GRIMM AND GRIMMER

Robert Venables QC[1]

1 Scope of the Article

The decision of Etherton J in *Grimm v Newman* [2002] STC 84 has understandably given rise to much criticism. It was an action for damages for loss allegedly occasioned by the negligent advice of the defendant accountant as to the operation of the Schedule E income tax remittance rules and in particular a gift abroad of foreign source income.

In this article, I shall deal with whether the advice given was wrong and what alternative advice might have been given.

I shall also comment on how we can all help to protect ourselves from actions in negligence, by ensuring, as far as possible both that they never occur, and, if they do, that the defence is conducted in the best possible way.

I have to make an admission. If I had been asked to advise in 1991, I would in all probability have given much the same advice as did the First Defendant and which was held by the Judge to have been negligent.[2] I rather suspect that so too would any other competent tax adviser. The entire problem appears to me to have been occasioned by the counsel who in 1997 advised that there was a problem. Mercifully for him, his identity is not revealed by the decision.[3]

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[2] I would, I hope, if sued, have defended myself much more vigorously and effectively.

[3] It is unknown to me.

2 The Basic Facts

The following account of the basic facts is taken from the judgment.

> "[3] Until 26th June 1996 the taxpayer was a citizen of the United States of America. He became resident in the United Kingdom in 1983. He became a citizen of United Kingdom on 6th January 1995. He continued, however, to be domiciled in the United States of America.
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> [4] The taxpayer is the managing director of Blue Ocean Associates plc. That company purchases petroleum in the wholesale market. Previously, the taxpayer was an employee within a Dutch group of oil companies, the Vitol Group (Vitol). Vitol paid its employees in part with Vitol shares.
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> [5] Vitol repurchased its shares from its employees from time to time. The repurchase of Vitol shares enabled the taxpayer to accumulate substantial sums and investments, which he maintained outside the United Kingdom.
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> [6] On 11th March 1991 the taxpayer countersigned a letter of engagement from the second defendants, by which the second defendants agreed, among other things, to provide the taxpayer with taxation advice from time to time. The first defendant, who, as I have already said, was then a partner in the second defendants, had a particular expertise in advising resident, but non-domiciled, individuals about United Kingdom tax liabilities.
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> [7] In 1991 the taxpayer became engaged to be married to Aurora Lombardi.
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> [8] The taxpayer was, at that time, living in rented accommodation. He and his fiancée decided that, following their marriage, they wished to purchase a house in London for themselves.
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> [9] The taxpayer sought the advice of the first defendant as to whether he could, without giving rise to United Kingdom tax, make his intended wife a gift from his assets outside the United Kingdom, which would then be transferred by her into the United Kingdom and used to acquire an interest for her in a house in London which they would purchase together. The initial inquiry from the taxpayer, and the initial response of the first defendant, were in September 1991. The initial response of the first defendant was favourable.
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> [10] The taxpayer married Aurora Lombardi on 29th September 1991.

[11] In late October 1991 the taxpayer sought the confirmation of the first defendant that the proposed gift to Mrs Grimm of assets of the taxpayer outside the United Kingdom, to be used for the purchase of a half-share interest for her in a house which they would jointly purchase in London, would not give rise to United Kingdom tax. Advice was also sought as to the making of additional gifts by the taxpayer to Mrs Grimm in the future. By letter dated 30th October 1991, the first defendant confirmed the proposals would not give rise to United Kingdom tax, provided there was no 'reciprocity' for the gifts, and with a warning as to large gifts on a regular basis.

[12] Pursuant to that advice, in November 1991 the taxpayer made a gift to Mrs Grimm of various assets outside the United Kingdom with a total value of approximately $US 685,000. He made a further gift to her of $US 100,000 in late January 1992. These gifts were made out of the proceeds of the redemption of Vitol shares.

[13] On 24th February 1992 the taxpayer and Mrs Grimm agreed to purchase Templewood Lodge, 1a Templewood Avenue, Hampstead, London NW3 (Templewood Lodge). The purchase price was £750,000. The solicitors acting for the taxpayer and Mrs Grimm on the purchase were Howell Jones & Partners.

[14] The purchase of Templewood Lodge was completed on 20th March 1992. A total of £386,983 was applied by Mrs Grimm towards the purchase. The balance of the purchase price and costs was funded by a £300,000 loan from First National Bank of Boston (Guernsey) Ltd (FNBB), which was secured on Templewood Lodge, and from other funds of the taxpayer.

[15] The first defendant advised the taxpayer that there was no need to report his gift to his wife in the taxpayer's tax return for the year ended 5th April 1992."

...

[20] The taxpayer alleges that the advice given by the first defendant was negligent and in breach of the second defendant's contract of retainer. In the particulars of claim he alleges that, in consequence of the negligence, he has suffered loss in the amount of £111,145. This amount represents what the taxpayer alleges is the aggregate of the tax he has had to pay on the remittances by Mrs Grimm to the United Kingdom out of the value of the gifts he made to her in 1991 and 1992, interest, wasted fees paid to the second defendants, and consequential expenses.

...

[40] On 18th October 1991, while in the United States, the taxpayer prepared and signed a letter to his wife in the following terms:

'Dear Aurora

On the occasion of our marriage and with love and affection, I hereby make a gift to you today of all my right, title and interest in the following assets [there is then set a number of shares and securities]

I have arranged for Prudential Bache, Louisville, Kentucky to set up an account in your name and these assets will be transferred to your account as soon as they receive all the necessary paper-work required.'

That letter did not constitute, under the relevant United States state law, a complete gift to Mrs Grimm of the specified assets. Under that law, the gift was not completed until the specified assets were transferred to Mrs Grimm.

...

[44] On about 15th November 1991 the assets specified in the taxpayer's letter to his wife of 18th October 1991 were transferred to Mrs Grimm. They had a net aggregate value at that date of $US 684,725·33.

...

[46] On about 31st January 1992 the taxpayer made a further transfer of $US 100,000 to Mrs Grimm. The first defendant was not specifically consulted in relation to the making of this transfer.

[47] Following a letter of instruction dated 1st February 1992 from Mrs Grimm to Prudential Bache Securities, a total of $US 786,000, realised from the aggregate of the gifts made by the taxpayer to Mrs Grimm, was transferred to her account with FNBB in Guernsey.

[48] By an agreement in writing dated 24th February 1992 the taxpayer and Mrs Grimm agreed to purchase Templewood Lodge for £750,000, and retained Howell Jones & Partners for that purpose.

[49] On 19th March 1992, FNBB, on Mrs Grimm's instructions, converted the $US 786,000 which had been transferred to her account and accrued interest

> into £454,763·23. Of that sum, she transferred £386,983 to Howell Jones & Partners for the purchase of Templewood Lodge.
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> [50] The purchase of Templewood Lodge by the taxpayer and Mrs Grimm was completed by a transfer dated 20th March 1992. The transfer, which was in a standard H M Land Registry form, stated that the property was transferred to the taxpayer and Mrs Grimm as 'joint tenants beneficially entitled'."

Hence, assets representing the Schedule E income were gifted to Mrs Grimm abroad and converted by her into "cash" in a deposit account in Guernsey. One rather gathers that it was transferred to an account with her solicitors which was situate in England before being applied in the purchase of her half share of the property.

3 Costs

Both Claimant and Defendants were represented by both Leading and Junior Counsel. Each had an expert witness. The case has now gone to the Court of Appeal where, it is understood, the Defendants will for the first time be instructing Revenue Counsel. This must surely be a case where the costs being racked up are out of all proportion to the amount involved and where, even if he is ultimately successful, the Claimant may not make a very high net recovery, when one takes into account the difference between his real costs and his costs taxed on the standard basis, which is the most he can expect to recover from the Defendants.

4 Expert Witnesses and Counsel

Each side had an expert witness. The Claimant's was Mr Simon Jennings, a chartered accountant, and a partner in Rawlinson & Hunter. The Defendant's was "Mr R E Churchill, formerly an employee of the Revenue for 22 years, eventually reaching the rank of inspector (principal), with authority to act on behalf of the Board of Inland Revenue. Although he is not himself qualified as a chartered accountant, he is a partner in Day, Smith & Hunter, chartered accountants, and is head of taxation for that firm."[4]

Counsel for the Defendant, John Ross QC and Andrew Warnock, are not members of the Revenue Bar Association and, so far as I am aware, have no expertise in taxation matters. Leading Counsel for the Claimant was Peter Trevett QC, who is

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4 Paragraph 34 of the Judgment.

a member of the Revenue Chambers at 11 New Square, Lincoln's Inn. It is a truism that when things go wrong, they go badly wrong. This is particularly true of negligence actions. It seems to me quite extraordinary that those advising the Defendants should have believed that the defence could be properly conducted without the assistance of Revenue Counsel or at least of a legally qualified practitioner specialising in Revenue law. If it has done nothing else, the judgment should have disabused them of that belief.

The Judge had the following to say about the expert testimony:

> "[35] Although I am satisfied that both experts were doing their best to assist me, I found their evidence of limited value in the resolution of the issues in the proceedings. A substantial part of their evidence appeared to be directed to establishing whether, as a matter of law, the remittance of the money by Mrs Grimm to the United Kingdom and applied in the purchase of Templewood Lodge gave rise to a charge to tax on the taxpayer. That, it seems to me, is a matter for the court and not one for expert evidence. ... Further, a considerable part of the report and evidence of Mr Churchill was directed to what, in his experience as a past inspector of taxes, would have been the view of the Revenue as to the interpretation of the statutory provisions governing remittances to the United Kingdom by resident, but non-domiciled, individuals. The relevant issue, however, for my purposes, is what a reasonably competent accountant would have considered to be the meaning and effect of the statutory provisions, and, most critically, the way in which a reasonably competent accountant tax adviser, with the same specialism as the first defendant, would have responded to the request for advice from the taxpayer in 1991."

Now the Judge was strictly correct in saying that the question whether there was a charge to tax on the Claimant was a question of law, and therefore a matter for the court to decide after hearing legal argument, and not one for expert evidence. I agree that it looks odd that persons who have no legal qualifications should hold themselves out as expert to advise Her Majesty's Judges on matters of pure law. And if one has counsel on both sides who are thoroughly competent in Revenue matters, they can make the points in their skeletons and speeches. Yet it must be admitted that in practice this rule is relaxed in Revenue matters. A statement in an expert witness report as to the state of the law is a not unhelpful way of setting out the issue between the parties.

Where an expert witness does come into his own is on the issue what advice a reasonably competent person in the position of the Defendant would have given at the time it was given. This is not something the Judge would normally have any knowledge of. It is, of course, normally impossible to advise on that issue without first setting out the then common understanding of what the basic law was. It does not appear from the judgment that much importance was attached to this issue in this case.

For similar reasons, I cannot agree that the Judge was right to reject as irrelevant the evidence of Mr Churchill as to the views of the Revenue. As all taxation practitioners know, if the Revenue do not consider that there is a charge to tax, then *de facto* there is none. For no one but the Revenue has any incentive to argue that there is. We are constantly advising clients that while, in our view, the "meaning and effect of ... statutory provisions" is that there is a charge to tax, yet it is clear that the Revenue's practice is not to exact any. Indeed, we are more likely to be held negligent if we are unaware of the Revenue's practice, at least if it can be discerned from published pronouncements, such as Statements of Practice, Revenue Interpretations and Extra-Statutory Concessions.

5 The Judge

Etherton J is a young and highly intelligent judge who had a distinguished career at the Chancery Bar. Yet the best judge in the world relies heavily on the assistance of counsel. English judges have no research assistants. No matter how bright they are, they cannot be expected to be knowledgeable on specialist areas of law, such as Revenue law, and its practice. In my view, the criticisms levelled at the Judge are largely misconceived.

6 "Was the Advice Negligent?"

6.1 Facts and Issues

Under the heading "Was the Advice Negligent?", the Judge set out further facts:

> "[37] The first defendant replied by letter ... in the following terms:
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> > '... It is possible for Rick to gift funds on the occasion of his marriage to his wife from his funds outside the UK, which would not be taxable in the UK. He may gift (say) enough funds for his wife to buy her half share of the house in London and provided that this is a gift on marriage this would be okay. ..."

> [42] The first defendant replied by letter dated 30th October 1991, which is in the following terms, so far as relevant:
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> > '... The gift of $695,000 is okay provided it is made outside the UK and there is no reciprocity. The gift to purchase a half share in their marital home may go ahead without any UK tax consequences.'
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> [51] Neither the second defendants generally, nor the first defendant in particular, were involved in the conveyancing arrangements for Templewood Lodge.
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> [52] The purchase price for Templewood Lodge and related expenses were paid partly with the £386,983 transferred by Mrs Grimm to Howell Jones & Partners, partly with a loan of £300,000 from FNBB secured on the property, and partly with other funds of the taxpayer."

The Judge set out the Claimant's case at paragraph 55. It was that:

> "Templewood Lodge was purchased by the taxpayer and Mr Grimm as beneficial joint tenants. Accordingly, the money transferred by Mrs Grimm to Howell Jones & Partners acquired for the taxpayer a proprietary interest and right of occupation in the entire property, and also a right to acquire the whole property if Mrs Grimm should pre-decease the taxpayer."

I shall consider these two arguments again below.

The Judge rejected a further submission on the Claimant's behalf, that his ability to purchase an interest in the property, and thereby to gain a right to occupy it, could only have been achieved by a charge over the entire property, which itself could only have been acquired with the assistance of the contribution to the purchase price made by Mrs Grimm. The Judge's reason was that "the effect of equitable accounting on any sale of Templewood Lodge was that any mortgage loan taken out by the taxpayer, for the purpose of his contribution of half the purchase price, would be deducted solely from his share of the proceeds of sale." The Judge was in my view quite right to reject[5] the argument that the giving of a security interest over United Kingdom situate property representing the gifted income could amount to a remittance of the income by the Claimant. Had he approached in the same way the

[5] At paragraph 76 of the judgment.

question of joint tenancy, discussed below, he would not have gone far wrong.[6] The judge continued, at paragraph 57, recording the submissions on behalf of the claimant:

> "Mr Trevett and Mr Jefferis submitted that, in the light of the width of the charging provisions relating to Case V of Sch D, Case III of Sch E, and s.12 of the [Taxation of Chargeable Gains Act], and in the light of the gloss on those provisions by Lord Radcliffe in *Thomson (Inspector of Taxes) v Moyse* [1961] AC 967,[1960] 39 TC 291 and by Templeman J in *Harmel v Wright (Inspector of Taxes*) [1974] STC 88,[1974] 1 WLR 325, it is clear that the remittance to the United Kingdom by Mrs Grimm of the assets given to her in 1991 and 1992 by the taxpayer gave rise to a charge to tax."

6.2 The Real Point

Now that was an impossible submission. The remittance to the United Kingdom occurred when Mrs Grimm transferred funds from her account with FNBB in Guernsey to her account with Howell Jones & Partners in, I assume, England. There is no question on the authorities of that giving rise to a charge to tax on her husband. See *Carter (Inspector of Taxes) v Sharon*[7] and *Timpson's Executors v Yerbury*.[8] The argument for the Claimant was that he became liable to tax because he had purchased Templewood Lodge as joint tenant with his wife and she had used the remitted income to buy her "share", which conferred some sort of benefit on him. That argument was, in my respectful view, quite untenable. Had there been an impartial[9] and legally qualified tax adviser in the court, it would soon have been dispatched. It is now clear that on the Revenue's view of the law, the Claimant would not even have been taxable if his wife, having purchased her "share", had then gifted it to him in its entirety. For, although he would have been beneficially entitled to assets situate in the United Kingdom which represented the income, those assets would not have been "money".

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6 It was further submitted on behalf of the Claimant that Mrs Grimm paid more than half the purchase price of Templewood Lodge and associated costs and expenses. The Judge refused to reach that conclusion on the evidence: see paragraph 77 of the judgment. The question whether that would have amounted to a remittance by the Claimant and, if so, of what amount, did not therefore arise.

7 [1936] 1 All ER 720, 20 TC 229

8 (1936) 20 TC 154, [1936] 1 KB 645. This Court of Appeal authority does not appear to have been brought to the Judge's attention.

9 One could hardly expect Mr Trevett QC to argue the points against his client's interest.

The Inland Revenue Inspector's Manual Provides:[10]

"1564. Received in UK

1. The meaning of 'sums received in the United Kingdom' in ICTA 1988, s.65(5)(a) and (b) was considered in the House of Lords' judgments in *Thomson v Moyse*, 39 TC at page 328 onwards. Income is received in the United Kingdom if *funds* provided in the United Kingdom are derived from income arising overseas. The precise mechanisms of banking and commerce used to achieve this result are immaterial. *The receipt may be in any commercially recognised form of money, for example, cash, notes, cheques, promissory notes, bills of exchange, or financial credit. Such money* does not have to be physically imported. It may be received from another United Kingdom resident in respect of the transfer to him abroad of money or assets representing the income. *The money* need not be received by the taxpayer himself but by a third party on his authority, for example, in settlement of a debt between the taxpayer and the third party.[11]

Where, however, the receipt is in the form of a *cheque*, the sum is received in the United Kingdom when it is realised in the United Kingdom, for example, it is *credited to a United Kingdom bank account* (*Parkside Leasing Ltd v Smith*, 58 TC 282), *exchanged for cash* in the United Kingdom (through a bank or otherwise), accepted by a third party in settlement of a debt owed by the taxpayer or given away as a gift.[12] *A cheque* representing income assessable under Schedule D, Case IV or V, which is received in the United Kingdom by or on behalf of the taxpayer but is sent abroad and credited to the taxpayer's overseas bank account *is not* a 'sum received in the United Kingdom'.

The investment of income abroad does not change its character as income and whether the investments or assets are realised abroad and the proceeds remitted here (*Walsh v Randall*, 23 TC 55, and *Patuck v Lloyd*, 26 TC 284) *or whether they are transferred here and then realised* (*Scottish Provident Institution v Farmer*, 6TC34), such transactions give rise to 'sums received'. On the other hand, *the mere transfer to the United Kingdom of such investments or assets other than commercially recognisable forms of money does not constitute 'sums*

10 Italics supplied.

11 This last statement is too wide, but that is a point beyond the scope of this article.

12 The words "accepted by a third party in settlement of a debt owed by the taxpayer or given away as a gift" are again too wide, but that point too is beyond the scope of this article.

> *received'* (*Scottish Widows' Fund Life Assurance Society v Farmer*, 5 TC 502).
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> ...
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> 1565. Gift abroad
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> It may be claimed that income arising abroad has been alienated from the taxpayer's possession by gift abroad (for example, to a relative) so that it is no longer his income when received in the United Kingdom. This may be challenged on the grounds that the gift was not completed until the income was received in the United Kingdom *(Timpson's Executors v Yerbury*, 20 TC 155) or that *financial consideration* for the 'gift' has been received in the United Kingdom. Before any such claim is accepted, a full report should be made to International Division (Cases IV and V), Strand Bridge House."

Just as "the mere transfer to the United Kingdom of such investments or assets other than commercially recognisable forms of money does not constitute 'sums received'", so too, the acquisition in the United Kingdom of investments of assets, such as a home or a share in a home, does not represent "sums received".[13] It follows from this that Mr Grimm would have escaped taxation had he transferred his share of the purchase price to the vendor outside the United Kingdom - a simple enough expedient.[14] He could be no worse off because, between his alienating the income abroad and his becoming entitled to its fruits in the shape of a non-monetary asset in the United Kingdom, the fruits had for a while existed in the United Kingdom in a monetary form to which he had no entitlement and in respect of which he enjoyed no benefit. In fact, he fell far short of becoming entitled to the fruits of the income in the United Kingdom. *A fortiore*, he could not be taxable.

Now that point, if taken, would have been enough to dispose of the claim. It was not taken. So the judgment proceeded on a wholly artificial basis.

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[13] See *Thomson (Inspector of Taxes) v Moyse* [1961] AC 967,[1960] 3 All ER 684, 39 TC 291, HL.

[14] I should make it clear that I do not criticise Mr Newman for not in 1991 having suggested this simple expedient. I myself took the view that a remittance in kind was a sufficient remittance to cause taxability and it was not until the Revenue manuals were published that I realised that that was not the Revenue's view.

6.3 The Judge's View

The Judge said

> "[61] ... the Revenue had a strong case for contending that the transaction did give rise to a charge to tax under Case III of Sch E".
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> [64] ... It seems to me, in the light of the very wide scope of the charging provisions relating to Case V of Sch D, Case III of Sch E, and s.12 of the 1992 Act, as elucidated in the case law to which I have already referred, that the Revenue had a strong argument that the transaction fell within those 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 a 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's 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 could 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 possibly 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."

The Judge had set out his view of the law in the section of his judgment headed "The Tax Legislation and Principles".

> "[21] An individual who is domiciled outside the United Kingdom, but is resident and ordinarily resident in the United Kingdom, is liable to United Kingdom taxation on income, profits and capital gains to the extent that they are remitted to the United Kingdom.
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> Income from possessions out of the United Kingdom
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> [22] Under the provisions of the Income and Corporation Taxes Act 1988 (the 1988 Act) ss.18 and 65(5)(b), income from possessions outside the United Kingdom is subject to United Kingdom income tax under Case V of Sch D-

> '... on the full amount of *the actual sums* received in the United Kingdom in the year of assessment 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 on credit or on account in respect of any such remittances, property, money or value brought or to be brought into the United Kingdom ...'[15]

[23] Those charging provisions have been given a wide interpretation by the court. Lord Radcliffe said the following, in relation to them (in their previous statutory form), in *Thomson (Inspector of Taxes) v Moyse* [1961] AC 967 at 995-996, 39 TC 291 at 335-336:[16]

> 'It is true that the rule then goes on to list a number of sources from which sums to be computed may have been received; and this additional wording has, I think, been the origin of some of the mystification which has crept into this branch of law. There has been a tendency to treat these several instances of the way in which income may be remitted as if they were limiting the generality of the phrase "actual sums received in the United Kingdom" and it may be said in defence of such a reading that the strict grammar of the sentence does so suggest. In my view, however, it would be wrong to give any weight to this; for I cannot think that it was ever the intention of the legislature to say in effect that whereas under Case IV all sums of foreign income were to be computable, if received in the United Kingdom, under Case V only those sums of income received were to be computable which were attributable to the specified operations or sources. There could be no reason for such a distinction. I think, therefore, that these four sub-heads, as they have been called, should be treated as illustrations, no doubt intended to form a comprehensive list of illustrations, of the way in which, when foreign income is transmitted to this country, the transmission can be effected *and the sterling sums obtained*. These sub-heads, which are not all very clearly phrased, should accordingly be construed according to their general sense and without too much nicety of language. For instance, "remittances payable in the United Kingdom" is a phrase capable of applying to the instrument employed to effect the transfer, to the credit arising from the transfer and, I think, to the whole operation of remitting *money to be paid here*.'"

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15 Italics supplied by RV.

16 Italics supplied by RV.

Now *Thomson v Moyse* was a case where the taxpayer finished up owning money situate in the United Kingdom which represented the foreign income. There was no question of his enjoying some other benefit in the United Kingdom. The italicised words show this very clearly. His argument, which the House of Lords rejected, was that the remittance had not occurred by one of the methods mentioned in the statute.

The Judge continued:

> "Income from employment
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> [24] A non-domiciled individual, who is resident in the United Kingdom and is employed by a foreign resident employer, for example, a foreign company, is subject to income tax under Case III of Sch E on the remittance basis in respect of emoluments 'received in the United Kingdom' for duties of the employment performed wholly outside the United Kingdom (see ss.19 and 192 of the 1988 Act). Section 132(5) of the 1988 Act provides the following wide definition of 'received in the United Kingdom', for this purpose -
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> > '... emoluments shall be treated as received in the United Kingdom if they are paid, used or enjoyed in, or in any manner or form transmitted or brought to, the United Kingdom ...'
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> Capital gains
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> [25] Section 12 of the Taxation of Chargeable Gains Act 1992 (the 1992 Act) imposes a charge to tax on the remittance basis in relation to gains accruing to individuals resident or ordinarily resident, but not domiciled, in the United Kingdom, from the disposals of assets situated outside the United Kingdom. Section 12(2) describes a chargeable remittance in the same wide terms as s.132(5) of the 1988 Act.
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> Constructive remittance
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> [26] In *Carter (Inspector of Taxes) v Sharon* (1936) 20 TC 229 Lawrence J held, on the facts of that case, that there was no charge to tax under Case V of Sch D in respect of a gift by a person domiciled outside the United Kingdom, where the gift was completed outside the United Kingdom, and even though the donee subsequently brought the gift to England and the donor was resident in England at that time.

"[27] On the other hand, *Harmel v Wright (Inspector of Taxes)* [1974] STC 88,[1974] 1 WLR 325, a case concerning Case III of Sch E, establishes that a charge to tax will arise, on the remittance basis, if an artificial 'conduit pipe' can be identified, through which the foreign source income or gain can be treated as passing from abroad to the financial benefit of the non-domiciled individual in the United Kingdom. In that case, the taxpayer, who was born and domiciled in South Africa, but resident in England, was employed by South African employers. In order to reduce his liability to United Kingdom tax on his annual salary of £25,000, the following scheme was devised. He was paid his salary in South Africa. He used the money to subscribe for shares in a South African company, in which he owned all the shares. That company loaned the money to another South African company, which then lent the money to the taxpayer in London. Templeman J held that the taxpayer had properly been assessed to tax under Sch E on the amount of the loans to him in London. Templeman J said ([1974] STC 88 at 93-94,[1974] 1 WLR 325 at 328):

> 'Has the taxpayer received in the United Kingdom emoluments from the South African company? Although at various stages different cheques are written on different accounts, one can, with fascination, with certainty and no difficulty at all, follow, for example, a salary of £25,000 paid by cheque from the South African company to the taxpayer; then by cheque by the taxpayer to Artemis; then by cheque by Artemis to Lodestar, and finally by cheque by Lodestar to the taxpayer in England. Ignoring for the moment exchange control and the possibility that some cheques will be in rands and others in sterling, and ignoring the costs that will drip away, that sum begins in South Africa from the employers of the taxpayer and ends up in this country with the taxpayer. In my judgment, on the peculiar circumstances of this case-and I say nothing about other cases where it may be possible that the money does, en route, disappear and it is not possible to follow with the same certainty as in the present case-the sums which the taxpayer eventually receives represent and are the emoluments which start off from his South African employers in the first place ... It is true that [the original sum of £25,000] is paid over at one stage as purchase price for shares, and it is true that one cannot normally identify money, but in the present case you can; you do not need to get behind the corporate veil to perceive and know that the £25,000 which goes in as purchase price for shares comes out on the instant in the form of the loan to Lodestar. In my judgment, on the wording of s.156, one does not need to strip aside the corporate veil if you find that emoluments, which mean money, come in at one end of a conduit pipe and pass through certain traceable pipes until they come out at the other end to the taxpayer.'

Having referred to *Thomson (Inspector of Taxes) v Moyse* [1961] AC 967, 39 TC 291 and cited passages from the speeches in that case of Lord Reid and Lord Radcliffe, Templeman J went on to say ([1974] STC 88 at 96-97,[1974] 1 WLR 325 at 331):

> 'Counsel for the Crown submitted in the alternative that the word "received" should now be given a slightly wider extension because of para 8 of Sch 2 to the Finance Act 1956, which requires that "emoluments shall be treated as received ... if they are paid, used or enjoyed". He does not submit that "paid, used or enjoyed" substantially alter the authorities on receipt or the test adumbrated by Lord Radcliffe, but he does say in a proper case they can shed light on and possibly give some small extension to the word "receipt". If one asks whether, in fact, the original sums paid in South Africa have been used or enjoyed in any manner or in any manner or form transmitted, it is difficult to avoid the conclusion that they have been used, enjoyed and transmitted. All I need to say is that para 8 is not inconsistent with the result I reach by construing s.156 in the light of the authorities.'

[28] The facts, reasoning and decision in *Harmel v Wright (Inspector of Taxes)* highlight the breadth of what constitutes a remittance to the United Kingdom under the statutory charging provisions which I have set out above, by virtue both of the express broad wording of s.132(5) of the 1988 Act and s.12 of the 1992 Act, and also the approach to construction taken by the court in *Thomson (Inspector of Taxes) v Moyse* and *Harmel v Wright* (*Inspector of Taxes*) itself."

Harmel v Wright was a case which has borne its own share of criticism. There are many who consider that the arguments of Lord Nolan[17] for the taxpayer are sounder than the reasons given by Templeman J in his judgment. Let us, however, assume that it is correct. The crucial point is that the taxpayer ends up being beneficially entitled to *money* situate in the United Kingdom. That is what is meant when it is stated that what he receives in the United Kingdom is a "financial benefit". The only unusual point about the case was that he had alienated the income abroad and received shares into which the income was traceable. Templeman J held that it was enough that one could trace the cash he had alienated abroad into cash he received in the United Kingdom. That is a far cry from the present case where it is alleged merely that the taxpayer obtained some benefit from the application of the money in the United Kingdom.

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17 Michael Nolan QC, as he then was.

So the Judge applied the wrong test. In my respectful opinion, he further applied that test wrongly. It will be recalled that he said, at paragraph 64 of the judgment:

> "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 possibly 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."

It seems to me that the existence of a joint tenancy, as opposed to a tenancy in common, conferred on the claimant a benefit of no importance whatsoever. True, if he survived his wife, he would take her share by the *ius accrescendi*. In return for that, he had a reciprocal right to take her share if he himself survived. Indeed, given that wives normally survive their husbands, he was notionally worse off in being a joint tenant. That however, is not the crucial point, which is that the right of survivorship was completely precarious, as Mrs Grimm could unilaterally sever the joint tenancy at any moment. Mr Grimm's rights were as precarious as his right to any of her property which he might take under her will or on her death intestate. What is odd is that the Judge does not even mention this rather obvious point, but does record - and reject - a much less obvious argument on the part of Counsel for the Defendants.

It is noteworthy too that the Judge goes on to state that this benefit was "plainly a financial benefit to him". It was certainly not a "financial benefit" in the sense in which that phrase is understood in the law of remittances, namely a benefit in "money".

7 Certainty of Advice

It was submitted on behalf of the Defendants that "it must have been, or ought to have been, obvious to the taxpayer in 1991 and 1992 that there was no certainty that the proposed arrangements would avoid tax on assets intended to be given by him to Mrs Grimm and remitted by her to the United Kingdom for the purchase of the proposed new home."[18] The Judge rejected this argument. He stated, at paragraph 73 of his judgment:

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[18] See paragraph 70 of the judgment.

> "I find, as a fact, that both the taxpayer and Mr Ott believed that, if the taxpayer acted in accordance with the proposals in the letter from Mr Ott to the first defendant dated 22nd October 1991 and the advice contained in the first defendant's reply to Mr Ott dated 30th October 1991, the proposals would not give rise to a taxable remittance. Furthermore, in my judgment, in view of the unqualified terms of the letter of 30th October 1991, their belief in that regard was reasonable."

The moral is that while all of us who advise on tax know that the strategies on which we advise and which are 100% bound to succeed are the exception rather than the rule and while we expect our clients to be canny enough to realise that, especially if they are astute men of business rather than lottery winners, a Chancery judge who has no experience of tax advising may take a very different view. In future, we shall have to head all our advice with an incantation in the form of a health warning such as:

> "The Commissioners of Inland Revenue are likely to be most unappreciative of your efforts to reduce your burden of taxation. You should expect them to scrutinise very carefully any and every claim that you have succeeded. While due care has been taken in the giving of the following advice, which represents our considered view, no guarantee can be given that the Revenue will agree with us or that, if they do not, they may not ultimately persuade some tribunal of the correctness of their views."

8 How Much Advice?

The Judge said, at paragraph 75 of his judgment:

> "The first defendant gave evidence that he expected to be asked to consider and advise again when the assets given to Mrs Grimm by the taxpayer were actually remitted by her to the United Kingdom or the new property was about to be purchased. He said that he expected to work with the conveyancing lawyers acting on behalf of the taxpayer and Mrs Grimm. I find, on the facts, that this expectation was not one which it was reasonable for him to hold, and is not one which would avoid liability for breach of duty of care. The first defendant did not at any time advise the taxpayer, whether in writing or orally, that he should be asked to advise again in those circumstances or that he should be asked to liaise with the conveyancing lawyers."

When I was younger, I was often amazed how often I would give very complicated advice to clients which they would then implement without coming back to me.

Where conveyancing was involved, quite inadequate instructions would sometimes then be given to conveyancing solicitors who had no knowledge of the tax implications. I now routinely make it clear that my advice is given in principle only, that the devil is very often in the detail of the drafting and that I expect to be instructed further if my advice is to be implemented.

9 Causation

Even if a defendant is negligent, he is liable to compensate the claimant only for the damage caused thereby. The defendant is not liable to put the claimant in the position he would have been in had the negligent advice been correct. As the Judge stated:

> "[83] It is a critical part of the defendants' case that, if further or fuller advice had been given to the taxpayer casting doubt on the advice given in the letter of 30th October 1991 to Mr Ott, the taxpayer would either have not proceeded at all at that time with the proposal to acquire a new home with his wife, or he would have gone ahead with the purchase of a house in a way that would have given rise to tax. The defendants submit that, in either case, the taxpayer will have suffered no loss attributable to any negligent advice given by the first defendant."

Now the Claimant's case had not been prepared quite so thoroughly on this aspect. The Judge referred to

> "[93] ... the answer of the taxpayer to the question, raised in the defendants' request for further information dated 24th October 2000, 'What advice do you allege the Defendants should have given to you, but failed to give to you?', namely: 'They should have advised that to make a gift in the US and remit the money to the UK for the purchase of a house from which the taxpayer would benefit would inevitably have created a UK tax liability'"

and commented "that the scheme finally formulated by Mr Trevett does not sit comfortably" with it.[19]

On the basis of the answer, it would have been impossible for the Claimant to demonstrate any loss. For if the Claimant had still procured that the funds were used to buy the house, he would have reaped a huge profit on its subsequent sale,

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[19] That answer was no doubt made before Mr Trevett became involved in the case.

which more than wiped out any loss arising from payment of tax. And if he had abstained from so doing, he would have paid no tax. What the Claimant had to show was that he ought to have been given some other advice which would have enabled him and his wife to proceed with the purchase without any liability to taxation.

It is at this stage that the case becomes most unsatisfactory. The learned Judge appears to have been extremely indulgent in allowing the Claimant to develop a new case, which one rather gathers had not been sufficiently raised in the pleadings or supported in evidence. He said:

> "[91] The issue of what alternative tax schemes might have been put in place, in order to avoid United Kingdom tax on a remittance or constructive remittance, was addressed only briefly in the oral evidence. It arose only in the context of the cross examination of the first defendant. He was asked whether he had advised his other clients about schemes for the purchase of property in the United Kingdom, without giving rise to United Kingdom tax on remittances. The various schemes that were put to him were arrangements for a bank loan to be made abroad, by deposit of matching funds abroad with a lender bank, the purchase of property in the United Kingdom in the name of off-shore trustees and the purchase of property by an off-shore company. As I have said, the taxpayer himself was not asked about and did not say which, if any, of these schemes he would have implemented, if advised. On this state of the evidence, I am not prepared to find that the taxpayer would have entered into a scheme by which a property would be purchased in the United Kingdom in the name of off-shore trustees or an off-shore company. It appears, from what I was told by Mr Trevett and Mr Jefferis, that in order to avoid tax the taxpayer could not be a beneficiary of any such trust of property in the United Kingdom, nor could he be a director of any such off-shore company. I have absolutely no idea, on the evidence, whether the taxpayer would have agreed to such a situation, and I therefore decline to find that he would. This aspect of the case, therefore, rests on whether I am able and willing to find, as a fact, that, if so advised, the taxpayer would have entered into a scheme, in which sufficient money would be raised by way of a loan made abroad, to purchase a suitable property in the United Kingdom, such loan being backed by a deposit of foreign assets."

The references to offshore trusts and offshore companies are tantalising. One would love to know (a) why it was thought that the Claimant could not be a beneficiary of such a trust and (b), on the basis that the main argument was valid, how any planning involving a trust was supposed to work, whether or not he was a beneficiary. One would also love to know how any planning involving an offshore company would have been expected to work, given again the main argument and the possibility of the Claimant being a shadow director. *(R v Allen* [2001] UKHL 45; [2001] STC 1537 was decided by the House of Lords on October 11th 2001, during the course of the hearing.) Possibly, we shall be educated further when the case is heard by the Court of Appeal.

The Judge continued:

> "[92] The first defendant accepted, in cross examination, that such a back-to-back loan scheme would be effective to avoid United Kingdom tax, subject to s. 65(8) of the 1988 Act. That sub-section provides, in summary, that, in order to be tax effective, the income from the foreign assets cannot be used to discharge or secure the capital of the loan. This would seem to provide an insuperable difficulty in the case of the taxpayer's Vitol shares. Mr Trevett accepted that the Vitol shares were the product of some kind of employee share scheme and would be regarded as income for United Kingdom tax purposes."

I interrupt the quotation to comment that it is not at all clear to me why there should have been an insuperable difficulty in respect of the Vitol shares.

> "At the very end of his submissions in reply, at the very end of the trial, Mr Trevett sought to deal with this problem by saying that the taxpayer could have made the gift to his wife, as he had done, and the funds in her hands would have been capital, which she could have deposited with a foreign bank lender as a back-to back arrangement for a loan."

After brushing aside the powerful protestations of Mr Ross QC for the Defendants at the way this vital part of the case had developed, the Judge said:

> "[94] Nevertheless, it seems to me right that the taxpayer should be able to advance the case that he would have proceeded with the proposal to acquire a new home in London by making an overseas gift of overseas assets to his wife, which she then would use to raise an overseas loan, if he had been advised that such an arrangement would clearly and certainly not give rise to United Kingdom tax. The taxpayer's position that he would have gone ahead with the purchase of property, if he had known that the first defendant's advice was not correct, and would and could have done so in a way that would not give rise to United Kingdom tax, is not inconsistent with the taxpayer's pleaded case. Further, the first defendant himself confirmed, as I have said, in his oral evidence that the off-shore back-to-back loan scheme would be effective for tax purposes and had been the subject of advice by him to clients. Further still, the first defendant's attendance note of 2nd January 1992 makes clear that he was aware that the taxpayer was intending to enter into a foreign loan arrangement, and the first defendant advised that, provided the interest on the mortgage was

paid outside the United Kingdom out of non-United Kingdom earnings, it would not constitute a taxable remittance to the United Kingdom."

Now I respectfully agree that the strategy mentioned would have worked, provided it was properly structured to take into account the anti-avoidance subsections in Taxes Act 1988 section 65. So too, in my view, would the much simpler strategy of the Claimant borrowing the money himself on a back-to-back loan. The only drawback with such a strategy is that the overseas bank would take an annual "turn".[20]

What is odd is that:

> on the one hand Counsel for the Claimant should have been prepared to advance, and the Judge to accept, the proposition that the width of the Schedule E remittance rules was so great as to catch a taxpayer who makes a gift of income abroad to his wife which she converts into an interest in United Kingdom situate real property, simply because he is a joint tenant with her of that property, having provided his full share of the purchase price while
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> none of them found any difficulty with a scheme under which the offshore income was effectively enjoyed in the United Kingdom through a totally artificial back-to-back arrangement.

If I had been asked to advise, I would have expressed the view that the simple gift route was infinitely preferable to the back-to-back route because it involved a very real transaction - the gift - as opposed to a highly artificial self-cancelling arrangement which made a difference in the non-tax world only on account of the turn which the bank took for its assistance in implementing it.[21]

The Judge found as a fact, at paragraph 95 of the judgment, that the Claimant would have implemented such a strategy, had he been advised so to do.

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20 While the Judge acknowledged there would be a cost, he took the First Defendant at his word when he said it would be "low": see paragraph 95 the judgment. In awarding damages, the Judge seems to have interpreted "low" to mean "negligible".

21 I hope I would have suggested that the spouses buy as tenants in common, rather than joint tenants, just in case the far-fetched proposition was ever advanced by any one that the latter would give rise to difficulties. I would not for one moment consider negligent any QC who did not so advise; still less so an accountant, of whom a lower standard is expected.

10 Conclusion

I therefore conclude that

Mr Grimm was, in the view of the Revenue, clearly not taxable, for reasons which would have become apparent to anyone reading the Inspector's Manual.

Even on the artificial basis on which the hearing proceeded, the mere fact that Mr Grimm was a joint tenant of United Kingdom situate real property, to the purchase costs of which he had contributed a half-share, did not cause him to have remitted the whole (or any part) of the income in fact remitted by his wife and used by her to purchase her share.

We must all now give our clients a health warning as to the possibility that a transaction on which we are advising may be attacked by the Revenue.

We should all now make it very clear when our advice is not definitive and when we expect to be consulted further as to its implementation, especially where non-tax experts will be involved.

It is most unwise to defend a negligence action without the assistance of proper experts. Where the claimant is represented by Leading Revenue Counsel, it will normally be appropriate for the defendant to be so represented.

If there was any negligence involved in this case, it was not in the advice given by the First Defendant.