

## **GAINES-COOPER and the EXIGUOUS PUBLICATION**

### ***Two problems with the recent Court of Appeal judicial review decision relating to IR20***

#### **Introduction**

When the news - having travelled teasingly through the corridors of HMRC headquarters and having completed a few circles and described some more curious shapes in doing so - eventually came to the notice of the factotums of HMRC that certain naive individuals had placed reliance on an Exiguous Publication of theirs for the purposes of deciding a question as important as whether they were liable to UK tax, they were, to say the least, befuddled.

Of course, it could not be denied that the Exiguous Publication did in fact purport to explain how HMRC understood and applied the law of individual tax residence and did so in rather straightforward terms (primarily through the use of English words, many of them monosyllabic and emanating from Old English). Nor could it be gainsaid by the factotums that the Exiguous Publication had been in circulation for several years and viewed by thousands. It is true, also, that it contained statements which Kant, had he had the opportunity of perusing this production, would have recognised as constituting 'categorical imperatives'.

But none of this could explain to the HMRC factotums the mystery as to what had happened: that is, why certain individuals had inexplicably allowed themselves to be guided in their conduct by it. These rash and trusting souls had gone as far as to plan on the basis of it and had now gotten their affairs all muddled up. It is worth parenthesizing, of course, that this consequent muddle was not the aspect of the affair which was particularly dolorous to the factotums. Indeed, it might be supposed by the more cynical among us that this inadvertent ballooning by pedants of their tax bills may not have been an entirely distasteful thought to the collective mind of the factotums. In any case, such was the generosity of the factotums that they had, for one reason or another, reconciled themselves to the possibility that some literalists out there would be much informed (in their actions, if not in a more general sense of the word) by this document. No: what was especially galling and what had caused the most hurt to the collective feelings of the factotums of HMRC was the uncalled-for assertion by these empiricists that HMRC were somehow bound by the Exiguous Publication. This was rather extraordinary.

Ladies and gentlemen, Mr. Gaines-Cooper is one of the vast number of Russian Formalists who unthinkingly affronted the sensibilities of HMRC. Mr. Gaines-Cooper read the Exiguous Publication and, having read it, decided that HMRC ought to treat him as not resident in the country. He formed this view on the basis of a Rule located within it, which was helpfully titled 'Leaving the UK Permanently or Indefinitely'. This Rule stated: 'If you go abroad permanently, you will be treated as remaining resident and ordinarily resident if your visits to the UK average 91 days or more a year.' Mr. Gaines-Cooper thought that this meant that if go abroad permanently, you will be treated as remaining resident and ordinarily resident if your visits to the UK average 91 days or more a year. This must have buoyed his spirits up considerably as he had taken up residence in the Seychelles as long ago as 1975 and had remained fairly ambulant even after he left those islands a few years later. Furthermore, for the years in question, the number of days he spent in the UK averaged less than 91

days a year if one were to discount (as the Exiguous Publication directed its trusting readers to do) the days in which he arrived in the UK and those in which he departed. He wrote to the factotums, informing them of the implications of the Rule and sat back as he awaited confirmation.

However, nothing in life is that simple and he had simply sown the seeds of a long-running dispute. I hasten to add that Mr. Gaines-Cooper is an individual and not a company, lest anyone presuppose that that might be the basis on which the benefit of the Rule be denied to him. Notwithstanding this detail, however, the benefit was denied indeed. The factotums sent a reply to Mr. Gaines-Cooper in which they communicated many interesting thoughts and most interesting of which (for the present purposes) was their view that the Exiguous HMRC Publication, being an HMRC Publication, was exiguous. In determining where Mr. Gaines-Cooper was resident, it was the position at law which really counted. And as far as the law counted, Mr. Gaines-Cooper had remained resident in the UK during the relevant years.

### **The Special Commissioner's Decision**

Before we can turn to the present judicial review, it is worth tracing the route which the dispute had previously negotiated through the judicial system of the land in arriving at this juncture. Mr. Gaines-Cooper appealed certain assessments, which were predicated on the basis that he was resident in the country, to the Special Commissioners. In this hearing, the point was made on his behalf that HMRC, in resiling from their stated position, were committing an sneaky volt-face and that on the basis of the Exiguous Publication, Mr. Gaines-Cooper ought not to be treated as resident in the country. Unfortunately, however, the Special Commissioners noted (at paragraph 100 of their decision) their agreement with HMRC regards the exiguity of the Exiguous Publication. So the question as to whether HMRC were bound by it passed into abeyance.

The Special Commissioners then went on to hold that what really mattered for the purposes of determining the locality of Mr. Gaines-Cooper's residence was that most solid of foundations – the Law. It transpired that the Law in this area was most pithily encapsulated in the words of Viscount Cave LC who decided the case of *Levene v Inland Revenue Commissioners* (1928) 13 TC 486. His Lordship had decided that 'the word reside is a familiar English word' and that it 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'. The Special Commissioners courageously drew inspiration from these sacred words from the dictionary. They considered a significant range of factors pertaining to Mr. Gaines-Cooper and eventually concluded that, as far as the Law was concerned, he had remained resident in the country. They do not, in their decision, expressly prioritise any one of these factors over the others – however, it is worth noting that the frequency of Mr. Gaines-Cooper's visits to the country and the duration of his stay are listed first at (paragraph 166) before the other factors, such as his enduring personal, social and business connections with the country.

### **Judicial Review Hearing**

The decision of the Special Commissioners in the case of Mr. Gaines-Cooper also involved questions as to his domicile and his residence status under statute. The former issue formed the basis of an unsuccessful appeal to the High Court. After this appeal had been decided, the question as to the Exiguous Publication and whether the HMRC were bound by it, which had been held in abeyance

hitherto, was now resurrected on his behalf. An application was made for a judicial review of the HMRC decision to treat him as though he were resident in the country. The case was heard in November last year. At the hearing, HMRC performed an arabesque move and admitted that the Exiguous Publication was not exiguous after all and that they were indeed bound by it. However, they then argued that the Rule in the Formerly Exiguous Publication did not apply as far as Mr. Gaines-Cooper was concerned (which was a lot). This because the Rule was predicated on the individual having 'left' the country and Mr. Gaines-Cooper had not left the country.

The Court of Appeal delivered its judgement in February 2010. The leading judgement was that of Lord Justice Moses – who dismissed Mr. Gaines-Cooper's appeal. Lord Justice Ward agreed with him, though not without 'considerable hesitation', and Lord Justice Dyson too, though he demonstrated somewhat less hesitation. Lord Justice Moses, for his part, does not appear to have had any hesitation in arriving at this decision. After all, he agreed with the particular construction which had been applied to the Rule by HMRC for two separate reasons. First, on the basis that the meaning of the word 'left' was moulded by the context in which it found itself within the Formerly Exiguous Publication (paragraph 50). And the context was such that in order for an individual to have left for these purposes, there needed to be something equivalent to an upheaval. Second, on the basis that the Formerly Exiguous Publication clearly aimed to represent the position in Law and that in Law, in order for an individual to have forfeited his residence, it was necessary that there be a distinct break with his life in the country (paragraph 52). It therefore followed that, one way or another, the departure referred to in the Rule signified a concept more akin to a distinct break. Such were the vicissitudes to which the publication was subject that not only had it ceased to be exiguous, but it was now being interpreted with the solemnity and principles of purposive construction to which only statutes are normally subject. The author, whilst accepting that his powers of exegesis are no match for those of his Lordship (or of Lord Justice Dyson, who agreed with everything that was expressed by his Lordship), would now like to present his objections to both these lines of reasoning.

### **The First Objection**

The author turns to the first basis on which Lord Justice Moses arrived at his decision. As stated above, Lord Justice Moses held that the Rule had to be construed in accordance with the context in which it found itself. The Rule could be differentiated from the other rules found in the Formerly Exiguous Publication such as that found in paragraph 2.2 and titled, 'Full Time Work Abroad'. This rule states:

If you leave the United Kingdom to work full-time abroad under a contract of employment, you are treated as not resident and not ordinarily resident if you meet all the following conditions...'

If one were to have left for the purposes of this rule, then it would suffice that one had physically left the country. And so this rule would be satisfied if the individual, having 'left' in this sense of the word, then also met the 'following' conditions. However, the Rule was different from this rule. As seen above, the Rule was titled 'Leaving the UK Permanently or Indefinitely'. The exact wording was as follows:

2.7 If you go abroad permanently, you will be treated as remaining resident and ordinarily resident if your visits to the UK average 91 days or more a year...

2.8 If you claim that you are no longer resident and ordinarily resident, we may ask you to give some evidence that you have left the UK permanently, or to live outside the UK for three years or more. This evidence might be, for example, that you have taken steps to acquire accommodation abroad to live in as a permanent home, and if you continue to have property in the UK for your use, the reason is consistent with your stated aim of living abroad permanently or for three years or more. If you have left the UK permanently or for at least three years, you will be treated as resident and not ordinarily resident from the day after the date of your departure providing:

a) Your absence from the UK has covered at least a whole tax year, and;

b) Your visits to the UK since leaving:

- have totalled less than 183 days in any tax year and;

- have averaged less than 91 days a tax year.

2.9 If you do not have this evidence, but you have gone abroad for a settled purpose (this would include a fixed object or intention in which you are going to be engaged for an extended period of time), you will be treated as not resident and not ordinarily resident from the day after the date of your departure providing:

a) Your absence from the UK has covered at least a whole tax year and;

b) Your visits to the UK since leaving:

- have totalled less than 183 days in any tax year and;

- have averaged less than 91 days a tax year...

c) Your absence actually covers three years from your departure, or;

d) Evidence becomes available to show that you have left the UK permanently;

e) Providing in either case your visits to the UK since leaving have totalled less than 183 days in any tax year and have averaged less than 91 days a tax year.

Lord Justice Moses concluded that a simple departure would not suffice here and that if the Rule was to apply – the departure must be permanent (as the Rule itself suggested) or at least indefinite (as the title suggested). He appears to accept the meaning of the terms 'leave' and 'go abroad' could be obliquely gleaned from paragraphs 2.8 and 2.9, which elaborated the evidential standard which had to be met if reliance was to be placed on the Rule. Now, the standards set by paragraphs 2.8 and 2.9 are not especially high and it might be supposed that this hermeneutical reliance by the judge on them would be beneficial to the taxpayer. However, the judge felt that paragraph 2.8 demonstrated the need to cut all existing ties with the UK (paragraph 45). (He was particularly impressed by the following statement: 'if you continue to have property in the UK for your use, the reason is consistent with your stated aim of living abroad permanently or for three years or more').

With respect to the contention made on behalf of Mr. Gaines-Cooper that the evidential burden required by the alternative evidential test in paragraph 2.9 was clearly less onerous, his Lordship concluded that it would be absurd for the paragraph 2.9 test to be less onerous than that laid out in paragraph 2.8 and, accordingly, that the paragraph 2.9 implicitly required there to be a distinct break as much as did paragraph 2.8 (which, in his view, it did a lot).

Now, the author disagrees with all of these reasons. Of course, he accepts that the meaning of 'leave' ought to be contextualised by reference to other parts of the Formerly Exiguous Publication. But where exactly does one look to for this context? The Glossary does not define 'leave' and so all one has are the words found in the Rule itself (though the usage of language in the other rules may be looked to for the purposes of making a contradistinction). The Rule refers to a departure which is permanent or indefinite – and to that extent it is admitted that there must be something more than a mere flight across the Channel. But this is by no means the same as requiring that there be something akin to a 'severance of that which bound the taxpayer to the UK' (paragraph 47). Surely it is possible, is it not, to depart to travel the Silk Route for three years and yet not sever all relations within this country? As for the two evidential rules, the author agrees that these should indeed cast some light on the Rule. However, the author can see no reason as to how his Lordship construed paragraph 2.8 to require a distinct break – especially, when one considers the italicised sentence above with which he was so impressed. One would have thought that, if anything, this sentence establishes that it is possible to have left the country permanently whilst at the same time retaining ties with it. And as for paragraph 2.9, it seems that the judge, rather than use the plain words of this test to shed light on the Rule, made assumptions relating to the Rule (and paragraph 2.8) and instead used these to interpret paragraph 2.9 and recalibrate the test within it to a rather higher standard than the language imposes.

### **The Second Objection**

If Lord Justice Moses commenced his exegesis of the Rule by reference to other parts of the Formerly Exiguous Publication, he concluded it by reference to that most trustworthy of hallmarks – the Law. He states at paragraph 53:

Whilst IR20 is designed to guide and simplify, I cannot accept that it provides a warrant for ignoring so obvious a factor [i.e. distinct break] for determining whether a taxpayer hitherto resident and ordinarily resident in the UK has ceased to be so and has left permanently or indefinitely.

There are so many objections which spring to mind that the author is at a loss as to where to commence. So, whilst this part of the article is conveniently titled 'the second objection', it is actually a collection of the two primary objections to the incorporation of the purported common law 'distinct break' test within the Rule. First of all, it is a little curious (by use of which phrase the author means 'extremely astonishing', as must be clear from the context) that one should purport to interpret a guide, such as the Formerly Exiguous Publication, by reference to the Law which it purports to represent. This is especially so with respect to a judicial review application on the grounds for legitimate expectation. If all public body publications and communications were required to be construed by the reader with the law in mind, then there can hardly be any judicial review application which would succeed on those grounds. It is submitted that the correct procedure in such cases is for the judge to address the matter teleologically. In other words, to

consider the plain words which have been read and relied on by the applicant and whether they give rise to a legitimate expectation on his behalf – it is neither here nor there that these words accurately represent the law which they purport to.

Second, even if the judge's curious notion (that one must be guided by the Law in interpreting the guidance) were to be somehow accepted, it is far from settled as to what the Law in this area is. In particular, it is far from settled that the Law actually requires a distinct break in order for there to be a forfeiture of residence. The author is fully aware of the contrariness of this suggestion. But there it is. Lord Justice Moses mentions two cases in support of that proposition: *Re Combe* [1932] 17 TC 405 and *Clark v Reed* [1985] STC 323. The *Re Combe* case is invariably cited as authority for the proposition that in order to cease to be resident, there must be a distinct break. In this case, the individual left for an apprenticeship of three years in New York. He visited the UK for two months in the first year and then for five and then six months. Lord President Clyde decided that the individual was not resident without making reference to any such concept of distinct break. On the other hand, Lord Sands found that there had been a distinct break and that the individual was not resident. However, this is not tantamount to his stipulating that a distinct break was necessary to evince non-residence. The two things are not the same. This contrarian view of the author's has been corroborated by comments made by Dr. Brice in the case of Mr. Gaines-Cooper and the recent Court of Appeal case of Grace. Similar observations could be made with respect to the case of *Reed v Clark*.

It is not inconceivable that had he been made aware of the flimsiness of the precedents (and the author is not saying that attempts were not made in that direction), Lord Justice Moses would have been less inclined to reach the conclusion which he did (and that Lord Justice Ward would have agreed with him). Furthermore, to the extent that the distinct break test is not currently part of the Law, there are various objections to it now being introduced. First, to do so could convert the test from an examination of one particular year to an inquisition of the individual's entire history. This would place an almost unbearable administrative burden on the taxpayer – especially in cases where he first left the country years ago. The author is not suggesting that the nature of the individual's connections with the country be rendered obsolete. Simply, that it would be far more preferable to consider the nature of the individual's connections with the country as they are in the relevant year. Second, it is not clear as to what would constitute a complete break. How would one demonstrate 'a severance of ties with things which bind us to the country'? Is there an HMRC form which one would have to complete in which one could elect to sever relations with one's aunt? Furthermore, in some cases there may well be a complete break with the country – though affected gradually and over the course of years. It is not clear what the position would be in respect to such circumstances. Lastly, might it be suggested that if a distinct break is necessary in order to forfeit residence, then, by the same logic, a distinct connection ought to be necessary before an incoming individual becomes resident. So, the mere passing of days in the country should not result in residence if X is only in the country for (say) a short-term project. However, the courts have not always adopted such a symmetrical approach – for instance, consider the case of Cadawalder where the individual only visited for the purposes of shooting and was yet found to be resident.

## Conclusion

To summarise the author's case, it is acceptable for the courts to require the reader to take into account the entirety of the Formerly Exiguous Publication when trying to interpret the Rule. It is also agreed by him that this process of construction has the effect of imbuing the word 'leave' in the Rule with a particular freight of meaning - something over and above a mere physical departure. However, this is where he parts company with Lord Justice Moses. It is his view that the Rule, when interpreted under this method, requires that the facts must be such as are consistent with a departure of at least three years. But there is nothing in the publication to suggest that the departure should involve as severe an upheaval as to include 'a severance of ties with which the individual is bound to the UK'.

And as for the incorporation of any concepts external to the publication (such as those emanating from common law), this would be absurd. If the purpose of the Formerly Exiguous Publication was to provide a clear set of rules which achieved certainty, then it would completely undermine this purpose by incorporating within it the confusing common law principles. To insist on such incorporation would only really defer the confusion on to another level. Furthermore, such a principle would mean that no application for judicial review on the grounds of legitimate expectation could ever be successful. And lastly, even if a case could be made for the incorporation of the Law in the Rule, it is worth noting that it is far from settled that a distinct break is necessary in Law in order for an individual to forfeit his residence.

Ladies and gentlemen, the case of Mr. Gaines-Cooper represents yet another small step in the juggernaut march of the government in the direction of totalitarianism. What is worse that whilst the factotums of HMRC gallantly kept up appearances in court by admitting that they were indeed bound by the Formerly Exiguous Publication (and by then wriggling out of their resultant obligations through reliance on an unusual and unlikely construction of it), they have at the very same time withdrawn the publication and replaced it with another, which states expressly that no reliance can be placed on it at all. It is hard to see why the factotums would have done so if they did not in fact have any objection to being bound by the publication. In any case, the Formerly Exiguous Publication, having been briefly elevated to the status of statute, has now been rendered exiguous again – at least with respect to departures in 2009 onwards. And as for Mr. Gaines-Cooper, the author hopes for his sake (and that of others) that there will be an appeal. In the meantime, he has the author's sympathies. Despite his many talents, there is at least one career which is not for him and that is escapology. He left in 1975 but would never quite 'leave'. He is the man who never left.

With apologies to Jonathan Swift,

Setu Kamal

March 2010