Neutral Citation: **[2024] UKUT 00280 (TCC)**

Case Number: UT/2023/000012

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, Fetter Lane
London, EC4A 1NL

Residence – whether Appellant had ceased to be UK resident – application of case law test and application of UK/Belgium DTC – held – Appellant remained UK resident – application of COVI limb of DTC tie-breaker resulting in Appellant being deemed to be UK and not Belgian resident – First-tier Tribunal decision upheld – appeal dismissed

Heard on: 17–18 June 2024
Judgment date: 12 September 2024

Before

MRS JUSTICE BACON
JUDGE VIMAL TILAKAPALA

Between

KEVIN MCCABE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Nicola Shaw KC and Samuel Brodsky, counsel, instructed by Forvis Mazars

For the Respondents: Christopher Stone KC and Charlie Hill, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal by the appellant Mr McCabe, brought with permission granted in part by the First-tier Tribunal (Tax Chamber) (**FTT**) and in part by the Upper Tribunal against the FTT decision released on 30 September 2022 (the **Decision**) dismissing the appeal by Mr McCabe against closure notices issued by the Commissioners for His Majesty's Revenue & Customs (**HMRC**) under s. 28A(1) and (2) of the Taxes Management Act 1970 in relation to tax years 2006/7 and 2007/8 (together, the **Relevant Period**).

2. The closure notices amended Mr McCabe's self-assessment tax returns for the Relevant Period, by charging him to income tax and capital gains tax on the basis that he was resident for tax purposes in the UK.

3. Mr McCabe's case is that the FTT erred in law in applying both the common law test of residence and the "tie breaker" provisions of the 1987 UK/Belgium Double Tax Convention, as amended and in force during the Relevant Period (the **DTC**). In his submission, the FTT should have found that Mr McCabe ceased to be UK resident at common law on 4 April 2006, or that he was non-resident in the UK (and resident only in Belgium) throughout the Relevant Period under the DTC "tie-breaker" or, in the alternative, that he ceased to be UK resident at some point after 4 April 2006 but before 6 April under either the common law or the DTC.

4. Unless otherwise indicated, paragraph references in this judgment are references to the Decision of the FTT.

BACKGROUND

5. Mr McCabe is the founder and chief executive of the Scarborough Property Group Plc (**Scarborough**), a successful property development, property investment and leisure organisation with operations throughout the UK. Scarborough's business evolved from being primarily UK based into a more international operation, as Mr McCabe began in the early 2000s to seek growth opportunities in mainland Europe and the Far East.

6. The most significant developments in this regard were (i) the acquisition by Teesland Development Company Ltd (a London listed company chaired by Mr McCabe and in which Scarborough held a significant interest) of IO Group, a property fund management company with a network of European offices; and (ii) the establishment of Scarborough Continental Partners, a joint venture between Scarborough and Bank of Scotland, with the purpose of acquiring real estate assets in mainland Europe.

7. Mr McCabe decided that he needed to move to Brussels to develop and grow the European business. His move to Brussels was also part of a tax planning strategy intended to ensure that he was not charged to capital gains tax (**CGT**) under s. 10A of The Taxation of Chargeable Gains Act 1992 on the gain arising on the disposal of shares in Scarborough. S.10A required him to be non-resident for at least five full tax years. He sought tax advice from several sources in order to plan the steps needed to ensure that he could arrange his relocation in a manner sufficient to make him non-resident.

8. Mr McCabe left his family house at 13 Deepdale Avenue in Scarborough (**Deepdale**) (which had been in his wife's sole ownership since 2004), and moved to Brussels on 4 April 2006. Over the course of the next seven years he rented or bought living and office accommodation in Brussels, and incorporated a Belgian personal service company

Scarborough Realty (Europe) SPRL (**SRE**), through which he entered into various paid consultancy agreements with Scarborough group members. Mr and Mrs McCabe remained married and spent considerable time together during the Relevant Period, but Mr McCabe's move to Belgium was inevitably reflected in significant changes to his social and business arrangements.

9. The FTT made detailed factual findings in respect of the practical arrangements that Mr McCabe made in advance of his move to Brussels, and his activities and movements over the Relevant Period.

10. On 9 July 2007 Mr McCabe sold most of his interest in Scarborough to an Australian listed property group (Valad Property Group) in return for loan notes and equity in the acquiring companies. He also became a non-executive director of certain Valad group companies. He then transferred his remaining ordinary shares in Scarborough to his sons for no consideration on 3 April 2008.

11. Mr McCabe's self-assessment tax returns for the Relevant Period, which included the disposals of his interests in Scarborough, were prepared on the basis that he was not UK resident (or ordinarily resident) during that period. Those returns were amended by the disputed closure notices, on the basis that HMRC considered Mr McCabe to have been resident in the UK during the Relevant Period.

12. It is common ground that Mr McCabe was UK resident from 3 May 2013.

RELEVANT LAW

The charging provision

13. S. 2(1) TCGA 1992 sets out the persons chargeable to CGT. It provided, at the relevant time, as follows:

> "2. Persons and gains chargeable to capital gains tax, and allowable losses
>
> (1) Subject to any exceptions provided by this Act, and without prejudice to sections 10 and 276, a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment during any part of which he is resident in the United Kingdom, or during which he is ordinarily resident in the United Kingdom."

The test for residence

14. The Relevant Period pre-dates the statutory residence test. Although there were, at the time, limited statutory provisions addressing residence in particular circumstances – specifically s. 334 ICTA for ordinarily resident individuals leaving the UK for the purpose of "occasional residence abroad" and s. 335 ICTA for UK residents working full time abroad – neither party relied upon them. It was also agreed that Mr McCabe was not "ordinarily resident" in the UK during the Relevant Period.

15. The question was therefore whether Mr McCabe was resident in the UK during the Relevant Period on the basis of the case law principles on residence. It was common ground both before us and before the FTT that the approach to be taken is as set out by David Richards J in *HMRC v Glyn* [2015] UKUT 551 (TCC), §§40–50. In particular, §42 made the two general points that:

> "First, it is entirely possible for a person to have more than one country of residence. A person previously resident in one country may take up residence in another country without losing his status of residence in the first country. Secondly, the approach to whether a person resident in the UK has ceased to be so resident is in some respects different from the approach to whether a person previously resident in another country has become resident in the UK."

16. The judge went on at §43 to cite Lewison J's summary in *Revenue and Customs Commissioners v Grace* [2008] EWHC 2708 (Ch) [2009] STC 213, §3, of the principles to be derived from earlier cases. The propositions in that summary which deal with the concept of "residence" (as opposed to "ordinary residence") are as follows:

> "i) The word 'reside' is a familiar English word which means 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place': *Levene v IRC* (1928) 13 TC 468 at 505, [1928] AC 217 at 222. This is the definition taken from the Oxford English Dictionary in 1928, and is still the definition in the current online edition;
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> ii) Physical presence in a particular place does not necessarily amount to residence in that place where, for example, a person's physical presence there is no more than a stop-gap measure: *Goodwin v Curtis (Inspector of Taxes)* [1998] STC 475 at 480, 70 TC 478 at 510;
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> iii) In considering whether a person's presence in a particular place amounts to residence there, one must consider the amount of time that he spends in that place, the nature of his presence there and his connection with that place: *IRC v Zorab* (1926) 11 TC 289 at 291;
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> iv) Residence in a place connotes some degree of permanence, some degree of continuity or some expectation of continuity: *Fox v Stirk*; *Ricketts v Registration Officer for the City of Cambridge* [1970] 3 All ER 7 at 13, [1970] 2 QB 463 at 477; *Goodwin v Curtis (Inspector of Taxes)* [1998] STC 475 at 481, 70 TC 478 at 510;
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> v) However, short but regular periods of physical presence may amount to residence, especially if they stem from performance of a continuous obligation (such as business obligations) and the sequence of visits excludes the elements of chance and of occasion: *Lysaght v IRC* (1928) 13 TC 511 at 529, [1928] AC 234 at 245;
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> vi) Although a person can have only one domicile at a time, he may simultaneously reside in more than one place, or in more than one country: *Levene v IRC* (1928) 13 TC 486 at 505, [1928] AC 217 at 223;
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> …
>
> xiii) Where a person has had his sole residence in the United Kingdom he is unlikely to be held to have ceased to reside in the United Kingdom (or to have 'left the United Kingdom) unless there has been a definite break in his pattern of life: *IRC v Combe* (1932) 17 TC 405 at 411."

17. As the last of those propositions and the earlier comments at §42 of *Glyn* both make clear, where a person has had their sole residence in the UK but then claims to have left the country, the question of residence is not applied in a vacuum, ignoring the fact of that person's previous life in the country. Rather, in such a case the focus is on whether there has been a definite or distinct break in the pattern of their life.

18. In that regard, Lord Wilson in *Gaines-Cooper v HMRC* [2011] 1 WLR 2625 made the following comments:

> "14. Since 1928, if not before, it has therefore been clear that an individual who has been resident in the UK ceases in law to be so resident only if he ceases to have a settled or usual abode in the UK. Although … the phrase 'a distinct break' first entered the case law in a subtly different context, the phrase, now much deployed including in the present appeals, is not an inapt description of the degree of change in the pattern of an individual's life in the UK which will be necessary if a cessation of his settled or usual abode in the UK is to take place.
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> …
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> 20. … The requirement of a distinct break mandates a multifactorial inquiry. In my view however the controversial references in the judgment of Moses LJ in the decision under appeal to the need in law for 'severance of social and family ties' pitch the requirement, at any rate by implication, at too high a level. The distinct break relates to the pattern of the taxpayer's life in the UK and no doubt it encompasses a substantial loosening of social and family ties; but the allowance, to which I will refer, of limited visits to the UK on the part of the taxpayer who has become non-resident, clearly foreshadows their continued existence in a loosened form. 'Severance' of such ties is too strong a word in this context.
>
> 21. It became clear from decisions like *Combe* that, if a taxpayer left the UK in order to pursue employment abroad which was full-time, it was likely not only that he would cease to be a UK resident but also that he would escape being deemed still to be a UK resident under the statutory provision. For, from the fact that the employment was full-time, it was likely to follow that he had made a distinct break in the pattern of his life in the UK."

19. Lord Hope in the same case likewise emphasised the multifactorial nature of the inquiry required for the determination of whether a taxpayer has become non-UK resident:

> "63. … the underlying principle that the law has established is that it must be shown that there has been a distinct break in the pattern of the taxpayer's life in the UK. The inquiry that this principle indicates is essentially one of evaluation. It depends on the facts. It looks to what the taxpayer actually does or does not do to alter his life's pattern. His intention is, of course, relevant to the inquiry. But it is not determinative. All the circumstances have to be considered to see what light they can throw on the quality of the taxpayer's absence from the UK."

20. Ms Shaw KC, for Mr McCabe, submitted that in applying the common law test of residence, a person's abode should generally be identified by where they sleep at night. She referred in support of that submission to *R v Hammond* (1852) 117 ER 1477, 1480, where Lord Campbell noted that:

> "A man's residence, where he lives with his family and sleeps at night, is always his place of abode in the full sense of that expression … In some instances he may be quite as well known if described of the place where he carries on his business; but this is never the place of abode in the ordinary sense of the expression ..."

21. The issue before the court in *Hammond*, however, concerned the election of borough councillors, and a requirement for each candidate's "place of abode" to be specified on the voting papers. In that context, the question was whether the place of abode meant the particular candidate's family residence, which was his "actual residence", or could also include his place

of business. As Mr Stone KC, for HMRC, pointed out, that was focusing on a choice between two bricks and mortar locations, and was an entirely different question from the question of whether an individual is resident in the UK, or has substantially loosened their ties with the UK, for tax purposes.

22. Ms Shaw also referred to *Lysaght v HMRC* (1928) 13 TC 511, which concerned the question of whether the taxpayer was resident for tax purposes, in circumstances where his family home was in Ireland but he travelled frequently to England for business purposes. The Special Commissioners found that he was resident in the UK for the relevant years. That was upheld by Rowlatt J. Ms Shaw emphasised the judgment of the Court of Appeal, which (by a majority) reversed the judgment of Rowlatt J, with Sargant LJ giving the example of someone:

> "living in a house or lodgings at some such place as Richmond or Reigate and travelling to the City every weekday to earn his living there. In such a case everyone would say that he resided at the place where he slept and that he worked or earned his living in the City … One element in arriving at this conclusion would be that residence would ordinarily be determined by the place where he slept, not where he worked …" (p. 520).

23. The House of Lords, however, reversed the majority decision of the Court of Appeal and upheld the original decision of Rowlatt J, finding by a majority that the concept of residence should be given its plain meaning, and that its application was one of fact and degree for the Commissioners. The House of Lords did not place any particular emphasis on the question of where the taxpayer was sleeping. Viscount Sumner noted, instead, that the word "resident" indicated a "quality of the person charged" rather than being descriptive of the person's property, and considered that a person was not precluded from being resident simply because they stayed at hotels rather than in their own house (p. 528).

24. *Lysaght* is not, therefore, authority for the proposition that particular weight must be given to the question of where a person sleeps at night, in the application of the common law test of residence. While that question is undoubtedly a relevant and important factor to consider, it is not an exclusive or determinative measure of presence in a particular location, and must be considered alongside all other relevant evidence of the time spent in that place, the nature of the taxpayer's presence there and their connection with that place.

The DTC and the tie-breaker provisions

25. Article 1 of the DTC provides that the DTC "shall apply to persons who are residents of one or both of the contracting states". Article 4 defines residence (so far as relevant to individuals) for the purposes of the DTC as follows:

> "(1) For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature; …"

26. Where an individual is a resident of both states, Article 4(2) contains the following "tie-breaker" provisions intended to determine where residence lies for the purpose of allocating taxing rights:

> "(2) Where by reason of the provisions of paragraph (1) of this Article an individual is a resident of both Contracting States, then his status shall be determined as follows:

(a) He shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);

(b) If the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be resident of the State in which he has an habitual abode;

(c) If he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national;

(d) If he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement."

THE FTT DECISION

27. The FTT hearing took place over three weeks and involved a significant amount of evidence. Detailed, comprehensive findings of fact were made by the FTT, on the basis of the witness evidence, documentary evidence (including the detailed entries in Mr McCabe's handwritten and electronic diaries for the relevant period) and the statement of agreed facts. The FTT started by setting out the evidence as to:

(1) Mr McCabe's background and his establishment of the Scarborough Group: §§51–59.

(2) Mr McCabe's living and office accommodation in Brussels, and the establishment of his Belgian service company SRE: §§60–71.

(3) The practical arrangements for Mr McCabe's relocation to Brussels in April 2006: §§72–78.

(4) Mr McCabe's Belgian tax residence: §78.

(5) The pattern of Mr McCabe's activities prior to 4 April 2006: §79.

(6) Mr McCabe's decision to relocate to Brussels, including the tax advice which he obtained in that regard: §§80–91.

(7) Mr McCabe's presence in the UK during the Relevant Period, including various calculations of days/part days in the UK, and nights spent in the UK and in Scarborough, and a detailed description of his travel pattern during that time: §§92–123.

(8) Mr McCabe's family and social relationships and activities: §§124–138.

(9) Changes to Mr McCabe's wealth over the Relevant Period: §§138–141.

(10) Mr McCabe's responsibilities for his UK businesses over the Relevant Period: §§142–157.

28. Following discussion of Mr McCabe's presence in the UK, connections to the UK, and non-UK activities, in particular (which we discuss further below), the FTT went on to conclude that:

(1) Although the pattern of Mr McCabe's life over the Relevant Period had changed significantly when compared to the position before 4 April 2006, in the context of an individual who had been resident in the UK since birth those changes were not such as to constitute a significant loosening of his ties with the UK for the purpose of the residence test: §204.

(2) The most significant factors against that conclusion were (i) the amount of time that Mr McCabe was physically present in the UK during the Relevant Period, referring to actual time spent and in the context of the number of nights and the brevity of individual visits; and (ii) the extent of his overseas activities during that time, accepting that Mr McCabe maintained a home and office in Brussels, and spent considerable time at his holiday home in La Manga, Spain (**La Manga**): §205.

(3) Those contrary factors were, however, outweighed by a series of factors indicating continued UK residence. These included Mr McCabe's ongoing business relationships in the UK, including headline roles in the business of the Scarborough Group, the time which he continued to spend with his family, the frequency of his attendance at Sheffield United matches, and the frequency and productivity of his visits to the UK for business, family and social activities: §207.

(4) Mr McCabe therefore remained resident throughout the Relevant Period. Various specified events relied upon by Mr McCabe as contradicting that conclusion did not demonstrate a sufficient loosening of ties: §§208–210.

(5) As Mr McCabe was resident in both the UK and in Belgium, the tie-breaker in Article 4(2) of the DTC applied: §212.

(6) For the purposes of the first limb of Article 4(2)(a) of the DTC, it was common ground that Mr McCabe had a permanent home available to him in Brussels: §220.

(7) Mr McCabe also had a permanent home available to him in the UK, in the form of Deepdale. Although that had been solely owned by Mrs McCabe since 2004, he was a welcome visitor there whenever he was in Scarborough, the house was available to him to use, he did use it throughout the Relevant Period. Although he did not stay there overnight, it was found that Mrs McCabe would have given him permission to do so whenever he wanted and for as long as he wanted: §§229–231.

(8) It was therefore necessary to consider Mr McCabe's centre of vital interests (**COVI**) under the second limb of Article 4(2)(a) of the DTC. Mr McCabe's COVI remained in the UK. In particular, the FTT relied on the time spent by Mr McCabe in the UK with family and long-standing friends, his attendance at a significant number of Sheffield United matches in the UK, the fact that he was the controlling shareholder of the Scarborough Group and a director of the holding companies and key subsidiaries within the group, and conducted a substantial amount of Scarborough Group business in the UK, and the fact that all of his employment income through SRE was from UK companies in the Scarborough Group: §§237–239.

(9) Mr McCabe therefore remained resident in the UK during the Relevant Period, and was deemed resident in the UK rather than Belgium throughout that period under Article 4 of the DTC: §249.

(10) If, contrary to that conclusion, the FTT had found that Mr McCabe's COVI could not be determined, or that he did not have a permanent home available to him in either State, it would have been necessary to consider where Mr McCabe had a habitual abode. The FTT's conclusion was that Mr McCabe had a habitual abode in Belgium and not in the UK. Accordingly, if residence had not been determined in favour of the UK under the COVI test, the FTT would have found Mr McCabe to be resident in Belgium under the habitual abode test: §§246–247.

THE GROUNDS OF APPEAL

29. Mr McCabe now appeals on the following four grounds:

(1) Ground 1a: the FTT failed to make a finding that Mr McCabe's full time work abroad indicated that he had a made a distinct break in the pattern of his life in the UK.

(2) Ground 1b: the FTT erred in its application of the common law test of residence.

(3) Ground 2a: the FTT erred in finding that Mr McCabe had a permanent home (i.e. Deepdale) available to him in the UK.

(4) Ground 2b: the FTT erred in law in finding that Mr McCabe had his COVI in the UK, rather than reaching a conclusion that his COVI was in Belgium or alternatively could not be determined.

30. As a preliminary observation, we note that the issues raised by the grounds of appeal raised a mixture of legal and factual points, which were not always straightforward to separate. Ms Shaw confirmed, however, that she was not advancing a challenge to the FTT's evaluation of the facts under the test in *Edwards v Bairstow* [1956] AC 14, to the effect that the FTT's findings were ones that no reasonable Tribunal could have reached. She sought instead to challenge the legal principles on which the FTT had made its decision. That is the basis on which we approach the grounds of appeal, to which we now turn.

GROUND 1(A) – FULL TIME WORK ABROAD

31. Ms Shaw submitted that the FTT had been invited to make a finding as to whether Mr McCabe had left the UK to take up full time employment abroad, but had failed to do so. That was, she contended, an error of law which might have made a difference to the FTT's decision. She cited the Upper Tribunal's decision in *Khan v HMRC* [2020] UKUT (TCC) as support for this submission.

32. Mr Stone submitted that there was no requirement for the FTT to make any determination on whether Mr McCabe had taken up full time employment abroad. He said that such a finding would not add anything, and would not dispense with the FTT's need to carry out a multifactorial review of Mr McCabe's situation to determine his place of residence.

33. In *Khan* the central issue was whether a company's buy-back of shares was a distribution taxable in the hands of Mr Khan under ss. 383 and 385 of the Income Tax (Trading and Other Income) Act 2005 (**ITTOIA**). The issue on appeal involved consideration of whether a series of transactions should be regarded as a single composite transaction (as Mr Khan contended) or as a series of individual steps.

34. The Upper Tribunal found that the question of whether s. 385 ITTOIA required transactions to be looked at as a composite whole or not was a question to be determined by reference to the statutory purpose of the provision in question. This was a question of law. The question of whether the transaction *was* a composite transaction was then a question of fact (§26). Accordingly:

> "27. … once a factual issue is relevant to the application of the statute to the case in question, a particular finding as to that issue is a finding of fact with all that entails in terms of susceptibility to the challenge on appeal. Understood thus, the appellant's ground is, in essence, that, having regard to the statutory purpose of the provision (s 385 ITTOIA), the FTT failed to make relevant findings of fact. In our view that ground properly raises a question of law rather than a question of fact."

35. The Upper Tribunal went on to conclude that the FTT had erred in failing to construe the relevant provisions in light of their statutory purpose, the consequence of which was that it could not be assumed that the FTT's fact-finding with respect to the issue necessarily encompassed the facts relevant to the statutory question (§37).

36. *Khan* thus addresses the factual findings relevant for a different statutory scheme (ss. 383 and 385 ITTOIA). It provides no support for the submission that the FTT was required as a matter of law to make a finding as to whether Mr McCabe was working full time abroad. Rather, whether that is a matter on which the FTT was required to make a finding turns on the application of the common law test for the concept of residence. As set out above, particularly in *Gaines-Cooper*, the inquiry is a multifactorial one which must take into account a broad range of factors.

37. Ms Shaw relied on the comments of Lord Wilson at §21 of *Gaines-Cooper*, which she cited as authority for the submission that a determination as to whether someone is working full time abroad is "a bright line indicator" that they are likely to have loosened their ties sufficiently with the UK in order to be treated as non-resident, or in other words a "rebuttable presumption" of non-residence, applying absent very specific circumstances.

38. We disagree. Lord Wilson expressly acknowledged that the question as to whether a person had made a distinct break from the UK was one that required a multifactorial inquiry. His comments at §21 went no further than saying that if someone had left the UK to take up full-time employment abroad it was "likely" that they had made a distinct break and loosened their ties with the UK. If the Tribunal does, therefore, conclude that the taxpayer has left the UK to take up full-time employment abroad, that will be an important factor in the inquiry.

39. That is, however, very different from the proposition that a rebuttable presumption or "bright line indicator" of non-residence arises in such a case. Still less is *Gaines-Cooper* authority for the proposition that the Tribunal must in every case make a distinct finding as to whether the taxpayer has taken up full-time employment abroad. The requirement is simply to consider "all relevant circumstances" (*Glyn* §41).

40. Those circumstances will, of course, include consideration of where the taxpayer was working during the relevant period (if the taxpayer was indeed working in that time), and how easy it is to commute between different locations for work and other activities. The FTT in this case properly considered that question, setting out in considerable detail its evaluation of Mr McCabe's work patterns, including his travel during the Relevant Period, with extensive details of the meetings he attended at various locations (§§104–123), and further findings on the board meetings and other meetings attended by Mr McCabe in relation to his UK businesses (§§145–

150). The FTT therefore considered, very carefully, where Mr McCabe was working during the Relevant Period, and took that into account in its overall conclusion on residence.

41. We therefore reject the submission that the FTT erred by failing to make a finding as to whether Mr McCabe was working full-time abroad during the Relevant Period.

42. In any event, we agree with Mr Stone that on the basis of the FTT's findings of fact (which are not challenged in this appeal) it would not have been possible to describe Mr McCabe as having worked full-time abroad during the Relevant Period, given the amount of work he conducted in the UK during that time.

43. We accept that Mr McCabe spent the majority of his time over the Relevant Period working outside the UK. However it is also clearly the case that he spent a significant amount of time working in the UK. Unlike an office-based worker with regular working hours, Mr McCabe was an internationally mobile businessman who was not predominantly working from his Brussels office, but held business meetings at a variety of locations in different countries. The FTT found that a significant number of those took place in the UK (§147, and see further references at §§69–70 below). The FTT also found that from October 2006 onwards Mr McCabe spent a significant proportion of each week in the UK (§108).

44. Ms Shaw argued that Mr McCabe's evidence was that he was working at least 50 hours a week in Brussels and elsewhere outside the UK, in addition to any work he conducted in the UK, and that he therefore spent time working outside the UK which was equivalent to a full-time job. His time spent working in the UK was not, she said, significant, but was simply an adjunct to his full-time work outside the UK.

45. We unhesitatingly reject that submission. Any consideration of where a taxpayer is working, for the purposes of the residence test, cannot sensibly refer to an abstract count of hours spent working in particular locations, but must take account of the nature of the taxpayer's occupation and the reality of their working arrangements. If the taxpayer is working long hours in several locations, it would be both artificial and arbitrary to ignore the location of some of that work on the grounds that the taxpayer's working time exceeded what might be regarded as the hours of a "normal" working week. In the present case Mr McCabe was a businessman working (by his own account) long hours which included a considerable amount of travel. It would be wholly unjustifiable to exclude his travel to and time spent in the UK from an analysis of his working pattern.

46. We therefore dismiss this ground of appeal.

GROUND 1(B) – APPLICATION OF THE COMMON LAW TEST OF RESIDENCE

47. Under this ground of appeal, Ms Shaw advanced a miscellany of points which she said showed that the FTT had erred in its understanding and application of the common law test of residence. Specifically, she contended that:

(1) The FTT erred in the way it took into account days and part days when determining Mr McCabe's presence in the UK.

(2) The FTT did not properly assess the quality of Mr McCabe's presence in the UK.

(3) The FTT misapplied the concept of a "tie" in considering whether there was a substantial loosening of Mr McCabe's ties to the UK.

(4) The FTT failed to compare Mr McCabe's situation before and during the Relevant Period when considering whether there was a distinct break in the pattern of his life in the UK.

48. We address each of these in turn.

The approach to counting days and part days in the UK

49. The FTT set out the evidence before it as to the number of days, part days and nights spent by Mr McCabe in the UK during the Relevant Period at §§96–100, followed by a detailed description of Mr McCabe's travel arrangements during the Relevant Period at §§104–123. The FTT's subsequent discussion of these points was at §§191–195. The FTT emphasised that it did not need to rely on only one set of data, nor did it need to confine its analysis to the question of where Mr McCabe slept during that time: §191. It went on to find that:

(1) Mr McCabe spent only 33 nights in the UK in the first year, and 43 in the second, but this fact alone did not give an accurate picture of the amount of time he spent in the UK, as he was present in the UK for 79 days or part days in the first year, and 95 in the second: §192(1).

(2) Mr McCabe made 98 visits to the UK throughout the Relevant Period, 53 of which did not involve an overnight stay: §192(2).

(3) The "whole days" approach (looking at the number of days on which Mr McCabe both woke up and went to sleep in the UK) was misleading, since it did not take account of day trips or trips where Mr McCabe spent just one night: §193.

(4) After the first six months, Mr McCabe made frequent short, regular trips to the UK, and there was rarely a period of more than five days when Mr McCabe did not visit the UK, save for stays at his holiday home in La Manga, or long-distance travel to Australia and other destinations: §194.

(5) The level of Mr McCabe's presence in the UK was less than that spent elsewhere, and the brevity of his trips meant that they did not have the feel of being settled, but the frequency of his visits and the ability to make many visits of short duration was aided by the proximity of Brussels to London and the ease of travelling between those destinations by private plane or Eurostar: §195.

50. Ms Shaw took issue with those conclusions on the basis that they gave insufficient weight to the question of where Mr McCabe slept at night. She also objected that the FTT had not weighted the days by comparison with part days in its count of days.

51. As a preliminary point, as we have already noted, the FTT concluded at §205 that the amount of time that Mr McCabe was physically present in the UK, compared with the extent of his overseas visits, were significant factors *against* a conclusion that Mr McCabe remained UK resident after 4 April 2006, albeit that this was outweighed by the other factors listed at §207. Ms Shaw's submission on this point was therefore ultimately a contention that the FTT should have given more weight than it did to its conclusions regarding the brevity of Mr McCabe's visits to the UK and the number of nights spent in the UK. The weight to be given to the different factors identified was, however, fundamentally a matter for the FTT, and as we have noted Ms Shaw did not advance an *Edwards v Bairstow* challenge to the FTT's factual evaluation.

52. In any event, we do not consider that the FTT's approach discloses any error of law. The FTT's evaluation of the time spent by Mr McCabe in the UK was part of its overall assessment of whether there was a substantial loosening of Mr McCabe's ties to the UK. As we have set out above, the question of where Mr McCabe slept at night was a relevant factor in that assessment, and was rightly taken into account by the FTT as a matter of some significance, but the FTT was not required to regard that as overriding all other considerations. Rather, the FTT was required to have regard to all the relevant circumstances: see *Glyn* §41, and *Gaines-Cooper*, §63. In particular, in this case, the FTT noted that the number of nights spent in the UK did not alone give an accurate picture of the time spent by Mr McCabe in the UK, given the fact that Mr McCabe's visits to the UK frequently did not involve an overnight stay. That was a finding that the FTT was entitled to make on the evidence before it.

53. The assessment of a taxpayer's presence in a particular place is, moreover, not a purely mathematical exercise, still less one that must be carried out according to a specific formula. The FTT therefore correctly considered that it was not bound to adopt a single metric for the evaluation of Mr McCabe's presence in the UK (§191). Rather, the FTT had regard to both parties' schedules showing Mr McCabe's presence in the UK, calculated on various different bases, as being helpful in seeking to illustrate his overall pattern of travel (§98). That approach was, in our judgment, unimpeachable.

54. Ms Shaw objected that it would not be appropriate to calculate days spent in the UK by simply aggregating days and part days, giving part days the same weight as full days. We agree that simply adding the number of whole days and part days together as a numerical exercise would not be a meaningful statistic on which to base a determination as to residence. That is, however, not what the FTT did. While §192 of the Decision referred to the days and part days on which Mr McCabe was present in the UK over the Relevant Period, that was a summary of the more detailed and granular evidence considered by the FTT in the earlier parts of its judgment. The FTT had already set out, among other things, not only the number of whole days spent in the UK but also several different representations of part days, based on quarter days (HMRC's approach) and a thirds approach (Mr McCabe's approach).

55. The FTT Decision must be read as a whole, and nothing in the conclusions at §192 suggested that the FTT was ignoring its earlier more granular analysis. On the contrary, it is clear that the FTT considered, in detail, the various different measures of presence in the UK that were submitted by the parties. The weight ultimately given to those measures of presence in the UK, as set against other factors connecting Mr McCabe to the UK, was a matter for the FTT in its evaluation of the facts.

56. We do not, therefore, consider that the FTT erred in its approach to the days and part days spent by Mr McCabe in the UK.

The quality of Mr McCabe's presence in the UK

57. At §196 the FTT rejected Ms Shaw's submission that the brevity of Mr McCabe's visits meant that they lacked the quality of presence which was required to determine residence. In particular, it considered that Mr McCabe's trips to the UK were busy and productive, and that where Mr McCabe was away from the UK for longer periods of time (with the exception of the first six months), this was generally not because he was in Brussels, but was rather because he was in Australia, La Manga or the Far East.

58. Ms Shaw made a number of submissions about this finding but did not, in our judgment, identify any error of law by the FTT. Her starting point was that in assessing the quality of Mr

McCabe's presence in the UK greater weight should have been placed on the visits to the UK which included overnight stays. We have already found that the FTT did not err in its understanding of the legal test. As to the weight given to overnight stays, that is a classic exercise of evaluation of the facts, which was a matter for the FTT.

59. Ms Shaw's submissions effectively suggested that Mr McCabe's visits to the UK should be disregarded if they did not involve overnight stays. We unhesitatingly reject that proposition. It is not consistent with the requirement to carry out a multifactorial assessment of all of the circumstances, as set out in the case-law which we have discussed above. Nor does it take account of the reality of modern travel options. A logical consequence of Ms Shaw's position would be that if someone visited the UK every day but chose to return, say to Brussels or Paris overnight (which is eminently possible, as Mr McCabe's travel schedule demonstrates), they could be taken to have had no UK presence at all. In Mr McCabe's particular situation it would mean (as recognised by the FTT at §192(2)) that of the 98 visits he made to the UK during the Relevant Period, 53 of those visits would be entirely disregarded. That would not give an accurate or a balanced picture of his presence in and ongoing connection to the UK during that period.

60. A further submission was that greater weight should have been given to the fact that when Mr McCabe did stay in the UK, he did not do so at Deepdale. The FTT's judgment acknowledged this to have been the case during the Relevant Period. As the FTT said at §186, however, residence in the UK does not require residence in a particular building in the UK. The fact that Mr McCabe slept in hotels, or at the houses of friends or his son Simon, whilst in the UK did not therefore preclude him from being UK resident.

61. There was, again, no error in that approach. In the *Lysaght* case, Viscount Sumner noted that the hotel where Mr Lysaght typically stayed during his visits to the UK was not much of a home to him, but that this was not conclusive, since:

> "Property obviously is no conclusive test. Whether Mr Lysaght resides in his own or in a hired house in Ireland cannot have much to do with it, nor is a person precluded from being resident because he puts up at hotels, and not always the same hotel, and never for long together. … although setting up an establishment in this country, available for residence at any time throughout the year of charge, even though used by little, may be good ground for finding its master to be 'resident' here, it does not follow that keeping up an establishment abroad and none here is incompatible with being 'resident here' if there is other sufficient evidence of it." (p. 528)

62. Ms Shaw also suggested that the FTT had left out of account the first six months of the Relevant Period, during which he did not return to the UK (save for a single day trip to watch a Sheffield United football match). That is in our view a misunderstanding of the Decision. The comments at §§194 and 196 did not indicate that the FTT was disregarding the first six months of the Relevant Period; rather, the FTT was simply acknowledging that during that period Mr McCabe was not (save for the one day trip) in the UK at all. That was a matter which was then expressly taken into account in the FTT's assessment of the overall fact pattern, but the FTT found at §201(1) that this was not sufficient to render Mr McCabe non-resident:

> "It is clear from the authorities that an absence from the UK of several months is not itself sufficient. The difficulty which Ms Shaw faces on the facts, and which I have concluded is not surmounted, is that during the six months from 4 April to 4 October 2006 (and leaving aside the return to the UK on 30 April 2006, which does not and should not dictate the conclusion), Mr McCabe retained some of his connections to the UK throughout whilst not physically present in the UK (eg attending board

> meetings of several of the UK companies, both in Brussels and Paris), and was continuing to hold meetings in relation to UK developments (eg Lumiere in Leeds). After six months, Mr McCabe returned to the UK and the pattern of his life continued, albeit with him spending time in Brussels as well as the UK, Spain and elsewhere. Mr McCabe's physical absence from the UK was a consequence of the tax advice which he had received, and was treated by him as a hurdle to overcome. He did remain absent for the time advised, but when viewed in the context of all the surrounding facts which I have relied on above, but I am not satisfied that Mr McCabe had made a sufficient loosening of ties by this date."

63. Ms Shaw's next point was that Mr McCabe had a habitual abode in Belgium (as the FTT went on to find) and spent more time there than in any other country. That obviously does not, however, preclude a finding that Mr McCabe was also resident in the UK. It is not disputed that a person may have more than one country of residence: see §42 of *Glyn*. The fact that Mr McCabe was, as is common ground, resident in Belgium, and the FTT's finding that he had his habitual abode there, is therefore not in any way inconsistent with a conclusion that he was also resident in the UK during the Relevant Period.

64. Finally, Ms Shaw took issue with the FTT's reference to the fact that Mr McCabe's return visits to the UK were "busy and productive", on the grounds that he was busy and productive wherever he was. Again, we see this as a point which goes to the FTT's evaluation of the facts that it found. In any event, we do not read the Decision as suggesting that the FTT is placing any significant weight on this point. Rather, the FTT was making the point as part of its rejection of Ms Shaw's submission that the brevity of Mr McCabe's visits to the UK meant that they did not have the necessary quality to be relevant in determining residence. The FTT was clearly right to reject that submission, and we note that Ms Shaw did not pursue that in this appeal (although she made similar points which we have rejected on the grounds set out above).

65. The FTT did not, therefore, err in its assessment of the quality of Mr McCabe's presence in the UK.

The concept of a "tie"

66. Ms Shaw's next submission was that the FTT had misunderstood the decision of the Supreme Court in *Gaines-Cooper* and in particular the reference to a "substantial loosening of ties" so as to amount to a distinct break in the taxpayer's pattern of life in the UK. In particular, she said that a connection should only be regarded as a "tie" for this purpose if it requires the taxpayer to be physically present in the UK.

67. On that basis, although Mr McCabe retained various interests in UK businesses, Ms Shaw said that he was able to manage those interests from outside the UK, and noted that the majority of meetings for his UK businesses (including board meetings) were held outside the UK. She therefore contended that the FTT erred by regarding Mr McCabe's ongoing UK business interests as relevant connections to the UK which indicated continuing UK residence.

68. We were not persuaded by Ms Shaw's submissions. In considering whether a taxpayer has substantially loosened their ties to the UK, while the primary focus must be on their physical presence in the UK, the enquiry is a holistic one which encompasses the nature and purpose of their visits to the UK, and the extent of their continued connection with the country. There is no reason why, in considering those matters, the court or tribunal should disregard any connection which does not require presence in the UK. Indeed, as the facts of the present case illustrate, to do so may lead to an analysis which is highly artificial, discounting a connection

which can in principle be maintained from overseas (e.g. through holding business meetings remotely or otherwise outside the UK), even if in fact the evidence shows it to have involved presence in the UK on a significant number of occasions. The relevant question is therefore not whether a connection *requires* presence in the UK, but rather the extent of the taxpayer's actual presence and their reasons for that.

69. Turning to the Decision, as the FTT recorded at §147, during the Relevant Period Mr McCabe attended 98 board meetings, of which 24 (almost 25%) were in the UK. A significant number of the board meetings were therefore in the UK during that time. The FTT then went on to describe, at §§149–150, Mr McCabe's attendance at other business meetings during the Relevant Period, which took place both in the UK and elsewhere. The FTT had also already set out at §§104–122 Mr McCabe's travel pattern from 4 April 2006 to 5 April 2008, which included reference to numerous meetings which he attended in the UK during that time.

70. The FTT then summarised the position at §198(5), taking account specifically of the extent to which Mr McCabe did in fact return to the UK for business purposes, even if (as the FTT had repeatedly acknowledged) much of his business was conducted outside of the UK:

> "198. Whilst Ms Shaw submitted that the reasons for Mr McCabe's visits were not ties to the UK, the reality is that Mr McCabe did return to the UK, and his activities in the UK covered a variety of reasons reflecting various types of connections to the UK:
>
> …
>
> (5) Looking at the business:
>
> (a) Mr McCabe was owner of the Scarborough Group, and this UK incorporated and UK resident company represented his main asset.
>
> (b) Mr McCabe was director of the holding companies and some of the other companies within the group, and he was Chairman of SUplc. Whilst the number of directorships reduced, he retained significant influence both as owner and director.
>
> (c) Whilst Mr McCabe's evidence included that all of the Scarborough Group's activities had some form of international element, and Ms Shaw submitted that the majority of Mr McCabe's work engagements were related to non-UK activities, the practical reality was that Mr McCabe conducted a wide range of activities in the UK. He did hold discussions and briefings in relation to the sale of a large part of the business to an Australian counterparty, but the target business was both UK and non-UK. However, it is readily apparent that he also attended meetings in the UK with key UK contacts (eg Mrs Robertson and Ms MacCagnan), he attended board meetings of UK companies in the UK, had meetings in the UK in relation to UK-specific matters, including the Tevez affair, developments in Leeds, the re-generation of Sheffield, legal disputes in relation to old projects, and met with international business partners (eg Dr Quek) in the UK.
>
> (d) I have found that I was not satisfied that Mr McCabe had handed over responsibility for running the UK businesses; but in any event, the extent of his involvement, and the number of trips he made to the UK for business meetings and their breadth of subject-matters, illustrates a key part of his connection to the UK throughout the Relevant Period."

71. It is therefore clear that the FTT analysed the extent to which Mr McCabe's business meetings were in fact held in the UK as opposed to in Brussels or elsewhere. It was the result

of this analysis that led to the FTT's conclusion at §198(5)(d), which then fed into its overall conclusion as to the nature of Mr McCabe's residence (particularly at §207, which we have summarised at §28(3) above). We find no error of law in that approach.

Comparison of position before and during the Relevant Period

72. Ms Shaw's final contention under this ground of appeal was that the FTT failed to carry out an adequate comparative analysis of Mr McCabe's pattern of life before and after 4 April 2006, the date on which he left the UK, and that it instead considered the pattern of his life during the Relevant Period in absolute terms.

73. We disagree. There is nothing in the Decision to support the suggestion that the FTT erred in this regard. The FTT specifically stated that it was adopting a comparative approach. Having reminded itself of the test in *Glyn* and *Gaines*-Cooper, §189 of the Decision referred back to the facts found regarded Mr McCabe's life before 4 April 2007. At §§191–201, the FTT then considered the position during the Relevant Period, analysing and assessing the detailed evidence set out earlier in the Decision, leading to the conclusion at §204 that there had been "a change in the pattern of Mr McCabe's life" after 4 April 2006 but "not such as to constitute a sufficient loosening of ties with the UK." The discussion at §§205–210 of specific aspects of the FTT's analysis which supported that conclusion also clearly addressed the situation before as compared to the situation during the Relevant Period.

74. Ms Shaw's only challenge could, therefore, be to the FTT's evaluation of the different aspects of the evidence. Again, however, absent an *Edwards v Bairstow* challenge, that is not a matter of law which is susceptible to challenge in this appeal.

75. We therefore dismiss this ground of appeal.

GROUND 2(A) – PERMANENT HOME IN THE UK

76. This ground of appeal concerns the application of the first limb of Article 4(2)(a) of the DTC "tie breaker", which asks whether the taxpayer has a permanent home available to them.

77. As set out above, it is common ground that Mr McCabe had a permanent home (within the meaning of the DTC) available to him in Belgium. The FTT found that Mr McCabe also had a permanent home available to him (within the meaning of the DTC) in the UK, at Deepdale. Ms Shaw took issue with the latter finding, relying in particular on the following paragraphs of the 2017 Commentary to Article 4 of the OECD Model Tax Convention on Income and on Capital, on which Article 4 of the DTC is based:

> "11. The Article gives preference to the Contracting State in which the individual has a permanent home available to him. This criterion will frequently be sufficient to solve the conflict, e.g. where the individual has a permanent home in one Contracting State and has only made a stay of some length in the other Contracting State.
>
> 12. Subparagraph a) means, therefore, that in the application of the Convention (that is where there is a conflict between the laws of the two states) it is considered that the residence is that place where the individual owns or possesses a home; this home must be permanent, that is to say, the individual must have arranged and retained it for his permanent use as opposed to staying at a particular place under such conditions that it is evident that the stay is intended to be of short duration.

> 13. As regards the concept of home, it should be observed that any form of home may be taken into account (house or apartment belonging to or rented by the individual, rented furnished room). But the permanence of the home is essential; this means that the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily of short duration (travel for pleasure, business travel, educational travel, attending a course at a school, etc.). For instance, a house owned by an individual cannot be considered to be available to that individual during a period when the house has been rented out and effectively handed over to an unrelated party so that the individual no longer has the possession of the house and the possibility to stay there."

78. The 2017 Commentary is an updated version of the 1977 edition of the OECD Commentary, which was the version of the commentary published at the time that the DTC was negotiated. In *Fowler v HMRC* [2020] UKSC 22, §18, a case which considered the UK/South Africa Double Taxation Treaty, Lord Briggs noted that the OECD commentaries "are updated from time to time, so that they may (and do in the present case) post-date a particular double taxation treaty. Nonetheless they are to be given such persuasive force as aids to interpretation as the cogency of their reasoning deserves …" We agree with the FTT's comment at §228 that the same should apply where the current version of the Commentary post-dates the Relevant Period in a particular case. We refer, therefore, in this judgment to the 2017 version of the Commentary, as did both parties in their submissions.

79. Ms Shaw advanced various arguments on the basis of the Commentary. The emphasis of those changed as between her skeleton argument and her submissions at the hearing. Considering both her written and oral submissions, we understand her to have advanced essentially five arguments which she said meant that the FTT could not properly have concluded that Deepdale was a permanent home available to Mr McCabe during the Relevant Period:

(1) Mr McCabe had no legal right to stay at Deepdale; and Mrs McCabe's ownership of the property was not sufficient.

(2) Mr McCabe had removed his possessions and handed over his keys, so could not be regarded as "possessing" the property.

(3) The FTT should have respected Mr McCabe's choice to give up the property.

(4) Mr McCabe did not spend a single night at Deepdale during the Relevant Period.

(5) German case-law indicated that regular use of the relevant property was required for it to be regarded as a permanent home under Article 4(2)(a).

80. We address these in turn.

The absence of legal rights to Deepdale

81. Ms Shaw said that Mr McCabe had divested himself of his legal right to stay at Deepdale by transferring the property to his wife's sole name in 2004. He therefore did not have any rights of ownership of Deepdale. The fact that the property was owned by Mrs McCabe was not, she said, sufficient for the purposes of Article 4(2)(a) of the DTC, since the Commentary refers to the taxpayer having retained the home for "his" use. Accordingly, she said, the focus

should have been on the question of whether Deepdale was Mr McCabe's home, and not whether it was the home of his wife.

82. We agree that the question to be answered under Article 4(2)(a) of the DTC is whether the taxpayer has a permanent home available to them in the State in question, and not whether their spouse has such a home. But the DTC does not require legal ownership of the property. It asks instead whether there is a permanent home "available" to the individual. The term "available" is not defined in the DTC, or the Commentary. (We address below the Commentary's reference to a residence as the place where the taxpayer "owns or possesses" a home.) Guidance as to how treaties should be interpreted is also, as recognised at §16 of *Fowler*, found in Article 31 of the 1969 Vienna Convention on the Law of Treaties, of which the UK and Belgium are both signatories. Article 31 includes the following provisions:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> …
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended."

83. There was no suggestion before us that the term "available" was intended to have a special meaning in the DTC. We fall back, therefore, on the ordinary usage of the term, which we consider means in its context no more than a residence being "able to be used" by a person or "at the disposal of" a person (as per the definition in the Oxford English Dictionary). That is a factual concept which can readily be applied by a court or tribunal, and was applied by the FTT in the present case. The FTT properly did not focus on the question of legal rights, nor did it assume that Deepdale was Mr McCabe's home simply because his wife owned the property and had her home there. Rather, the FTT based its conclusion on a factual finding that Mr McCabe could have stayed at Deepdale whenever he wanted to, Mrs McCabe having acknowledged that she would have given permission if asked. That was a conclusion that the FTT was entitled to reach on the evidence before it.

Possession of Deepdale

84. Ms Shaw relied on the reference in §12 of the Commentary to the relevant residence being where the taxpayer "owns or possesses" a home. She said that Mr McCabe was not in possession after April 2006, since he had removed himself and his possessions and had handed over the keys.

85. The reference to owning *or* possessing a home in the Commentary makes clear that legal ownership is not required. Beyond that, we do not consider that the concept of "possessing" a home adds anything to the remainder of the relevant passages of the Commentary, which refers to the permanent and continuous availability of the home for the use of the taxpayer. The FTT found that Deepdale was available to Mr McCabe to use, and that "he did use it throughout the Relevant Period" (§229(2)). Ms Shaw has not challenged that factual assessment on *Edwards v Bairstow* grounds.

86. We also find it entirely within the ability of the FTT to have disregarded what it saw as the "artificial step" of Mr McCabe handing the keys of Deepdale to Mrs McCabe (§229(4)). As the FTT observed at §214, it was required to adopt a purposive approach to the interpretation of the DTC: *Bayfine UK v HMRC* [2012] 1 WLR 1630, §50. The FTT considered that the

reality of the situation was that, notwithstanding the handover of the keys, in practice the house was available to Mr McCabe during the Relevant Period. Ms Shaw's submission that he did not have the "practical ability" to stay at Deepdale is therefore simply inconsistent with the FTT's unchallenged findings of fact.

Whether Mr McCabe had chosen to give up his home at Deepdale

87. Ms Shaw said that the statement in §12 of the Commentary that "the individual must have arranged and retained [the home] for his permanent use" demonstrates that the focus must be on the acts of the taxpayer, such that if a taxpayer chooses to give up their permanent home in a jurisdiction, then that choice should be respected.

88. We agree with that as a matter of principle. Whether or not that is the case, however, must be determined on the basis of the facts before the court or tribunal, by reference to all of the relevant evidence.

89. The FTT's conclusion was that, on the evidence before it, although Mr McCabe had removed his personal belongings from Deepdale, the house did in fact remain available to him as his permanent home in the UK during the Relevant Period. The example at §13 of the Commentary of an individual choosing to rent their home to a third party, such that they no longer had the possibility of staying there, was relied on by Ms Shaw but in fact supports the FTT's conclusion (as the FTT found at §230): unlike that example, the FTT found that Mr McCabe was in fact able to stay at Deepdale whenever he wanted, and for as long as he wanted.

90. This was not, therefore, a case where on the facts Mr McCabe had given up his permanent home in the UK. Not only did the home remain available to him, but (as we have already noted) the FTT found that he did in fact use it throughout the Relevant Period.

Mr McCabe's decision not to spend nights at Deepdale

91. Ms Shaw said that Mr McCabe did not in fact spend a single night at Deepdale during the Relevant Period, which she said shows that Mr McCabe did not treat it as his home.

92. Again, however, the relevant question for the purposes of the DTC is whether the taxpayer has a home that is "available" to them, a question which the FTT addressed on the facts before it. That is different from the question of whether the taxpayer in fact spends time sleeping at the property. As the FTT noted at §125(4), although Mr McCabe spent time at Deepdale when he was in Scarborough during the Relevant Period, he did not sleep there for reasons solely attributable to the tax advice he had received. Mrs McCabe would, however, have given permission for Mr McCabe to sleep there if he had asked. On the basis of those findings, we do not consider that the fact that Mr McCabe did not in fact spend any nights at Deepdale undermines the FTT's finding that Deepdale was a permanent home available to Mr McCabe.

German case-law

93. Finally, at the hearing Ms Shaw sought to introduce two German court decisions (concerning, respectively, the Germany/Switzerland and Germany/Spain Double Taxation Agreements) which she said showed that the property should be regularly used by the taxpayer for it to be regarded as a permanent home for the purposes of Article 4(2)(a).

94. That was a new submission, not mentioned in Ms Shaw's grounds of appeal or her skeleton argument; nor had it been raised before the FTT. In fact, in the FTT Ms Shaw's submission was the opposite: the transcript of the hearing records her submission as being that "if a person has arranged a home to be permanently and continuously available for him to stay at, then whether or not he, in fact, stays there is nothing to the point."

95. It is well-established that an appellate court should be cautious about allowing a new point to be raised on appeal, and will not generally permit such a new point if it would necessitate new evidence or would have resulted in the trial being conducted differently with regards to the evidence. The decision whether to allow the new point will depend on all of the relevant factors, including the nature of the proceedings which have taken place in the lower court, the nature of the new point, and any prejudice that would be caused to the opposing party if the new point is allowed to be taken: *Notting Hill Finance Limited v Sheikh* [2019] EWCA Civ 1337, §§25–27.

96. In the present case the FTT trial took place over 13 days, and involved extensive arguments and a large volume of witness and documentary evidence. While (as we have already noted) the FTT found that Mr McCabe did use Deepdale throughout the Relevant Period, and earlier in its judgment had found that Mr McCabe visited Mrs McCabe at Deepdale on several occasions, including the Christmas periods (§125(2)(b)), the FTT made no specific findings as to the extent of that use, because the question of the extent and regularity of Mr McCabe's visits to Deepdale had not been raised as a relevant issue for the purposes of Article 4(2)(a) of the DTC. Had the point now raised been before the FTT, it would inevitably have required evidence and argument on this point.

97. We therefore do not have the evidential material available to us to consider the point now raised by Ms Shaw. Not only that, but the fact that the argument was advanced for the first time at the hearing meant that Mr Stone had not had the opportunity to formulate submissions on the German decisions, which concern different treaties and different fact patterns to those of this appeal. Taking these factors into account, we consider it inappropriate to allow Ms Shaw to introduce a new point of law in relation to interpretation of Article 4(2)(a), on the basis of the German case-law which she referred to at the hearing.

98. We therefore dismiss this ground of appeal.

GROUND 2(B) – COVI IN THE UK

99. The final ground of appeal concerns the application of the second limb of Article 4(2)(a) of the DTC, which provides for an individual with a permanent home available to him in both the UK and Belgium to be resident in "the State with which his personal and economic relations are closer (centre of vital interests)". In other words, this limb asks where the taxpayer's COVI is located.

100. In analysing that question, the FTT started out (at §237) by noting that this limb of Article 4(2)(a) required a comparison between relevant aspects of Mr McCabe's personal and economic relations in the UK and Belgium during the Relevant Period. It noted that its conclusions on Mr McCabe's permanent home or habitual abode were not relevant when assessing COVI, as that issue would arise at a separate stage of the Article 4(2) "waterfall". In addition, the FTT discounted, as irrelevant, the question of the extent of time spent by the McCabe family in La Manga, and a comparison between Mr McCabe's relations before and during the Relevant Period.

101. While the FTT accepted that Mr McCabe had various connections to Belgium during that time, it ultimately placed greater weight on his personal and economic relations in the UK (§§238–239). The FTT therefore found that Mr McCabe's COVI remained in the UK during the Relevant Period.

102. Ms Shaw's criticisms of those findings again evolved somewhat between her written submissions and the hearing. By the time of the hearing, we understood her submissions to be that:

(1) No reasons, or insufficient reasons, were given for attributing greater weight to Mr McCabe's personal and economic relations in the UK.

(2) The FTT erred by discounting Mr McCabe's connections with Spain and his employment income from Australia. Properly assessed, the FTT should have concluded that a COVI in the UK or Belgium could not be determined.

(3) The FTT erred in not taking account that Mr McCabe had a habitual abode in Belgium.

(4) The FTT was wrong to reject as irrelevant a comparison between Mr McCabe's personal and economic relations prior to and during the Relevant Period.

103. We address these in turn.

Sufficiency of reasons

104. Ms Shaw made the point that a failure to give reasons or sufficient reasons essential to a decision could constitute a ground of appeal, citing *HMRC v Hippodrome Casino* [2024] UKUT 27 (TCC). She contended that while the FTT listed various personal and economic connections to both Belgium and the UK, relevant to the assessment of COVI, it did not explain why it gave greater weight to the UK connections.

105. We do not accept this criticism. At §238 the FTT listed what it considered to be Mr McCabe's key personal and economic relations with Belgium. It then stated at §239 that having assessed "all of Mr McCabe's relations" it placed greater weight on his personal and economic relations in the UK. The key factors relied on were then listed at §§239(1) to (5), and we have summarised them at §28(8) above.

106. It is clear to us that the FTT was, in those paragraphs, setting out the result of its evaluative analysis, recording the key UK connections which it considered to outweigh the Belgian connections which it had also set out. In other words the FTT's reasoning was that on the basis of the various Belgian and UK connections which it listed, it considered that Mr McCabe's personal and economic relations with the UK carried most weight in its assessment, leading to the conclusion that Mr McCabe's COVI was in the UK.

107. While the FTT's summaries in paragraphs §§238–239 of the Belgian and UK connections that it considered to be relevant was concise, those paragraphs must be read in the context of the judgment as a whole, in which the FTT had already made very detailed findings on each of the matters set out in those summaries. It was not necessary for the FTT to repeat those findings, extensively, in its discussion on the issue of COVI.

108. Unlike the comments at §63 of the *Hippodrome* case, this was therefore not a case where the FTT "failed to give any reasons" for reaching the conclusion that it did, or had simply failed to address with the case advanced by one or other party.

109. As Ms Shaw's submissions revealed, her real objection was not to the sufficiency of the reasons given by the FTT, but to the FTT's evaluation of Mr McCabe's connections as supporting a finding that Mr McCabe's COVI was in the UK. Her submissions on that were, however, in reality a challenge to the FTT's factual assessment and its decision as to the weight to be given to its factual findings, which cannot be pursued save on *Edwards v Bairstow* grounds. Ultimately, while Ms Shaw took issue with the significance of Mr McCabe's connections with the UK, she did not suggest that the factors relied upon by the FTT at §239 of the Decision were wholly irrelevant to the FTT's analysis, or that the FTT's conclusion was not one that was open to a reasonable tribunal, properly directed as to the law.

110. For completeness, however, we comment briefly on the points made by Ms Shaw in this regard.

111. First, Ms Shaw took issue with the FTT's findings as to the time spent by Mr McCabe in the UK with family and friends. These were, however, findings that were open to the FTT on the evidence before it. The fact that Mr McCabe's social contacts with UK friends reduced after his move does not undermine that analysis – as we discuss further below, the test does not require a comparison of the situation before and during the Relevant Period, but solely requires analysis of the situation as it stood during the Relevant Period. Ms Shaw also noted that Mr McCabe spent most of his time with his family outside of the UK, primarily at La Manga. Again, as we discuss below, the test does not require consideration of connections to third countries. It was therefore not relevant for the FTT, in this part of its analysis, to take account of the time spent by the McCabe family in La Manga.

112. Secondly, Ms Shaw said that Mr McCabe's presence at Sheffield United matches was significantly less than it had been, and that he also pursued sporting interests in Brussels and overseas. Neither of those factors undermine the validity of the FTT's reliance, for the purposes of its COVI analysis, on the fact that Mr McCabe continued to attend numerous Sheffield United matches in the UK during the Relevant Period.

113. Thirdly, as regards Mr McCabe's continued involvement in the Scarborough Group, and his continued conduct of a substantial amount of Scarborough Group business from the UK, Ms Shaw pointed to various factual points which she said should have been regarded as significant by the FTT. The FTT's finding that Mr McCabe continued to conduct a "substantial" amount of Scarborough Group business from the UK was, however, supported by its detailed findings earlier in the Decision on Mr McCabe's travel pattern, responsibility for UK businesses and meetings in the UK. Beyond that, the weight given to the various aspects of Mr McCabe's business activities was a matter for the FTT. We do not accept, in particular, that the FTT ignored the fact that Mr McCabe had sold the majority of his interest in the Scarborough Group to the Australian group Valad. That transaction and its impact on Mr McCabe's responsibilities was addressed in the earlier detailed discussion in the Decision, which was the basis for the FTT's COVI analysis.

114. Fourthly, we do not agree with Ms Shaw's submission that the source of Mr McCabe's employment income from SRE (i.e. that it derived from UK companies within the Scarborough Group) was immaterial. The FTT was entitled to take account of the facts as a whole, and the

reality that although Mr McCabe had incorporated a Belgian personal service company, that company derived its revenue from consultancy contracts with UK businesses.

Mr McCabe's connections with Spain and Australia

115. Ms Shaw submitted that the DTC tie-breaker is intended to result in clear and unequivocal determinations. She contended that by failing to take into account Mr McCabe's presence in La Manga with his family, and his income from Australia, the FTT failed to appreciate that Mr McCabe's COVI could not be determined as between the UK and Belgium.

116. We do not accept these submissions. At §241 the FTT expressly recognised that if COVI could not be determined it would need to consider where Mr McCabe had his habitual abode. The FTT was well aware, therefore, that a possible outcome of the analysis might be that COVI could not be determined as between the UK and Belgium. Article 4(2)(a) does not, however, require a determination of COVI to be "clear and unequivocal"; rather, the question is simply whether the State of the taxpayer's COVI can be determined or not. The FTT decided that Mr McCabe's COVI could be determined as being in the UK, and nothing in the Decision suggests that the FTT's conclusion in that regard was equivocal or marginal.

117. As to the factors relevant to that analysis, Article 4(2)(a) requires a determination of "the State with which [the taxpayer's] personal and economic relations are closer". That requires a comparative exercise between the two contracting States in which the taxpayer is resident, i.e. Belgium and the UK. The FTT therefore did not err in law by focusing its analysis on a comparison between Mr McCabe's personal and economic connections in Belgium and the UK. That was the comparison required by the DTC test, and the FTT concluded that Mr McCabe's personal and economic relations were closer to the UK than to Belgium. The fact that Mr McCabe spent considerable time at the family holiday home in La Manga and received employment income from Australia had no bearing on that analysis.

The relevance of Mr McCabe's habitual abode

118. Ms Shaw's submission was that the FTT should have taken account of Mr McCabe's habitual abode in its determination of COVI, since if Mr McCabe had a habitual abode in Belgium, then it was unlikely that his COVI would not also be in Belgium.

119. We agree with Mr Stone that this submission failed to recognise the "waterfall" structure of Article 4(2) of the DTC. That provision sets out a series of sequential, compartmentalised tests. The question of habitual abode under in Article 4(2)(b) is third in that sequence of tests, and therefore does not arise for consideration unless and until the first two tests have failed to establish the deemed residence of the taxpayer for the purposes of the DTC. Elision of the COVI test with the test for habitual abode would fail to give effect to the priority set out in that waterfall structure.

120. The FTT did not, therefore, err in law in failing to consider Mr McCabe's habitual abode in the context of its determination of his COVI. The FTT did, however, properly consider the fact that Mr McCabe had bought an apartment at Avenue Louise in Brussels, in 2007, and that he spent time in Brussels with his family when they visited him there. Those were relevant factors in the FTT's assessment of Mr McCabe's personal and economic relations in Belgium, and were taken into account in that assessment. The weight given to those factors in the assessment of COVI, compared with the weight given to Mr McCabe's connections with the UK, was ultimately (as we have already said) a matter for the FTT.

Rejection of a temporal comparison

121. Ms Shaw's final criticism was that the FTT was wrong to disregard as irrelevant a comparison of Mr McCabe's personal and economic relations prior to and during the Relevant Period.

122. We reject that submission. The COVI test in Article 4(2)(a) of the DTC requires an examination of the taxpayer's personal and economic relations during the period in issue. There is no provision in the test for any comparison to be made between an individual's relations with one jurisdiction before and after the date on which the examined period commences. The test is, in that regard, fundamentally different from the common law test of residence, which does require such a comparison in order to determine whether ties with the State of original residence have been sufficiently loosened.

123. We therefore dismiss this ground of appeal.

DISPOSITION

124. In conclusion, for the reasons set out above, this appeal is dismissed.

MRS JUSTICE BACON
JUDGE VIMAL TILAKAPALA

Release date: 12 September 2024