**[2020] UKUT 0367 (TCC)**

**Appeal number: UT/2019/0140 (V)**

*INCOME TAX – "Transfer of assets abroad" – appeal dismissed*

**UPPER TRIBUNAL**
**(TAX AND CHANCERY CHAMBER)**

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| **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS** | **Appellants** |
| **-and-** | |
| **ANDREAS RIALAS** | **Respondent** |

**TRIBUNAL: MR JUSTICE MEADE**
**JUDGE JONATHAN RICHARDS**

**Sitting in public by way of remote video hearing treated as taking place at The Royal Courts of Justice, Rolls Building, Fetter Lane, London on 8 December 2020**

**Sadiya Choudhury, instructed by the General Counsel and Solicitor for Her Majesty's Revenue & Customs for the Appellants**

**Alastair Wilson and Menna Bowen, of Gunnercooke LLP, for the Respondent**

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## DECISION

1. The appellants ("HMRC") appeal against a decision (the "Decision") of the First-tier Tribunal (the "FTT") released on 7 August 2019. HMRC's appeal raises a point of law arising out of what is commonly known as the "transfer of assets abroad" legislation contained in Chapter 3 of Part 17 of the Income and Corporation Taxes Act 1988 ("ICTA")[1]. The issue is whether the Respondent, Mr Rialas, could be made liable to income tax under that legislation by virtue of putting in place arrangements under which shares in a UK company were transferred, not to him, but to a non-UK resident company whose shares were owned by an offshore discretionary trust. HMRC's Grounds of Appeal also raise the question of whether the FTT was correct to decide that the "transfer of assets abroad" legislation infringed Mr Rialas's EU law rights to free movement of capital, but for reasons we will come to, we will not address that issue in this decision. The hearing before us took the form of a fully remote video hearing, neither party having requested a different form of hearing.

### Statutory provisions

2. The main charging provision is set out in s739 of ICTA which provides, so far as material, as follows:

> **739 Prevention of avoidance of income tax**
>
> (1) … the following provisions of this section shall have effect for the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfer of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled outside the United Kingdom.
>
> (1A) Nothing in subsection (1) above shall be taken to imply that the provisions of subsections (2) and (3) below apply only if—
>
> > (a) the individual in question was ordinarily resident in the United Kingdom at the time when the transfer was made; or
> >
> > (b) the avoiding of liability to income tax is the purpose, or one of the purposes, for which the transfer was effected.
>
> (2) Where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled outside the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all purposes of the Income Tax Acts.

[1] The legislation has since been rewritten as Chapter 2 of Part 13 of the Income Tax 2007. However, in the periods relevant to this legislation the provisions of ICTA were in force.

3. The issue arising in this appeal is best understood by summarising s739(1) and s739(2) by reference to their component parts:

> (1) The legislation as a whole has the purpose of preventing the avoidance of income tax by individuals ordinarily resident in the UK by means of transfers of assets.
>
> (2) In order for the charging provision in s739(2) to apply, all of the following conditions must apply:
>
> > (a) There must be a "transfer of assets".
> >
> > (b) By virtue of or in consequence of that transfer of assets, either alone or in conjunction with "associated operations", income must arise to a person resident or domiciled outside the UK.
> >
> > (c) Also by virtue of or in consequence of the transfer of assets, either alone or together with associated operations, "such an individual" must have "power to enjoy" income of a non-UK resident or domiciled person which would have been subject to income tax if it had been received by that individual.
>
> (3) Where the charging provision applies, the person identified as "such an individual" in s739(2) is subjected to income tax on the income he or she has "power to enjoy", even though that income has actually been received by a non-resident person.

4. Importantly for the purposes of this appeal, section 739 does not expressly determine the characteristics a person must have in order to be "such an individual" for the purposes of s739(2) so as to be made liable to income tax. Until the decision of the House of Lords in *Vestey v IRC* 54 TC 503, it was thought that, on the basis of an earlier decision of the House of Lords in *Congreve v IRC* 30 TC 163 "such an individual" need only be a person ordinarily resident in the UK with "power to enjoy" income of a non-UK resident or domiciled person. However, in *Vestey,* the House of Lords overruled *Congreve*, or at least aspects of it.

5. Although the parties do not agree on the precise effect of the judgment in *Vestey*, they do agree that its result was that, in order to be "such an individual" who can be charged to income tax under s739(2), a person needs to have <u>some</u> involvement in the "transfer of assets". Where they differ is as to the nature and extent of the requisite involvement and it is that difference that lies at the heart of this appeal.

6. Section 741 contains an exemption applicable to bona fide transactions not carried out for, or designed for, the purpose of avoiding tax. The FTT found that Mr Rialas was not entitled to the benefit of this exemption and, since Mr Rialas is not challenging that conclusion, we do not need to address the terms, or effect, of s741.

7. Also relevant to this appeal is the definition of "associated operation" which is set out in s742 of ICTA as follows:

> (1) For the purposes of sections 739 to 741 "an associated operation" means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets.

**The facts**

8. The FTT's findings of fact were not in dispute. We summarise those findings below, with numbers appearing in square brackets being references to paragraphs of the Decision.

9. At all material times, Mr Rialas was resident and ordinarily resident, but not domiciled, in the UK. ([5]).

10. Mr Rialas and Mr Cressman each owned 50% of the shares of a UK incorporated company ("Argo"). Argo carried on a successful business as a fund manager. Neither Mr Rialas nor Mr Cressman had, by virtue of their shareholdings in Argo, control over Argo ([6], [7], [14]).

11. However, after around December 2004, relations between Mr Rialas and Mr Cressman deteriorated. Mr Rialas approached RAB Capital Limited ("RABCAP") who expressed an interest in purchasing all of the shares in Argo. RABCAP was interested in doing so, but only if Mr Cressman was not involved with Argo. Mr Rialas therefore discussed with Mr Cressman the possibility that he would first purchase Mr Cressman's 50% stake in Argo so that Mr Rialas would then be in a position to effect a share sale to RABCAP. Mr Cressman indicated that he would be prepared to sell his shares to Mr Rialas for a price of USD15m, which he considered to reflect the pricing implicit in discussions with RABCAP ([18] to [21]).

12. Mr Rialas concluded that the best structure for purchasing Mr Cressman's shares would involve the formation of a new company ("Farkland"), whose shares would be owned by a trust for the benefit of Mr Rialas's family (the "Rialco Trust"), the trustee of which would be a Cyprus incorporated and resident company ("Madrigal"). Madrigal was a company owned by Mr Messios, a friend of Mr Rialas who practised as a solicitor in Cyprus. Farkland would then borrow $15m and purchase shares from Mr Cressman ([22]). To that end:

> (1) On 22 March 2005, Farkland was incorporated as a shelf company in the British Virgin Islands ([24]).
>
> (2) On 18 April 2005, Madrigal was appointed trustee of the Rialco Trust, which was a discretionary trust for the benefit of Mr Rialas, his wife and his son. Mr Rialas made an initial contribution of 10 Cyprus Pounds ( "C£10") to the Rialco Trust. The FTT found that this C£10 was used "to acquire [the subscriber shares in] Farkland and to pay the necessary fees to Mr Messios" ([26]).

(3) On 28 April 2005, Mr Cressman entered into an agreement with Farkland for the sale and purchase of Mr Cressman's 50% interest in Argo for a price of USD 15,300,000 payable on completion ([29]).

(4) On 10 May 2005, a company ("Magnetic") entered into an agreement to lend Farkland USD15,300,000 to enable Farkland to pay the purchase price to Mr Cressman. That loan was for a three-year term with a facility for early repayment and provided for interest to be charged at a rate of LIBOR + 1.5% ([30]). Mr Rialas played a key role in ensuring that Farkland was able to borrow, on an unsecured basis, on such generous terms. He knew the directors of Magnetic, Magnetic had done well out of previous business relationships with Argo and the directors of Magnetic trusted Mr Rialas to ensure that the loan was repaid ([31]).

13. The FTT found that, at all material times, both Madrigal and Farkland were tax-resident outside the UK ([23] and [25]).

14. Following the sale of the Mr Cressman's 50% interest to Farkland, Argo declared and paid interim dividends of £2,153,873 in 2005 and £3,318,460 in 2006. 50% of those dividends were paid to Farkland (in respect of the 50% interest in Argo that Farkland held); the other 50% was paid to Mr Rialas who continued to own the other 50% of the Argo shares ([34]).

**The FTT's decision**

15. HMRC assessed Mr Rialas to income tax, under s739, on the dividends that were paid to Farkland as set out at [13] above. Mr Rialas appealed to the FTT against those assessments on three grounds:

(1) That he was not "such an individual" who could be assessed to tax under s739(2).

(2) Even if he could in principle be assessed, he benefited from the motive defence in s741 of ICTA.

(3) Even if he could be assessed and was not entitled to the benefit of the motive defence, the imposition of a charge under s739 would infringe his EU law right to free movement of capital.

16. The FTT determined the first issue in Mr Rialas's favour. That conclusion on its own meant that Mr Rialas's appeal had to be allowed, but the FTT also went on to consider other two issues as well, deciding (i) that Mr Rialas was not entitled to the benefit of the motive defence in s741 but that (ii) any imposition of a charge on Mr Rialas under s739 would infringe his right to free movement of capital.

17. Before the FTT, HMRC defended the assessments that they had made on two bases:

(1) HMRC's primary argument relied on the proposition that the relevant "transfer of assets" that gave rise to a liability under s739 consisted of Mr Cressman's transfer of his Argo shares to Farkland. That "transfer of assets", together with associated operations, resulted in income (dividends

on the Argo shares) being received by a non-resident (Farkland) with Mr Rialas having "power to enjoy" that income (by virtue of being a beneficiary of the Rialco Trust). HMRC acknowledged that the actual transfer of the Farkland shares was made by Mr Cressman, not by Mr Rialas. Nevertheless, HMRC pointed to Mr Rialas's close involvement in both the structuring and financing of the transaction (see [57] of the Decision) arguing that all the conditions necessary were present for Mr Rialas to be subject to tax on dividends received by Farkland.

(2) HMRC's secondary argument was that the relevant "transfer of assets" was the settlement of C£10 on the Rialco Trust. That transfer of assets was unquestionably made by Mr Rialas. It, together with "associated operations", resulted in the Rialco Trust owning the shares in Farkland, the chosen vehicle that would receive the Argo shares and so receive income in the form of dividends on those shares. Since Mr Rialas had "power to enjoy" that income, they argued that this was a further basis on which Mr Rialas could be assessed under s739.

18. The FTT approached the question of whether Mr Rialas could be assessed under s739 by asking whether he was:

> the "transferor" within the meaning of this term for the purposes of s739 ICTA

The term "transferor" does not actually appear in s739 and later in this decision, we will consider HMRC's submission that, in using this shorthand, the FTT was misdirecting itself as to the category of individuals who could be made liable under s739. We note, as we will address shortly, that within its consideration of "transferor", the FTT also had in mind the concepts of "quasi-transferor" and "procurement".

19. The FTT surveyed relevant authorities on s739 and predecessor legislation including *Vestey*, *Congreve* and *IRC v Pratt* [1982] STC 756. It also considered the non-binding authorities of the Special Commissioners and FTT respectively in *Carvill v IRC* [2000] STC (SCD) 143 *Fisher v HMRC* [2014] UKFTT 804 (TC)[2].

20. The FTT concluded from these authorities that, while *Vestey* had, by reversing the decision in *Congreve*, materially limited the scope for persons who had not <u>themselves</u> effected a "transfer of assets" to be assessed under s739, the "alternative ratio" set out in *Congreve* remained good law. Under that alternative ratio, a person who had not actually made a transfer, but had "procured" a transfer to be made by another could be assessed under s739 (provided, of course, that the other conditions of s739 were met). The FTT noted that, in *Pratt*, Walton J had referred to persons who had procured transfers to be made by others as "quasi-transferors" and a relevant question as being "who was the 'real transferor'"? Noting Walton J's statement in *Pratt* to the effect that, while the concept of "procurement" might not be completely apt, it was a better definition of the relevant concept than anything else, the FTT approached the first issue by considering whether Mr Rialas had "procured" Mr Cressman's transfer of the Argo

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[2] The decision of the Upper Tribunal in *Fisher*, which reversed in part the FTT's decision, was not available until 4 March 2020.

shares. At [62], the FTT concluded, having considered the decision of the Special Commissioners in *Carvill*, that it would take an "exceptional case" for one individual's influence over another to be so strong as to result in that individual "procuring" a transfer effected by the other.

21. The FTT then applied its analysis of the law to the facts before it. It acknowledged, at [65] of the Decision, that "Mr Rialas orchestrated the purchase side of the transaction". However, it considered that this was not sufficient for Mr Rialas to have "procured" the transfer, saying:

> It is however stretching the meaning of the word "procure" beyond breaking point to suggest that the fact that he organised the purchasing structure means that he dictated to whom Mr Cressman should sell his shares.

22. The FTT then turned to HMRC's secondary argument. It rejected that argument because it considered the "associated operations" on which HMRC relied in support of it did not have effect "in relation to" the payment of C£10 which HMRC asserted was the relevant "transfer of assets" saying, at [70]:

> Clearly the words "in relation to" can have a very wide meaning but to suggest that the formation of a subsidiary company, Farkland, the borrowing of $15m by that company, followed by the acquisition of the shares in Argo, were "associated operations" "in relation to" the C£10 again seems to be stretching the words beyond breaking point.

23. It was reinforced in this conclusion by its perception of the consequences that it considered to flow from HMRC's second argument saying (emphasis in the original):

> 71. If this argument were correct then it would mean that the establishment of any non-resident trust by a UK resident individual, <u>with however small an initial contribution</u>, could lead to that individual being taxable on the income from any investments which such a trust might acquire, directly or indirectly, from anywhere in the world, even though the whole of the funds required in order to acquire those investments had been borrowed. We do not believe that this is a consequence which could have been in the mind of Parliament or indeed the draftsman of this legislation. This is simply going too far.
>
> 72. The objective of s739 and its successor provisions is to deter a UK resident individual from transferring abroad income producing assets which <u>he already owns or controls</u>, such that he might avoid future UK taxation on the income from those assets. This suggested interpretation extends s739 way beyond that objective and cannot therefore be correct.

24. In its appeal to this Tribunal, HMRC effectively re-present their primary and secondary arguments set out at [17]. We will consider the detail of those submissions in the next section. However, the core of HMRC's arguments on the non-EU law issue can be summarised as follows:

> (1) The FTT misunderstood the true effect of the House of Lords' judgment in *Vestey* by proceeding on the basis that an individual who had not actually

effected a "transfer of assets" could be assessed under s739 <u>only</u> if he or she had "procured" the transfer. In fact, *Vestey* established that "procuring" a transfer was just one basis on which such a "non-transferring" individual could be made liable. There were other bases as well and, given Mr Rialas's close involvement with the structuring and financing of the transaction, he could have been liable to tax under s739 even though he did not actually "procure" Mr Cressman to sell his Argo shares to Farkland.

(2) The FTT dismissed HMRC's alternative argument simply because it thought that the C£10 was too small a sum of money to support it. The FTT's conclusion was also vitiated by a misunderstanding of the purpose of s739 (as set out at [72] of the Decision) and of the consequences of HMRC's argument (at [71]).

**Discussion**

*Previous authorities*

25. Given the way in which HMRC advance their arguments, we will start with our own analysis of relevant authorities dealing with s739 and its predecessors.

26. We start with the case of *Congreve*. In that case, the relevant "transfer of assets" was actually made by a company. The taxpayer (Mrs Congreve) held a controlling shareholding in the company that effected the transfer and her father (Mr Glasgow) was a director of that company. The transfer of assets resulted in Mrs Congreve having "power to enjoy" income received by a non-resident person and HMRC sought to assess her under a predecessor to s739. Mrs Congreve s argued that she could not be assessed because she had not <u>herself</u> effected the transfer. The House of Lords rejected that argument with Lord Simonds saying, at 205:

> The language of the Section is plain. If there has been such a transfer as is mentioned in the introductory words, and if an individual has by means of such transfer (either alone or in conjunction with associated operations) acquired the rights referred to in the Section, then the prescribed consequences follow. In the present case, such a transfer was made, though not by Mrs Congreve personally; she did acquire the rights in question; the assessment was therefore correctly made.

27. The Court of Appeal in *Congreve* had set out an alternative basis on which the assessment on Mrs Congreve could have been upheld, namely that, although she did not herself effect the transfer of assets, she procured that transfer, with Cohen LJ saying, at 197:

> … it is, we think, in the present case, a reasonable inference from the facts found that the execution and performance of the transfers and associated operations in question by all the companies concerned were procured by Mrs Congreve acting through her agent Mr Glasgow. We should have been prepared, if it had been necessary, on this alternative ground to uphold the decision of the Commissioners.

28. It was common ground between the parties that the main ratio of *Congreve*, set out at [26] above was reversed by the subsequent decision of the House of Lords in *Vestey*. It was also common ground that the Court of Appeal's alternative ratio, set out at [27] was not overruled and remains good law.

29. *Vestey* concerned a situation where there was a large number of beneficiaries, and potential beneficiaries, with "power to enjoy" income arising in consequence of a transfer of assets. However, despite the fact that those beneficiaries had no involvement at all with the transfer of assets, the then Inland Revenue was claiming that the predecessor provision to s739 gave them power to assess each beneficiary to income tax on the whole of the trust's income with a broad administrative discretion as to which beneficiaries to assess and in what amounts. The Inland Revenue's approach was supported by the decision in *Congreve.*

30. All members of the judicial panel agreed that the Inland Revenue's interpretation of the law could not be supported. As Ms Choudhury pointed out in her skilful submissions, however, their reasoning differed.

31. Lord Wilberforce (with whom Lord Salmon and Lord Keith expressed themselves to agree) approached the matter by concluding that the ratio of *Congreve* set out at [26] was the "main ratio" of that decision and led to the result for which the Inland Revenue argued. Lord Wilberforce characterised that result, as "arbitrary, unjust, and in my opinion unconstitutional". Since it produced such a result, he considered that doubt was cast on the decision in *Congreve*. Lord Wilberforce then set out a different interpretation of the provision that avoided the unjust result as follows:

> There are undoubtedly two possible interpretations of s412, particularly having regard to the preamble. The first is to regard it as having a limited effect: to be directed against persons who transfer assets abroad; who by means of such transfers avoid tax, and who yet manage when resident in the United Kingdom to obtain or be in a position to obtain benefits from those assets.
>
> For myself I regard this as being the natural meaning of the section. This avoids all the difficulties discussed above. No difficulty arises from cases of multiple transfers. The second is to give the whole section an extended meaning, so as to embrace all persons, born or unborn, who in any way may benefit from assets transferred abroad by others. This is or follows from the *Congreve* interpretation. This I regard as a possible but less natural meaning of the section.

32. Having canvassed arguments in favour of, and against, the competing interpretations, Lord Wilberforce said:

> My Lords, these and other arguments, together with the linguistic, persuade me that the better interpretation of the section is not that accepted in [*Congreve*] but is one limiting its operation and charging effect to the transferors of assets.

33. He then reflected on whether it was right to overrule *Congreve,* expressing his overall conclusion as follows:

> My Lords, we have not, I hope, in recent years become so habituated to fiscal severities or to "overkill" sections as to be insensitive to those proprieties which were so eloquently stressed by Walton J in his judgments. It is respect for these and for the fabric of our fiscal law which persuade me that *Congreve,* as to its principal ratio, and the following cases, should be departed from or overruled and the section as applying only where the person sought to be charged made, or may be, was associated with, the transfer.

34. Viscount Dilhorne agreed that *Congreve* should be overruled but set out a slightly different approach that focused on the correct construction of the term "such an individual" in what is now s739(2). By focusing on this term, Viscount Dilhorne determined that:

> The choice lies between the section having a limited application, applying only to the individual who has sought to avoid income tax and his or her spouse and a wide application to all individuals who have rights bringing them within subs (1) or who have received a capital sum within subs (2), however, innocent of tax avoidance an individual might be…

35. Having expressed the question in those terms, Viscount Dilhorne determined that:

> …the section only applies to the individual who has sought to avoid tax and to his or her spouse.

Therefore, whereas Lord Wilberforce had concluded that a person could only be charged if he or she "made, or may be, was associated with, the transfer", for Viscount Dilhorne, the relevant question was whether that individual had "sought to avoid tax".

36. As we have noted, both Lord Keith and Lord Salmon expressed agreement with Lord Wilberforce. However, that might not itself fix the ratio of the case as being that set out in Lord Wilberforce's speech because Lord Keith also expressed agreement with the speech of Viscount Dilhorne, in the following terms:

> I consider that the natural and intended meaning of the words "such an individual" in section 412 (1) is that they indicate not merely an individual ordinarily resident in the United Kingdom, but an individual so resident who has sought to avoid liability to income tax by means of such transfers of assets as are mentioned in the preamble.

37. And Lord Edmund-Davies, in his speech, appeared to echo the approach of Viscount Dilhorne (in slightly different terms from Lord Keith), saying:

> In my judgment, the words "such an individual" appearing in subs (1) and (2) hark back to the opening words of the preamble, namely to individuals whose purpose is the avoidance of liability to tax, and do not refer simply to any individual "ordinarily resident in the United Kingdom".

38. If, therefore, we were the first court of record to consider the judgment in *Vestey*, our task in determining the ratio of that judgment might not have been entirely straightforward. Three of their Lordships agreed with an approach that focused on

whether an individual had made, or "may be" had been associated with, a transfer and up to three (depending on the view to be taken of Lord Keith's opinion) agreed with an approach that invited an analysis of whether the individual had sought to avoid tax. Had we had to decide the point entirely ourselves we would have preferred the view that Lord Keith associated himself with Lord Wilberforce's analysis, by his use of the words "*by means of such transfers of assets*", although admittedly this is not the strongest pointer. There is no inconsistency between this and Lord Keith's general agreement with Lord Dilhorne's conclusions as to the overall result, and that *Congreve* should be overruled.

39. However, this issue has in any event previously been considered by courts whose superiority is co-ordinate with that of this Tribunal. In *Pratt*, Walton J approached matters on the basis that the ratio of *Vestey* on the relevant issue appeared in Lord Wilberforce's speech saying, at 791b:

> … the House of Lords, in [*Vestey*], decided that the astonishingly rigorous provisions of the section only applied to persons who themselves transfer assets abroad. It does not in any way apply to persons who may benefit from such transfer if they themselves have not made the relevant transfer…
>
> As we therefore now know, strictly, of course the question in relation to an individual sought to be taxed under s412 is is that person 'such an individual' as is mentioned in sub-ss (1) and (2) of s412, that is to say, a person who has sought to avoid liability to income tax by means of a transfer of assets, which, being reduced to its simplest element, means that the individual in question must, as the first step, be a transferor of assets. This is hereafter the form in which the question will be posed.

40. Therefore, in *Pratt*, Walton J perceived his task as being to decide whether the individuals whom the Inland Revenue were seeking to tax were "transferors", a term which he introduced as part of his application of Lord Wilberforce's approach. In setting about that task, Walton J noted that the alternative ratio in *Congreve* remained undisturbed and so concluded at 792b:

> So here we have it established that a person who is not a transferor may nevertheless be liable as if he were a transferor, if he 'procured' the transfer. It is convenient to use the phrase of junior counsel for the Crown and call such a person a 'quasi transferor'.

41. Pausing there, Walton J was not purporting to determine that individuals who had not themselves made a transfer could only face a liability to tax under s739 by "procuring" a transfer. The conclusion was more limited: persons who "procured" transfers could be taxed under s739 in the same way as persons who effected transfers themselves. Put another way, Walton J was concluding that, for individuals who were not themselves transferors, 'procuring' a transfer was a sufficient condition for liability under s739. He did not purport to decide that it was a necessary condition. He did, however, determine, at 796j that, "having a hand in" or being "associated with" a transfer was not sufficient to make an individual a "transferor".

42. The decision of the Upper Tribunal in *Fisher* took matters further by offering more guidance on the circumstances in which an individual could be made liable under s739 despite not having made a transfer himself or herself. At [70] of its decision, the Upper Tribunal held that the relevant question in such a case was "who was the real transferor?". At [72], the Upper Tribunal amplified this point saying that the question could not be answered by posing general questions such as whether a person "organised", "brought about", "engineered", "caused" or even "procured" the transfer:

> … if any of those expressions is used to describe a situation in which the actual transferor is not in any sense acting for, or induced by, or under the control of, the individual taxpayer in making the transfer of assets. There must be some proper basis for ascribing the acts of the person transferring the assets to the individual concerned and treating him as being responsible for the transfer as if he had carried it out himself. If the individual has no influence over what the actual transferor does with the assets, there is no good reason why he should be treated as the "real" Transferor. It does not follow that in all cases in which the individual plays some part in the actual transferor's decision-making, he should be treated as having made the transfer himself.

*HMRC's first argument set out at [17(1)]*

43. Before we address the detail of HMRC's submissions, we will address Ms Choudhury's argument, developed in her oral submissions, that the true ratio of *Vestey* might not be found in the speech of Lord Wilberforce. As we have observed, it is not entirely straightforward to discern the ratio of *Vestey*. However, Walton J in *Pratt* determined that Lord Wilberforce's speech did set out the ratio and indeed, in the light of that speech, coined the expression "transferor" to describe the individuals who could, provided other conditions were met, be made liable to tax under s739. We are not bound by the High Court's judgment in *Pratt* (see *Gilchrist v HMRC* [2014] UKUT 0169 (TCC)) although we will follow that judgment unless we are satisfied that it is wrong (paragraph 94 of *Gilchrist*). We are not satisfied that the decision in *Pratt* on this issue is wrong, and on the contrary, for the reasons we set out above we would have reached the same conclusion.

44. HMRC criticise the FTT's rejection of their first argument, set out at [17(1)] as being unduly concerned with the question whether Mr Rialas "procured" the transfer of Mr Cressman's shares, which was simply a gloss on the legislation and no substitute for a consideration of its terms. HMRC make a similar point about the FTT's use of the words "transferor" and "quasi-transferor".

45. The FTT could, perhaps, usefully have emphasised that the words "transferor" and "quasi-transferor" were glosses on the legislation derived from the judgment of Walton J in *Pratt*. It could also perhaps have made it clear that the concept of "procuring" a transfer was also a judicial gloss and, moreover, did not set out a necessary condition for Mr Rialas to face a liability to s739 in relation to a transfer of assets consisting of the Argo shares. But those are minor criticisms of the way that the FTT expressed itself. In evaluating HMRC's first argument, the FTT foreshadowed the approach of the Upper Tribunal in *Fisher*. In effect, it asked itself whether Mr Rialas was the "real transferor".

Moreover, the FTT clearly considered, consistent with the approach set out at [72] of *Fisher*, that since Mr Rialas had no influence over what Mr Cressman did with his assets, he could not be treated as the "real transferor".

46. HMRC argue that following the approach in *Fisher* could not save the FTT from falling into error because the facts of *Fisher* were different. For example, in *Fisher*, the transfer in question was made by a company in which none of the individuals whom HMRC were seeking to tax had a controlling interest. Moreover, in *Fisher*, the FTT had found that the avoidance of income tax or corporation tax was not a purpose of the transaction. We do not accept that submission. There were factual differences between this appeal and the case of *Fisher*. However, as we think Ms Choudhury ultimately accepted in response to questions from the Tribunal, the FTT was following the same *approach* as that applied by the Upper Tribunal in *Fisher*. It follows that we can only conclude that the FTT's approach is wrong in law if we conclude that the Upper Tribunal's approach in *Fisher* was similarly wrong. As with *Pratt* and for essentially the same reasons, we are not so satisfied.

47. HMRC's next criticism was that the FTT had found (at [63] of the Decision) that Mr Rialas was the "only game in town" in the sense that, realistically, there was no-one else to whom Mr Cressman could realistically hope to sell his shares for some $15m. Therefore, they argue that it was only because of Mr Rialas's efforts, particularly in relation to obtaining finance from Magnetic, that any transfer of those shares was possible. The difficulty with this submission is that it flies in the face of the Upper Tribunal's decision in *Fisher* quoted at [42] above. Crucial though Mr Rialas's involvement was, the FTT's finding, which HMRC do not challenge, was that Mr Rialas had no control over whether Mr Cressman sold his shares. There is certainly no support in any of the FTT's findings that Mr Rialas was so responsible for Mr Cressman's transfer of shares so that he should be treated as if he had carried it out himself.

48. In a similar vein, we dismiss HMRC's argument that the FTT erred by approaching the issue, based on the decision of the Special Commissioners in *Carvill*, that it would only be in an "exceptional case" that Mr Rialas could be made liable to tax under s739, on the basis of a transfer of assets consisting of Mr Cressman's Argo shares, without himself having transferred those shares. "Exceptional" or not, the FTT approached the matter in the way mandated by *Fisher*, by asking whether Mr Rialas should be treated as the "real transferor" of those shares.

49. Accordingly, before we could conclude that the FTT erred in rejecting HMRC's first argument, we would need to decide that either or both of the decisions in *Pratt* and *Fisher* were wrong, and we do not do so, for reasons given above. If either of those decisions is to be overruled, that will be a matter for the Court of Appeal which is hearing an appeal against the Upper Tribunal's decision in *Fisher* next year.

50. We dismiss HMRC's appeal on the basis of their first argument.

*HMRC's secondary argument set out at [17(2)]*

51. HMRC's secondary argument proceeds by reference to the following line of reasoning:

> (1) The payment of C£10 to the Rialco Trust was a transfer of assets that was unquestionably made by Mr Rialas.
>
> (2) The Rialco Trust used that C£10 to purchase the subscriber shares in Farkland. That was an "associated operation" in relation to the C£10 "transfer of assets".
>
> (3) Without Farkland being held by the Rialco Trust, there would be no vehicle available to acquire Mr Cressman's shares and so no vehicle to receive dividends paid on those shares. Moreover, without the Rialco Trust being constituted, with Mr Rialas as a beneficiary, Mr Rialas would have no "power to enjoy" income received by Farkland.
>
> (4) Therefore, the relevant requirements of s739 were met such that Mr Rialas could be assessed to tax on dividends received by Farkland.

52. That argument can be dismissed briefly. The statutory requirement is that the receipt of income by non-residents must be "by virtue or in consequence of" the transfer of assets and associated operations. No doubt the establishment of the Rialco Trust and that trust's acquisition of the subscriber shares in Farkland were necessary preconditions to the transfer of Mr Cressman's shares as those steps were important to the acquisition structure that Mr Rialas put in place. However, that is not the same thing as saying that Argo paid dividends to Farkland in "by virtue or in consequence of" the establishment of the Rialco Trust or that trust's acquisition of the subscriber shares, or a combination of both. Put another way, the establishment of the Rialco Trust, and the acquisition of the subscriber shares in Farkland, did not themselves enable Farkland to receive dividends on the Argo shares. The receipt of such dividends could only be guaranteed once Mr Cressman had, additionally, agreed to sell those shares and Farkland had funds to pay the purchase price due.

53. Perhaps with an eye on that objection, Ms Choudhury sought, in passages in her submission, to expand the scope of the relevant "associated operations" to include Farkland's borrowing of $15.3m from Magnetic and its acquisition of the Argo shares themselves. However, the FTT was correct to note, at [70], that these transactions could not be relevant in the context of HMRC's second argument since they were not operations "in relation to", the transfer of the C£10 as required by s742(1).

54. The FTT perhaps exaggerated at [71] of the Decision when it said that, if HMRC's argument was correct, any establishment of any non-resident trust would inevitably lead to a charge under s739. At the very least, a charge would only arise if the exemption in s741 was not available. In addition, we agree with HMRC that the statute does not provide that s739 is to apply only in the context of assets which an individual already owns (see [72] of the Decision). However, these are relatively minor quibbles with the Decision. The FTT's core conclusion, that HMRC's secondary argument should be rejected, was correct.

**Disposition**

55. For reasons we have given, HMRC's appeal against the FTT's conclusion that Mr Rialas could not be assessed under s739 fails. In those circumstances, it is not necessary for us to decide whether the FTT was correct in its conclusion to the effect that a charge under s739 would infringe his EU right to free movement of capital. We told the parties this at the conclusion of the hearing. We also thought that limiting this decision to the first point would enable our reasons to be given more quickly, and without prejudging the right course or the position of any party, that may allow better co-ordination of any appeal with the appeal in *Fisher*.

**MR JUSTICE MEADE**
**JUDGE JONATHAN RICHARDS**

Signed on original

**RELEASE DATE: 18 December 2020**