Outcome bias?

Is this HMRC's approach to the characterisation of Usufructs?

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Introduction

1. This Article[1] is concerned generally with how Usufructs should be characterised for IHT purposes and how this should be approached. By way of illustration, some reference will be made to French "usufruits".
2. HMRC say in the IHT Manual at IHTM27054
   "In HMRC's view, a usufruct should be treated as a settlement for IHT purposes given the closing words of IHTA84/S43(2), '….or would be so held charged or burdened if the disposition were regulated by the law of any part of the UK….'. This creates a fiction solely for the purposes of charging Inheritance Tax (IHT) and ***requires us to look at the outcome*** of the disposition and then ***consider how that outcome could be achieved[2] under the law of any part of the UK***. Bearing in mind the nature of the split in ownership that a usufruct achieves, the closest equivalent under UK law is a life interest settlement, with the bare owners holding the property for the benefit of the usufructuary (life tenant) with remainders to themselves".
3. The authors[i] consider this to be the wrong approach and we explain why in this Article which we hope will provoke discussion. There is no fiction created as such by s.43(2), at most a requirement of comparison. Having ascertained what the position under the foreign law is, there are then two limbs to be considered. These are **that**:
   3.1. **the property would be so held or charged or burdened if the dispositions were regulated by the law of any part of the United Kingdom**; **or**
   3.2. **under the law of any other country**, **the administration of the property is for the time being governed by provisions equivalent in effect to those as to holding or burden.**
4. Under the second limb of the subsection, the position is to be compared to see what is the equivalent in UK law to the administration of the property under the foreign law. Under the first limb however, if, for example, a Jersey trust was set up then one would know that there would be, for want of a better term a Jersey entity and any comparison to UK law would be of a trust with a trust. Where something other than a trust is created, it does not follow that because say there is an entitlement to income as it arises, that that is the equivalent to a trust of an interest in possession in settled property. The case of *Pearson* only speaks to an interest in possession in settled property not to a "life interest" - if and to the extent that any such interest exists at law. This approach leads to HMRC's wrong view that the outcome should be that a usufruct is equivalent to a trust say under English law and thus a settlement. This is syllogistic and is not comparing administration of the property under the foreign law with an English equivalent. This is not the approach to characterization which the case law mandates

1 A separate article is in contemplation on the history as to how we got here.

2 This is not what the section says. It requires consideration as to whether "under the law of any other country, the administration of the property is for the time being governed by provisions ***equivalent in effect*** to those as to holding or burden". [emphasis supplied] This requires a search for an equivalence of what was done to the position under the law of part of the UK not "… how that outcome could be achieved[2] under the law of any part of the UK". Not what could have been done but an equivalence to what was actually achieved by the foreign disposition. The grammar is important here.

(See 27ff below). Moreover, the precise terms used in the statute militate against that approach. HMRC admit that in the case of a usufruct there is a split in ownership but attempt to ignore this and the distinction between legal interests and equitable interests to arrive at their preferred "outcome". It also ignores aspects of the administration of a trust fund under English law.

5. We will approach our task by:
   5.1. Setting out the relevant statutory provision;
   5.2. Considering what are Usufructs and the modern French servitude of a Usufruit;
   5.3. Making some general comments on statutory interpretation;
   5.4. Considering the proper approach to characterisation and some relevant case law such as *Barclays Wealth*[3];

The relevant statutory provision

6. We are concerned here with IHT and settlements and the associated charges. HMRC wish to apply the settlement portions to Usufructs to collect IHT as if the Usufruct were a settlement.
7. This requires one to know what is a settlement for these purposes.
8. The most relevant legislation here is section 43 IHTA particularly subsection (2) .
9. Section 43 IHTA is headed "Settlement and related expressions" and, so far as relevant, reads:

   "(1)The following provisions of this section apply for determining what is to be taken for the purposes of this Act to be a settlement, and what property is, accordingly, referred to as property comprised in a settlement or as settled property.

   (2) "**Settlement**" means **any disposition or dispositions of property**, whether effected by instrument, by parol or by operation of law, or partly in one way and partly in another, whereby the property is **for the time being**—

   (a) **held in trust for persons in succession or for any person subject to a contingency**, or

   (b) held by trustees **on trust to accumulate the** whole or part of any **income** of the property or with power to make payments out of that income at the discretion of the trustees or some other person, with or without power to accumulate surplus income, or

   (c) **charged or burdened** (otherwise than for full consideration in money or money's worth paid for his own use or benefit to the person making the disposition) **with the payment of any annuity or other periodical payment** payable for a life or any other limited or terminable period,

   or **would be so held or charged or burdened if the disposition or dispositions were regulated by the law of any part of the United Kingdom**; **or** whereby, **under the law of any other country**, **the administration of the property is for the time being governed by provisions equivalent in effect to those which would apply if the property were so held, charged or burdened.**

   (3)….". [*Emphasis supplied*]

10. As noted above, the statute uses the phrase "if …. **regulated** by the law of any part of the United Kingdom" and another in its second limb the term "or…. the administration of the property is **governed** by provisions equivalent in effect to those …." which would apply if the property were held in trust or charged or Burdened with an annuity or other periodical payments.

3 [2017] EWCA Civ 1512 discussed in particular at 29ff

11. "Regulation" implies rules within a given legal system and the terms "administration" and "governed by" require a comparison of the foreign law governing the disposition or dispositions to see if there is a UK equivalent as to the administration of the property.
12. The minutes of Standing Committee A in 1975 discussing the second limb were clear. The entities aimed at by the term "administration" and "governed by" were the Liechtenstein Foundations and anstalts in vogue at the time which had legal personality under the governing laws and which therefore were not governed by the law of England within the United Kingdom, but whose internal administration was equivalent to that over property held in trust. (see §1735-1738 17th February, 1975 Standing Committee A. Finance Bill). Given that the House of Lords in the prior case of *Philipson-Stow* [1961] A.C. 727 had been unable or unwilling to raise their Latin to distinguish the inherent meaning of the terms regulation and governing, which are in fact clear to any classicist, it is evident that the Parliamentary Draftsman deliberately chose to define each of them and then apply them separately by reference to the subject referred to in each limb. The fact that two distinct terms are used means that the substantive meaning of each limb is different.
13. In other words, if the subject of the investigation is an entity, not an arrangement which is not an entity (such an arrangement could be a trust), the term "governing" is applied effectively to "change[4]" the law governing the entity to that of England[5] and then analyse its administration in trust or settlement terms. If, on the other hand, the disposition of property is not into a foreign entity, then the issue is whether the internal regulation under the foreign law of property by which it is regulated in the first limb matches that of an express disposition by way of settlement into a trust under (a) and (b). In our view, HMRC cannot change the nature of the foreign disposition from a non-trust into a trust under the first limb.
14. It seems that there is no charge or burden of an annuity as generally understood in the case of a usufruct[6]. There is arguably a right to periodical payments[7], but this is to be construed in the context of an annuity. Here the potential rights do not have a certainty of receipt or amount to them that is thought by some to be a characteristic of an annuity nor the return of capital element.
15. It would seem that the important matter here is the phrase "held in trust" and the equivalence requirement. This is considered below - see particularly 53 ff.
16. It is essentially a matter of Statutory Interpretation on which we make some general comments below.
17. We will make some comments on statutory interpretation and then we will consider what Usufructs and Usufruits are before completing our analysis and seeking to2 draw some conclusions.

Statutory Interpretation

18. For the interpretation of the statute in the UK the general rule is the words in a statute are to be given their plain and ordinary everyday meaning[8].
19. On the more old-fashioned approach it is only when the literal approach leads to absurdity that

4 This is used in a loose sense

5 Or other part of the UK where relevant

6 It was said in *Scoble v Secretary of State for India* [1903] 1 KB 494 "an annuity means generally the purchase of an income, and usually involves a change of capital into income, payable annually over a number of years".

7 This does not seem to be correct when a Usufruit is involved – see 46ff

8 Ogden and Richards *The Meaning of Meaning* (1923) London: Routledge & Kegan Paul

the "Golden Rule"[9] is to be applied. The Golden Rule, it is said, is only to be used if one applies the literal rule and finds that it led to absurdity. The Mischief Rule is used if neither the literal rule nor golden rule help. It comes from *Heydon's* case[10]. The starting point is the plain and ordinary meaning of the words.

20. It has been said that "The task in the interpretation of any statute is to ascertain the true meaning of the words used by the legislature"[11].

21. The purposive approach has emerged in more recent times. Here the court is not just looking to see what the mischief Parliament was aiming at but is deciding what Parliament intended to be the purpose of the legislation and to construe the provision in the context of that purpose. This has been overlaid by the approach to construction of Directives and Regulations in the context of European Law and UK legislation connected with it. This is not always directly in point case but needs to be borne in mind as does "*abus de droit*" which has influenced the UK approach to avoidance in the context of abuse.

22. We would suggest that the purpose of section 43 is to charge IHT in respect of dispositions which are at least equivalent to settlements in the UK, according to the second limb. The first limb is more restrictive. The proposed construction is therefore to be by equivalence rather than outcome. There is no indication in the minutes of Standing Committee A of 17th February 1975 that Parliament intended for anything other than a settlement by way of a trust of foreign property to fall within charge (see Dr. Gilbert referring to (2) (a), (b) and (c). at §1736).The exception made was stated to be for certain types of foreign entities such as Liechtenstein Foundations and Anstalts to be brought into the charge by the second limb. There is no evidence or reason that a simple set of property rights which were not constitutive of an entity were intended to be treated as a settlement where no disposition interposing a foreign trust was under consideration under that limb.

23. Parliament's intention is not always easy to be sure of particularly when the legislature enacts something speedily and/or without debate[12]. The starting point is still the words of the statute in doing this.

24. Filling in the gaps where there is more detailed legislation is difficult for a court. The IHTA is quite detailed legislation.

25. As was said in *UBS AG v HM Revenue and Customs Commissioners; DB Group Services (UK) Ltd v HM Revenue and Customs Commissioners* at [66] "The position was summarised by Ribeiro PJ in *Arrowtown Assets*, para 35, in a passage cited in *Barclays Mercantile*

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9 see also e.g. *River Wear Commissioners v Adamson* (1877) to app Cas 743 at 764 – 5, *Luke v IRC* [1963] AC 557 Lord Reid at 579. The golden rule, it is said, is only to be used if one applies the literal rule and finds that it led to absurdity. The rule involves trying to determine what the statute should have said or mean rather than what the words in their literal meaning give rise to. This rule may be given a narrow or wider interpretation. In its narrow version it is only used where there are two apparently contradictory meaning. The wider version is used when there are issues or difficulties such as absurd results. It is closely linked to the mischief rule.

10 Court of Exchequer of Pleas Easter Term, 1584 EWHC Exch J36, 3 Co Rep 7a, 76 ER 637 The mischief rule is used if neither the literal rule nor golden rule help. The mischief rule is the most flexible rule. The mischief rule would generally only be used if there is still difficulty after applying the literal rule and golden rule. It goes much further than the golden rule as it can involve consideration of the statute in relation to the law as a whole. This it gives greater leeway in the construction of statute. It can allow more just than choosing between the different meanings of the statutory language or inferring some words into the statute. It is a flexible rule which can be adapted to deal with many kinds of cases. It is linked to the purposive approach considered below.

11 Simon's Taxes
https://www.lexisnexis.com/uk/legal/results/enhPubTreeViewDoc.do?nodeId=TAACAADAABAAD&backKey=20_T141052799&hideViewLastSearch=true&refPt=null&docViewState=normToc

12 A Finance Act in the past has, it is said, passed all its stages including Royal Assent in about five hours.

"The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.""

26. Overall, the words in a statute are generally to be given their literal meaning[13] or as it is sometimes put their plain, ordinary, everyday meaning. This is an important matter to remember in the age of "precision drafting".

Characterisation etc.

27. It is now necessary to consider the characterization of the Usufruct for these purposes and how this should be approached. Otherwise, in the absence of proper characterization, the process at law is compromised.
28. The case law points to a two-stage process to characterization consisting of:
    28.1. an analysis of the rules of the foreign system of law[14] in question to determine the nature and characteristics of the disposition, transaction, arrangement or entity – here, for example under the first limb of the second paragraph of s.43(2) ITA, to determine what is a usufruct and whether the regulation of the different legal property rights and obligations are "held in trust" and secondly, were an entity to be involved exactly the rights and duties of the parties under a foreign entity were; and
    28.2. then to consider the application to those characteristics and circumstances etc. of the relevant UK taxing statute as part of UK law – here section 43 IHTA.
    28.3. This seems to flow, in particular, from:
        28.3.1. *Dreyfus v. The Commissioners of Inland Revenue Tax Cases Vol XIV (1928-1929) p. 560;*
        28.3.2. *Memec plc v HMRC* [1998] STC 754,; and
        28.3.3. *Revenue and Customs Comrs v Anson* [2015] UKSC 44.

Approach to considering Characterisation

29. In more detail we consider that the approach for these purposes according to the case law is essentially a two-step process. This process is :
    29.1. To ascertain the position under the relevant foreign law (excluding foreign tax law) such as the applicable corporate law or the law giving the rights in question under that foreign law; and
    29.2. then to apply the UK applicable tax law to that position properly found.
30. It should be noted that in an English Court foreign law is a matter of fact which needs to be proved by expert evidence. In the absence of such evidence the foreign law will be assumed to be the same as English/UK law15.
31. This two-step approach is supported by what Robert Walker J said in *Memec* [1996] STC 1336 at 1348:

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13 Ogden and Richards *The Meaning of Meaning*

14 Foreign law is a question of fact which needs to be proved. Hence, when dealing with an entity such as an anstalts, proper Lichtenstein legal advice on this could prove helpful if obtained sooner rather than later.

15 On the requirement to prove foreign law see *Dicey, Morris & Collins*, "*The Conflict of Laws*" (15th Ed.) Rule 25 which reads:

"(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.

(2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case".

There is a number of cases supporting this including e.g. *Iranian Offshore Engineering and Construction Company v Dean Investment Holdings SA* [2018] EWHC 2759.

''When an English tribunal has to apply the provisions of a United Kingdom taxing statute to some transaction, arrangement or entity which is governed by a foreign system of law, the tribunal must take account of the rules of that foreign system (properly proved if not admitted) in order to determine the nature and characteristics of the transaction, arrangement or entity. But having informed itself in this way, the tribunal must then apply the taxing statute as part of English law.''

32. This two-stage approach was essentially approved by the Supreme Court in *Anson* [16]. Lord Reed outlined the two stage approach at paragraph [51] saying:

''First, the questions whether the members had a right to the profits, and as to the nature of that right, were questions of non-tax law, governed by the law of Delaware. The FTT's conclusion, whether correctly construed as a finding that Delaware law had the effect of conferring on the members of the LLC an automatic statutory (or contractual) entitlement to the profits of the LLC, or as a finding that Delaware law vested the members with a proprietary right to the profits as they arose, was on either view a finding of fact. Secondly domestic tax law – in this case, the relevant double taxation agreement as given effect in UK law – then fell to be applied to the facts as so found.''

33. It is also usually helpful to consider any relevant HMRC practice. However, this is not law and may be indicative of HMRC's approach and gives an indication as to whether they may be prepared to accept as the proper analysis what the taxpayer puts forward but is, of itself, not determinative as it is merely HMRC's view and not binding in the way a Court decision's *ratio decidendi* is[17].HMRC have published a list entitled "Foreign entity classification for UK tax purposes: List of Classifications of Foreign Entities for UK tax purposes"[18] in their International Manual.
34. Unfortunately, this list does not cover Usufructs as it would seem usufructs are emanations of property law and therefore not *per se* entities.
35. There is also a recent Court of Appeal case that is in point here. This is the case of *Barclays Wealth Trustees (Jersey) Limited and another v. Commissioners* [2017] EWCA Civ 1512**.**
36. In *Barclays Wealth* Lord Justice Henderson (with whom Lord Justice Sales and Lord Justice McCombe agreed) having set out section 43 said:

[31.] The definition of **"settlement" therefore requires** a combination of two things: first, **a disposition or dispositions of property,** and secondly, a **state of affairs brought about by that** disposition or those dispositions, **whereby the property is held in various ways, or would be so held if the conditions at the end of subsection (2) were satisfied**. In broad terms, paragraph (a) of subsection (2) covers fixed-interest trusts, such as those in the DBJT19, while paragraph (b) covers discretionary trusts, such as those of the 2001 Settlement. Both the DBJT and the 2001 Settlement20 were governed by Jersey law, but the hypotheses relating to foreign law at the end of the subsection clearly bring them within the scope of the definition. [Emphasis supplied]

37. Lord Justice Henderson had commented upon the interpretation of statutory deeming provisions at paragraph 47 referring to the well-known statement by "Peter Gibson J, sitting in

16 *George Anson v HMRC* [2015] UKSC 44
17 See e.g. The Ultimate Guide to the Ratio Decidendi and Obiter Dictum — The Law Project www.thelawproject.com.au/ratio-decidendi-and-obiter-dictum
18 https://www.gov.uk/hmrc-internal-manuals/international-manual/intm180030
19 One of the settlements in question
20 Another of the settlements in question

this court with Balcombe and Simon Brown LJJ, in *Marshall (Inspector of Taxes) v Kerr* [1993] STC 360 at 366:

[31] "For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

This statement of principle has been cited with approval in many subsequent cases, including *DV3 RS Ltd Partnership v Revenue and Customs Commissioners* [2013] EWCA Civ 907, [2013] STC 2150, at [13] and [14] per Lewison LJ, with whom Gloster and Maurice Kay LJJ agreed. Lewison LJ added, at [15], that the fact that deeming provisions are involved "does not displace the ordinary principles of statutory interpretation".

In other words, there is no room for any “view” taken by HMRC to be capable of extending the scope of the statutory provision to include other matters than settlements by way of express trust, except through the “second limb” and a fictional change in the governing law for the sake of fiscal interpretation.

38. Lord Justice Henderson continued at paragraph [63] that he was not content with “… a construction of section 48(3) which is at odds with the normal conception of what constitutes a settlement, even though (as the judge recognised) that normal conception is reflected elsewhere in the 1984 Act, and notably in section 64 ... For my part, I prefer to construe section 48(3) in a way that accords as far as possible with the usual practice and understanding of trust lawyers and practitioners; and in the context of the present case, such an approach seems to me to provide strong support for [Counsel for the taxpayer]’s submissions.”
39. Were the case to have addressed an entity, this would fit in neatly with the approach to the characterization we have outlined above based on equivalence. But given that a trust was involved, it also supports the clearer position that a foreign trust or at the most an arrangement qualifying as a trust under the meaning that accords as far as possible with the usual practice and understanding of trust lawyers and practitioners has to be involved for the first limb of the second paragraph of the subsection to apply. .

Usufructs and Usufruits

Introductory

40. Once the initial question is answered and the relevant dispositions understood, HMRC’s view is that one looks to the outcome rather than what the legislation in effect requires namely a comparison of the Usufruct or Usufruit in question to the concept of a trust to see if there is an equivalence following the disposition in the way the property is held or charged or burdened or administered if the disposition or dispositions were regulated by the law of any part of the United Kingdom such that the property would be held in the same way as if there were a trust**.** That is effectively an unacceptable mixture of both limbs of the second paragraph ignoring the word “or”.

35. The correct approach requires us to know what is:

a. A Usufruct or Usufruit; and
b. What is a trust and what is the minimum content of a trust?

What is a Usufruct

36. What is a Usufruct is considered in this section. The related trust matters are considered below.
37. Oxford Reference[21] says of "usufruct" that it is "The right of reaping the fruits (*fructus*) of things belonging to others, without destroying or wasting the subject over which such rights extend". It should be noted that a usufruct gives the owner of the usufruct the right to use the chose as the owner of a right *in rem* not "as if the user were the owner".

    (*The following is based on An introduction to Roman law Barry Nicholas Clarendon Law Series Oxford University Press 1962*.)
38. Usufructs are of Roman law origin. They fall within the category of personal servitudes which included usufructs. Usufruct was the right to use and take fruits and profits of another's property, movable or immovable, without fundamentally altering its character. It is sometimes said to give a fraction of ownership[22] in property vested in someone other than the owner. It is a right *in rem* rather than a right *in personam*. However, as a personal servitude the right is vested in a person as such irrespective of the ownership of anything and the right was personal to that person and inalienable. Accordingly, they were not successive interests. The nearest late Roman law got to this was the *fideicommissum hereditatis* and in even later law the *emphyteusis*. This is the nearest approach that Roman law ever made to the creation of successive and yet simultaneous ownerships. However, this is a very imperfect approximation. In Roman law it was not possible to give X and Y rights *in rem* which are both successive yet simultaneously marketable. Whilst the usufructuary and the owner have rights *in rem* which can be asserted against third parties only the owner can alienate the property which is the object of the usufruct. The usufructary can hire out or sell the enjoyment the usufruct but this fell short of alienation of the usufruct itself. It confers on the buyer only a right *in personam* and the usufructuary is still liable to the owner for any abuse by the buyer of his rights. This is an important distinction from English Trust Law.
39. Generally speaking, at no stage was any "entity" of the type under consideration here other than perhaps a societas created in Roman law. Hence the *fideicommissum hereditatis* and later the *emphyteusis* may have a similar effect but they are not the same thing. Even nowadays, the modern derivatives of *emphyteusis* do not create any legal entity of the type which was mentioned in Standing Committee A's minutes in 1975.
40. In modern times Civil Law has been much influenced by the Roman law approach. Usufruct, with the conception of ownership which is implied, is a fundamental feature of a Civil law system. Some even say it could serve as the identifying mark of such a system in the same way that the doctrine of Estates is the mark of a Common law system. The usufructuary under the French

21 https://www.oxfordreference.com/view/10.1093/oi/authority.20110803114947610 As we shall see this is a part but not a complete definition of a usufruct as it exists in our neighbouring continental jurisdictions

22 However, this can be confusing as it is a separate right *in rem.* In our experience, they are also the ones most often come across in practice.

Code effectively has a separate property right as a right in *rem* without the derivation of property rights from rights *in personam* against the trustee as is the case with English trusts.

Usufruits and French Law[23]

41. French law is chosen as a useful source and example of the use and application of the genus of the usufruct in Europe as used in a number of other jurisdictions[24]. In our experience they are also the ones most often come across in practice.
42. Usufruits are dealt with in Titre Troisieme[25] of the *Code civil* headed "De l'usufruit, de l'usage et de l'habitation" .
43. We are told in this Title that in French Law, the "Usufruct is the right to enjoy things/choses that someone else owns, as the owner himself, but on the condition of preserving the substance"[26]. This has evolved into a property right. It is a separate property right but there is no shared dominion. There is a transfer of the jouissance of the thing or *chose* which would otherwise be enjoyed by the owner. As in older English legal parlance, a chose is an object to which legal rights can be attached.
44. A Usufruit is established by law, or by human will[27]. The usufruit can be established, either purely (in other words directly and immediately), or on a certain day, or on condition[28].
45. A usufruit can exist over movable or immovable choses or in English terms over chattels and land[29].
46. The usufruitier has a right of enjoyment of the object of the usufruct as owner. Article 582 tells us this. It provides that "The usufructuary has the right to enjoy any kind of fruit, whether natural, industrial or civil[30], which the object of which he has the usufruct may produce". The civil fruits are the rents of the houses, the interest of the exigible sums, the arrears of the annuities[31].
47. If the usufruct includes things that cannot be used without consuming them, such as money, grains, liquors, the usufructuary has the right to use them, but at the expense of returning, at the end usufruct, either things of the same quantity and quality or their estimated value on the date of return[32].
48. If the usufruct includes things which, without being consumed immediately, deteriorate little by little through use, such as linen, furniture, the usufructuary has the right to use them for the use

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23 It is interesting to note that by Article 6.2 UK France DTA "The term immovable property, shall … include … usufruct of immovable property" effectively accepting it as a separate right in rem

24 See e.g. for a European approach *Stichting 'Goed Wonen' v Staatssecretaris van Financiën* [2003] STC 1137 (Case C-326/99)

25 i.e. Articles 578 ff. See https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070721/LEGISCTA000006117905/#LEGISCTA000006117905

26 Article 578

27 Article 579

28 Article 580

29 See Article 581 "It can be established on any kind of movable or immovable property".

30 By Article 586 "Civil fruits are deemed to be acquired day by day and belong to the usufructuary in proportion to the duration of his usufruct. This rule applies to the prices of farm leases as to the rents of houses and other civil fruits".

31 See Article 584 The prices of farm leases are also included in the category of civil fruits.

32 Article 587

for which they are intended, and is only obliged to return them at the end of the usufruct in the state in which they are found, not damaged by his will or his fault[33].

49. By Article 595 "The usufructuary can enjoy himself, lease to another, even sell or assign his right free of charge". There are special rules in that Article as to the effect of doing so including the effect on the bare owner's entitlement as owner at the end of the usufruit .
50. Article 617 deals with when a usufruit comes to an end. It provides:

"The usufruct is extinguished:

By the death of the usufructuary;

By the expiration of the time for which it was granted;

By the consolidation or the reunion on the same head, of the two qualities of usufructuary and owner;

By the non-use of the right for thirty years;

By the total loss of the thing on which the usufruct is established".

50. The usufruit can also come to an end if there is "abuse"[34].
51. In French Law there can only be succession to a usufruit where that is stipulated in the instrument creating it under the term condition. In most cases a joint usufruit retained is not successive but passes by survivorship. An important matter in the context we are considering.
52. Whether expressed for a term or otherwise, the usufruit extinguishes at nil value, albeit perhaps with obligations as to substance and repairs to the nu-propriétaire on the death of the last usufruitier. Each particular usufruit must be analysed to see what rights it gives and how section 43 might apply in that specific case. It is not to be treated as a settlement for IHT just because it is a usufruit. To be a settlement it must meet the conditions of section 43 as properly interpreted and applied.
53. There are special rules where:
    53.1. the usufruct is granted to a person other than an individual, an entity, when it lasts for only thirty years[35];
    53.2. the usufruct in some circumstances granted to a class till a fixed age will last till then even if there are deaths before[36].

English Trusts

54. Despite its long history there is no universally accepted definition of "trust"[37].
54. Millett LJ (as he then was) said in *Armitage v Nurse* [1997] EWCA Civ 1279:

"It is the duty of a trustee to manage the trust property and deal with it in the interests of the beneficiaries".

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33 Article 589

34 Article 618 which provides "The usufruct can also cease by the abuse that the usufructuary makes of its use, either by committing damage to the fund, or by letting it wither for lack of maintenance.

The creditors of the usufructuary may intervene in disputes for the preservation of their rights; they can offer reparation for the degradations committed and guarantees for the future.

The judges may, depending on the gravity of the circumstances, either pronounce the absolute extinction of the usufruct, or order the return of the owner to the enjoyment of the object which is encumbered by it, only under the charge of paying annually to the owner. 'usufructuary, or to his successors in title, a fixed sum, until the moment when the usufruct should have ceased".

35 See Article 619

36 See Article 620 which provides "Usufruct granted until one third has reached a fixed age lasts until that time, although the third has died before the fixed age".

37 For a discussion of this see Shipwright and Baldry *Trusts & UK Taxation* 2nd Ed Key Haven Publications PLC ISBN 1 870070 67 4 © 2000 2.1 ff

55. This is not obviously the case with a usufruct. The usufructary has a separate right *in rem*.
56. However, there is more to being a trustee than that as appears from what his Lordship went on to say. He said:

    "I accept the submission made on behalf of [the Appellant] that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts. … The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient. ..."
57. This, in our view, fits well with what is sometimes called the Obligational Theory of Trusts. A usufruct does not fit in at all well with this as it is a right *in rem* which is personally attached to the usufructuary.
58. It is argued from what his Lordship said that there is an 'irreducible core content' which must exist if there is to be a trust at all. This gives to the conception of the trust as obligation.
59. This is sometimes known as the obligational theory of trusts. This treats a trust as an equitable obligation, under which the trustee is bound to deal with trust property owned by him as a separate fund, distinct from his private patrimony, for the benefit of the beneficiaries or for the furtherance of a purpose. This is not the case for a usufruct.
60. This conception of the trust as an equitable obligation for academic purposes originated from Adrian Shipwright's former colleague Professor David Hayton. He argues that the core of the trust involves a duty of confidence upon the trustee in respect of particular property, which is positively enforceable in a Court of Equity by a beneficiary or beneficiaries. Again, this is not a Civilian concept and is not obviously applicable to a Usufruct. There is no duty of confidence within the meaning here in the case of usufruct.
61. It flows from that the right of the beneficiaries to enforce the trust and to make the trustees account for their actions in the context of the trust, and the resultant duties owed by the trustees to the beneficiaries are at the heart of the trust concept. Again, this is not a Civilian concept and is not obviously applicable to a Usufruct.
62. Under this theory trusts ought to be understood as a species of obligation rather than as a form of property ownership. This is a distinction from the property right of a Usufructuary when compared to the individual right of a beneficiary particularly a discretionary beneficiary. This is not outright to deny the proprietary nature of trusts. Rather, the property rights are to be treated as conditional upon, and subsequent to, the equitable obligations upon the trustee under the "deal" between them and the settlor.
63. This can be seen as an extension of the so-called Rule in *Saunders v Vautier* and fits well with the history of the trust as originating as an *in personam* obligation biting on the conscience of the trustee as to how to deal with particular property In respect to which the trustee holds the legal rights.
64. Under the so-called Rule in *Saunders v Vautier*[38] although generally the beneficiaries individually have no specific rights to the assets or aliquot share in the trust fund but, as a group, they do

38 A rule under which the beneficiaries of a trust, if of full age (18), sound mind, between them wholly entitled to the trust property, and in agreement, may direct the trustees to end the trust and transfer the trust property to themselves as beneficiaries absolutely. It is named after the case Saunders v Vautier (1841) 49 ER 282.
https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100433893

have an equitable right to them which explains the legal ownership but not the equitable ownership of those assets being in the trustee. Again, this fits in with the history[39] of the trust but is not obviously applicable to a Usufruct which is a distinct specific right *in rem* held by the usufructary.

65. It has been said that "An express trust is an equitable obligation binding a person ("the trustee") to deal with identifiable property to which he or she has legal title for the benefit of others to whom he or she is in some way accountable. Such obligations may either be for the benefit of persons who have proprietary rights in equity, of whom he or she may be one, or for the furtherance of a sufficiently certain purpose which can be enforced by someone intended to have a right of enforcement under the terms of the trust…"
66. The good faith aspect of Lord Millett's dictum brings in the fiduciary duties of a trustee as well as other duties of the office.
67. A trustee holds legal title to the trust's assets but owes fiduciary duties to the beneficiaries who hold as a whole the equitable title in those assets but with no individual interest in the underlying assets. Again, this is not a Civilian concept and is not obviously applicable to a Usufruct.
68. Fiduciary duties include:
    68.1. the duty to act honestly and in good faith;
    68.2. the duty to act with due care, skill and diligence in relation to the best interests of beneficiaries;
    68.3. the duty to avoid conflicts of interests; and
    68.4. the duty not to profit from the trust.
69. A trustee who is in breach of one of these duties can be held liable for any loss arising from that breach and to an action for account.
70. Fiduciaries include more than just trustees. It was said in *Bristol and West Building Society v Mothew* (1998)*:*

    *"*A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.*"*
71. There are personal and proprietary remedies for breach of fiduciary duty. The personal remedy lies against the fiduciary as the person in breach. The proprietary remedy is a tracing of property/funds (which can also include an account of monies). There is no Civilian equivalent to

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39 Cf *Earl of Oxford's case* (1615) 21 ER 485 broadly to the effect equity takes precedence over the common law. This reflects the most notable characteristics of equity namely:

(a.) equity acts *in personam* see e.g. *Penn v Lord Baltimore* (1750) 1 Ves Sen 444 *Cook Industries Inc v Galliher* [1979] Ch 439 and *Ewing v Orr Ewing* (1883) 9 App Cas 34

(b.) equitable remedies are discretionary e.g. a declaration see e.g. Dyson v AG (No 2) [1912] 1 Ch 158. Megarry V-C said "normally equitable remedies are discretionary" in *Tito v Waddell* [1977] Ch 106 at 259c.

this beyond the duty of replacement or damages where the usufructuary has in some manner wrongly consumed or reduced the capital incurring a debt to the owner. This is the source of what is known as the quasi-usufruct, which is frequently used as a tax planning device on the continent. No fiduciary duty arises under a usufruct or a quasi-usufruct. Any rights and duties arise under law, not by virtue of any fiduciary addition.

72. The personal remedy for damages or compensation in a trust or fiduciary will aim to put the beneficiary back into the position they would have been but for the breach of fiduciary duty and is subject to the normal rules of causation, foreseeability, mitigation and quantification. But in addition a remedy in breach of fiduciary duty cases is to trace and recover or substitute unlawful gains.
73. The Irish Law Reform Commission[40] provide a longer list of trustee duties which is not limited to fiduciary duties. They include:
    73.1. Duty of Good Faith
    73.2. Duty to Avoid Conflicts of Interest
    73.3. Duty not to Make an Unauthorised Profit
    73.4. Duty to Take Personal Responsibility for the Administration of the Trust
    73.5. Duty to treat all Beneficiaries Fairly
    73.6. Duty to Keep Accounts and Provide Information to Beneficiaries
    73.7. Duty of Care
74. The difference in particular is the inclusion of the duty of care. There are differences of view as to whether this is a fiduciary duty but it is a duty owed to the beneficiaries which they can enforce.
75. The duty includes the obligation to act as a reasonable person of business[41]. Again this is not a Civilian concept and is not obviously applicable to a Usufruct.
76. . The trustees of the trust owe their "fiduciary duties" and other duties ' to the beneficiaries of the trust. Trustees are jointly and severally liable for breach of trust to their beneficiaries where that breach has led to a loss to the trust fund. This is not the position under a usufruct as no breach of trust or fiduciary duty will be involved.
77. The breach of a trustee's duties to beneficiaries include where a trustee:
    77.1. Distributes trust assets to someone not entitled under the terms of the trust.
    77.2. Invests trust funds in a way not permitted by the trustee's powers.
    77.3. Breaches a fiduciary duty such as the duty not to profit from the trust.
    77.4. Breaches the common law or statutory duty of care, for example by exercising a power of investment without exercising such skill and care as is reasonable in the circumstances.

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40 Trust Law: General Proposals
Law Reform Commission First Published December 2008 Issn 1393-3132
Chapter 1 The Nature Of The Office
Https://Publications.Lawreform.Ie/Portal/Downloadimagefile.Ashx?Objectid=510

41 See now in England section 1 Trustee Act 2000. The Explanatory Note says "12.In relation to the investment of trust funds the new duty makes statutorily explicit the present common law duty which measures the behaviour of the trustees against that expected of the ordinary prudent man of business. This test includes a subjective element to allow for the particular skills and experience of the trustee in question. The new duty of care puts this beyond doubt. In relation to collective delegation by the body of trustees the new duty will however replace the unsatisfactory and insufficiently demanding provisions of sections 23 and 30 of the Trustee Act 1925.". It continues "14.Section 2 introduces Schedule 1 to the Act, which defines when the new duty will apply. In general terms the new duty will apply to any exercise by a trustee of a power to invest trust property or to acquire land; to appoint agents, nominees and custodians; or to insure trust property".

78. The beneficiaries can enforce these duties under a trust in a way they cannot under a Usufruct. Such duties do not usually exist in the case of usufruct.
79. Reference should also be made to LC 171 Trustee Exemption Clauses[42].
80. It was said there:

"2.3 In this project, we are concerned with the extent to which trustees can exclude or modify their liability to the beneficiaries for breach of trust. In the words of Sir Arthur Underhill:

A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one, and any one of whom may enforce the obligation.

Breach of Trust

2.13 A breach of trust is a breach of any obligation owed by the trustee. Such obligations may be imposed expressly by the trust instrument or impliedly by law.

As Millett LJ explains in *Armitage v Nurse*:

Breaches of trust are of many different kinds. A breach of trust may be deliberate or inadvertent; it may consist of an actual misappropriation or misapplication of the trust property or merely of an investment or other dealing which is outside the trustees' powers;

it may consist of a failure to carry out a positive obligation of the trustees or merely of a want of skill and care on their part in the management of the trust property; it may be injurious to the interests of the beneficiaries or be actually to their benefit[43].

Breach of fiduciary duty

2.14 Trustees stand in a fiduciary relationship with their beneficiaries and as such are subject to the fiduciary obligation of loyalty. From the fundamental obligation of loyalty there have evolved specific duties which trustees must observe. These duties are that trustees:

(a) must act in good faith[44];

(b) must not make an unauthorised profit from their trust[45];

(c) must not place themselves in a position where their duty and interest conflict[46]; and

(d) must not act for their own benefit or for the benefit of a third party, without the informed consent of the beneficiaries of the trust[47].

Breach of duty of care

2.15 The most common breach of duty occurs where a trustee breaches his or her duty to act with care and skill in the administration of the trust, which causes loss to the trust fund[48]. This duty of care may be imposed by statute, or by common law. The duty of care is not a fiduciary duty as such and should therefore be distinguished from those duties, peculiar to fiduciaries, which are mentioned above.[17]

42https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage 11jsxou24uy7q/uploads/2015/03/cp171_Trustee_Exemption_Clauses_Consultation.pdf

43 [1998] Ch 241, 251.

44 *Re Second East Dulwich* (1899) 68 LJ Ch 196

45 *Bray v Ford* [1896] AC 44

46 *Keech v Sandford* (1726) 2 Eq Cas Abr 741

47 *Boardman v Phipps* [1967] 2 AC 46

48 *Bartlett v Barclays Bank Trust Co Ltd (Nos 1 & 2)* [1980] Ch 515

2.16 The Trustee Act 2000 introduced a statutory duty of care which applies to the exercise of powers and the performance of duties conferred or imposed by that Act, as well as to certain powers conferred by other statutes and powers conferred by the terms of the trust[18]. It is not, however, of general application.
The duty of care "under the general law" applies therefore to those powers and duties that are not expressly covered by the 2000 Act.

Duty of care under the general law

2.17 Under the general law, at least three standards of care may be imposed upon a trustee:
(1) First, a trustee is generally required to take all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own[19].This is an objective test. It does not require the court to consider the standard which the individual has in fact adopted in relation to his own affairs[20].
(2) This duty has however never applied to the exercise by trustees of their powers of investment. In such circumstances, the duty under the general law is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally bound to provide[21].
(3) Finally, where the individual is a specialist, for example a trust corporation
carrying on the business of trust management, the standard which it will be expected to achieve when exercising any power will be higher[22].

Statutory duty of care

2.18 The statutory duty of care requires the trustee to exercise such care and skill as is reasonable in the circumstances, having regard in particular to any special care and knowledge or experience that he has or holds himself out as having. If he acts as trustee in the course of a business or profession, regard must also be had to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession. The higher standard which is expected of so- called professional trustees replicates the way in which the general law developed the duty of care by reference to the type of trustee.

Negligence not necessary

2.19 It is important to emphasise that liability for breach of trust is not restricted to acts or omissions which can be characterised as negligent. Where the trustee acts outside the powers conferred upon him or her (ultra vires), it is not necessary for the claimant beneficiary to prove negligence. As has been stated by one commentator, there is as a result in the law of trusts:
...a strong element of strict liability in the sense of liability which is not dependent on showing negligence or unreasonableness on the part of the trustee[23].

The nature of trustees' liability

2.20 Where the loss to a trust fund is caused by a breach of trust, the trustees of the fund are liable to restore the lost property, or to pay compensation for the loss.[24]
When assessing the loss to the trust fund following a breach of duty, the court does not apply the common law rules of causation, foreseeability and remoteness.
This is because the trustees' liability is to restore the trust property.[25] Even if the immediate cause of the loss to the trust fund is the dishonesty or failure of a third party, the trustees are liable to make good that loss if it would not have occurred had there been no breach of trust.

2.21 The position was summarised as follows in the case of *Caffrey v Darby*: [26]

...if they have been already guilty of negligence, they must be responsible for any loss in any way to that property: for whatever may be the immediate cause, the property would not have been in a situation to sustain that loss, if it had not been for their negligence...If the loss had happened by fire, lightning, or any other accident, that would not be an excuse for them, if guilty of previous negligence".

81. The position is significantly different from the position of the person who is not a trustee and does not owe fiduciary duties. This would include the owner of property whose fruit or income is subject to a usufruct.

Profit a prendre en gros

82. It is sufficient for the taxpayer to show that the disposition in question is not one whereby the property is for the time being:
    82.1. "… held in trust for persons in succession or for any person subject to a contingency, or
    82.2. held by trustees on trust to accumulate…"
83. This has been done above. This includes establishing that the usufruct:
    83.1. is a is a separate property right [with no shared dominion of the land or other asset to which it relates] (see 42)
    83.2. it does not involve any trust as French Law does not recognise trusts and France whilst a signatory to the Hague Convention of 1984, has not ratified it and the fiduciaire project was not enacted otherwise than by a more limited fiducie.
    83.3. cannot be for persons in succession unless specifically so stipulated see [49] above and Article 617 – e.g. it comes to an end on the death of the usufructuary etc.
    83.4. It is a right to take income or property directly, *in rem* and *in specie;* not to accumulate it. see 45 above and by illustration Article 582 *Code civil.*
    83.5. It does not give rise to the "state of affairs" inherent in a settlement where a trustee in effect is responsible for the property concerned.
    83.6. It does not give rise to the "… irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust" and so a trust does not exist as the requirements of the irreducible core of a trust are not met.
84. However, it is useful to have a cross check if possible and to be able to show an equivalence other than a trust.
85. The possibilities include:
    85.1. Trust;
    85.2. Lease;
    85.3. Licence;
    85.4. Rent charge;
    85.5. Contractual Right;
    85.6. Statutory Right;
    85.7. Other Right;
    85.8. Profit a prendre
86. Trust
    86.1. This has already been shown not to be in point.
87. Lease

87.1. There is nothing equivalent to a term of years here. A lease in French law is defined in a different Title, takes effect in contract, not by way of a "convention" over property entitlement and gives rise to personal rights not rights *in rem*.

88. Licence

88.1. There is no licence here giving a right to take property away or to enjoy the property. There is no equivalence here as there is a right *in rem* rather than a permission or licence.

89. Rent charge

89.1. No rent charges may be created since Section 2 of the Rent charges Act 1977 prohibited the creation of new rent charges.

89.2. Accordingly, there can be no equivalence here.

90. Contractual Right

90.1. The usufruct is not created by a contract creating personal rights.

90.2. It is established in accordance with Article 579 A Usufruct is established by law, or by human will. Accordingly there is no contractual right.

91. Statutory Right

91.1. The power to establish a usufruct is given by the Code Civil.

91.2. The usufruct itself is not a statutory right. It is the result of an active human will. The usufruitier has the right to use the servitudes and other rights of passage of the owner as the owner himself under article 579. The French usufruit has evolved out of the Roman Law into a full right of property.

92. Other Right

92.1. There may be an "other right" but this right may be sui generis and other than what is discussed next does not appear to have a clear equivalent in English/UK law.

93. Profit a prendre[49]

93.1. This is a special kind of legal interest in English |Law which does not involve a trust but does involve a special legal interest which exist separately at law and can be registered where land is involved which gives rights in respect of someone else's land or property without Co-ownership or a trust for sale or a trust for land within TOLATA.

93.2. This is discussed next.

Profit a prendre

94. Oxford Reference says of profit à prendre[50] it is

"The right to take soil, minerals, or produce (such as wood, turf, or fish) from another's land (the servient tenement) or to graze animals on it. [cf Articles 578 and 586]

It may exist as a legal or equitable interest. [No French law or civil law equivalent]

The right may be enjoyed exclusively by one person (a several profit) or by one person in common with others (a common). [cf *inter alia* Article 620]

A profit may exist in gross (i.e. existing independently of any ownership of land by the person entitled) and may be exercisable without any limit on the amount of produce taken.

It may be sold, bequeathed, or otherwise dealt with.

Profits existing for the benefit of the owner's land (the dominant tenement) are generally exercisable only to the extent to which the dominant tenement can benefit. They may be appurtenant, when the nature of the right depends on the terms of the grant; or *pur cause de*

49 It has been described as a "very peculiar type of interest" see Ellison v XX (1986) 7 NSWLR 104 at 103D per Young J

50 Profit à prendre - Oxford Reference

vicinage (Norman French: because of vicinity), in respect of cattle grazing the dominant tenement and straying onto the unfenced adjacent servient tenement. Profits may be created by express or implied grant or by statute; profits appurtenant may also arise by prescription (or presumed grant).

They may be extinguished

(1) by an express release;

(2) by the owner occupying the servient tenement; or

(3) by implied release (e.g. through abandonment, which may be presumed through long non-user, through changes to the dominant tenement that make enjoyment of the right unnecessary or impossible, or through an irreversible alteration of the servient tenement)".

95. A profit a prendre is an interest in land[51] (rather than an estate in land) which can exist at law.

96. It falls within section 1(2) LPA. This provides so far as relevant

"The only interests … in or over land which are capable of subsisting or of being conveyed or created at law are

(a) An easement, right, or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or term of years absolute …"

97. Accordingly, it is a form of interest over land that can exist at law which is separate from the estate in land itself.

98. It is not dependent on any form of trust for sale as was the case in the past for co-ownership nor subject to TOLATA. It is a separate interest at law existing in its own right.

99. It can be described as a right *in alieno solo* or part of the *jura in re aliena*. In Roman law terms it would be a praedial servitude giving a right *in rem*.

100. It is "… a proprietary interest in land which can be assigned, but generally unlike an easement it can exist 'in gross', that is unconnected to a specified dominant tenement…[52]"

101. Halsbury's Law at Paragraph 974 of Vol 87 reads "Meaning of 'profit à prendre'.

A profit à prendre[53] is a right to take something off another person's land[54]. It may be more fully defined as a right to enter another's land and to take some profit of the soil, or a portion of the soil itself[55], for the use of the owner of the right[56]".

On an oral letting a profit à prendre may be reserved orally3. Leases or agreements of tenancy may contain reservations of profits à prendre; these operate as if they were made by way of regrant.

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51 Halsbury's Laws Vol 87 paragraph 975. "Profit à prendre as an interest in land.
A profit à prendre is an interest in land, and for this reason any disposition of it must be in writing1. A profit à prendre which gives a right to participate in a portion only of some specified produce of the land is just as much an interest in the land as a right to take the whole of that produce".

52 The Evolution of the Profit À Prendre and Its Importance In Australia Fiona Burns Monash University Law Review (Vol 44, No 3) https://www.monash.edu/__data/assets/pdf_file/0008/1981457/07_Burns.pdf (monash.edu)

53 … A profit à prendre is a servitude, although the word is not much used in modern domestic law: see PARA 733.

54 *Duke of Sutherland v Heathcote* [1892] 1 Ch 475 at 484, CA, per Lindley LJ; *Webber v Lee* (1882) 9 QBD 315, CA; and see *Lowe (Inspector of Taxes) v JW Ashmore Ltd* [1971] Ch 545 at 557, [1971] 1 All ER 1057 at 1068. The converse does not hold; not all such rights are profits: *Lowe (Inspector of Taxes) v JW Ashmore Ltd* at 557 and at 1068.

55 *Manning v Wasdale* (1836) 5 Ad & El 758 at 764 per Patteson J ('a profit à prendre … must be something taken out of the soil'). See also PARA 773 text and note 2.

56 For judicial dicta from which the nature of a profit à prendre may best be gathered see *Manning v Wasdale* (1836) 5 Ad & El 758 at 763 per Lord Denman CJ, and at 764 per Patteson J; *Sury v Pigot* (1626) Poph 166, per Whitlock CJ; *Wickham v Hawker* (1840) 7 M & W 63 at 79 per Parke B; *Race v Ward* (1855) 4 E & B 702 at 709; *Webber v Lee* (1882) 9 QBD 315, CA. In *Benson v Chester* (1799) 8 Term Rep 396 at 401, Lord Kenton CJ speaks of a right of common which is a profit à prendre as an 'easement over the soil'. See also *Warburton v Parke* (1857) 2 H & N 64 at 69 per Bramwell B; *White v Williams* [1922] 1 KB 727, CA (sheepwalk or right of depasturing sheep); *Peech v Best* [1931] 1 KB 1, CA (shooting rights); *Mason v Clarke* [1955] AC 778, [1955] 1 All ER 914, HL (rabbiting rights)

102. It interesting to consider the position from the perspective of solicitors and other conveyancers. This what the Land registry does in its Practice Guides.

103. In Land Registry Practice guide 16: profits a prendre57 it is said(*inter alia*):

[1.2]A profit a prendre in gross is a right not attached to the ownership of any particular piece of land. The owner of the profit may not own any land at all and may dispose of the profit independently from any land they do own. A profit a prendre in gross may be substantively registered with its own title and this is the subject of this guide.

[1.3] …Alternatively, a profit a prendre in gross may be the subject of notice in the register of the affected land, without being registered with its own title or, if the affected land is not registered, the subject of a caution against first registration. For information on notices see practice guide 19: notices, restrictions and the protection of third party interests; for information on cautions against first registration see practice guide 3: cautions against first registration.

[1.4] Creation

A profit a prendre in gross may be created by express grant (or reservation), by statute, or by prescription at common law or under the doctrine of lost modern grant. It cannot be acquired under the provisions of the Prescription Act 1832 (section 5 of which requires the right to have been enjoyed for the benefit of the claimant's land).

Because different profits a prendre in gross may be granted over the same land to take different things, or to take the same thing at different times, there may be more than one profit a prendre in gross affecting the same land.

102. As can be seen from what is set out above there is much similarity between the usufruit and a profit à prendre. There is an equivalence as required by section 43 on its wording to a profit a prendre which there is not for a holding involving a trust or administration of property under the disposition. What is required is a search for an equivalence as to the administration of the property of what was done to the position under the law of part of the UK not "… how that outcome could be achieved[1] under the law of any part of the UK". Not what could have been done but an equivalence to what was actually achieved by the foreign disposition.

Conclusion

103. We have demonstrated that there is no trust involved in in a usufruct or usufruit.
104. We have also shown that the rights and responsibilities in a usufruit like any other civil law right are by their nature *in specie*, not indirectly arising *in personam* against a trustee as in a trust settlement
105. We have also shown the proper approach to characterization of a usufruct or Usufruits is in accordance with what Henderson LJ sets out in *Barclays Wealth*. In other words, at least a need to analyse the foreign rights and if the second limb is deployed, to see if there is an equivalence to a trust as properly understood, and more robustly, if the first limb is deployed whether there has been an actual disposition into a foreign trust so as to provide the legal and regulatory framework implicitly required in the subsection.
106. On that basis the usufruct or usufruit is a separate property right *in rem* not involving a trust.
107. Accordingly, the approach set out the IHT Manual at IHTM27054 is misconceived and does not fit in with that set out by the Court of Appeal in the Barclays wealth case.

57 See https://www.gov.uk/government/publications/profits-a-prendre--2/practice-guide-16-profits-a-prendre

108. We would therefore recommend that HMRC brings its manual into line with the Court of Appeal decision of which it is aware. It altered the outcome as to excluded property by section 73 FA 2020 but not the characterisation approach.
109. We look forward to considering the revised manual in the near future.

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Adrian Shipwright and Peter Harris have contributed each to the whole. Adrian has drafted the section on the English Trust and the English equivalences, whilst Peter's contribution has been to the sections on the interpretation of s.43(2) ITA by reference to his practice on the IHT treatment of the French usufruit on which he has also commented.

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