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THE PRINCIPLE OF MORTGAGE EXTENSIVENESS WITH REGARD TO BUILDINGS AND SEPARATE PARTS OF IMMOVABLE PROPERTY UNDER CONSTRUCTION***

ABSTRACT: In accordance with the principle of legal unity of immovable property, immovable property consists of parcels of land and everything permanently connected to it, whether on the surface or underground. The reform of the system of real property law in the Republic of Srpska established the legal unity of immovable property between land, building, and separate parts of immovable property, making the owners of separate parts of immovable property (co)owners of the entire immovable property (land and building). Immovable property, which is identified with land, is the object of property rights and the object of a mortgage. In accordance with the principle of extensiveness, a mortgage exists with respect to immovable property as a whole, which means that a mortgage constituted

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on a land also covers the building as well as the separate part of the immovable property (apartment, business space, garage, etc.). Acquisition of property rights and acquisition of a mortgage on immovable property as a whole is possible on the basis of the principle of reliance, which takes precedence over the principle of *Nemo plus iuris ad alium transferre potest quam ipse habet*. When it comes to buildings and separate parts of immovable property under construction, the application of the principle of mortgage extensiveness or the principle of reliance depends on the moment the property rights or a mortgage are acquired. The principle of mortgage extensiveness takes precedence if the owner of the land managed to register the mortgage before the sale of the building or separate part under construction, and vice versa, the principle of reliance takes precedence if a conscientious buyer of an apartment in a building under construction managed to register ownership before the mortgage was constituted on the land.

Keywords: immovable property, legal unity of immovable property, principle of reliance, mortgage, mortgage extensiveness, condominium, building and separate part of immovable property under construction

DEFINITION OF IMMOVABLE PROPERTY – LEGAL UNITY OF IMMOVABLE PROPERTY

The legal unity of immovable property stems from the Roman principle of *superficies solo cedit* which states that the land is the main property (*res principale*), and everything on the land becomes an integral part of it. Roman law allowed no exceptions to this principle because it was considered to express the complete harmony of civil and natural law.¹

In the law of the former Yugoslavia, the application of the principle of legal unity of immovable property was suspended because buildings were legally separated from land in social ownership. The land was treated as one immovable property, and the building as another immovable property, so in the land registry, land without a building was entered in one land registry entry, and a building without land was entered in another land registry entry. The building was separated from the land by the so-called permanent right of use

¹ *Proprietas et civili et naturali iure eius est cuius et solum* (D. 43, 18, 2) or according to Ulpian: *Nature ius, quid superficies ad dominium soli pertinent, that is, semper enim superficiem solo cedere* (D. 43, 17, 3, 7) and Paulus: *Sic et in tradento si quis dixerit se solum sine superficie tradere, nihil proficit, quod minus et superficies transeat quae natura solo cohaeret* (D. 44, 7, m 44, 1).

that lasts as long as the building exists.² In the socialist period, instead of the principle of legal unity of immovable property, the principle of legal duality of land and what was firmly connected with land was applied, so land, buildings, apartments, and office buildings were considered immovable property as independent objects of property rights.³

The reform of the system of real property law in the Republic of Srpska, carried out by the adoption of the Law on Real Rights (ZSP),⁴ resulted in the reaffirmation of the principle of legal unity of immovable property.

According to ZSP art. 6, para. 2:

“Immovable property is a parcel of the land surface, together with everything that is permanently connected to the land on the surface or under it, unless otherwise determined by law.”⁵ It should be noted here that the concept of immovable property defined this way differs from the definition of the concept of immovable property in the positive Law on Survey and Land Registry of the Republic of Srpska (ZPKRS)⁶. Namely, in the ZPKRS, the term immovable property includes land, buildings, separate parts of the building, other above-ground facilities, and underground facilities,⁷ which deviates from the principle of legal unity of immovable property and returns to the principle of legal duality of land and everything that is firmly connected with it⁸. If the concept of immovable property from ZPKRS were to be accepted, then the concept of real property law, based on the principle of

² See Art. 12 of the Law on Basic Property Law Relations, *Official Gazette of the SRBiH*, no. 60/80 and 36/90.

³ Art. 1 of the Law on Real Estate Transactions, *Official Gazette of the SRBiH*, no. 38/78, 4/89, 29/90, and 22/91. The exception in that sense existed only if it concerned privately owned land, because the principle of legal unity of immovable property applied only in that case, but not in the case of land in social ownership, which was nevertheless the dominant form of ownership in socialist law.

⁴ Law on Real Rights, *Official Gazette of the Republic of Srpska*, no. 124/2008, 3/2009, 58/2009, 95/2011, 60/2015, 18/2016, 107/2019, 1/2021, 119/2021.

⁵ Similarly, under Art. 14, paragraph 1. ZSP: “Immovable property includes everything that is built on, above or below the land surface, and is intended to remain permanently there or is permanently connected to it by construction, attachment, superstructure, or in any other way, and is a part of that immovable property until it is separated from it.”

⁶ Law on Survey and Cadastre of the Republic of Srpska, *Official Gazette of the Republic of Srpska*, no. 6/2012, 110/2016, 22/2018, 62/2018, and 95/2019.

⁷ See: Art. 2, paragraph 1, point n). Similarly, according to Art. 2, paragraph 1, point 2) of the Law on Land Registers (ZZK), *Official Gazette of the Republic of Srpska*, no. 74/2002, 67/2003, 46/2004, 109/2005, and 119/2008, which is applied in the Republic of Srpska based on Article 189 of ZPKRS.

⁸ In socialist law, a “permanent” connection was sought between the land and what belongs to it, while according to the provisions of the ZSP, a “firm” connection with the land is required.

legal unity of immovable property, would be completely derogated from, and it is necessary to remove this inconsistency through legislation.”⁹

Therefore, according to the adopted concept of immovable property in the ZSP, everything that is permanently connected to the land above or below the surface represents its segment, an integral part of the land, and constitutes one legally homogeneous immovable property.¹⁰ Buildings and other constructions, as well as everything that is built into the immovable property, added to it, upgraded, or otherwise permanently connected to it, is part of that immovable property and together with it is an independent thing in legal transactions of the immovable property. *Argumentum a contrario*, buildings and other structures that are intended to be temporary are not an integral part of the land, such as kiosks, containers, sheds, and the like, because they retain their legal autonomy in relation to the land. Additionally, even permanent buildings built without a building permit cannot be considered an integral part of the land until they are legalized because there is a possibility that they will be demolished based on a decision of a competent authority.¹¹ Permanent buildings and other structures are not an integral part of the land if they are legally¹² separated from the land by some real or other right, usually the right to build or a concession.

The right to build gives its holder the authority to have his own building on the surface of the land or under it, so the building that is built on the land that is encumbered by the right to build acquires that right as if it were the land, and not just part of it.¹³ Therefore, the right to build by its legal nature is “artificial” or “legal” immovable property, as opposed to land, which is “natural” immovable property. Accordingly, the right to build will take over the function of the land and the principle of legal unity of immovable property will now exist between the right to build and the building itself, and no longer

⁹ Powlakić, M. (2020). Pravno (ne)jedinstvo nepokretnosti – povodom dvije recentne odluke sudova u Federaciji BiH i Republici Srpskoj. *ZIPS*, vol. 1430, 48. Sarajevo: Privredna štampa. Jotanović, R. (2021). Etažna svojina kao predmet hipoteke. *Primena prava i pravna sigurnost. Zbornik radova 34. susreta Kopaoničke škole prirodnog prava “Slobodan Perović”*. Belgrade: Kopaonička škola prirodnog prava – “Slobodan Perović”, vol. 2, 300–301..

¹⁰ Medić, M. (2020). Šta čini predmet hipoteke (povodom odluke Okružnog suda u Banjoj Luci)? *Sudska praksa*, vol. 85, 31. Sarajevo: Privredna štampa.

¹¹ Simonetti, P. (2006). Reintegracija pravnog jedinstva nekretnine u Bosni i Hercegovini. *Pravna riječ*, vol. 8, 56. Banja Luka: Udruženje pravnika Republike Srpske..

¹² Due to the force of gravity (gravitational force) by which the Earth attracts all objects that are on it or near it, there is no way to physically (factually, naturally) separate a building or other structure from the land on which it is located..

¹³ See: Art. 286. of ZSP.

between the land and the building. A concessionaire on public property may have independent immovable properties (buildings, structures, or facilities) which are legally separated from it by the concession and are the property of the concessionaire.¹⁴ This is a deviation from the principle of legal unity of immovable property because the land and the immovable property built on the land are legally separated.¹⁵

LEGAL UNITY OF IMMOVABLE PROPERTY WITH REGARD TO CONDOMINIUM OWNERSHIP

In socialist law, there was a legal duality of land and buildings in condominium ownership. Namely, condominium ownership broke the legal unity of the land and the building, as well as the legal unity of the building itself because there was a right of ownership on a separate part of the immovable property, there was joint (indivisible) ownership on the common areas of the building, and there was co-ownership on the land on which the building was located and which served for the regular use of the building. Instead of one immovable property, three legally separate and independent immovable properties existed here: a separate part of the immovable property (apartment, business space, garage, etc.), common areas of the building (foundations, main walls, attic, stairs, corridors, elevators, electrical, sewage, water, and telephone network, etc.) and the land.

The reform of the system of real property law in Republika Srpska established the legal unity of immovable property between land, building, and separate parts of immovable property so that the owners of separate parts of immovable property became (co)owners of the entire immovable property (land and building).¹⁶ According to the new concept, condominium ownership

¹⁴ See: Art. 7. Para. 4. of ZSP.

¹⁵ Babić, I., Jotanović, R. (2020). *Gradansko pravo, Knjiga 2: Stvarno pravo*. Banja Luka: University of Banja Luka, Faculty of Law, 179.

¹⁶ This legislative solution has been criticized because it established the principle of legal unity of immovable property in reverse – the owners of a building and separate parts of the immovable property have become owners of the land, instead of the owners of the land becoming owners of the building and separate parts of the immovable property, as would be consistent with the application of the principle of legal unity of immovable property. As an alternative legislative solution, it was proposed to convert the permanent right to use land into the right to build, where the owners of the land would be cities and municipalities, which would then establish the right to build in favor of the owners of the buildings and separate parts of the immovable property on such land. This legislative solution was adopted in the Law on Ownership and Other Real Rights of the Brčko District of

is a complex, specific form of property right, i.e. a legal construct¹⁷ consisting of two rights – the exclusive right of ownership on a separate part of the immovable property and the right of co-ownership on the entire immovable property (land and buildings)¹⁸. These two rights are one legal monolith because they are only found together in legal transactions¹⁹ although there are specific powers of the condominium owner on each of these elements of the condominium ownership.²⁰ Therefore, when it comes to condominium ownership, there is a right of ownership on a separate part of the immovable property, and not on a separate part of the building, because the land and the building form one legal entity. Additionally, the right of ownership on a separate part of the immovable property (real part) is a secondary right, and the right of co-ownership on the immovable property as a whole consisting of land and buildings (ideal part) is the main right.²¹ Land with a building and separate parts of the immovable property represents a unique object of condominium ownership, so it is entered as such in the same land register.

The legal unity of immovable property with regard to condominium ownership also applies in the event that the right to build is established on the land. The right to build, which separates the building from the land, takes the place of the land, so the principle of legal unity of immovable property is applied, *mutatis mutandis*, between the right to build and the building. The co-owned part of the immovable property, in addition to the land and the building, can also consist of the right to build and the building.²²

Bosnia and Herzegovina. *Official gazette of the Brčko District of Bosnia and Herzegovina* no. 11/2001, 8/2003, 40/2004, 19/2007. More details can be found in Simoneti, P. (2006). Reintegracija pravnog jedinstva nekretnine u Bosni i Hercegovini. *Pravna riječ*, vol. 8, 56. Banja Luka: Udruženje pravnika Republike Srpske, 84–85.

¹⁷ *Condominium ownership is a construct in every legal system, and it is based on a specific object that is the result of a special legal construct of condominium ownership*", Povlakić, M. (2009). *Transformacija stvarnog prava u Bosni i Hercegovini*. Sarajevo, 187.

¹⁸ Babić, I., Jotanović, R. (2020). *Građansko pravo, Knjiga 2: Stvarno pravo*. Banja Luka: University of Banja Luka, Faculty of Law, 242.

¹⁹ According to Art. 80, paragraph 1. Of ZSP: "The ownership of a separate part of immovable property (condominium ownership) arises and remains inseparably connected with the corresponding co-owned (ideal) part of the immovable property on which it was established, and can only be transferred or encumbered together with it."

²⁰ Ownership rights in condominium ownership, however, are concentrated on the special part of the immovable property on which the condominium owner exercises them independently, see Perkušić, A. (2019). Uspostavljanje etažnog vlasništva – otvorena pitanja tumačenja i primjene. *Zbornik of the Faculty of Law, University of Rijeka*, 1 (40), 322.

²¹ Meliha Povlakić, in: Babić, I., Medić, D., Hašić, E., Povlakić, M., Velić, L. (2011). *Komentar Zakona o stvarnim pravima Republike Srpske*. Sarajevo: Privredna štampa, 143.

²² See: Art. 80, paragraph 3. of ZSP.

It should be noted that the concept of condominium ownership adopted by the ZSP deviates from the provisions of the ZPKRS, which link condominium ownership to joint ownership because the owner of a separate part of immovable property on the common areas of the immovable property has the right of joint ownership²³ instead of the right of co-ownership, which deviates from the principle of legal unity in condominium ownership. The registration of joint ownership of immovable property under condominium ownership is not compatible with the concept of condominium ownership adopted by the ZSP, and the registration of joint ownership as such cannot be done in the public land registry.²⁴

APPLICATION OF THE PRINCIPLE OF RELIANCE

The principle of reliance is one of the general principles of the public land registry²⁵ that goes beyond its content because the essence of the public land registry is based on this principle (together with the principle of registration) as a new property record that should provide complete, accurate, and credible data regarding immovable property and rights on immovable property in the Republic of Srpska.²⁶ It has two legal effects: 1. reliance on truthfulness based on an irrefutable assumption that the registration of the predecessor in the public land registry is true, i.e. that the registered predecessor is formally the holder of the registered right²⁷ which he can freely dispose of in favor of a conscientious acquirer who will acquire that right, regardless of whether the registered predecessor is the actual owner of the transferred right²⁸ and 2. reliance on completeness that creates an irrefutable assumption that all data concerning certain immovable properties are registered in the public land registry and that those data on immovable property that were not formally registered do not actually exist²⁹.

²³ See: Art. 106, paragraph 5. of ZPKRS. In the original text of ZPKRS from 2012, this provision did not exist, but was added by amendments to this law from 2016.

²⁴ Jotanović, R. (2021). Etažna svojina kao predmet hipoteke. *Primena prava i pravna sigurnost. Zbornik radova 34. susreta Kopaoničke škole prirodnog prava "Slobodan Perović"*. Belgrade: Kopaonička škola prirodnog prava – "Slobodan Perović", vol. 2, 302.

²⁵ Art. 53. of ZPKRS.

²⁶ Jotanović, R. (2014) Načelo povjerenja u katastar nepokretnosti u pravu Republike Srpske. *Pravna riječ*, vol. 40, 559. Banja Luka: Udruženje pravnik Republike Srpske.

²⁷ A registered right is the right that is registered in the public land registry with respect to a certain immovable property.

²⁸ Art. 56, paragraph 1. of ZSP and Art. 56, paragraph 1. of ZPKRS.

²⁹ Art. 56, paragraph 2. of ZSP and Art. 56, paragraph 2. of ZPKRS.

The principle of reliance, both in terms of truthfulness and completeness, enables a conscientious acquirer³⁰ to acquire the registered right through a legal transaction³¹ from his legal (registered) predecessor, regardless of whether that predecessor's registration was causal [based on a valid (true, correct, proper) legal basis]. In essence, if there is a difference between the formally registered and the actual, factual situation regarding the holder of the right to the immovable property, the conscientious acquirer will acquire such a right based on the principle of reliance, thereby derogating from the application of the principle *Nemo principle plus iuris ad alium transferre potest quam ipse habet* (no one can transfer more rights to another than he himself has).³² The dominance of the principle of reliance is further pronounced even in the case of acquisition based on law. For example, a legal mortgage on a taxpayer's property in favor of the tax authority is created (method of acquisition) by registration in the public land registry;³³ ownership acquired by adverse possession before it was registered cannot stand in opposition to the right of the mortgage creditor who, relying on the principle of reliance, acquired that right before the property right by adverse possession was registered³⁴. Only registered rights have an absolute effect.³⁵

With its legal effect, the principle of reliance provides legal protection to a conscientious acquirer of a registered right by taking the already registered

³⁰ A conscientious acquirer is one who did not know, nor under the circumstances had reason to suspect, that the land registry status is not complete or true (see: Article 10, paragraph 4 of ZSP). Conscientiousness of the acquirer is presumed, so the burden of proof lies on the one who claims otherwise, and conscientiousness must exist from the moment the legal transaction is concluded until the moment the application for registration is submitted.

³¹ The principle of reliance does not apply in the case of acquisition of registered rights if the legal basis is not a legal transaction.

³² Acquisition based on the principle of reliance is a special type of acquisition in which the appearance of a right replaces the right, see: Powlakić, M. (2014). Načelo povjerenja u zemljišnu knjigu u najnovijoj praksi Vrhovnog suda Federacije BiH. *Nova pravna revija*, 8, (1), 48–49. When acquiring property rights based on the principle of reliance, it is not a derivative acquisition but a specific original acquisition of property rights. Abdić, A. (2017). Načelo povjerenja u zemljišne knjige u Bosni i Hercegovini. *Zagrebačka pravna revija*, 6 (1), 112.

³³ Art. 58, paragraph 2 of the Law on Tax Procedure of the Republic of Srpska, *Official Gazette of the Republic of Srpska*, no. 78/20 and 37/22. In more detail: Jotanović, R. (2019). Sticanje zakonske hipoteke na osnovu načela pouzdanja u javnu evidenciju nepokretnosti. *Pravna riječ*, vol. 59, 235 i dalje. Banja Luka: Udruženje pravnika Republike Srpske.

³⁴ Decision of the Supreme Court of the Federation of Bosnia and Herzegovina, 23 0 P 015197 12 Rev., dated December 20, 2012.

³⁵ Rights that have absolute effect even without registration are an exception, see: Medić, D. (2005). *Hipoteka i ostala sredstva obezbjeđenja potraživanja – stanje i pravci razvoja*. Banja Luka, 157.

(existing) right as valid, regardless of whether such a right corresponds or not to the factual and legal status of the immovable property and the registered predecessor, so the conscientious acquirer will acquire the right to the registered immovable property from the registered predecessor, even if it differs from its factual status.³⁶ The only condition for the legal effect of the principle of reliance is that 3 years have passed since the date of registration of the predecessor's rights (the deadline for the so-called fiction of absolute accuracy, i.e. the deadline for tabular adverse possession) because the predecessor's registration can be disputed within that period through so-called lawsuits for deletion of registration.³⁷ Therefore, the legal effect of the principle of reliance begins after the expiry of the deadline for a lawsuit for deletion of registration if a suit has not been filed, or after it has been rejected.³⁸

EFFECT OF MORTGAGE EXTENSIVENESS

The right of lien was largely marginalized in the socialist period - based on non-market economic conditions. With the return to the market way of securing mortgages, it has gained importance and become one of the most important legal means of securing claims, primarily due to the value of immovable property as the object of a mortgage.³⁹

The object of a mortgage is immovable property, but it follows from the nature of the mortgage right that not all immovable property can be subject to it.⁴⁰ Only immovable property that is in circulation can be subject to it, which arises from the legal provision that only immovable property that can be monetized⁴¹ i.e. immovable property that is in legal circulation, can

³⁶ Josipović, T. (2001). *Zemljišnoknjižno pravo. Zagreb: Informator; 134.*

³⁷ Only an invalid (false, inaccurate, invalid) registration of the immediate acquirer can be contested, and if a third party acquired the right relying on the right of the previous owner, their registration cannot be annulled if the nullity of the legal transaction on the basis of which the registration of the right of their registered predecessor was carried out, from whose right he derives his own right, is established.

³⁸ A lawsuit for deletion of registration postpones the application of the principle of reliance in terms of reliance on truthfulness, while the legal effect of reliance on completeness occurs immediately after the registration is completed.

³⁹ Medić, D. (2003). Nekretnine kao objekt hipoteke u pravu Republike Srpske. *Zbornik radova – Reforma i funkcionisanje pravnog sistema Republike Srpske*, vol. 1, 105. Banja Luka: Glosarijum.

⁴⁰ Simonetti, P. (1994). Hipotekarno zalaganje nekretnina i prava građenja. *Zaštita vjerovnika – Zbornik radova*, vol. 2, 1–16. Zagreb: Informator; Rijeka: Faculty of law, University of Rijeka.

⁴¹ Art. 139, paragraph 2. of ZSP.

be encumbered. *Argumentum a contrario*, immovable properties that are not in legal circulation cannot be mortgaged because they cannot be monetized (sold). The establishment of legal unity of immovable property and public land registries based on the principle of registration and the principle of reliance should contribute to a greater use of immovable property as the object of a mortgage. The object of a mortgage is primarily determined by the concept of immovable property specified by the legal provision which defines it as only land with all that is connected to it above or below its surface.⁴² Thus, immovable property is identified with land,⁴³ which is, according to the rules of land registry law, linked to a land registry entity registered in a single land registry entry. The land registry entity consists of one or more cadastral parcels, which are located in the same cadastral municipality and have the same legal relationships.⁴⁴

From the principle of legal unity of immovable property follows that buildings and other structures that do not have autonomy in relation to the land are permanently attached to the land and together with that land constitute a legally homogeneous immovable property.⁴⁵ The land is the main property, and buildings and other structures as an addition to it follow the legal fate of the land because they cannot be an independent object of a mortgage or another real right. The land “appropriates” all things that are permanently attached to it.

A mortgage exists with regard to immovable property as a whole (land and building or other structures).⁴⁶ It follows that whoever has the right of ownership or another real right over the land (e.g. the right to build) also has that right over all its attachments. The right of the mortgage creditor extends to the building as an attachment to the land, and it is not necessary to specify this, as it arises from the law itself.⁴⁷ Therefore, there is a legal presumption that all property belonging to the land on which the mortgage is constituted is also encumbered by the mortgage, but if the property belonging to the land is specified in the mortgage contract by a notary, it does not cause harm and may even prevent the consequences of incorrect application of substantive

⁴² Art. 6, paragraph 2 and Art. 14, paragraph 1. of ZSP.

⁴³ Medić, M. (2020). Šta čini predmet hipoteke (povodom odluke Okružnog suda u Banjoj Luci)?. *Sudska praksa*, 85. Sarajevo: Privredna štampa, vol. 85, 31.

⁴⁴ Art. 16, paragraph. 3. of ZZK .

⁴⁵ Medić, M. (2020). *Op. cit.*, 31.

⁴⁶ Law on Enforcement Procedure – ZIP, *Official Gazette of the Republic of Srpska*, no. 59/2003, 85/2003, 64/2005, 118/2007, 29/2010, 57/2012, 67/2013, 98/2014, 5/2017, 58/2018, and 66/2018, in art. 69, paragraph 1. States that the object of enforcement can only be immovable property as a whole, unless otherwise specified.

⁴⁷ According to Art. 139, paragraph 6. of ZSP: “All of its attachments are also encumbered with the lien, unless otherwise determined by law.”

law.⁴⁸ If nothing else is agreed upon, the determination of which attachments are included in the mortgage is based on the state of the immovable property and its attachments at the time of satisfaction of the mortgage creditor, and not at the time of establishing the mortgage.⁴⁹ This represents a kind of deviation from the principle of specialty (definiteness) of the object of a lien, but it is in accordance with the principle of indivisibility because the entire property that is under a lien secures the claim as a whole.

A building that is constructed on land that is already mortgaged is part of that land. The building cannot be separated from the land, nor can the land be separated from the building constructed on it, so the mortgage on the land also extends to the building. The building and other structures on the immovable property are considered improvements to the immovable property, to which the mortgage extends based on the principle of extensiveness.⁵⁰ If the value of the object of the lien increases after the establishment of the lien, it remains fully covered by the lien.⁵¹

Improvements to immovable property occur after the establishment of the mortgage by increasing the value of the immovable property, so what benefits the owner of the immovable property⁵² also benefits the mortgage creditor. By extending the mortgage to the attachments, the legal position of the mortgage creditor is strengthened because the value of the object of the lien increases, and the creditor can more securely satisfy the claim secured by the mortgage through its monetization.

MORTGAGE EXTENSIVENESS WITH REGARD TO CONDOMINIUM OWNERSHIP

By establishing condominium ownership (condominiumization) on a building, its registration in the land registry is carried out as a right associated

⁴⁸ Powlakić, M. (2020). Pravno (ne)jedinstvo nepokretnosti – povodom dvije recentne odluke sudova u Federaciji BiH i Republici Srpskoj. *ZIPS*. Sarajevo: Privredna štampa, vol. 1430, 53.

⁴⁹ Medić, M. (2020). Šta čini predmet hipoteke (povodom odluke Okružnog suda u Banjoj Luci)? *Sudska praksa*, 85. Sarajevo: Privredna štampa, vol. 85, 33.

⁵⁰ In addition to extensiveness in terms of the object of the mortgage, there is also extensiveness in terms of claims, because the effect of the mortgage extends to the increase of claims (interest, costs, etc.), Lazić, M. (1994). *Sadržina hipoteke*, master's thesis. Niš, 52.

⁵¹ Hiber, D., Živković, M. (2015). *Obezbeđenje i učvršćenje potraživanja*. Belgrade: Faculty of Law of the University of Belgrade, 104–105.

⁵² Conversely, the owner may not do anything that reduces the value of the mortgaged immovable property, Art. 165. of ZSP.

with the corresponding co-owned part of the entire immovable property.⁵³ This is in accordance with the adopted concept of condominium ownership in the law of the Republic of Srpska, according to which it consists of two rights - the exclusive right of ownership on a separate part of the immovable property and co-ownership of the entire immovable property (land and building). However, despite the fact that there are two rights with different regimes, in essence, there is a single object of property rights – condominium ownership. Although the property rights of a condominium owner in relation to the separate part of the immovable property (apartment, business space, garage, etc.) are dominant, co-ownership in relation to the common areas and land is the main right, and this derives from the principle of legal unity of the immovable property.

The building is mortgaged together with the land on which it was built⁵⁴ because it is a single immovable property (land and building) as the object of the mortgage. Condominium ownership is complex and specific, but it represents a unique immovable property that is subject to legal transactions as a whole. It is not possible to transfer ownership of a specific part of immovable property without simultaneously transferring the right of co-ownership on the common parts of the building and land on which the building is located, since ownership of a specific part of the property arises from the corresponding co-owned part of the entire property. In that sense, it is not possible to have a different mortgage on the separate part of the property and the common areas of the building and land on which the building is located. By applying the principle of extensiveness, a mortgage established on the land encompasses the building, as well as the separate part of the immovable property, because they represent a single object – an immovable property as a whole consisting of the ownership of a separate part of the immovable property and the co-ownership of the common areas of the building and land on which the building is located.

A mortgage exists with regard to the immovable property as a whole because the object of enforcement can only be the immovable property as a whole unless otherwise specified.⁵⁵ Therefore, it is redundant to stipulate that the mortgage will encompass the land, building, and separate part of the immovable property, as this follows from the legal provisions that it is a single immovable property. It is not possible to carry out enforcement only on the land, without including the building or a separate part of the immovable property. In this regard, the principle of mortgage extensiveness produces a legal

⁵³ Art. 84, paragraph 2. and 4. and Art. 85. of ZSP.

⁵⁴ „When a building is erected on mortgaged land, it is considered an attachment, so the mortgage will also extend to the building”. Marković, L. (1911). *Hipotekarno pravo*. Belgrade, 54.

⁵⁵ Art. 69, paragraph 1. of ZIP.

effect, regardless of whether the attachment to the immovable property existed at the time of the constitution of the mortgage or later, until the moment of the satisfaction of the mortgage creditor.

However, there is also a different approach in judicial practice, where the court has taken the position that if the mortgage was established only on the land in question and it was not agreed that the mortgage would also include a building as part of the land that has yet to be constructed on that land, the building that was constructed after the conclusion of the mortgage agreement is not part of the land.⁵⁶

MORTGAGE EXTENSIVENESS WITH REGARD TO BUILDINGS AND SEPARATE PARTS OF IMMOVABLE PROPERTY UNDER CONSTRUCTION

Disposition (sale and establishment of mortgage) of buildings, i.e. separate parts of immovable property under construction, is widespread in the real estate market in the Republic of Srpska, regardless of the fact that the ZSP does not contain provisions on buildings under construction⁵⁷ and future condominium owners.⁵⁸ The right of ownership over immovable property and other real rights based on a legal transaction are acquired by registration in the public land registry.⁵⁹ As long as the buyer is not registered, there is only an obligational claim for the transfer of ownership between the registered predecessor

⁵⁶ Decision of the District Court in Banja Luka, no. 710P255024 19 Mož dated September 24, 2019.

⁵⁷ A physically completed object, or its separate part, which is not registered in the land registry, is also considered an object under construction. Lazarević, D. (2015). *Komentar Zakona o hipoteci: sa sudskom praksom, registrom pojmova i prilogom*. Belgrade: Poslovni biro, 42.

⁵⁸ Conversely, the Law on Real Rights, *Official Gazette of the Federation of Bosnia and Herzegovina*, no. 66/13, 100/13, 32/19, in Art. 86. paragraphs 4–9. states that condominium ownership can be disposed of during construction in such a way that the prenotation of future condominium ownership is entered in the encumbrance sheet of the land registry entry of the immovable property on which the building is being constructed. Also, Mortgage Law, *Official Gazette of the Republic of Serbia*, no. 115/05, 60/15, 63/15, 83/15 in art. 1, paragraph 1, point 6. states that the object of the mortgage can be: “an object under construction, as well as a separate part of an object under construction (apartment, business space, garage, etc.) regardless of whether it has already been constructed, provided that a valid approval for construction in accordance with the law governing the construction of buildings is given.”

⁵⁹ Art. 53, paragraph 1. of ZSP.

and the acquirer (constitutive effect of the principle of registration),⁶⁰ and the seller (registered predecessor) can still assert his right against any third party.

Buildings, or separate parts of immovable property under construction, are not *ex lege* objects of (condominium) ownership or other real rights (mortgages). Immovable property consisting of land and a building, i.e. separate parts of the immovable property, is a single object of real rights, so the owner of the land will also own the building, i.e. separate parts of the immovable property, after the establishment of condominium ownership by registration in the public land registry⁶¹. *Until condominium ownership is established de iure*, there is only land and the owner of the land registered as such in the land registry. Any disposition of rights related to the land by the owner of the land is carried out by registration or prenotation of rights in the land registry.

In practice, a contract is concluded in the form of a notarized document, whose subject is the sale of a separate part of the immovable property under construction, between the owner of the land, who is also the investor, and the buyer of the separate part of the immovable property under construction, usually the buyer of the apartment. Given that the apartment is not constructed at the moment the contract is concluded, and therefore not registered as belonging to the land in question, a registration of the acquisition of ownership rights over the apartment that will be built on that land is made in the land registry by registering a prenotation of acquisition.⁶² Usually, the conclusion of the contract of sale of the apartment is followed by the conclusion of a mortgage agreement with a bank and the prenotation of the mortgage⁶³ in the land registry.

⁶⁰ Jotanović, R. (2021). Etažna svojina kao predmet hipoteke. *Primena prava i pravna sigurnost. Zbornik radova 34. susreta Kopaoničke škole prirodnog prava "Slobodan Perović"*. Belgrade: Kopaonička škola prirodnog prava – "Slobodan Perović", vol. 2, 306.

⁶¹ Art. 84 and 87. of ZSP.

⁶² Often, the registration of the note of the acquisition of ownership rights to the apartment is registered (sometimes also the registration of the note of the existence of rights from the sales agreement) instead of the registration of the prenotation of the acquisition of ownership rights to the apartment, which is a mistake because the registration of a note does not grant ownership rights or other real rights, neither definitively nor conditionally. Prenotation is a registration "... by which real rights to immovable property are conditionally acquired, transferred, limited or terminated" (Art. 95, paragraph 1. of ZPKRS), while a note "...registers facts that are important for establishing, modifying, terminating, or transferring real rights on immovable property, which refer to the identity of the right holder, to the immovable property itself, or to legal relations regarding the immovable property" (Art. 98, paragraph 1. of ZPKRS).

⁶³ Most often, in fact, the registration of the note of priority order is done for the registration of the mortgage, which is a mistake because only by registration or prenotation can real rights be acquired, transferred, limited, and terminated, according to Art. 92 and Art. 95, paragraph 1. of ZPKRS.

The registration of the prenotation of the acquisition of ownership rights on an apartment and the registration of the prenotation of a mortgage enables the application of the principle of reliance in favor of the buyer of the apartment and the bank as conscientious third parties in the case of multiple dispositions of the property by the owner of the land, as well as in the event of potential enforcement on the property.⁶⁴ The principle of reliance protects a registered holder of the right acquired based on a legal transaction⁶⁵ (the buyer of the apartment and the mortgage creditor) if he is conscientious. Conscientiousness applies both in terms of reliance on truth (the acquirer believes that the immovable property is acquired from the person who was registered as the owner)⁶⁶ and reliance on completeness (the acquirer acquired the immovable property as if there were no other rights, encumbrances, or restrictions on it that were not registered at the time of its registration, nor was it visible that their registration had been requested in the public land registry).⁶⁷

MORTGAGE EXTENSIVENESS *VERSUS* THE PRINCIPLE OF RELIANCE WITH REGARD TO BUILDINGS AND SEPARATE PARTS OF IMMOVABLE PROPERTY UNDER CONSTRUCTION

The owner of the land can mortgage the land before or after selling the apartment that is being built on that land. In either case, the validity of the disposition depends on the conscientiousness of the mortgage creditor or the apartment buyer. In the first case, when the landowner has registered a mortgage in the land registry before selling the apartment in the building that is being built on that land, the apartment buyer will be considered unconscientious regarding the registered mortgage because he could have determined the existence of the registered mortgage by accessing the land registry or by being

⁶⁴ Since there can only be one right of ownership on one immovable property because it is an exclusive right, the principle of reliance applies in favor of the registered owner of the immovable property in question, as opposed to a mortgage as a non-exclusive right where it is possible for multiple such rights to exist simultaneously on one immovable property whose rank (priority) is determined by the time of occurrence of each of those rights, Živković, M. (2021). *Pravo registra nepokretnosti: Opšti deo*. Belgrade; Faculty of Law, University of Belgrade, 134.

⁶⁵ That legal transaction should be onerous, Živković, M. (2021). *Ibid*, 168.

⁶⁶ Art. 56, paragraph 1. of ZSP.

⁶⁷ Art. 56, paragraph 2. of ZSP. See more in: Čubrilović, B. (2021) *Pravni režim na objektu u izgradnji u pravu Republike Srpske. Zbornik radova „Izazovi pravnom sistemu“*, vol. 2, 392–407. East Sarajevo: Faculty of Law, University of East Sarajevo.

notified by the notary who drafted the sales contract. The constructed building and the apartment in question will become part of the land due to the effect of the principle of legal unity of immovable property, which means that a single object of ownership and mortgage rights will be created. A mortgage on the land according to the principle of extensiveness also includes everything that is permanently attached to the land as its integral part. In fact, following the concept of condominium ownership adopted in the law of the Republika Srpska, the object of the mortgage is the immovable property as a whole composed of ownership of the apartment and co-ownership of the common areas of the building and the land on which the building is located. A mortgage creditor acquires the mortgage from the registered owner of the land, and an unconscientious buyer acquires an apartment encumbered with a mortgage, which, through the application of the principle of mortgage extensiveness, becomes the object of the mortgage together with the land. In case of enforcement on the immovable property in question (land with a building or an apartment), the enforcement document from a notary based on which the mortgage is entered in the encumbrance sheet of the land registry, and in terms of the legal effect of the principle of reliance, only the moment of the registration of the mortgage is taken into account – the buyer of the apartment is conscientious until the moment the mortgage is registered, and after the registration of the mortgage, i.e. at the time the application for registration of the prenotation of the acquisition of ownership rights to the apartment is submitted, he is unconscientious.

In the second case, when the owner has mortgaged the land after selling the apartment in the building that is being constructed on that land, the buyer of the apartment will be conscientious because, at the time of registration of the prenotation of the acquisition of ownership rights to the apartment, it was not visible from the data registered in the public land registry that the mortgage was registered. Here, the principle of reliance takes precedence, so the legal effect of mortgage extensiveness does not occur. However, we can distinguish between two types of conscientious buyers, i.e. buyers who concluded a contract for the purchase of an apartment under construction before the establishment of a mortgage on the land.⁶⁸ The first type includes those conscientious buyers who, after the contract was concluded, registered the prenotation of the right from the purchase agreement for an apartment under construction in the public land registry (they have both *iustus titulus* and *modus acquirendi*). The second type are those conscientious buyers who, after the contract was concluded, did not obtain the registration of the prenotation

⁶⁸ Jotanović, R. (2021). Etažna svojina kao predmet hipoteke. *Primena prava i pravna sigurnost. Zbornik radova 34. susreta Kopaoničke škole prirodnog prava "Slobodan Perović"*. Belgrade: Kopaonička škola prirodnog prava – "Slobodan Perović", vol. 2, 309.

of the right from the purchase agreement for an apartment under construction in the public land registry (they have *iustus titulus* but not *modus acquirendi*).

The right of ownership of immovable property based on a legal transaction is acquired through registration in the public land registry (constitutive effect of registration).⁶⁹ This means that the registered status of the property and the principle of reliance take precedence over the actual status of the property. Whether or not a conscientious buyer of an apartment under construction will acquire the right of ownership depends on whether the ownership right has been registered in the public land registry or not. If the registration of a property right has been completed, the legal effect of the principle of mortgage extensiveness will not occur because the mortgage was created after the registration of property rights, so the principle of reliance in favor of the previously registered owner takes precedence. However, if the registration of the property right has not been completed, the legal effect of the principle of mortgage extensiveness occurs, and the mortgage on the land also extends to the building and separate parts of the immovable property under construction. Essentially, in this case, the legal situation is identical to that of an unconscientious buyer of an apartment in a building under construction, i.e. a buyer who registered the prenotation of the acquisition of the right from the purchase agreement for an apartment under construction, but only after the seller (owner of the land) had already registered the mortgage on the land, so the legal effect of mortgage extensiveness will take precedence over the principle of reliance, which is valid only in favor of the conscientious the buyer (in this case, the buyer was unconscientious, he knew or could have known about the existence of a mortgage on the land at the time of registration of the prenotation of the right from the purchase agreement for an apartment under construction).

Therefore, the view that ownership of an apartment is the limit that resolves the issue of the scope of mortgage extensiveness⁷⁰ has limited application, i.e. it only applies when the buyer acquired ownership of the apartment before the registration of the mortgage on the land, in which case there is no legal effect of mortgage extensiveness. There is a completely different legal situation when the buyer of the apartment has indeed entered into a contract after the registration of the mortgage on the land, but did not register his property right in the public land registry, and therefore has not become the owner, because that would be contrary to the principle of the constitutive effect of registration, regardless of the fact that it is qualified as a property right in judicial

⁶⁹ Art. 53, paragraph 1. of ZSP.

⁷⁰ Blagojević, M. (2020). Granica ekstenzivnosti hipoteke. *Sudska praksa*, vol. 86, 65. Sarajevo: Privredna štampa.

practice.⁷¹ In this case, the buyer did not formally become the holder of the property right because he was not registered in the public land registry, and even if he had registered his property right in the land registry, it would have been encumbered by the mortgage because it was visible in the registry at the time of acquiring the property right to the apartment.

CONCLUSION

According to the concept of immovable property adopted in the ZSP, immovable property consists of land with everything that is permanently attached to it, in accordance with the principle of legal unity of immovable property. The object of the property right and the object of the mortgage is the immovable property as a whole (a legally homogeneous whole) – land as the main property and all its attachments as secondary property. In accordance with the legal nature of condominium ownership adopted in the law of the Republic of Srpska, it is immovable property consisting of 1. ownership rights on a separate part of immovable property and 2. co-ownership on the common areas of the building and the land on which the building is located and which serves for the regular use of the building. The object of property rights and the object of a mortgage in condominium ownership is the immovable property as a whole, where co-ownership is the main right, and ownership of a separate part of the immovable property is a secondary right.

The principle of mortgage extensiveness is also in accordance with the principle of legal unity of immovable property because the object of a mortgage is the immovable property as a whole, which is identified with the land, and the land is linked to the land registry entity that is registered in the land registry. These two principles are complemented by the principle of reliance, which is one of the basic principles on which public land registry is based as

⁷¹ Such a position was taken by the Constitutional Court of Bosnia and Herzegovina, which states in its decisions that an apartment purchase contract (contract law) and the transfer of the apartment into the buyer's possession are considered a material interest, i.e. the right to property in the sense of Art. 1 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, so the right of ownership of an apartment as a property right can be acquired even before registration in the land registry, Decision of the Constitutional Court of Bosnia and Herzegovina, no. AP-648/19 dated April 24, 2019. Available at: <http://www.ustavisud.ba/dokumenti/AP-648-19-1183017.pdf>. and no. AP-2326/18 dated July 17, 2018. Available at: <https://www.ustavisud.ba/dokumenti/bs/AP-2326-18-1141226.pdf>. We believe that this position is in contradiction with the basic postulates of land registry law.

a complete, reliable, and up-to-date record of data on immovable property and holders of rights to immovable property.

Buildings and separate parts of immovable property under construction are not *ex lege* objects of property rights and mortgages, but in practice, all these principles of real property law and land registry law are applied to them. Based on this, the right of ownership of an apartment under construction, or the right of ownership encumbered by a mortgage, will be acquired by a conscientious buyer or mortgage creditor. A conscientious buyer is one who, at the time of submitting a request for registration of the prenotation of the acquisition of the right of ownership of an apartment under construction, did not know, nor was it visible from the public land registry, that a mortgage registration had been requested on the land on which the building containing the apartment in question is being built. A conscientious mortgage creditor is one who obtained the registration of the mortgage on the land before the buyer of the apartment under construction obtained the registration of the prenotation of the acquisition of the right of ownership of the apartment. Given that not all separate parts of the object (apartments/business space/garages) will be sold simultaneously, the mortgage creditor may be conscientious regarding those future separate parts of the object in relation to which the prenotation of the acquisition of the right of ownership of a separate part of the object under construction was not registered at the time of registration of the mortgage on the land. As for the unconscientious buyer (who knew or could have known about the existence of the mortgage on the land at the time of registration of the prenotation of the right from the purchase agreement for an apartment under construction), he acquires an apartment encumbered by a mortgage, which, according to the principle of mortgage extensiveness, becomes the object of the mortgage together with the land.

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