

## **FOREIGN REAL PROPERTY**

### **DIVISION OF ASSETS ON DIVORCE WHEN A PROPERTY IN FRANCE IS CONCERNED**

#### **1. Introduction**

Family law practitioners are increasingly confronted with a situation where a couple's assets include French property. Problems inevitably arise when the issue is addressed within a wholly UK context, ignoring the need for early specialist advice as to the implications of any proposal for the French property.

#### **2. First Steps**

As in many continental legal systems, the couple's matrimonial property regime will be relevant, as will be the way in which the property is held. Matrimonial property regimes are a difficult concept for us as English lawyers but at the time of purchase, the French Notaire will have analysed the facts to determine the couple's existing regime (in the absence of a marriage contract having been signed) and this will be detailed on the purchase deed (separate Estates, community property, etc).

The couple may also have adopted a new matrimonial property regime under French law for the property in France (e.g. la communauté universelle). The Hague Matrimonial Property Regimes Convention [XXV of 14 March 1978] gives clients the right after marriage to change the law applicable to their matrimonial property regime and to adopt a new law, for instance a choice of the *lex situs* for the immovable property in France.

The matrimonial property regime is important in the French context and will be relevant as it may have a bearing on the ownership of the property and practitioners will need to establish the current regime at an early stage and certainly prior to agreeing terms for the French property in the Consent Order.

As the clients will often only have a sketchy understanding of the nature of their investment in France, early checks need to be made to ascertain the ownership arrangements and whether any automatic inheritance clauses, e.g.

*tontine* clause – equivalent to a sort of joint tenancy, are in place in France which may need to be terminated. A copy of the title deed (*titre de propriété*) should be obtained – it is not unknown for clients to believe the property is in joint names, whereas in fact the purchase was made in the name of only one party.

An up-to-date valuation of the property should be obtained – as well as serving as a basis for the negotiations, it will be used for the calculation of the French tax payable on the transfer / property division and for this purpose alone needs to be kept under review if the negotiations are prolonged. Clients should also be encouraged to have the property transfer arrangements carried through at the earliest opportunity following the Order for Financial Provision.

Whilst the Court does have power to make orders in relation to properties overseas, it is essential that careful consideration be given at the outset to dealing with questions of implementation and enforcement, especially if one party should prove uncooperative.

Orders in relation to the French property are likely to be one of the following:-

1. sale
2. transfer from joint names into the sole name of one of the parties.
3. retention of the property in joint names.

Tax liabilities may arise in both the UK and France and the interaction of two different systems of law must be understood.

### **3. Sale**

The solicitors acting in the divorce will advise each party concerning the distribution of the proceeds of sale of foreign property within the overall context of the ancillary relief settlement. In practical terms the English lawyer will have little to do with the actual sale itself as this should be dealt with by a *Notaire* in France. However, before agreeing to a sale, it is essential that the client has a clear understanding of all associated costs and the tax consequences, both in France and the UK.

In France a Vendor has to obtain a number of experts reports (e.g. termites) at his cost prior to the contract being signed. Provision should be made as regards both the disbursements and the mechanism for obtaining the reports. The sales agent will usually be able to assist the client.

It is important to bear in mind when advising a seller that a Vendor in France can be bound to sell at the price agreed in the Estate Agent's mandate and a sale can be enforced even if the Vendor has subsequently changed his mind / wishes to increase his price. Both parties should sign all sales mandates even if care and control is effectively given to one party.

In relation to UK tax, if the property is considered to be the principal private residence (PPR), then there may be an exemption from CGT liability in certain circumstances. A liability to CGT may arise if the sale of the matrimonial home takes place more than three years after separation or in the tax year following separation/divorce of the parties. However, the most common scenario will be the sale of a second home in France which does not attract any exemption as the PPR. Further complications also arise if the property is held in a corporate structure.

Whatever the position in the UK, there may well be a French CGT liability. Under current rules, properties held in excess of 15 years are exempt from French CGT on sale. Property held for a shorter period may qualify for partial relief. Any tax payable in France (currently at the rate of 16% for EU residents) should be allowable against the UK tax liability.

#### **4. Transfer Between Spouses**

Procedurally the transfer of property between spouses from an English perspective is a fairly straightforward process. However, practitioners should always be aware of any potential liability to UK CGT. If there is any doubt, expert advice should always be taken to establish the likelihood of a liability to tax and the amount of tax that may be payable. It is always advisable that the Consent Order specifies who bears the responsibility for payment of UK CGT. Normally there will be no UK CGT liability on transfer between spouses. The Order should also specify who will be liable for the costs of implementation in France and ascertaining the French costs and taxes will be essential prior to advising a client to accept.

In France, however, the process may not be straightforward at all. Your client will need to know how to implement the provisions of the Consent Order and the likely costs.

France like many jurisdictions imposes a Gift Tax on transfers between spouses and a higher rate of tax between persons not married (or no longer married!). It must be clear from the financial order that the transfer is part of an overall division of matrimonial assets, and that there is therefore an element of exchange and division rather than pure gift. It is conceivable under French law that an attempt may be made to impose a tax on the total value of the assets being divided including the UK assets. Expert advice will be needed: the starting point for such a transfer, both procedurally and for tax purposes, will be the dissolution of the matrimonial property regime.

Advisers should be aware that it is becoming increasingly common for clients to adopt a French matrimonial property regime for the French property. Even if they have not, France will have considered the position on the original purchase and reference to the couple's matrimonial property regime will be found on the purchase deed.

It is extremely important to consider these aspects and obtain expert advice before finalising any financial order. Getting it wrong can be extremely expensive.

In some circumstances, it may be more appropriate to structure the transfer as a sale between the parties rather than a transfer, in order to avoid any Gift Tax issue. Other issues arise when the property was purchased by the couple prior to the marriage.

Depending on how the transfer is structured, the same issues in relation to French tax and the UK tax may still be relevant. If the transfer is structured as a sale, there will be a relationship between the local CGT and UK CGT and the extent to which one may be set off against the other, If the transfer is structured as a transfer by way of gift, the issues will be the relationship between UK CGT and French gifts tax, and the extent to which one may be set off against the other (if at all).

#### **4. Retention in Joint Names**

It is possible for the parties to retain the property so that they both have the benefit of its future enjoyment. If contemplating such an arrangement, expert advice should be obtained to establish the tax consequences of continuing to own property in joint names following a divorce. In particular, if a transfer to one party is effected at a later stage, the tax payable is likely to be levied at a higher level.

Practitioners intending to impose some form of English trust on the continuing ownership will need to understand the difficulties this may cause. Although such a trust may be recognised and enforceable in England either under the Hague Trusts Convention of 1 July 1985 (Recognition of Trusts Act 1987) or by virtue of the common law<sup>1</sup>, a trust will cause ongoing difficulties in France. Issues of forced heirship which will apply if either party has children, and taxation issues (lifetime and death) should also be considered. Such an arrangement should be avoided, if possible.

The parties will also need to put in place a valid Will covering the succession to the French property on death and taking account of the French reserved heirship provisions. It should not be overlooked that if the ex-husband dies, the wife may find herself owning the property jointly with her and her husband's children and her step-children.

Generally, services applied to the property must be paid up to date to ensure that no liabilities remain following the disposition of the property. During the negotiations, provision should be made for the outgoings to be met (e.g. co-

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<sup>1</sup> *Webb v Webb* [1994] QB 696 and *Prazic v Prazic* [2006] EWCA Civ 497

ownership / local taxes), as failure to pay on time may result in a charge being taken over the property.

A retention of the property if subject to a mortgage avoids the need to obtain the consent of the lender to a transfer of property to one or other spouse.

## **Summary**

From a French perspective, it is often unclear how the provisions contained in the Consent Order relating to the French property can be implemented within the available legal framework; the difficulty is compounded when considering the French tax consequences applicable to the circumstances.

It is often worthwhile obtaining a form of recommended wording for the Consent Order so as problems are not later experienced with implementation and the tax and other costs can be attributed appropriately. The Notaire responsible for giving effect to the Order will require as much help as possible to achieve a rapid, clear and satisfactory conclusion.

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