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Article : English Trusts of Land : FATCA and the French trusts fiscal legislation of 2011

20th January, 2015.

The concept of realty in England and Wales was consolidated in the 1925 legislation, and has since evolved in many ways. The initial economic impulse to the freeing up of land ownership following Lloyd George's taxation of estates in the beginning of the last century has not halted. The eventual demise of Settled Land was finally achieved in the Trusts of Land and Appointment of Trustees Act, 1996 (TLATA), which in turn abolished the notion of the doctrine of conversion of land into personalty under a trust for sale (s.3 TLATA).

In effect that meant that an interest in land held under a trust for sale became an overriding interest in land in equity which for reasons clear to any English lawyer, as opposed to a foreign lawyer, takes effect finally as against the proceeds of sale not as against the land in trust under the Land Registration Act 2002, to the extent that that Act applies to the land concerned. I remind myself that it is at that point that the divergences between equitable interests in and the ownership at common law of the land are resolved by their reduction to money. The concept of weighing out rights as against their monetary value, in the scales of justice is a Roman law concept with which civil lawyers are familiar.

Aside the fundamental changes made to the 1925 legislation, in the applicable sections and schedules; the various sections of the TLATA give effect to the ramifications of land held on trust for sale: **for example**, s. 4 substitutes the term "in trust" for "in trust for sale" in s. 36 (1) and (2) of the Law of Property Act relating to joint tenancies of land; s. 14 TLATA gives effect to the notion of land under a trust for sale remaining "land" in relation to its proceeds of sale; s. 16 TLATA protects purchasers against any invalidation of a conveyance for issues as to the equitable interests involved; and the trustees have the right to transfer the land to the beneficiary, under a court order if necessary under s. 6(2). It is therefore a very English way of addressing the conflicting issues arising over land, and the division of its ownership.

Article : *Trusts of land under TLATA 1996 in an international context*

Date: 20th January, 2015

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Perhaps best to bear in mind that the definition of a trust of land under s.1 (2)(a) TLATA defines a trust, generally *as including any description of trust (whether express, implied, resulting or constructive), including a trust for sale and a bare trust, and to any description of trust (whether express, implied, resulting or constructive), including a trust for sale and a bare trust, and (b) includes a trust created, or arising, before the commencement of this Act.*

Coupled with the abolition of the doctrine of conversion at s.3 TLATA, which effectively renders land held under trust for sale as land and no longer as deemed personalty, this is reasonably straightforward for an English solicitor. However, where the lawyer concerned has acquired English practice rights under a conversion course from a foreign bar, these essential distinctions may be less evident for them in the international context, unless the linkages with private international law principles and taxation are pointed out.

It is worth going back to the fundamental principle that land as land is subject to the sovereign laws of the state in which it is situated. There have never been any real challenges to this fundamental principle of any real importance. Land is land; interests in land are interests in land not mere personalty.

However recent practice from the French side of the Channel has been to attempt to re-assimilate to French land, foreign holdings of French land through structures designed to render these movable, and therefore outside the French stamp duty and fiscal sovereign space, has engendered a perversion of this rule for pure fiscal expediency.

It is that trend within the international context which I am addressing in outline here, and the means of resisting its excessive application.

1. FATCA

FATCA, in its initial state as a bad piece of legislation has merely succeeded in including its genetic perversity in the various offshoots which are beginning to sprout from it in its

Article : *Trusts of land under TLATA 1996 in an international context*

Date: 20th January, 2015

.../...

unfortunate evolutionary spread. It was initially confined to isolating personalty or movable investments of American citizens resident abroad.

Realty, or the American term Real Estate, was never an issue that FATCA was intended to address. This is clear from the outset, and the subsequent requests for confirmation from the IRS by the various international bodies and States affected by it have confirmed this.

The difficulty is that the instruments which it was addressing are also used in various non-American, and therefore, dare I put it in such terms, "alien" configurations for the holding of land abroad.

It is therefore clear that care has to be taken by trustees of TLATA trusts - previously "tagged" for sale - of English and Welsh land that they now assert in the international context that these are immovable rights, as it is the law of England and Wales that defines the rights as such, not any law of the United States of America. Note here, for example, that the term "joint tenancy" as defined in the United States Federal system Regulations cannot include the statutory trust of land which we have in England and Wales, and should under no circumstances be confused with that American federalised generalisation in an international context, in particular in the US Succession Duty Treaty context. The Americans do not use trusts as a conveyancing tool: having a larger supply of land, their state laws have not had to develop to the degree of complexity required for the various interests that can arise over the limited supply of land in England and Wales. Fortunately, whence the inability of American title insurance firms to take over financial responsibility for English conveyancing.

The United States since the early 1980s has had a significant administrative arsenal against foreign holdings of US real estate though the Foreign Investment in Real Property Tax Act. To a limited degree FATCA addresses the movable aspects of undisclosed American holdings that FIRPTA did not address.

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It is therefore important for Trustees not to be fooled into declaring trusts of English and Welsh land, including those trustees who hold proceeds of sale of such land defined as land by ss. 3 (1) and 17 TLATA, under FATCA's increasing compliance grip. Bear in mind that Countries such as the USA and France are attempting to requalify foreign personalty as their own land rights, rather than the other way round.

2. The French "anti-trusts" legislation of 2011: *La loi de finances rectificative pour 2011*.

The position is that most lawyers have simply taken the discrimination involved in the arbitrary definition of a trust in what is now article 792-0 bis I CGI as being "*incontournable*"; rather than incomplete, and in certain cases unlawful.

One aspect of this anomaly in relation to trust of land is important. The law of England and Wales states clearly and incontrovertibly that a trust of land, since 1996, whether for sale or not, is now in effect an interest in land and therefore an immovable right from the French private international law perspective.

The fact that any requalification of such an immovable right into something else, and therefore levying taxation upon it, is a breach of the European Union freedom of movement of capital rules, and on that basis alone is unlawful, if applied to English land is but one issue arising.

A consequence of that general statement is that the English lawyer can now argue from the basis of the law of property, and using the English administration of estates legislation, that a will trust constituting a trust of land can be used to create an interest in land outside the scope of article 792-0 bis CGI, and providing that it is so drafted, can remain an immovable right in the hands of a French resident beneficiary of the will trust.

Article : *Trusts of land under TLATA 1996 in an international context*

Date: 20th January, 2015

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Why? because the estate is in administration, , and the creation of the interest in land by the executors of the will is part of that administration.

The administration of the estate is governed, exclusively in certain cases by the Succession Duty Treaty of 1962, between France and the United Kingdom. It is to be noted that as TLATA states categorically that a trust of land is land, that any interest in a trust format created under the estate of a deceased British domiciliary has to be treated as such, and cannot be requalified by the French as something else.

The Succession Duty Treaty eliminates the receipts basis of taxation for a French resident beneficiary of an English domiciliary's estate over English immovables, and certain French resident situs assets.

The effect on French assets after the entry in to force of the European Succession Regulation, for deaths after 17th August, 2015 is one thing. However, the Succession Regulation will not render English immovable assets of an English resident domiciliary open to French requalification. In other situations each case will need to be treated and considered on a case by case basis.

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