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Article : Trusts of land, usufruits, usufructos and the CJEU decision in Case C-605/14, Komu v Komu.

Date 24th February, 2016.

Case n° C-605/14 Komu v.Komu was a request for a preliminary ruling from the Court of Justice of the European Union under Article 267 TFEU from the Korkein oikeus (Supreme Court, Finland), made by decision of 22 December 2014, received at the Court on 30 December 2014.

The ruling is of interest in relation to rights *in rem* over immovable property within the EU, as it emphasises the jurisdictional rules addressing which court has jurisdiction over issue relating to immovable property under what has come to be known as Brussels 1 : Article 22 (1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

The Court set out its classical analysis of the steps to be followed in establishing the exclusive jurisdiction over immovable property rights under article 22 (1).

The CJEU was addressing other issues in that case, a co-ownership agreement including a *usufructo* a Spanish property right

However, the implications of the ruling for the recognition of other Member States property rights under the Regulation are significant. I am therefore looking at that issue here. The manner in which an English trust over land and property is used as an alternative to any co-ownership agreement, is well know, but hardly fully known on the Continent.

The question of whether an English trust of land is a trust giving rise to rights *in personam*, or rights *in rem* in land was a fundamental one. The English law was fundamentally resolved by s.3 of the Trusts of Land and Appointment of Trustees Act 1996, which revoked the last remnants of the equitable doctrine of conversion. For those familiar with the *travaux préparatoires* of the Hague Convention on the Recognition of trusts, that was a fundamental element for the recognition by civil law of the trust concept. The Van Doorn Report premised recognition of this set of property rights on the basis that a trust converted the property and rights held in trust into movable rights or personalty. The subsequent abolition of the doctrine of conversion in the Trusts of Land and Appointment of Trustees Act 1996, effectively reversed that position and rendered trusts of English land, land.

Given the current scepticism in Europe as to trusts in general, it is essential to be able to bring together the various initiatives being taken at a European level, but also at a national level against

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trusts into a legal context rather than the somewhat warped and emotional context into which the debate has strayed with fiscal overtones.

The issue is also of importance in relation to the EU Succession Regulation n° 650/2012 in relation to adaptation of rights over immovable property where the draftsman of the will has used a domestic concept under stood in the law of the habitual residence or nationality rather than one relevant to the jurisdiction where the immovable is situated:

> *"(16) However, in order to allow the beneficiaries to enjoy in another Member State the rights which have been created or transferred to them by succession, this Regulation should provide for the adaptation of an unknown right in rem to the closest equivalent right in rem under the law of that other Member State. In the context of such an adaptation, account should be taken of the aims and the interests pursued by the specific right in rem and the effects attached to it. For the purposes of determining the closest equivalent national right in rem, the authorities or competent persons of the State whose law applied to the succession may be contacted for further information on the nature and the effects of the right. To that end, the existing networks in the area of judicial cooperation in civil and commercial matters could be used, as well as any other available means facilitating the understanding of foreign law."*

and

> Article 31
>
> **Adaptation of rights in rem**
> *"Where a person invokes a right in rem to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right in rem in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right in rem under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it."*

There is no doubt that, under the laws of England and Wales, a trust of land, whether containing a trust for sale or otherwise or discretionary in nature, is now land. To doubt that or to question it, is the act of an illiterate or of another class in the Venn diagram of the equitably unwashed, namely an *inspecteur des impôts*.

The Court of Justice ruled as follows in Komu v Komu:

> *"27 Also, according to settled case-law of the Court, the difference between a right in rem and a right in personam is that the former, existing in corporeal property, has effect erga omnes, whereas the latter can be claimed only against the debtor (judgment in Weber, C-438/12, EU:C:2014:212, paragraph 43 and the case-law cited).*

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> *28 In the present case, as the Member States that submitted written observations correctly claim, an action for termination of the co-ownership of immovable property, such as that at issue in the main proceedings, constitutes proceedings which have as their object rights in rem in immovable property falling within the exclusive jurisdiction of the courts of the Member State in which the property is situated.*
> *29 In that regard, clearly such an action, designed to bring about the transfer of a right of ownership in immovable property, concerns rights in rem which have effect erga omnes and is intended to ensure that the holders of those rights can protect the powers attached to their interest.*
> *30 Similarly, it must be stated that the considerations of sound administration of justice which underlie the first paragraph of Article 22(1) of Regulation No 44/2001 also support such exclusive jurisdiction in the case of an action intended to terminate the co-ownership of immovable property, as that in the main proceedings."*

then concluded:

> *"The first paragraph of Article 22(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that an action for the termination of co-ownership in undivided shares of immovable property by way of sale, by an appointed agent, falls within the category of proceedings 'which have as their object rights in rem in immovable property' within the meaning of that provision."*

The facts of the case involved a co-ownership by three Finns of an immovable property in Spain which in fact had a set of enjoyment rights over the property, not dissimilar to beneficial ownership or usufructuary ownership.

For reference the provision of Brussels 1 read as follows:

Article 2(1) states:

> '*Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'*

Under Article 3(1) of the Regulation:

> *'Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.'*

In Section 6 of Chapter II of the regulation, entitled 'Exclusive jurisdiction', the first paragraph of Article 22(1) states:

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> '*The following courts shall have exclusive jurisdiction, regardless of domicile:*
> *(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.*'

In Section 8 of Chapter II of Regulation No 44/2001, entitled 'Examination as to jurisdiction and admissibility', Article 25 states:

> '*Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.'*

The facts in *Komu* were as follows:

Mr Pekka Komu, Ms Jelena Komu, Ms Ritva Komu, Ms Virpi Komu and Ms Hanna Ruotsalainen, all domiciled in Finland, are co-owners of a house situated in Torrevieja (Spain), the first three each with a 25% share and the other two each with a 12.5% share. In addition, Ms Ritva Komu has a right of use [Spanish text: **un derecho de usufructo]**, registered in the Spanish Land Register, over the shares held by Ms Virpi Komu and Ms Hanna Ruotsalainen.

This is a usufruit which is a real right over the property *in rem* for these purposes generically identical to the French usufruit.

Mr Komu, Ms Ritva Komu, Ms Virpi Komu and Ms Ruotsalainen are also co-owners of an apartment situated in the same district, Mr Komu with a 50% share, Ms Ritva Komu with a 25% share and Ms Virpi Komu and Ms Ruotsalainen each with a 12.5% share. Ms Ritva Komu also has a right of use, registered in the Land Register, over the interests held by Ms Virpi Komu and Ms Ruotsalainen.

Wishing to realise the interests that they hold in both properties, and in the absence of agreement on the termination of the relationship of co-ownership, Ms Ritva Komu, Ms Virpi Komu and Ms Ruotsalainen brought an action before the Etelä-Savon käräjäoikeus (District Court, South Savo, Finland) for an order appointing a lawyer to sell the properties and fixing a minimum price for each of the properties.

It is unclear whether the lawyer to be appointed was a Spanish notary, which is more likely than Finnish lawyer

In other words the Finnish court was asking if the rights concerned were rights *in rem* over immovable property, and if so, that it had to declare of its own motion that it had no jurisdiction.

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If the rights were not over an immovable and not *in rem*, in other terms *droits personnels* then the Finnish court would have had sole jurisdiction as the defendants were domiciled in Finland under Brussels 1.

The case is interesting in that not only does it confirm that a Spanish usufruct /*usufructo* is an *in rem* right in immovable property, contrary to HMRC's now frankly childish insistence to the contrary, but also for English land rights arising under a trust of land. These can now only be addressed in an English Court, irrespective of the domiciliation of the Defendant under Brussels 1 .

It is also now clear that both EU fiscal authorities and any Member State court seeking to exercise legal jurisdiction over these trust rights will be forced to admit that they have no jurisdiction to address the issue under their own laws and practices. The issue as to the law and the procedures involved in enforcing the *in rem* right concerned are exclusively limited to the Member State where the property is situated.

What is also clear is that Regulation N° 1215/2012 make no mention of it being inapplicable in fiscal matters. Taken alongside the freedom of movement of capital it is unlikely that the Court of Justice would support any argument from HMRC that it can subvert the *usufructo* or the *usufruit* as a matter of substantive content and law and turn it into a form of trust, as that is what its current interpretation s 43 (2) ITA 1984 in fact presumes to do.

It is beginning to get tiresome having to repeat elementary points of law against tax administrations who see no interest in collecting taxation correctly, and "position" their heads in the sand accordingly in relation to foreign property rights *in rem*.

The difficulty with adopting an ostrich position such as the following -

> ***IHT treatment of usufructs***
> *HMRC has been asked, following a recent article and other commentary, whether its approach to the treatment of a usufruct for IHT purposes which was outlined in the Newsletter of April 2013 has altered.*
>
> *HMRC can confirm that its approach to the treatment of a usufruct remains as stated in the April 2013 Newsletter.*
>
> *Since April 2013, HMRC has dealt with a small number of cases where the estate included a usufruct and in each case, the facts were less than straightforward. HMRCapplied its approach to the facts of each case as it understood them to be, and in each case, the difference between the value reported by the*

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> *taxpayer and the value that emerged following HMRC's approach was not sufficient to warrant pursuit. So in accordance with its Litigation and Settlement Strategy, HMRC adopted the value reported by the taxpayer.*
>
> *But HMRC remains of the view that, generally, a usufruct should be treated as giving rise to a settlement for IHT purposes and will pursue the collection of tax on that basis. (September 2015 Newsletter) -*

is that the position adopted is a tempting target for a royal boot up the arse, particularly with this level of misrepresentation of what actually happened.

Add that this is a deliberate fiscal obstacle to the freedom of movement of capital in succession matters as dismissed as unlawful by the CJEU in its jurisprudence, and the position of HMRC is decidedly a sorry one to behold. Particularly as it appears to have wanted to add concrete to the sand in which its buried its head in 2013.

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