

# Anonymised version

Translation

C-433/19 — 1

Case C-433/19

## Request for a preliminary ruling

**Date lodged:**

6 June 2019

**Referring court:**

Oberster Gerichtshof (Austria)

**Date of the decision to refer:**

21 May 2019

**Appellant:**

Ellmes Property Services Limited

**Respondent:**

SP

---

**REPUBLIC OF AUSTRIA**

**OBERSTER GERICHTSHOF (SUPREME COURT)**

[...]

The Oberster Gerichtshof (Supreme Court), sitting as the court dealing with appeals on points of law ('Revision') [...], in the case of the applicant, SP, 5700 Zell am See, [...] against the defendant, Ellmes Property Services Limited, GB DN46SA Doncaster, [...] United Kingdom, [...] concerning an action for a prohibitory order, following the defendant's appeal on a point of law against the judgment of 30 January 2019 of the Landesgericht Salzburg (Regional Court, Salzburg) as the appeal court [...], by which the judgment of 5 November 2018 [...] of the Bezirksgericht Zell am See (District Court, Zell am See) was amended, makes the following

Order

[Or. 2]

EN

**A.** The following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

**1.** Is the first alternative in the first subparagraph of Article 24(1) 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 ('Brussels Ia Regulation') 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 Article 7(1)(a) of the Brussels Ia Regulation to be interpreted as meaning that the actions referred to in paragraph 1 concern contractual obligations to be performed at the location of the property?

**B.** [...] [stay of proceedings]

Grounds:

**I. Facts**

Both parties are co-owners of a house situated in Zell am See, Austria. The applicant, who is the owner of apartment No 10, has his home address at this location. The defendant company, which is the owner of apartment No 20, has its registered office in [Or. 3] the United Kingdom. It uses its apartment, which was designated for residential purposes, for tourist purposes by regularly letting it out to holiday guests.

**II. Arguments of the parties and forms of order sought**

In his action brought before the Bezirksgericht Zell am See (District Court, Zell am See), the applicant seeks to prevent the use of the apartment for tourist purposes, contrary to its designated use and arbitrarily in the absence of consent of the other co-owners, which interferes with the applicant's rights of co-ownership. He relied on the jurisdiction referred to in the first alternative in the first subparagraph of Article 24(1) of the Brussels Ia Regulation.

The defendant objected on the basis of the lack of local and international jurisdiction.

### III. Previous proceedings

The court of first instance (Bezirksgericht Zell am See (District Court, Zell am See)) declined local and international jurisdiction. The dispute relating to a private-law use agreement between co-owners did not directly concern their rights *in rem*.

The court of second instance (Landesgericht Salzburg (Regional Court, Salzburg)) allowed the applicant's appeal and rejected the defence of lack of local and international jurisdiction. The designated use of a property subject to co-ownership was based on the private-law agreement between the co-owners (usually laid down in the co-ownership agreement). The designation for a specific use and the adherence to the use thus defined was one of the absolutely protected rights *in rem* of a co-owner.

The defendant lodged an appeal with the Oberster Gerichtshof (Supreme Court) against that decision. The applicant requests that the appeal should not be allowed. [Or. 4]

### IV. European Union law

1. Article 24 of the Brussels Ia Regulation establishes, inter alia, the following exclusive jurisdiction:

*'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.'*

2. Article 7(1) of the Brussels Ia 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;*

*(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be*

- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,*
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,*

(c) *if point (b) does not apply then point (a) applies.*'

**V. National legislation [Or. 5]**

The Wohnungseigentumsgesetz (WEG) 2002 (2002 Law on co-ownership, 'the WEG') provides, in extracts:

*Paragraph 2.*

(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.*

...

*Paragraph 3.*

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

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

... [Or. 6]

*Paragraph 16.*

(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 property subject to co-ownership (including changes in designated use) at his 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.

## VI. Grounds for the questions referred

1. According to national case-law, each co-owner is entitled to bring an action to prevent and/or to remove any interference with his proprietary interests 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 co-ownership property, including to its designated use. Such an action does not concern matters relating to management where the association of all co-owners has legal personality. 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 the co-ownership agreement. The tourist use of a property subject to co-ownership designated as an apartment [Or. 7], alleged in the action, is a change in designated use according to national case-law. The designated use of a property subject to co-ownership and the adherence to the use thus defined is an absolutely protected right of each co-owner [...].

2. The referring court takes the view that the action in question may fall under exclusive jurisdiction under the first alternative in the first subparagraph of Article 24(1) or, alternatively, special jurisdiction under Article 7(1)(a) of the Brussels Ia Regulation.

3. According to the case-law of the Court of Justice, the exclusive jurisdiction of the courts of the State in which the property is situated (Article 24(1) of the Brussels Ia Regulation) does not encompass all actions concerning rights *in rem* in immovable property but only those which are actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein and to provide the holders of those rights with the protection of the powers which attach to their interest. The difference between a right *in rem* and a right *in personam* is that the former, existing in an item of property, has effect *erga omnes*, whereas the latter can be claimed only against the debtor (Court of Justice, 16 November 2016, *Schmidt*, C-417/15, paragraphs 30, 31).

4. Austrian co-ownership, as the right of a co-owner to exclusive use of a specific property subject to co-ownership, is a right *in rem* which is protected against interference both by third parties and by the other co-owners. The [Or. 8] co-owners enter into a contractual relationship voluntarily by virtue of the co-ownership agreement. If the jurisdiction of the place where the property is situated is excluded and the focus is on the contractual obligation of a co-owner to use his co-ownership property in the agreed manner, the dispute at issue may be subject to Article 7(1)(a) of the Brussels Ia Regulation.

[...] [national proceedings] [...] Supreme Court,  
Vienna, 21 May 2019  
[...]

WORKING DOCUMENT