

# Real estate

## Pre-emption rights – an unfailing source of conflict

A recent court decision saw potential sellers miss out on the sale and lose their garden into the bargain, all as a consequence of Swiss rules on co-ownership



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Swiss property law recognises various forms of collective ownership of real estate. One of these is co-ownership (Art.646, Civil Code (CC)), whereby several persons own a share in an object that is physically undivided.

The law provides more than a basic regime on the management of co-ownership – it confers on co-owners a statutory pre-emption right against any person acquiring a share who is not already a co-owner (Art.682, CC). The holder of the pre-emption right is entitled to buy the property on the conditions agreed by the seller with the buyer (Art.216d, Code of Obligations).

These seemingly simple rules have proved to be an unfailing source of dispute in the sale of real estate, not only shedding uncertainty on the ability of a buyer to acquire an object, but also leading to sometimes unwanted results for the seller.

The issues to which the parties to a real estate transaction may be exposed are illuminated by a recent decision of the Swiss Federal Supreme Court, clarifying the extent of a co-owner's pre-emption right.

### The facts

The parties concluded a contract on the sale of a property formally including six land parcels: (a) a flat in the upper floor of an apartment building, (b) the garden, (c) the forecourt, (d) the cellar, (e) a shed, and (f) a parking lot. Notwithstanding this formal legal structure the envisaged normal use of the property was only guaranteed if the buyers could acquire all six parcels, which thus formed an economic unity ('Sachgesamtheit'). The parties consequently agreed an overall price for the whole of the property.

An issue arose due to the fact that the sellers were only co-proprietors of parcels a-c. Upon notification of the purchase contract the remaining co-proprietor relied on his pre-emption right to claim ownership of parcels b and c. As a result the buyers would only have been able to acquire the property without the garden and forecourt, which would obviously have rendered it unattractive.

### The decision

The issue to be decided was whether, in view of the economic unity formed by the parcels and the potential disadvantage for the sellers, the co-proprietors could be forced either to declare the pre-emption of all six parcels

(thus extending the pre-emption right) or to renounce their pre-emption right. The seller's argument was based on an analogous application of the solution provided in German law. This approach was applied and confirmed by the courts of first and second instance, but rejected by the Federal Supreme Court.

The basic rule in Germany is similar to Swiss law: as a matter of principle the pre-emption right can be executed with regard to particular properties even if those properties are sold in a package with other unencumbered properties. But in contrast to Swiss law, German law confers the right to request the extension of the pre-emption right to all properties if separation of the properties leads to a disadvantage for the seller.

The Federal Supreme Court held that Swiss law intentionally confers a stronger position on the holder of pre-emption rights than German law, and that the requested extension of the pre-emption right would enable the parties to a purchase contract to circumvent the pre-emption right by voluntarily shaping their deal to include 'necessary' economic packages. It therefore confirmed the pre-emptor's right to elect which parcels they would like to acquire.

### An unfortunate outcome for sellers

The judgment confirms that the position of the holder of pre-emption rights cannot be influenced by contractual arrangements between the seller and the buyer of a property. Pre-emption rights can only be limited by an agreement with the holder of these rights. In a sale (or structuring) of a property, attention should therefore not only be paid to a proper analysis of the ownership structure, but also to the necessity of addressing potential issues with third parties.

In the case at hand the sellers ended up in an unfortunate position. Not only had the buyers withdrawn from the contract but the co-proprietors were entitled to rely on their pre-emption right.

The sellers having fallen into the pit, they are now in a situation whereby not only is the sale lost, but their garden has gone too.