 'in matters relating to a contract', within the**

meaning of that provision. Subject to verification by the referring court, the place of performance of the obligation on which that action is based is the place where the property is situated.

[Signatures]