
The Personal Tax Planning Review

REMITTER

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Grimm v Newman [2002] STC 84 concerned professional negligence. The case represents one addition to the growing volume of illustrations of the perils facing those who advise on taxation – whether as a result of their own fault, or of the fault of those who come after them to advise their clients or of the Judges trying such disputes.

The decision might be thought of interest as throwing light on the interpretation of the “remitter” provisions relating to Case III of Schedule E in section 132(5) Income and Corporation Taxes Act 1988.² So it is whatever one may make of its merits. But because of the qualifications apparent both from the judgment of Etherton J and from the factual background of the case itself it is more likely to lead to attempts to distinguish it than to persuade the Courts to adopt the reasoning upon which the decision appears to have been based.

Grimm v Newman concerned a taxpayer who was ordinarily resident but not domiciled in the UK. As is notorious such persons (as taxpayers) are only to be assessed to UK tax in respect of income (or chargeable gains) arising from or accruing in respect of disposals of assets situate outside the UK if the income or gains are received in (“remitted to”) the UK. In the case of emoluments chargeable under Case III of Schedule E the net is cast wider than for other income and gains. They are treated as received in the UK “if they are paid, used or enjoyed in, or in any manner or form transmitted or brought to, the UK ...”. (Section 132(5).)

Contrast section 65(5) of the Taxes Act. This provides that in the case of Case IV of Schedule D tax is to be computed on the full amount “of the sums received in the United Kingdom”. In the case of Case V of Schedule D the charge is on “the full amount of the actual sums received in the United Kingdom ... from remittances payable in the United Kingdom, or from property imported, or from money or value arising from property not imported, or from money or value so received ...”.

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² Taxes Act.

For Case III of Schedule E and Cases IV and V of Schedule D Parliament has provided expressly for one form of what might be called constructive "remittance" in sections 65(6) to (9).

Not surprisingly considerable ingenuity has been devoted over the years to the devising of ways in which the income or gains of a UK resident but non-domiciled person can be enjoyed in the UK without the concomitant charge to tax. The Courts, at the behest of the Inland Revenue, have displayed equal ingenuity in defeating such schemes. Before *Grimm v Newman* it was generally thought that the high watermark of cases in which income had been held to be constructively remitted had been reached in *Harmel v Wright* [1974] 49 TC 149, which, like *Grimm v Newman*, concerned the proper interpretation of provisions now found in section 132(5). In *Harmel v Wright* the taxpayer, who retained his South African domicile, devised a scheme under which emoluments earned from his employment in South Africa were used to subscribe for shares in a South African company which he controlled (I call it Company A). That company in turn used the money (apparently the identical sum) in the making of interest-free loans repayable on demand to a second South African company (Company B). The taxpayer did not control Company B. It was controlled by trusted business associates. But in view of the terms on which Company A lent money to Company B this probably did not much matter. Company B in turn lent precisely the same sums to the taxpayer in the UK. These loans too were free of interest and repayable on demand. Templeman J had little hesitation in finding that the original emoluments which these sums represented had been remitted to the UK within the meaning of what is now section 132(5). It is unnecessary to refer to the well-known passages from his judgment or from the speeches in the House of Lords in *Thomson v Moyse* [1960] 39 TC 291 (which concerned Case V of Schedule D) cited both by Templeman J and by Etherton J in *Grimm v Newman*. It suffices to point to what in *Harmel v Wright* distinguishes it from the factual situation on which decisions such as *Carter v Sharon* [1936] 20 TC 229 and *Grimm v Newman* were (or should have been) based. The taxpayer in *Harmel v Wright* had sought to set up a scheme under which he could contend that what was received in the UK and enjoyed by him in the form of a loan was not the income in the form of the emoluments which he had earned in South Africa. Those emoluments had been transformed into a capital form on subscribing for shares in Company A. Those shares still belonged to the taxpayer. The amount remained in South Africa and had not been "enjoyed" or received in the UK. Furthermore the shares retained their original value represented as they were by the debt owing by Company B. The money (said the taxpayer) which arrived in the UK via the Company B conduit pipe was not the same money as the emoluments. It was a fundamentally different asset – viz. the amounts of money represented in turn by a loan repayable on demand. The problem with this argument was that it disregarded the underlying economic and legal reality of what was being done. The taxpayer's net assets originally represented by his South

African emoluments were of equal value (tax apart) when the loan arrived in the UK from Company B as they were before he subscribed for shares in Company A. The underlying economic reality was the same. True it is the taxpayer owed money to Company B which, since the taxpayer did not control it, could call in the loan at any time. But if that had happened the taxpayer was in a position, as the controller of Company A to complete this reversal of events by calling in the loan from Company A to Company B. It was not surprising that with this background the Court was able to find that receipt of the cash representing the loan in the UK amounted to the receipt of the emoluments – albeit on a constructive basis – in the UK.

Now contrast the facts in *Grimm v Newman*. It is unnecessary for present purposes to dwell on the advice which the defendant, Mr Newman, gave as distinct from the actions taken on that advice.

The claimant taxpayer Mr Grimm had in September 1991 shortly before his marriage expressed a wish to make tax free remittances to his intended wife and had expressed a desire to remit funds to the UK so that he could purchase a house. So there was here some indication at the outset of an intention to remit funds (whether emoluments or other income or gains is not clear though later passages in the judgment suggest it could only be out of what would otherwise be taxable emoluments) so that they might be enjoyed in one way or another in the UK. Then in October 1991 shortly after the marriage Mr Grimm wrote to his wife indicating his intention to make gifts to her in the form of certain stocks as specified in the letter. Neither in the letter nor elsewhere (at least as appeared from the judgment) was there any evidence that Mr Grimm had agreed with his wife that the gifted property or proceeds of the same should be used for any particular purpose. Indeed it would appear clear that Mrs Grimm was to be free to do with the gifted funds as she chose. However, at that stage the gift had not been completed. Before the gift was completed by transfer of the shares and stock there came a further indication of intention on the part of Mr Grimm. His United States tax adviser wrote to Mr Newman on the 23rd October 1991

“As you recall Rick desires to make this gift to allow Aurora to acquire a one-half interest in the property which they will jointly acquire in London later this year ...”

At first blush that might provide some evidence that Mr Grimm was making it a condition of the gift that his wife should apply the money for a specific purpose which could, arguably at least, afford some enjoyment to the Claimant Mr Grimm of the sum remitted for this purpose. The somewhat tenuous impression is almost at once rebutted by Mr Newman's response to this letter: viz. that the gift was “okay

if made outside the UK and there is no reciprocity". It may be that the reference to "reciprocity" should be interpreted as implying merely that there should be no corresponding gift back. But given the relatively sophisticated nature of Mr Grimm and his United States tax adviser it is equally likely to have been interpreted as meaning that there should be no reciprocal bargain as to how the money should be expended.

Subsequently (in November 1991) the gift to Mrs Grimm was completed by transfers of the shares. It was these shares (which apparently had been issued to Mr Newman as an employee of the company of which he was a director) which represented the Case III emoluments. It is at this point that the case parts company with *Harmel v Wright*. Seemingly Mr Grimm on completion of the gift parted with the ownership of his emoluments just as the taxpayer in *Harmel v Wright* had parted with his ownership of the cash representing his emoluments when he subscribed for shares in Company A. The difference lies in this: in *Harmel v Wright* the taxpayer had complete control over Company A. He could have recovered his cash by the simple process of procuring that company to be wound up or to make some other loan or lawful distribution to him. Once Mr Grimm had completed the gift to his wife he had parted once and for all with the emoluments and the ability to control the same. Nothing short of an outright gift back by Mrs Grimm would allow him once again to control or own the property representing the emoluments. There was not an iota of evidence that Mrs Grimm had at that juncture agreed to apply the monies representing by the gifted shares in any particular way – still less of any binding agreement on her part so to do, even more so of any obligation on her part to restore the gifted property to Mr Grimm. There was no suggestion that she held the gifted property as a trustee or that she was in some way estopped from applying the cash representing the gifted property otherwise than in the proposed purchase. All one has at that juncture is an indication on the part of Mr Grimm that his motive in making the gift was to put his wife in funds so that she could (not would) remit the funds to the UK to assist in the purchase of a house. As to what Mrs Grimm's understanding of the position no evidence was, apparently, called to trial.

Before turning to the way in which Etherton J dealt with these points, insofar as he did so, the remaining facts can be summarised.

On the 1st February 1992 Mrs Grimm transferred some US\$786,000 to an account in Guernsey.³ On 24th February 1992 contracts were exchanged for the purchase of the London house – that is some three months after the gift had been completed. On the 19th March 1992 the Guernsey bank, on the instructions of Mrs Grimm, converted the monies standing to her credit into sterling and remitted £386,983 to

³ It should be added that this included a sum of US\$100,000 gifted to her by Mr Grimm at a later date.

the solicitors acting for Mr Grimm and herself on the purchase. That, one would have thought, represented the crucial stage of remitter at which the character of the remitted sum as income or something which was not income, fell to be considered. It does not appear that Etherton J considered this point at all. Although no doubt the money was intended to be applied in the purchase of the house, the reality was that it was at that stage Mrs Grimm's property to do with as she wished. Then, on the 20th March 1992 the contract to purchase was completed by a transfer into the names of Mr and Mrs Grimm as the Judge found (no doubt correctly) beneficial joint tenants.

Subsequently, as a consequence of Revenue enquiries into his affairs, Mr Grimm sought the advice of tax counsel (not, apparently, counsel representing him at the trial of the case against Mr Newman) as to the efficacy of these arrangements as a means of avoiding the remittance basis charge on the emoluments originally represented by the assets gifted to Mrs Grimm. The Revenue had contended that as a consequence of the arrangements under which the house had been purchased in joint names and occupied by both Mr Grimm and his wife as their home, there had been a constructive remittance within section 132(5). Counsel then instructed on Mr Grimm's behalf appears to have advised that there was no answer to the Revenue's claim. The result of this was that Mr Grimm settled his on-going disputes with the Revenue⁴ for a figure which included a sum of tax on the basis that there had been a remitter of the emoluments. It is clear from the report of the case that this sum was very substantially less than the tax which would in fact have been payable on the assumption that the Revenue's contentions were correct. This suggests that the Revenue did not share the confidence of Mr Grimm's own advisers as to his chances of successfully resisting their contentions.

Inevitably, perhaps, the defendant Mr Newman put as his first line of defence the contention that had found favour in *Carter v Sharon* [1936] 20 TC 229. It is as well to keep in mind the factual background of that case if only to point to the obvious, if perhaps irrelevant, ground for distinction. The taxpayer, who was domiciled in the United States but resident in the UK, had before leaving the United States in 1928 instructed her agent there to pay a monthly sum out of the income derived from her investments in the United States to her daughter. The agent made such payments posting in Californian bankers drafts drawn on a London bank to the order of the daughter and purchased with a cheque drawn by him on the Californian bank account into which the income from the United States investments had been paid. In *Carter v Sharon* the gifts of income were complete before the money left the United States in the form of the bankers draft and before the daughter of the taxpayer received the monies in the UK. That was sufficient to distinguish the case from *Timpsons Executors v Yerbury* 20 TC 155 where the gifts of income to the taxpayer's children

were held not to be complete until the income had in fact been received in the UK and the cheques encashed by the children.⁵

Lawrence J found that there had been no remitter of income to the taxpayer. His reasoning is best encapsulated in the closing words of his judgment

“I so construe those two rules [(the rules applicable to Case V of Schedule D⁶)] when read together that they only apply to income from foreign possessions which is either received by the taxpayer in this country or to which he is entitled at the time it comes to this country.”

What came to the UK was not received by the taxpayer but by her daughter. It was not a sum to which she was entitled and, one might add, was not received in its character as income.

The correctness of the decision in *Carter v Sharon* has never been doubted. It was referred to without any hint of disapproval by Lord Radcliffe who delivered the leading judgment in *Thomson v Moyes* and remains good law. As put by the Judge in *Grimm v Newman* page 95 (para.56)

“Mr Ross QC’s starting position on behalf of the defendants was that this action was a classic *Carter v Sharon* . . . transaction, by which a non-domiciled individual had completed, outside the UK, a gift of assets outside the UK, and had retained no interest of any kind in the assets transferred. He submitted that in accordance with the reasoning and decision of that case, a remittance to the UK by the donee of her own assets would not give rise to a charge to tax, even though the donor was resident in the UK and the remitted funds derived from assets which had been given to her by way of gift.”

In *Carter v Sharon* there is not the slightest evidence that the taxpayer derived any benefit from any of the sums remitted. By contrast a wide variety of benefits were prayed in aid by those representing Mr Grimm as illustrating their proposition that the monies remitted by Mrs Grimm had been paid, used and enjoyed in the UK within the meaning of section 132(5). It was no doubt this obvious contrast between the facts in *Carter v Sharon* and the facts in *Grimm v Newman* which led Counsel for Mr Grimm to advise that his chances of success in resisting the Revenue’s contentions were slim and which formed the foundation for the action for negligence

⁵ For a full commentary on that case and on the remitter basis of assessment see James Kessler “Taxation of Foreign Domiciliaries” published by Key Haven Publications Plc Chapters 5 and 6.

⁶ This refers to income being received in the UK.

against Mr Newman.

Mr Grimm's contentions put by his counsel in support of their proposition that the emoluments being used and enjoyed by Mr Grimm in the UK were stated by Etherton J at pages 94 to 95 (para.55) as follows (a) Templewood Lodge (the house) had been purchased by Mr and Mrs Grimm as beneficial joint tenants – which gave Mr Grimm the right to occupy the whole property and the right as survivor to the whole should Mrs Grimm predecease him, (b) the ability for Mr Grimm to himself acquire an interest with borrowed money which he could only do by charging the whole house purchased with Mrs Grimm's money, (c) that Mrs Grimm in any event paid more than half the purchase price and associated costs and expenses. The Claimant relied on *Thomson v Moyes* and *Harmel v Wright*. Nowhere was it alleged or contended that there was some form of bargain or measure of reciprocity that, when accepting the gift, Mrs Grimm had assumed an obligation to apply the gifted property in purchasing the house. That is not surprising. The evidence of such an obligation was scant to say the least even if such an application of the monies is something which was in the contemplation of Mr Grimm himself.

The problem with the contentions put on Mr Grimm's behalf is that they failed altogether to deal with Mr Newman's contention (no doubt because there was no answer to it) that, by contrast to the taxpayers in *Thomson v Moyes* and *Harmel v Wright*, Mr Grimm had, once the gift to his wife was complete, parted altogether with the emoluments and, more significantly, with any property which they represented and the ability to control the same. At the crucial moment when the money representing the gift entered the UK it was the exclusive property of Mrs Grimm. In her hands it was capital, not income. Contrast the two cases relied on by Etherton J. In *Thomson v Moyes* the overseas investment income held in the form of dollar deposits at a bank in New York remained the property of the UK resident taxpayer until sold at his behest by UK banks in return for sterling deposits in the UK. In *Harmel v Wright* the loans received in the UK could, as explained above, be readily converted into cash representing the emoluments which were not loans by the simple process of unravelling the interposing company/loan structure. There was nothing Mr Grimm could have done to recover these monies from his wife or to compel her to apply the monies in any way. At the time they arrived in the UK they could only have been returned to Mr Grimm or applied in the purchase of the house by the voluntary act of his wife. It followed that there was no "income" which was received by Mr Grimm in the UK, still less income which he was entitled to at the time it came to the country within the meaning of the closing passage from a judgment of Lawrence J in *Carter v Sharon*.

If Mr Grimm had had a right capable of enforcement (whether based on contract, constructive trust or estoppel) to compel Mrs Grimm to apply the money

representing the gifted property in the purchase of the house some at least of the matters relied on by Mr Grimm would have provided evidence that the remitted sum was "paid, used and enjoyed in the United Kingdom" for the purposes of section 132(5). But there was no such right. The Judge appears to have accepted that the gift to Mrs Grimm was an outright gift.

That is, or should have been, an end to the matter. Unfortunately Etherton J appears to have been misled (or perhaps misled himself) by other weaker arguments which were put on behalf of Mr Newman into ignoring the *Carter v Sharon* argument in his judgment. He contented himself with observing (page 96, para.64)

"I do not however accept Mr Ross's submission that it is not strongly arguable that the acquisition by the taxpayer of an interest in Templewood Lodge as a beneficial joint tenant, as a result of the use by Mrs Grimm of assets given to her by the taxpayer and applied in the purchase of the property, brought the taxpayer within the charging provisions concerning taxable remittances by ordinarily resident, but non-domiciled, individuals. It seems to me, in the light of the very wide scope of the charging provisions relating to Case V of Schedule D, Case III of Schedule E, and s.12 of the 1992 Act, as elucidated in the case law to which I have already referred, the Revenue had a strong argument that the transactions fell within these charging provisions. Not only did the acquisition of his interest in the beneficial joint tenancy give the taxpayer a proprietary right which carried with it the right of physical occupation, but it conferred on the taxpayer a prospective right to ownership of the entire property. I do not accept Mr Ross' submission that in the absence of any evidence that there was a market for the sale of a right of survivorship or as to the value of such a right, there would be no realistic argument by the Revenue that the transaction gave rise to a charge to tax. The prospective, albeit contingent, right of the taxpayer to the entire property was manifestly an important benefit to him. It gave him the contingent right to ownership of a much larger property than he could have afforded from his own resources, apart from the gift to his wife. That was plainly a financial benefit to him, even if it turned upon an uncertain and possible remote contingency, namely his wife predeceasing him before sale of Templewood Lodge or severance of the joint tenancy so as to create the taxpayer and Mrs Grimm equitable tenants in common."

Arguably, at least, the application of monies belonging to another in the purchase of an asset in which one is a beneficial joint tenant and (more significantly) which one is able to enjoy, albeit with the person providing the money, is a payment of monies for the use and enjoyment by the other joint or common owner (here

Mr Grimm). It is unnecessary and irrelevant to refer to the Revenue's own views dealing with the right of a beneficial joint owner to occupy property as affecting inheritance tax and other liabilities. It suffices to say that if the matter ended there the Revenue would have an arguable case for saying that the money had been brought into the UK in the sense that it was paid, used and enjoyed by Mr Grimm in the UK.

But all this obscures the fact that the income – or perhaps more accurately the assets representing the income – had ceased to be Mr Grimm's property when the gift to his wife was complete in November 1991. There was no suggestion (and there could have been no suggestion) that in Mrs Grimm's hands the money was still income. In her hands, as a taxpayer, the sum actually remitted was capital and was received in the UK as capital to which she alone was entitled. The manner or use to which Mrs Grimm put the money once it had been remitted to the UK was or should have been irrelevant.

At the close of his submissions in *Harmel v Wright* Counsel appearing for the Crown in that case (as recorded at page 160 of the report) submitted in the alternative that the word "received" as applied to Case III of Schedule D should be given a wider meaning than in what is now section 65 of the Taxes Act because what is now section 132(5) required that the "emoluments shall be treated as received ... if they are paid, used or enjoyed ..." however, it is noteworthy that Mr Vinelott is recorded as submitting that these words did not "substantially alter the authorities on receipt or the test adumbrated by Lord Radcliffe" (in *Thomson v Moyes*). He submitted merely that in a proper case they can shed light on and possibly give some more extension to the words "receipt". That does not suggest that there is the slightest crumb of comfort for the Crown in the case on the facts in *Grimm v Newman* in the somewhat wider words used in section 132(5).

Following on reported cases in which professional negligence has been alleged and proved it is tempting, and perhaps fanciful, to suggest ways in which the trap into which Mr Newman appears to have fallen in *Grimm v Newman* could have been avoided. Permission to appeal against the decision of Etherton J has been given and it may yet be that the Court of Appeal will overturn the decision at first instance. What, then, if any, steps can be taken to secure that taxpayers in a similar position to Mr Grimm can effectively procure the routing of overseas income (in particular income chargeable under Case III of Schedule E) to the UK to assist in the purchase of a house in which they will be part owners and occupiers?⁷

⁷ A remitter following cesser of the source of income (where as here the source is overseas employment) would not succeed in avoiding the charge on the remittance basis - sections 202A(2)(b) and 19(4A) of the Taxes Act.

In the course of this judgment (paragraphs 68 and 69) Etherton J observed that a reasonably skilful and careful accountant tax adviser, with the same specialisations as the first defendant, would have recognised in 1991 that a scheme “by which assets representing income were paid to the taxpayer’s wife and applied by her in the purchase of property jointly acquired with the taxpayer intended to be occupied by them ... ran a high risk of being challenged by the Revenue and stood a significant prospect of giving rise to a charge to tax on a constructive remittance by the taxpayer”. He goes on to say that the first defendant accepted that he was aware “of a distinction between a beneficial tenancy in common and a beneficial joint tenancy. He did not, however, advise the taxpayer whether the risk of a charge to tax would be reduced by structuring the intended purchase of a new home as a purchase by the taxpayer and his wife as equitable tenants in common, and therefore by avoiding the complication of the right of survivorship inherent in a joint tenancy. Nor did he advise that any particular care could be taken in relation to the conveyancing so as to reduce the risk of a charge to tax”. Objectively, and given persons of reasonably good health and life expectancy, it is hard to see how the beneficial joint tenancy really operates to confer anything by way of additional enjoyment to one or other of the joint tenants merely by reason of the fact that if the other joint tenant predeceases him or her the survivor will take his or her share. Given the ability to sever the joint tenancy producing a situation in which the two joint tenants become tenants in common in equal shares this somewhat remote right of survivorship which could be so easily destroyed by exercise of the right of severance can hardly be said to amount to a “receipt”. On the assumption that the basic implied proposition (*viz.* that *Carter v Sharon* was distinguishable) is correct it is hard to see how Mr Newman could have saved himself by advising that the house should be owned by Mr and Mrs Grimm as beneficial tenants in common. What was of greater benefit to Mr Grimm as “a use and enjoyment” of the remitted sums was the ability to live in the whole house which he could not have done but for the assistance of his wife’s money and, perhaps, the ability to charge the whole house to secure the money he himself had borrowed. It is impossible to avoid the conclusion that any proposal under which property representing income or gains arising outside the UK is gifted to a person outside the UK with the intention (not being translated into some form of enforceable obligation of any kind) that that person should bring the property into the UK for the purpose of acquiring a property for the enjoyment of the taxpayer will be a remittance regardless of the way in which the ownership of the property is in fact structured.

Various alternative schemes were suggested (page 105, para.91). The only one which appears to have been considered by the Judge was one in which money was raised by way of a loan abroad to purchase property in the UK. Such loan being backed by a deposit of foreign assets (presumably represented by the Case III Schedule E income). As was pointed out by Mr Newman in cross-examination

(para.92) such a scheme if implemented by Mr Grimm alone, would have been caught by the express “constructive remitter” provisions of section 65(8) as applied for this purpose by section 132(5). So Counsel for Mr Grimm, having accepted that this was a problem, sought to contend that Mrs Grimm could, with the gifted property as security, have borrowed the money overseas to make the purchase in the UK. It is by no means clear from the judgment quite how counsel for Mr Grimm considered such a proposal would work when the more simple scheme before the Court did not. If the remitter by Mrs Grimm of the gifted funds and their application and the purchase of the house constituted a form of constructive remitter caught by section 132(5) following *Harmel v Wright* it is hard to see how the remitter of funds borrowed by Mrs Grimm on the security of the gifted property to purchase the London house under the proposals advanced by Mr Grimm’s counsel could escape attack as a remitter. The only advantage of this proposal would be to obscure the issue in a way which would make it safe, for the time being, from Revenue enquiries. That is not a sensible basis on which clients should be asked to proceed.

For non-domiciled taxpayers, well endowed with assets which are not pregnant with gain and which do not represent income the remitter of sums to the UK to assist in the purchase of a house present no problems. For non-domiciled taxpayers who have assets pregnant with gain and who can find a lender (whether the lender is in the UK or overseas matters not) who is prepared to accept those assets as security for the loan there is again no problem in borrowing money and remitting it to the UK to assist in the purchase of such a house. Until the assets are disposed of there is no gain which can be made the subject of a charge to capital gains tax (under section 12 of the Taxation of Chargeable Gains Act) and, so long as the gain is not remitted to the UK when it does finally accrue there will be no charge. But if *Grimm v Newman* is found to be correctly decided taxpayers whose only recourse is sums or property representing overseas income will encounter considerable difficulty in utilising those sums, whether directly or indirectly, in the purchase of a house in the UK.