A STICKING POINT – TO WHAT EXTENT IS UK RESIDENCE ADHESIVE?

Keith Gordon[1]

Introduction

When debating with HMRC as to whether or not an individual has ceased to reside in the United Kingdom, I am often faced with the assertion that residence in the UK is "adhesive". Ordinarily, I can deal with such an assertion as simply a rather ambitious overstatement of the Revenue's case, which is not backed up by any rule of law. Nevertheless, I have now ceased to be surprised to see the assertion repeated by them in subsequent cases.

The assertion

The assertion is generally made along the following lines:

> "The statutory rules make clear how adhesive the quality of residence is in the case of a person whose ordinary residence has been in the UK."

It is, with respect, my view that this assertion is totally without any merits. In short, there is nothing in the statute that does anything of the sort.

For a start, "the word 'reside'," as Viscount Cave stated in *Levene*[2], "is a familiar English word and is defined in the Oxford English Dictionary as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place". For this reason, the word when found in tax statutes is given its normal meaning, with no different nuance for tax purposes. Consequently, it is impossible for the statute to modify the common law meaning of the word.

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2 (1928) 13 TC 486 at 505

Furthermore, as the cases of *Shepherd*[3] and *Grace*[4] have recently confirmed, the starting point for any discussion of an individual's residence is indeed the common law meaning of the term. However, as is fully accepted, the statute does provide certain further rules that have to be considered. The relevant provisions are the Income Tax Act 2007, section 829 (formerly, the Income and Corporation Taxes Act 1988, section 334), section 830 (formerly, section 335) and sections 831 and 832 (together, the former section 336).

The impact of the statutory provisions

Of these provisions, only section 830 modifies the common law test.[5] That is the section that deals with individuals who are working full-time abroad. For such individuals, section 830(2) provides that "[i]n determining whether the individual is UK resident [one should] ignore any living accommodation available in the United Kingdom for the individual's use."

That provides, therefore, a statutory modification to the common law rule that the availability of living accommodation in the UK is a relevant factor that needs to be considered when ascertaining an individual's residence status in accordance with the common law (as confirmed in *Cooper v Cadwalader*[6], *Grace* etc). However, section 830 is not of general relevance: it is applicable only in cases where the criterion of working full-time abroad is fulfilled. And, for the purposes of this article, I would argue that section 830 does not go so far as to confirm anything about the meaning of residence – it certainly does not confirm any adhesiveness about the quality of residence.

Sections 829, 831 and 832 are, in my view, even less indicative of an adhesiveness of the status of residence.

Sections 831 and 832 provide rules which simply supersede the common law position: they provide for a simple 183-day test. Provided that an individual satisfies the conditions for the sections to apply, then that individual's tax liability will be determined solely by reference to whether or not that individual is present in the country for 183 days or more: if the day count is less than 183 days then the individual will be taxed as if he or she were not resident, irrespective of the individual's residence status under the common law; conversely, physical presence aggregating to 183 days or more will result in the individual being taxed as resident,

3 [2006] EWHC 1512 (Ch)

4 [2009] EWCA Civ 1082

5 Section 830 does not modify the *meaning* of residence. It instead modifies the test that has to be applied when determining an individual's residence.

6 (1904) 5 TC 101

again notwithstanding the common law position. However, as made clear in *Grace*, those sections are applicable only when the conditions stated in them are satisfied: they do not modify or even impinge upon the common law meaning of residence; when the rules are in point, an individual's tax position is determined irrespective of his or her residence status under the common law. Again, though, what is relevant for the purposes of this article is that those sections say nothing about the alleged adhesiveness of residence in the UK.

The one section that is potentially relevant to the issue of adhesiveness is section 829. That applies if:

(a) an individual has left the United Kingdom for the purpose only of occasional residence abroad, and

(b) at the time of leaving the individual was both UK resident and ordinarily UK resident.

Therefore, it is dealing with a case where an individual (who was UK resident and also ordinarily resident in the UK) leaves the UK (and, it is strongly implied) becomes non-resident, albeit only for the purposes of occasional residence abroad.

When the section is invoked, subsection (2) provides that the individual should (continue to) be treated as UK resident for the purposes of calculating the individual's liability to income tax. So, section 829 *deems* UK residence to have an adhesive quality – inasmuch as temporary residence abroad will not be sufficient to shed UK residence. However, such deeming is applicable for tax purposes only: it does not affect the common law meaning of residence. Secondly, as Lewison J held in the *Grace* case, it, too, is a section that is relevant only when its statutory conditions are complied with: Mr Grace had set up a permanent home in South Africa and, therefore, the question in his case was whether he had retained his UK residence status as well. Given that Mr Grace's residence status in South Africa was clearly more than occasional, Lewison J confirmed that the section could not assist the Revenue. (Conversely, he correctly noted that if Mr Grace had not ceased to be resident in the UK, then what is now section 829 was of no relevance either because, in that case, it would not have been necessary for HMRC to resort to the section.)

Once again, however, it is necessary to consider the accuracy of the Revenue's assertion in the light of the actual wording of section 829.

As already noted, section 829 is applicable only for tax purposes. It does not deem the non-resident individual to whom it applies to be resident in the UK: instead it provides that such individuals should be taxed *as if* they had remained resident – a subtle difference, I would suggest. More importantly, I would argue that section 829 does precisely the opposite of what HMRC allege. It does not confirm any adhesive quality of residence; at best, it merely deems UK residence (so far as the concept is

relevant for tax purposes) to have an enduring quality, provided that an individual satisfies its conditions. However, I would go one stage further. Given that section 829 exists, it, if anything, provides statutory confirmation that an individual *can* cease to be resident (at common law) even if it is replaced only by occasional residence abroad. In other words, at common law, it is relatively easy to shed UK residence (even if one starts off the process as both resident and ordinarily resident). Consequently, it is my view that section 829 confirms the *lack* of adhesiveness of the quality of residence. It is therefore unfortunate that HMRC see it fit to suggest otherwise.

The view of the Court of Appeal

However, it should be noted that my argument (as summarised above) now has to overcome an additional hurdle. In February 2010, the Court of Appeal gave its long-awaited judgment in the applications for judicial review by Messrs Gaines-Cooper, Davies and James[7].

At paragraph [47] of his judgment, Lord Justice Moses noted:

> The very concept of dual residence despite departure abroad reveals the adhesive quality of the previously held status of resident within the UK. Permanent or indefinite absence abroad connotes a severance of that which previously bound the taxpayer to the UK.

Further, at paragraph [52], he added:

> Thus far, I have based my views that the concepts of permanent or indefinite absence connote a distinct break from previous ties within the UK on the terms of IR20. I am confirmed in that view by the objective of IR20 stated in the opening words of the Preface, that it is designed to reflect the law. It would, therefore, be surprising if IR20 had the effect of contradicting established jurisprudence. The adhesive quality of residence is reflected in the reference in s. 334 ICTA to 'occasional residence abroad'. The notion of a distinct break from previously held ties provides a clear test as to whether previously held residence, for example in the UK, has ceased permanently or indefinitely. It distinguishes exclusive residence abroad from dual residence, a concept recognised in *Grace* [6(viii)]. In *Levene v IR Commrs* (1928) 13 TC 486, the taxpayer was held to be resident and ordinarily resident in the UK, despite the absence of any fixed home in the UK. It is of note that the Special Commissioners, whose conclusions were upheld all the way to the House of Lords, referred specifically to 'his past and present habits of life' and 'ties with this country' (490). Rowlatt J explained

7 [2010] EWCA Civ 83

> 'ordinary residence' as a reference to 'the ordinary course of a man's life' (494).

So, are these *dicta*, contrary to my earlier assertions, indicative that UK residence has an adhesive quality? I would respectfully suggest not.

In paragraph [47], Lord Justice Moses was discussing the notion of dual residence. I would suggest that it is uncontroversial that an individual can be resident in one jurisdiction and then acquire a second residence in another jurisdiction. Residence, in this context, is adhesive only to the extent that the acquisition of residence elsewhere does not automatically sever UK residence.

Paragraph [47], at first blush, however, does seem to continue so as to suggest that UK residence cannot be severed absent a "permanent or indefinite absence abroad" in that such an absence "connotes a severance of that which previously bound the taxpayer to the UK". It is my respectful view that this meaning was not implied by Lord Justice Moses.

First, Lord Justice Moses would undoubtedly have recognized that, unlike with regard to domicile, an individual could be resident nowhere – a true nomad. Such was undoubtedly the status of the taxpayers in *IRC v Zorab*[8] and *IRC v Brown*[9]. Supposing a taxpayer were initially resident (as was the case with Mr Brown between 1893 and 1918), such a taxpayer could sever enough ties with the UK and become a perpetual tourist. Taxpayers can therefore lose their UK residence status without acquiring a residence elsewhere, let alone a residence elsewhere that is either permanent or indefinite. (Indeed, the latter test is tantamount to the conditions for acquiring a domicile of choice and I am sure that Lord Justice Moses was not suggesting that residence is equivalent to domicile.)

Indeed, contrast with the law of domicile is illustrative. An individual can have only one domicile. Acquisition of a new domicile means, by definition, the loss of a domicile elsewhere. Not so with residence. However, whilst an individual must have a domicile at all times, an individual can be resident nowhere. Furthermore, an individual's domicile, particularly, if that is the individual's domicile of origin, is often said to be tenacious.[10] Whilst that statement could be challenged[11], I do not

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8 (1926) 11 TC 289

9 (1926) 11 TC 292

10 In *Henderson v Henderson* [1967] P 77 at 80, Sir Jocelyn Simon P suggested that the standard of proof required to displace a domicile of origin "goes beyond a mere balance of probabilities". A year later, Scarman J in *Re Fuld (No. 3)* [1968] P 675 at 685 responded by reverting to the normal civil standard of proof. However, even he emphasised the need for cogent evidence.

suppose for an instant that Lord Justice Moses was suggesting that an individual's residence status (even, residence in the UK) is as difficult to shed as a domicile of origin.

Secondly, Lord Justice was not actually interpreting the common law test of residence. The *Gaines-Cooper* case concerned the meaning of the extra-statutory guidance known as IR20. The paragraphs under consideration were headed "Leaving the UK permanently or indefinitely" and the key paragraph (2.7) itself referred to taxpayers leaving the UK "permanently". Consequently, for a taxpayer to rely upon the representations made by the Revenue in those paragraphs, the taxpayer has to show that any departure from the UK has the qualities of permanence. This is clear from his Lordship's earlier comments at paragraph [44]: "The adverbs 'permanently or indefinitely' make, as a matter of construction, all the difference." As Lord Justice Moses continued:

> "The extent to which a taxpayer retains social and family ties within the United Kingdom must have a significant and often dispositive impact on the question whether a taxpayer has left permanently or indefinitely (for at least three years)."

When Lord Justice Moses stated that UK residence can be shed only by acquiring permanent or indefinite residence abroad, he was not, I would suggest, setting down any test applicable under the common law but merely commenting what was necessary for a taxpayer to do in order to come within the terms of paragraph 2.7 in IR20.

I would argue that the test in paragraph 2.7 was, therefore, stricter than the common law. However, given that IR20 was merely offering guidance rather than any form of extra-statutory concession, there is no reason why it could not lay down a higher hurdle than the law actually requires. Indeed, the various editions of the IR20 guidance stated that the advice therein was without prejudice to a taxpayer's right to appeal to the Commissioners, such appeal to be considered on the merits of the taxpayer's position in law.

Thirdly, prior to the passage under consideration, Lord Justice Moses had considered the "health warning" in paragraph 1.4 of the IR20 guidance.[12] That paragraph reminds readers that taxpayers can be resident in more than one jurisdiction. But all this says is that the mere acquisition of residence overseas will

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11 See, for example, Arden LJ's judgment in *Barlow Clowes International Limited (in liquidation) v Henwood* [2008] EWCA Civ 577 at paragraphs [91] *et seq*, which, in my opinion, properly holds that a domicile of origin should not (on its own) be treated as any more tenacious than a domicile of choice.

12 Indeed, HMRC's junior Counsel in *Gaines-Cooper* (Christopher Stone), when writing in *Taxation*, 'Leaving on a jet plane', 11 March 2010 explained that the alleged adhesiveness of residence is based upon the possibility of dual residence as noted in paragraph 1.4

not necessarily amount to the severing of any residence status in the UK. UK residence is adhesive in that it will not fall away just because a taxpayer is resident elsewhere. Indeed, if that is all that is meant by HMRC's assertion, then I would not beg to differ. Conversely, I would suggest, neither is it the case that the acquisition of a residence overseas will necessarily amount to the retention of any former status as a UK-resident. Each particular case must be dependent on its own set of facts.

Fourthly, IR20 was attempting to codify not only the common law tests but also the modifications made by statute. For example, the common law contains no suggestion that physical presence in a place for more than 182 days makes someone necessarily resident there – the *Zorab* case indeed demonstrates that there is no common law 183-day test as Mr Zorab was physically present in the UK for 337 consecutive days spanning, fairly equally, two different tax years and was held not to have been resident in the UK. Yet, one of the rules stated in IR20 is that physical presence in the UK for 183 days or more amounts to "residence". This statement is an oversimplification of the rule in sections 831 and 832; as mentioned above, where the sections are in point, they merely tax someone as if they were resident. IR20 therefore used the term "resident" where it would have been more correct for it to say "subject to income tax and capital gains tax as if resident". I would suggest that Lord Justice Moses was, not inappropriately, using the terminology of the document which he was required to interpret, rather than making any sweeping statement about the word "resident" as it is understood in different contexts.

This is further evidenced by what Lord Justice Moses said at paragraph [50]:

> "It would be absurd if a taxpayer could acquire non-resident status on the basis of his claim that he has left permanently or indefinitely, without establishing that he has severed social and family ties in the UK."

What the learned Judge was doing was interpreting the test laid down in IR20 which required a taxpayer to have left the UK permanently or indefinitely. The Judge held that such a test could not realistically be said to have been satisfied if the taxpayer has left his family to remain in the UK. The Judge was making no finding that an individual cannot cease to reside in the UK in situations where family members remain.[13]

Fifthly, it is suggested that analysis of paragraph [52] – which includes the other reference to adhesiveness – confirms the above arguments.

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13 It is acknowledged, however, that in most cases, the continued residence of family in the UK would mean the continued residence of an individual who had gone abroad. See, for example, *Re Young* (1875) 1 TC 57. Nevertheless, as acknowledged by the Court of Appeal in *Grace* (at [19]), one of the relevant facts in that case was the fact that Master Young had not established a residence anywhere else.

> [52] Thus far, I have based my views that the concepts of permanent or indefinite absence connote a distinct break from previous ties within the UK on the terms of IR20. I am confirmed in that view by the objective of IR20 stated in the opening words of the Preface, that it is designed to reflect the law. It would, therefore, be surprising if IR20 had the effect of contradicting established jurisprudence. The adhesive quality of residence is reflected in the reference in s. 334 ICTA to 'occasional residence abroad'.

The learned Judge explained it thus. First, he noted that a resident taxpayer making a distinct break from the United Kingdom will distinguish himself or herself from one who becomes dual resident. Secondly, his Lordship referred to the case of *IR Commrs v Combe*[14] where the notion of a distinct break was first mentioned. In that case, Mr Combe commenced an apprenticeship in the United States and was noted to have made such a break, even though he made subsequent return visits to the UK. To contrast, in the second and third tax years after the supposed distinct break was made, Mr Combe spent (respectively) 175 and 181 days present in the UK. It was noted by Lord Sands that, had it not been for the previous break, such a period of time spent in the United Kingdom would not have been enough to amount to the cessation of residence.

This theme is then continued by Lord Justice Moses at [53] where he considers the relationship between the common law and the guidance contained in IR20.

> "Whilst IR20 is designed to guide and simplify, I cannot accept that it provides a warrant for ignoring so obvious a factor for determining whether a taxpayer hitherto resident and ordinarily resident in the UK has ceased to be so and has left permanently or indefinitely. IR20 itself, at 1.4, requires a value judgement to be made as to whether a taxpayer, claiming to come within 2.7–2.9, has ceased to be resident in the UK. There can be no sensible reason why one of the most telling features of such a cessation, a distinct break from family and social ties in this country, should be ignored. It would not create clarity or simplicity; it would merely remove from consideration an obvious test of permanent or indefinite absence abroad."

Thus, once one accepts that the *Gaines-Cooper* case is merely concerned with the interpretation of IR20, it does no more than confirm that an individual wishing to lose the status of being a UK resident must make a break with the past way of life – a distinct break.

Finally, Lord Justice Moses (at paragraph [52]) made his second reference to the adhesive nature of residence. However, as is clear from his wording ("the adhesive quality of residence is *reflected* in the reference in s. 334 [my emphasis]"), he was merely referring to the adhesive *effect* of the former section 334 so far as an

14 (1932) 17 TC 405

individual's residence-dependent tax liability is concerned, rather than making any suggestion that residence at common law has any adhesive quality.

Conclusion

Thus it is clear that residence is not in itself adhesive. For cases where section 829 is in point, it might as well be, because it generally matters little whether an individual is resident under the common law or taxed as resident by virtue of statute.[15] But the common law itself does not recognise any adhesiveness about an individual's residence status.

15 Of course, the difference could be fundamental if one is counting years of residence (for example, for the purposes of ascertaining whether the remittance basis charge is applicable or to determine an individual's deemed domicile for inheritance tax purposes). However, that issue is not considered further.