

Court of Justice—interpretation of Articles 24 and 7 of Regulation (EU) 1215/2012, Brussels I (recast) (Ellmes Property Services v SP)

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Dispute Resolution analysis: This case confirms that Article 24(1) of Brussels I (recast) must be interpreted as meaning that an action by a co-owner seeking to prevent the use of an apartment by another co-owner for touristic purposes (where there is no such agreement by the co-owner) only falls under that provision if that use is also enforceable against any person who is not a party to the agreement (an erga omnes effect). Article 7(1)(a) of Brussels I (recast) must be interpreted as meaning that, where the use agreed in the co-ownership agreement is not enforceable erga omnes, such an action would fall within the concept of ‘matters relating to a contract’ within the meaning of that provision. The obligation in question related to the actual use of the property and, accordingly, such an obligation must be performed in the place in which the property was situated. Written by Georgia Whiting, barrister at 4 King’s Bench Walk.

Ellmes Property Services v SP [C-433/19](#)

What are the practical implications of this case?

This case serves as a helpful analysis of the overall interpretation of [Articles 24](#) and [7](#) of Regulation (EU) 1215/2012, Brussels I (recast).

This case makes clear that Article 24 of Brussels I (recast) 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 without consent must be regarded as constituting an action ‘which has as its object rights in rem in immoveable property’ within that meaning. This, however, was contingent upon the designated use in question being relied upon not only as between the co-owners, but also as against third parties, such as tenants (an erga omnes effect). That was a matter for the referring court to determine in due course.

In the event that it cannot be said that such rights take effect erga omnes, Article 7 (1) of Brussels I (recast) must be considered, which provides that a person domiciled in an EU Member State may be sued in another EU Member State and specifically, concerning contractual matters, in the courts located in the country where the obligation in question is to be performed. This was to be interpreted as meaning that, subject to verification by the referring court, the appropriate jurisdiction was that of the courts located where the property in question was situated.

What was the background?

Ellmes Property Services (Ellmes) was a company established in the UK. That company and a company named SP were the co-owners of an apartment building in Zell am See (Austria). Ellmes was the owner of an apartment in that building which was designated for use as residential premises, but it instead used that apartment for touristic purposes, renting it out to holidaymakers.

By an action for cessation brought before the courts in Austria, SP sought the cessation of that 'touristic use' on the ground that it was contrary to the designated use of the building and arbitrary, failing any consent of the other co-owners. As such, it was said that the use of the building interfered with SP's co-ownership rights. As regards the jurisdiction of the Austrian courts, SP relied upon the exclusive jurisdiction provided for in Article 24(1) of Brussels I (recast). Such jurisdiction was disputed by Ellmes.

The Austrian court declined jurisdiction, holding that the dispute before it concerned a private use agreement between co-owners, and one which did not directly affect the legal position of those co-owners with regard to a right in rem.

The Regional Court in Austria on appeal varied the order of the lower court, dismissing the objection of a lack of jurisdiction raised by Ellmes. According to that court, the designated use of a property subject to co-ownership was 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 a property for a specific use and the adherence to the use thus defined were among the absolutely protected rights in rem of co-owners.

Ellmes brought an appeal on a point of law against that order before the Supreme Court in Austria. That court took the view that the action in question may have fallen under the exclusive jurisdiction provided by Article 24(1) of Brussels I (recast) or, alternatively, Article 7(1)(a) of Brussels I (recast). In that regard they stated that, according to the case law of the Austrian courts, each co-owner may bring an action for a cessation order against a co-owner who arbitrarily and without consent of co-owners carries out changes to the property, including to its designated use.

The Supreme Court of Austria, however, decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling as follows:

- is the first alternative in the first subparagraph of point 1 of Article 24 of Brussels I (recast) 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?
- if the first question should be answered in the negative: is point 1(a) of Article 7 of Brussels I (recast) 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?

What did the court decide?

The Court of Justice considered that Article 24(1) of Brussels I (recast) must be interpreted as meaning that an action by which a co-owner of immovable property seeks to prohibit another co-owner from carrying out changes arbitrarily and without consent, must be regarded as an action 'which has at its object rights in rem in immovable property' within the meaning of that provision, provided that such designated use may be relied upon not only against the co-owners of that property, but also erga omnes (ie towards all), which was for the referring court to verify.

In considering the second question, the court held that Article 7(1)(a) of Brussels I (recast) 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 such 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 its designated use must be regarded as constituting an action ‘in matters relating to a contract’, within the meaning of that provision.

The court also held that, pursuant to the relevant provision, matters relating to a contract may be determined in the courts of the place of performance of the obligation in question, namely, the obligation corresponding to the contractual right upon which the claimant’s action was based. Subject to verification by the referring court, it was held that the obligation in question related to the actual use of the property and that the obligation must accordingly be performed in the place in which the property was situated.

Case details:

- Court: Court of Justice
- Judges: J C Bonichot (president of the chamber), R Silva de Lapuerta (rapporteur and vice-president of the court), C Toader, M Safjan and N Jääskinen (judges)
- Date of judgment: 11 November 2020

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