

# CONTEMPLATING *GRACE*: THE IMPACT OF *RCC V GRACE* ON THE TEST FOR DETERMINING INDIVIDUAL RESIDENCE

by Aparna Nathan

It is a well recognised fact that the law for establishing an individual's residence status is far from satisfactory. The statutory rules contained in s829 et seq ITA 2007 do not set out tests for determining whether an individual is resident in the UK: that task has been left to the courts. The limitations of the courts' appellate jurisdiction have not been conducive to the formulation of a clear and practical test for determining an individual's residence status. It is against this background that HMRC Booklet IR20 was welcomed by practitioners with its introduction of a 91-day test, and formed the backbone of most practitioners' advice on the issue of determining an individual's residence. However, HMRC's approach in the *Gaines-Cooper* case has cast doubt on practitioners' ability to rely on HMRC's published practice in IR20. HMRC have been at pains to state (see HMRC Brief 01/07- found as an Appendix to IR20 ) that they have not resiled from the practice set out in IR20. They state:

“Where an individual has lived in the UK, the question of whether he has left the UK has to be decided first. Individuals who have left the UK will continue to be regarded as UK-resident if their visits to the UK average 91 days or more per tax year, taken over a maximum of up to 4 tax years...There was no change to HMRC practice about residence and the ‘91 day test’...”

There are currently on-going judicial review proceedings in relation to the perceived failure of HMRC to apply their guidance in IR20. It is understood that in two such cases permission to bring judicial review proceedings has been refused and that these refusals are being appealed. Whatever the outcome of such judicial review proceedings, the fact remains that IR 20 cannot currently safely be relied upon by practitioners. As a result, practitioners are once more forced to revert to, and rely on, the case law in this area. The most recent High Court decision on individual residence is *RCC v. Grace*<sup>1</sup>. The facts in that case were, briefly, as follow. The taxpayer was an airline pilot, in the employ of British Airways, whose work required him to make long-haul flights between the UK, South Africa and elsewhere. He had a house in Cape Town, and he had a house in the UK near Gatwick Airport. The UK house (which was fully furnished) was the taxpayer's principal residence between 1990 and 1997. In 1997, he set up home in Cape Town – initially in a rented apartment and later in a house which he purchased. The taxpayer was on the electoral roll in the UK as a resident, post was sent to him at his UK address, he had a bank account in the UK into which his employment income was paid, he had a dentist and doctor in the UK, but he did not belong to any club or society in the UK other than the professional body of the British Airline Pilots Association, and he had no relatives in the UK apart from his ex-wife (whom he met twice in 30 years) and their daughters (whom he never met in 30 years). The taxpayer was assessed to income tax on his employment income for the years 1997/1998 to 2002/2003 on the basis that he was UK resident and ordinarily resident. The Special Commissioner held that the taxpayer was non-resident and not ordinarily resident, stating at para 40:

“...I find that after 1997 the Appellant did not dwell permanently in the United Kingdom as his permanent residence was in South Africa. Also, the United Kingdom was not where he had his settled or usual abode as that was in South Africa. During the years of assessment the subject of the appeal the Appellant left Cape Town for business purposes only.

Although he retained a house in the United Kingdom that house was not in the nature of a home but was rather a substitute for hotels.”

And then at para 42:

“...I find that although the Appellant was resident in the United Kingdom before 1997 in that year there was a distinct break and since then his settled mode of life has been in South Africa...since 1997 he has returned to the United Kingdom but only for the purpose of his employment.”

On section 334 ICTA 1988, which concerned whether the taxpayer had left the UK for the purpose of only occasional residence abroad, the Special Commissioner stated at para 55:

“However, in my view his presence abroad after that date was not for the purpose only of occasional residence abroad but for the purposes of continuous and settled residence in his house in Cape Town punctuated only by the need to visit the United Kingdom for the purposes of his work.”

Finally, on s336 ICTA 1988, which concerned whether, on the assumption that the taxpayer had left the UK and had ceased to be resident, the taxpayer’s visits to the UK were for temporary purposes only, the Special Commissioner stated at para 59:

“In my view, leaving aside the availability of living accommodation, all the factors mentioned above point to the conclusion that after September 1997 the Appellant was in the United Kingdom for temporary and occasional purposes only. He was here in order to do his work and for no other reason. He has no intention of establishing his residence here and his intention was to establish his residence in South Africa. Thus in my view section 336 applies to the Appellant so that he is not to be treated as resident in the United Kingdom.”

In the High Court, Lewison J overturned the decision of the Special Commissioner, holding:

1. that the taxpayer’s life did not indicate that there had been a “distinct break” in the pattern of his life: the setting up of a home in Cape Town only meant that he went from having only one home in the UK to having two homes, one in the UK and one in Cape Town;
2. that, in relation to s336 ICTA 1988, presence in the UK for the purposes of work, under a permanent or at least an indefinite contract of employment, was not a temporary purpose – it was not casual or transitory;
3. that s336 ICTA 1988 applied where the taxpayer was not resident, and residence had to be established on common law grounds or because the taxpayer fell within s334 ICTA 1988;
4. that s334 ICTA 1988 applied only where the taxpayer had “left” the UK, and if he had “left” the UK the taxpayer must have left for the purpose of occasional residence abroad. The concept of “distinct break” was relevant when determining whether the taxpayer had “left” the UK and also when considering the purpose for which he had left the UK i.e. whether it is for occasional residence abroad. It was conceded by HMRC that if the taxpayer had left the

UK by reason of having set up home in Cape Town, he had left for more than occasional residence abroad.

### **Does *Grace* provide clear guidance on how to determine an individual's residence status?**

The *Grace* principle (so termed for convenience) is simple enough to state: in order for a UK resident and ordinarily resident individual to be treated as non-resident and not ordinarily resident, that individual must really have “left” the UK. However, this begs the question, “When is an individual regarded as having *left*”? In answering this question, regard must be had to the manner in which the taxpayer orders his life before and after his purported departure from the UK. If, before his departure, there are clear links with the UK, and such links are absent or minimal after his departure, this would tend to show that the taxpayer has “left” the UK: in other words one needs to look for a “distinct break”. What amounts to a “distinct break” will vary from individual to individual and no single, universally applicable, rule can be formulated. It is clear from the foregoing that *Grace* provides no greater certainty when seeking to determine an individual's residence status than the cases that preceded it. It does not, therefore, give the practical certainty provided by IR20 prior to *Gaines-Cooper*. That said, however, the High Court judgment in *Grace* is more consistent with the view of the facts adopted in that case and the principles enunciated in the cases preceding it than was the decision of the Special Commissioner.

Lewison J's judgment clarifies the interaction of the statutory provisions on residence with the common law rules on residence. It also shows that an individual's presence in the UK for the purposes of work is not to be regarded as involuntary or to be placed in some special category to which less weight can be attached than is attached to other factors. Further, Lewison J warns against focusing unduly on the term “distinct break” and seeking to define its parameters when determining an individual's residence status. One surmises from this warning that the question of whether there has been a “distinct break” is something that should be reasonably clear from the facts in each case. The author's real concern with Lewison J's judgment, however, follows from the finding that the taxpayer had not ceased to be UK resident and ordinarily resident simply because he had set up home in Cape Town. Lewison J was quick to hold that from having only one home in the UK the taxpayer had become a person with two homes – one in the UK and one in Cape Town. In the author's view, this seems to make it more difficult for an individual leaving the UK to show that he is no longer resident in the UK. It is not possible simply to point to the existence of a fully-furnished and functioning home in another country. Such a move, while helpful, must, in the author's view, go hand in hand with a significant reduction in links with the UK (or, ideally, a termination of links with the UK) in order for non-UK residence to be established. Lewison J's judgment on this point will also make it much easier, in the author's view, for non-UK residents to become UK resident because a non-UK resident could be regarded as UK resident even if he continues to have a home abroad.

### **Establishing non-UK residence and non-ordinary residence following *Grace***

In *Barrett v RCC*<sup>2</sup>, the Special Commissioners considered certain factors to be relevant when determining whether there had been a “distinct break”. The factors were:

1. the taxpayer was employed under the same contract of employment both before and after his purported departure from the UK;

2. the taxpayer's duties and place of performance of those duties did not change;
3. the taxpayer did not establish a permanent residence abroad;
4. the taxpayer's partner and family continued to live in the UK in the same family home both before and after his purported departure from the UK;
5. the taxpayer did not make special financial arrangements for his time abroad e.g. bank accounts, credit cards, medical insurance. He maintained and used his UK bank accounts and credit cards;
6. no special arrangements were made in relation to his car, driving licence, residence permits, foreign identity card;
7. there was uncertainty about the date of departure from the UK, which seemed surprising given that this was meant to be a major event. In particular, the taxpayer did not have his ticket, boarding pass stub or similar evidence of date of departure;
8. the taxpayer's diary did not evidence a "distinct break".

To this list one can add the following factors:

9. whether the taxpayer has items in storage in the UK;
10. whether the taxpayer has club or other memberships in the UK;
11. whether the taxpayer is on the electoral roll in the UK;
12. whether the taxpayer maintains a property in the UK and, if so,
  - a. whether it is let out ;
  - b. whether it is fully furnished;
  - c. whether it is fully staffed;
  - d. whether all the utilities are connected.

These factors are not in themselves determinative and must be viewed in the light of all the circumstances.

## **Conclusion**

*Grace*, in the author's view, suggests that the steps that a putative emigrant must take in order to become non-UK resident have become aligned with those that he must take in order to abandon a UK domicile of origin. This seems to set a rather high threshold for breaking UK residence. The counsel of perfection has to be that a putative emigrant must not retain any links with the UK, and not visit the UK during the first year after his departure from the UK, in order to demonstrate clearly that there has been a "distinct break" in the pattern of his life. Such advice is unlikely to be willingly received, and, more importantly, applied in practice. There are, it is understood, currently moves afoot to introduce a statutory test for

establishing residence based purely on day counts. In the light of the current uncertainty in this area, the certainty introduced by a properly drafted statutory test must be a cause for celebration.

---

<sup>1</sup> [2009] STC 213

<sup>2</sup> [2007] UKSPC SPC00639 at para 48