[2015] UKUT 0551 (TCC)

Appeal no: FTC/23/2014

Income Tax – Whether the Respondent had ceased to be non-resident before the tax year 2005-2006 – Retention of the Respondent's home in the UK to which he returned on a number of occasions during the year – Whether the First-tier Tribunal had made findings of fact justified by the evidence – Whether the First-tier Tribunal had applied the correct tests as a matter of law – Appeal allowed and case remitted to First-tier Tribunal for re-hearing

UPPER TRIBUNAL

TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

-and-

JAMES GLYN

Respondent

Tribunal: The Hon Mr Justice David Richards

Sitting in public in London on 16, 17 and 20 April 2015

Akash Nawbatt and Sebastian Purnell, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Patrick Way QC and Emma Chamberlain, counsel, instructed by Pinsent Masons LLP for the Respondent

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DECISION

Introduction

1. This is an appeal by the Commissioners for Revenue and Customs (HMRC) against the decision of the First-tier Tribunal (Judge Howard M. Nowlan and Mr Harvey Adams) (the FTT) allowing the appeal of James Glyn against an assessment to income tax of approximately £5.5 million on a dividend of some £24.59 million paid to him in the tax year 2005/2006. The FTT refused permission to appeal, but permission was given by the Upper Tribunal (Judge Sinfield) on four grounds of appeal on 27 February 2014 and by the Upper Tribunal (Judge Bishopp) on the fifth ground on 31 July 2014.

2. The sole issue for determination by the FTT was whether Mr Glyn had ceased to be resident in the United Kingdom for that tax year. It is common ground that if he was not resident in that year, he is not liable to income tax on the dividend, whereas he is so liable if he was resident in the United Kingdom in that year. Mr Glyn also claims that he was non-resident in the following four tax years but that, as the FTT made clear in paragraph 1 of their Decision, was not an issue which arose for determination.

3. I will summarise the material facts, the Decision and the relevant law, before turning to the grounds of appeal and the submissions of the parties.

The facts

4. Mr Glyn is a British citizen who was born in 1949. He has been married for many years to his wife Sarah and they have two children, a son who was aged 29 in early 2005 and a daughter who was then aged 24. Both children had by then left home, each living in a house or flat provided by Mr Glyn. It was the practice of Mr and Mrs Glyn and their children to have dinner together on Friday evenings, normally at the family home.

5. From 1993, Mr Glyn and his wife had lived in St John's Wood in a house which they and their children regarded as the family home. The FTT in paragraph 3 of the Decision observed that Mr and Mrs Glyn "were obviously very attached to the house". They further observed that:

> "It was also located exactly where they wished to live, close to the Appellant's elderly mother, close to [the children], and close to the Appellant's and Sarah's considerable circle of close friends. They referred to St John's Wood as "the village"."

6. For many years before 2005, Mr Glyn and his brother had run a property investment business. They had bought out the other shareholders by 1989. By 2005 it was worth something in the order of £60 million. In the early 2000's, Mr Glyn reached the conclusion that he wished to retire from the business and to realise his investment. He and his brother took advice from their accountants, BDO Stoy Hayward (BDO), as to the best means of achieving these aims. A new holding company was superimposed on top of the existing property investment company, on the basis of

advice that this would be advantageous in terms of tax on gains realised on selling the underlying properties, and Mr Glyn and his brother set about selling all the properties. With BDO's advice, it was agreed that the realisation of Mr Glyn's investment would be achieved by the re-designation of his shares as carrying the right to a special dividend. Following payment of the dividend his shares would carry virtually no rights and would be almost without value. The dividend would equal half the net proceeds of sale of the properties. It was agreed that the dividend would be paid, and it was paid, in the tax year 2005/2006.

7. Mr Glyn decided that for the tax year 2005/2006 and for the indefinite future, meaning at least five years, he would cease to be resident in the UK. The FTT noted in paragraph 8 of the Decision:

> "He obviously reached this decision to some degree because it would tie in neatly with the plan that half of the realisation proceeds of the property sales could be paid to him as a dividend that would be tax free if he was non-resident when he received the dividend."

8. In paragraph 5 of the Decision, the FTT stated:

> "The Appellant did not dispute that avoiding tax on the dividend was a significant influence on his going non-resident. He claimed, however, that additional reasons for going non-resident were that he would find himself drawn back into the property business if he did not make a total break, and that he wanted a totally different lifestyle from the one that for many years he had found to be drudgery. Sarah was more hesitant about the decision to emigrate. She, as the more extrovert of the two, and a great cook and hostess, was keener than the Appellant to retain at least the option of visiting the UK more frequently than the Appellant intended to do. She accordingly decided that … she would not seek to sustain non-resident status, and would return to the UK more regularly than the Appellant if she wished."

In the event, Mrs Glyn spent the majority of her time with her husband out of the United Kingdom.

9. Mr Glyn and his wife decided that they would acquire an apartment in Monaco and take up Monagasque residence. The FTT observed that they did not dispute that the choice of Monaco was also partially inspired by the tax advantages of living in Monaco rather than France. In late 2004 and early 2005 Mr and Mrs Glyn paid a number of visits to Monaco, to arrange residence permits and to lease an apartment. They wished to lease an apartment in a block called The Rocabella but none was available and so they took a 3-year lease of an apartment in a block called the Villa Rose. They insisted on a break clause in the lease at the end of each year, which they exercised in 2007 when an apartment in The Rocabella became available. On 5 April 2005 Mr Glyn left London for Monaco and moved into the apartment in the Villa Rose, where he was joined soon after by his wife.

10. The FTT found that the apartment in Villa Rose was furnished and equipped as a home as distinct from being merely a holiday home. It accepted the evidence of friends, which was not in any event seriously disputed, that the apartment was attractive, comfortable and suitable as a home where Mr and Mrs Glyn could happily live. While the apartment in the Villa Rose was slightly less imposing than might have been expected, Mr and Mrs Glyn were looking for a better apartment. The FTT found that Mr Glyn enjoyed to the full much of what Monte Carlo had to offer. Each of their children visited them and stayed at the apartment for three or four short visits in the year 2005/2006 and a number of their friends also visited them.

11. Mr and Mrs Glyn retained their house in St John's Wood (the London house). Mr Glyn made 22 visits to London in the year 2005/2006. Seven of these visits appear to have been made primarily to attend particular functions, such as weddings, a funeral, charity events and special parties. Other visits in 2005/06 and the later years included the birthdays of his two children, his own birthday and the three most significant Jewish festivals. On each visit he stayed at the London house, and on 15 visits there was the traditional Friday evening family dinner with his wife and their children which, the FTT found, almost always took place at the London house. As earlier mentioned, this had been very much a feature of their family life and, by way of illustration, there had been 35 such dinners in 2004/2005.

12. Mr and Mrs Glyn took a number of holidays during 2005/2006, which required long haul flights. They invariably took those flights from Heathrow and would frequently spend a day or two at the London house at the same time.

13. A further reason for visits to London was to attend meetings with his brother at the offices of BDO. There were nine such meetings between April 2005 and November 2006. The purpose of these meetings was to consider and take advice in relation to the challenges being made by HMRC to the corporate restructuring of the property investment business. Again, Mr Glyn would stay at the London house for a day or so at the time of these visits.

14. There are a number of different ways of calculating the number of days spent by Mr Glyn in the UK in 2005/2006. If the days of travel are excluded, he spent 44 days in the UK. HMRC pointed out that he usually took an early plane from Nice to Heathrow and late plane from Heathrow to Nice, in each case enabling him to spend most of the travelling days in the UK. On this basis, the number of days spent in the UK in 2005/2006 would be 88. The FTT concluded that the most appropriate calculation of the number of days spent in the UK was 65. Almost exactly the same number of days was spent on foreign holidays out of the UK, France and Monaco.

15. In 2010, Mr Glyn returned to the UK permanently and has since lived at the London house.

The Decision of the FTT

16. The FTT noted in paragraph 1 of the Decision that this was a hard-fought appeal, in which evidence was given by Mr Glyn, his wife, his children, his brother and by numerous friends. Mr Glyn was cross-examined extensively, as was his wife and brother. The evidence lasted many days.

17. The Decision contains a detailed account and analysis of the evidence and detailed consideration of the factors which the FTT took into consideration in reaching its decision.

18. The FTT considered that the London house was not retained principally for the purpose of its use by Mr Glyn when he visited the UK. It was not his habitual abode or one of such abodes in the five years commencing with 2005/06. The FTT found that "the obviously dominant reason" for the retention of the house was that Mr and Mrs Glyn realised that they would not live in Monaco forever and would wish to resume living there when they returned to live permanently in the UK.

19. The visits to the UK were not made for a settled purpose, but for a number of purposes, generally two or more combined. Mr Glyn did not, for example, visit London specifically for the purpose of the Friday evening family dinners, most of the visits being for two or more purposes. They did, however, accept that if no other consideration dictated the timing of a visit, Mr Glyn would seek to be in London on a Friday. It was not, however, possible to say that there was a dominant reason for any visit. Mr and Mrs Glyn had a very wide circle of friends which was important to them and, on his visits to London, he was likely to see some of them. However, the almost weekly Sunday dinners with friends almost totally ceased for them.

20. In dealing with the law governing residence in the UK by individuals in the tax year 2005/2006, the FTT noted that it was derived from both case law and the "slightly obscure statutory provisions" contained in sections 334 and 336 of the Taxes Management Act 1988. They took the list of principles set out by the Special Commissioner in *Shepherd v CIR* 78 TC 389 as "a very useful starting point to our understanding of the legal principles that we should apply". A number of those principles are summarised in paragraph 113 of the Decision.

21. As regards the principle that the words "residence" and "to reside" mean to dwell permanently or for a considerable time or to have one's settled or usual abode at a particular place, the FTT noted that this was of central relevance and continued at [115]:

> "… we consider that it is marginally easier to treat someone as having a habitual home if he or she is present at the house for long periods, rather than on several visits that might in total represent the same number of days. This is not remotely to say that someone who stays habitually in the UK for multiple short periods is unlikely to be regarded as a resident. Particularly if those short periods are for a settled purpose, such as to be available for work, as in the case of the two pilots in the recent reported cases, the likelihood is that the person habitually in the UK in that manner will be resident. It is also clearly the case that a person who is present in the UK habitually and for some settled purpose, such as acting as a director of a UK company, can on appropriate facts be UK resident, even if merely staying at hotels. Obviously permanently available accommodation, as opposed to use of hotels, is more likely to result in the conclusion that someone is resident, but neither factor

> (permanently available accommodation or use of hotels) is conclusive in either direction."

22. The FTT observed that it can be very relevant to consider whether a person has a home outside the UK "and indeed relevant to consider whether any such home is the dominant home". They accepted that a dominant home abroad "does not remotely preclude a UK house from simultaneously being a habitual home and therefore occasioning dual residence, ie for present purposes UK residence." Nonetheless, they considered it:

> "very important (in this case for instance) to give consideration to whether the Appellant had a genuine home in Monaco, that much of his way of life revolved around life in Monaco, and whether the Appellant indeed had purposes broader and more genuine for being in Monaco than simply camping abroad to avoid tax."

23. None of this means that the London house could not be "a habitual home" but it is to be taken into account in weighing up all the factors.

24. At [117], the FTT noted the decision of the Supreme Court in *R (on the application of Gaines-Cooper) v Revenue and Customs Commissioners* [2011] UKSC 47, 81 TC134. The effect of that decision was that:

> "… in order to demonstrate that a UK resident person has ceased to be UK resident, it is virtually critical to demonstrate a "complete break", and that this requires it to be shown that the person has not necessarily severed family, social and business ties with the UK, but that at least there has been a "substantial loosening" of such ties."

25. At [118], the FTT identified three tests as those on which they should predominately concentrate, leaving aside sections 334 and 336. The tests were: first, on and after 5 April 2005, did Mr Glyn make a distinct break from his former way of life, commencing a quite different and intended way of life in Monaco, and can he demonstrate not only the required substantial loosening of ties with family, friends and former business life, but whether his whole way of life changed; secondly, having regard to the importance of the London house to Mr Glyn, did it remain a habitual abode, and more particularly a habitual abode in the UK for a settled purpose; thirdly, how long was he in the UK and can his periods of presence in the UK realistically be described as "visits" and were they for a settled purpose.

26. In [119]–[120], the FTT expanded on the significance of a "settled purpose". They stated that this was vital in the present case because a house or other accommodation is more likely to rank as a settled abode if the appellant lives there for a settled purpose, rather than merely staying there on casual visits. In *Gaines-Cooper*, the tax payer visited his property in the UK not because it was convenient, but because his wife and son lived there and he had his valued possessions there. They further observed that it had been HMRC's contention that Mr Glyn was returning to the London house for the settled purpose of enjoying occasions with his son and daughter, but the FTT regarded it as unrealistic to contend that visits, quite possibly made for

one or more various reasons, which gave Mr and Mrs Glyn the opportunity to have their traditional Friday evening dinner, became "visits for a settled purpose". I should note here that on this appeal HMRC has stated that this was not their submission before the FTT. At [121] the FTT stated that it:

> "seems strongly arguable to us that the sort of purposes that are fatal, as "settled purposes" are those that are the occasioning cause of all the visits".

27. While being in the UK for employment reasons or to be with one's wife and family are plainly settled purposes of real significance, the FTT stated that:

> "it must be distinctly questionable whether the Jewish tradition of inviting the close family to share the traditional Friday night dinners can rank as a "settled purpose", when there may have been several quite distinct reasons for a visit to London in the first place."

28. The FTT concluded that Mr Glyn had unquestionably acquired a habitual abode in Monaco, for a settled purpose, being "to live the life, accompanied by his wife, of a relatively rich man, enjoying the relaxation, the walking and swimming, and the countless attractions that Monte Carlo and the delightful surrounding countryside offered." Although Mrs Glyn spent longer in the UK than Mr Glyn, and was not concerned to become non-resident in the UK, she nonetheless lived most of her time with her husband in Monaco and it would certainly be unrealistic to say, as was the case in *Gaines-Cooper*, that Mr Glyn visited the UK in order to see his wife.

29. The FTT concluded that there was a substantial loosening of Mr Glyn's ties in relation to his business, family and social life.

30. As regards business ties, the FTT found that there was no continuance of any business role that they could regard as remotely significant. For about 30 years up to April 2005, Mr Glyn had been dealing with the administration of nearly 200 let properties with 300 different tenants. All bar one of those properties had been sold by April 2005 and the one remaining property was worth only £20,000. It was sold very shortly after April 2005. The FTT looked at each of the continuing business links, in reaching their conclusion that there was a substantial loosening of ties. There was, the tribunal concluded, to all intents and purposes, a complete severance of this former business role.

31. As regards social ties, the FTT concluded that there was a very significant loosening of the social ties of Mr Glyn and his wife as regards their friends in London. Mr Glyn's attendance at the Sunday dinners and similar occasions that had been regular and common before April 2005 virtually ceased.

32. In relation to family ties, the FTT regarded HMRC as raising their most telling connections. In considering the 15 Friday night dinners, as well as family birthdays and the major Jewish celebrations, the FTT emphasised that they were required to look at matters in a common sense manner and to look at the overall reality. While Mr Glyn would visit his mother at least once if not twice on each of his visits to London, the principal responsibility for looking after their mother passed to his

brother. Turning to his ties with his children, the FTT concluded that there was at least a significant loosening of ties.

33. As regards the London house, the FTT had regard to the significance of its retention and to the related issue of whether visits made to it were for a settled purpose.

34. As regards the reasons for retaining the London house, the FTT said at [158]:

> "A very strange feature of the hearing was that, with the exception of the first three lines of the part of the Appellant's witness statement that gave the reasons for the retention of 50 Circus Road, nobody referred again to the obvious and the real reason why the house was retained. Comments were made in relation to a couple of rather far-fetched reasons, and it was obviously said that it was retained because it would be likely to remain a very sound investment, but the absence of attention to the dominant real reason gave the wrong impression that 50 Circus Road might have been retained because the Appellant and Sarah had an absolute requirement that they should stay there during their visits."

35. The FTT continued in [159] to state that the fundamental reason for retaining the London house was that both Mr and Mrs Glyn knew that at some time they would return to London permanently and they considered it unthinkable that they would live anywhere else. From the point of view of stamp duty and sale and purchase costs, it would make no sense to sell the house and then purchase an equivalent house on their return. Equally, the FTT considered that "letting the house would have been rejected because with or without the removal of all the furniture and contents, the risks of letting out the house would have been regarded as completely out of the question." Also, the fact that the housekeeper continued to live there "would almost certainly have remained the case" even if Mr and Mrs Glyn had never been to the house while they were based in Monaco, because it was obviously risky to leave the house unoccupied for long periods. It was only a convenient side-effect that the housekeeper was also available for the visits which Mr and Mrs Glyn made to the house. The FTT thus concluded "without hesitation" that the house was retained for the simple reason that Mr and Mrs Glyn both wished to live there again permanently when they returned to the UK.

36. As for the purpose of Mr Glyn's visits to the London house, the FTT were unimpressed by his claim that he used it "like hotels" but they considered that he used it because it was convenient to do so and obviously cheaper and perhaps more pleasant than staying at hotels. The FTT considered it to be "very instructive" that the invariable description of Mr Glyn's personality was that when he set about achieving some objective, he pursued it single-mindedly. If he had thought that using the house would compromise his objective of not being resident in the UK, he would not have stayed there. The FTT rejected what was said to be a submission made by HMRC that it was utterly vital to Mr and Mrs Glyn that they should live at the London house and still treat it as a habitual home with life there remaining a settled purpose. Again, I should note that on this appeal HMRC has stated that this was not their submission. It was, the FTT concluded, totally unrealistic to suggest that it was critical to them to live at the house allegedly demonstrating that it was a settled abode for a settled

purpose. They had little doubt that Mr Glyn would have been perfectly prepared to stay in hotels and eat at restaurants on Friday evenings had he thought it significant. Likewise, when Mr Glyn used the house before or after a long haul flight from Heathrow, it was a case of him "dropping in" there.

37. The conclusion of the FTT on the purpose of visits to the London house is set out at [167]:

> "We have already described the numerous different reasons for which the Appellant visited 50 Circus Road. None of those purposes was settled, in the sense that he absolutely had to be there, and there regularly. He could have received reports of the state of play from BDO. He could have declined invitations to the occasional party. He could have minimised his trips, but for the fact that on carefully counting his days of presence in the precise way in which he was encouraged to do by HMRC he thought that he could safely do what he did. We conclude, however, that the fact that he did visit for various purposes, often more than one on a short visit, and that none were required or vital, undermines the claim that his presence in the UK was accounted for by any settled purpose."

38. The FTT helpfully summarised their conclusions on the matters referred to above at [174], leading to their conclusions that Mr Glyn was resident only in Monaco in the tax year 2005/2006 and was not dual resident and therefore not resident in the UK.

39. The FTT noted in a number of places in the Decision that, without taking full advice, Mr Glyn believed that, provided he restricted the number of days in any tax year spent in the UK to well below 91 days, he would not be treated as resident in the UK. The 91 days, excluding days of travel, were referred to in what the FTT described at [9] as "the so-called guidance in HMRC's infamous publication IR20". The FTT accepted of course that, in the light of the decision of the Supreme Court in *Gaines-Cooper*, Mr Glyn could not rely on compliance with IR20 as establishing that he was not resident in the UK in the tax year 2005/2006. Nonetheless, the FTT considered that this had some relevance because, having decided to retain the house as the home to which they would return when they resumed permanent residence in the UK, Mr and Mrs Glyn believed that it was not detrimental to his residence status if he stayed there for a substantially shorter period than the 91 days specified in IR20.

The law

40. Although the residence of a person in the United Kingdom may create a liability under statute to income tax and capital gains tax, there is no statutory definition of residence relevant to this appeal. Its meaning is to be derived from judicial decisions. The residence of a person under the common law may in certain circumstances be qualified by statutory provisions, in particular sections 334 and 336 of the Income and Corporation Taxes Act 1988, but those provisions are not directly applicable to the facts of this case.

41. The authorities establish a number of relevant factors that have to be taken into account in deciding the question of a person's residence. The task of the FTT is to

make findings of fact on the evidence before it as regards all the relevant circumstances and, applying the factors identified in the authorities, to determine, having regard to all relevant circumstances, whether or not the person has in the relevant period been resident in the UK.

42. It is here worth mentioning two general points, neither of which were in dispute, that are of particular relevance in the case of Mr Glyn. 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 United Kingdom 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 United Kingdom.

43. In *HMRC v Grace* [2008] EWHC 2708 (Ch); [2009] STC 213, Lewison J summarised at [3] the relevant legal principles to be derived from earlier cases, which were largely agreed between counsel for the parties in that case. Although a number of propositions deal specifically with whether a person is "ordinarily resident", rather than "resident", it is I think nonetheless helpful to set out the summary in full:

> "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 Commissioners of Inland Revenue* (1928) 13 TC 486, 505. This is the definition taken from the Oxford English Dictionary in 1928, and is still the definition in the current on-line edition;
>
> 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* (1998) 70 TC 478, 510;
>
> 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: *Commissioners of Inland Revenue v Zorab* (1926) 11 TC 289, 291;
>
> iv) Residence in a place connotes some degree of permanence, some degree of continuity or some expectation of continuity: *Fox v Stirk* [1970] 2 QB 463, 477; *Goodwin v Curtis* (1998) 70 TC 478, 510;
>
> 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 Commissioners of Inland Revenue* (1928) 13 TC 511, 529;

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 Commissioners of Inland Revenue* (1928) 13 TC 486, 505;

vii) "Ordinarily resident" refers to a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life, whether of short or long duration: *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 343;

viii) Just as a person may be resident in two countries at the same time, he may be ordinarily resident in two countries at the same time: *Re Norris* (1888) 4 TLR 452; *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 342;

ix) It is wrong to conduct a search for the place where a person has his permanent base or centre adopted for general purposes; or, in other words to look for his "real home": *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 345 and 348;

x) There are only two respects in which a person's state of mind is relevant in determining ordinary residence. First, the residence must be voluntarily adopted; and second, there must be a degree of settled purpose: *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 344;

xi) Although residence must be voluntarily adopted, a residence dictated by the exigencies of business will count as voluntary residence: *Lysaght v Commissioners of Inland Revenue* (1928) 13 TC 511, 535;

xii) The purpose, while settled, may be for a limited period; and the relevant purposes may include education, business or profession as well as a love of a place: *R v Barnet LBC ex p Shah* [1983] 2 AC 309, 344;

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: *Re Combe* (1932) 17 TC 405, 411."

44. The propositions in sub-paragraphs (i)-(vi) and (xiii) are concerned with "residence", while the remaining sub-paragraphs are concerned with whether a person is "ordinarily resident". This summary was cited with approval on appeal: see *Grace v HMRC* [2009] EWCA Civ 1082; [2009] STC 2707 at [6].

45. *Grace* was a case in which the taxpaper had been resident in the United Kingdom from 1986, with his only residential property being in the United Kingdom. He was employed as a pilot by British Airways, flying long haul flights from Gatwick and Heathrow airports. In 1997, for personal reasons, he decided that he wished to base himself in South Africa, where he at first rented an apartment and, a year later, bought a house. He retained his house in England where he would usually stay for two or three days before or after each long haul flight. The Special Commissioners decided that he had ceased to be resident in the United Kingdom in 1997, while Lewison J reversed that decision and held that the only possible conclusion from the primary facts found was that he remained resident in the United Kingdom. The Court of Appeal agreed that the Special Commissioner had misdirected herself but held that the case should be remitted to the First-tier Tribunal for re-determination.

46. In considering whether Mr Grace remained resident in the United Kingdom after 1997, the nature of the enquiry was described by Lloyd LJ, giving the leading judgment in the Court of Appeal, at [18]:

> "Thus, the enquiry which she had to undertake involved assessing the duration of Mr Grace's presence in the United Kingdom and the regularity and frequency of his visits, the nature of the visits and his connection with this country. Equally, she had to take into account also his connection with South Africa, including his ownership and use of a house there, and his activities, ties and other connections there. She could not regard his ownership and use of a house there as conclusive that he did not reside in the UK, but it was a relevant factor to be taken into account."

47. The *Gaines-Cooper* case to which I have earlier referred was primarily concerned with the effect of IR20. However, the judgments in the Supreme Court, particularly that of Lord Wilson, contain important observations on the issue of residence more generally. After referring to the decision of the House of Lords in *Levene v Inland Revenue Commissioners* [1928] AC 217, Lord Wilson continued at [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, as I will explain in para 19 below, 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."

48. Lord Wilson further explained what was meant by a distinct break at [20]:

> "It is therefore clear that, whether in order to become non-resident in the UK or whether at any rate to avoid being deemed by the statutory provision still to be resident in the UK, the ordinary law requires the UK resident to effect a distinct break in the pattern of his life in the UK. The requirement of a distinct break mandates a multifactorial inquiry. In my view, however, the controversial references in the judgment of Moses L.J. 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 tax-payer'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."

49. Lord Wilson also discussed the concepts of a "settled purpose" and a "settled abode". At [18], he explained how Nicholls J in *Reed v Clark* [1986] Ch 1 had used the concept of residence for a settled purpose in contrast to "occasional residence" for the purposes of what was then section 49 of the Income and Corporation Taxes Act 1970. The issue in that context was whether the taxpayer who had previously been resident in the UK had acquired more than "occasional residence" abroad. It was not a test used to determine whether the taxpayer had retained residence in the UK. The concepts of settled purpose and settled abode were "clearly different". As Lord Wilson said at [41]:

> "Nicholls J was describing the settled purpose not as a route to becoming non-resident but as a means by which the taxpayer who had become non-resident escaped being treated otherwise under what is now section 829 of the 2007 Act."

50. Lord Hope described the essential inquiry at [63]:

> "But 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."

Grounds of appeal

51. The grounds of appeal are that the FTT:

> "i. Failed to consider whether the necessary distinct break had been effected by 5 April 2005 rather than "on and after" 5 April 2005 and failed to take into account and address the inherent implausibility that an individual who has always been UK resident will be able to effect the necessary distinct break overnight, which is what Mr Glyn was required to establish given that he claimed to have left on 5 April 2005.
>
> ii. Impermissibly and in any event erroneously applied the concept of "settled purpose" in determining whether (a) Mr Glyn had made the necessary distinct break with the UK; and (b) whether he retained a habitual or settled abode in the United Kingdom;
>
> iii. In considering the "significance of the retention of 50 Circus Road", focussed on the reason for the retention of 50 Circus Road rather than the fact and quality of its retention and continued use.
>
> iv. Made findings that the "dominant real reason" for the retention of 50 Circus Road was the desire to live there at the end of the intended 5 year period of claimed non-residence and "had nothing or at least very little to do with interim use whilst [Mr Glyn] and Sarah were in Monaco" which were contrary to the contemporaneous documents, witness evidence and the submissions of both parties.
>
> v. Failed to carry out the correct balancing exercise in determining whether Mr Glyn had made the necessary distinct break, failing to take into account relevant considerations and taking into account irrelevant considerations."

52. I will deal first with Grounds 1 and 4, before then considering the remaining grounds.

Ground 1

53. In my judgment, there is no substance to this ground of appeal. It is clear from the evidence, which was recited and summarised at length by the FTT in the Decision, that Mr Glyn's departure for Monaco on 5 April 2005 was preceded by a long period of planning, including obtaining the lease of an apartment in Monaco and a residence permit. His departure was the culmination of careful preparation and planning and not a sudden or overnight event. The fact that he planned a return to London within two weeks does not detract from this conclusion.

Ground 4

54. HMRC challenge three findings of fact made by the FTT as being contrary to or unsupported by the evidence. The findings are: first, that the dominant reason for the retention of the London house was to live there once Mr Glyn returned permanently to live in England; secondly, the London house was retained for a reason having nothing or at least very little to do with interim use; and thirdly, Mr Glyn would have stayed in hotels if he had realised that the use of the London house might affect his tax status.

55. The parties were agreed that the correct approach to challenging factual findings of the FTT on appeal was summarised by Evans LJ in *Georgiou v Customs and Excise Commissioners* [1996] STC 463 at 476:

> "The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relied, but, was there evidence before the Tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the Tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the Tribunal was not so entitled.
>
> It follows, in my judgment, that for a question of law to arise in the circumstances, the Appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding, and, fourthly, show that that finding, on the basis of that evidence, was one which the Tribunal was not entitled to make."

56. It is clear from the Decision that the FTT regarded the reason for the retention of the London house as significant. At [108] they stated that they considered it to be "a very important point". They said at [165] that, having decided to retain the London house for the reason found by them, Mr and Mrs Glyn decided that "they might as well use it during visits, particularly as they thought such use was of little tax significance". One of the overall conclusions in [174] was that the London house "was retained for a reason having nothing or at least very little to do with interim use, while the Appellant and Sarah were in Monaco".

57. The findings made by the FTT were expressed in clear terms. Retention of the London house for the purpose of living there when Mr and Mrs Glyn returned permanently to the UK was "the obviously dominant reason": see [108]. It is variously described in the Decision as "the dominant real reason" ([158]), "the fundamental reason" ([159]) and at [162] they state:

> "we thus conclude, without hesitation, that 50 Circus Road was retained because of the simple reason that the Appellant and Sarah both wished to live there again permanently when they returned to the UK."

58. HMRC submit that there was no evidence before the FTT to show that this was the dominant or real reason for the retention of the London house. In paragraph 98 of his first witness statement, Mr Glyn gave a list of reasons for the retention of the London house. Although returning to live in it permanently was the first reason in the list, there is nothing in the witness statement to indicate that the list is ranked in importance. The other reasons given were as follows. First, the children still regarded the London house as their home and they were in a somewhat vulnerable state following the recent attack on Mr and Mrs Glyn's son. Secondly, the London house would provide an ideal place for Mr Glyn's elderly mother to live with a resident carer if the need should arise while Mr Glyn was away. Thirdly, the London house represented an excellent investment in terms of capital appreciation and, fourthly, "it was convenient to use when back in the UK and in the light of the advice we received about the implications of IR20 we saw no reason why we should not retain the Circus Road house for use on occasional visits to the UK."

59. Equally, in his second witness statement, Mr Glyn refers back to the reasons given in paragraph 98 of his first witness statement and gives no indication of a dominant or real single reason for its retention. Indeed, he states that "it was retained for my visits back to the UK and in case my elderly mother needed some greater level of assistance". This evidence was reflected in the skeleton argument of counsel for Mr Glyn before the FTT which refers to four principal reasons for the retention of the London house, none of which was a desire to return to live there permanently in the future or any suggestion that that was the dominant reason. Similarly, no reference had been made to this as a reason for retaining the house in Mr Glyn's response to HMRC's statement of case.

60. Earlier communications by or on behalf of Mr Glyn were to similar effect. In a letter dated 5 January 2009, his accountants listed three reasons for the retention of the London house. One of the reasons was that Mrs Glyn remained resident in the UK and wished to be able to stay at the house when she was in the UK. There was no reference to returning to live there permanently in the future as being a reason. The same is true of an undated statement drafted by Mr Glyn in 2010 and submitted by his accountants to HMRC in that year.

61. The FTT noted at [158] that:

> "A very strange feature of the hearing was that, with the exception of the first three lines of part of the Appellant's witness statement that gave the reasons for the retention of 50 Circus Road, nobody referred again to the obvious and the real reason why the house was retained."

62. In the FTT's reasons for refusing permission to appeal, it is stated at [12] that "curiously little significance was made of this point" by Mr Glyn in argument. It appears that the FTT based their finding on the reference to it in sub-paragraph (a) of paragraph 158 of Mr Glyn's first witness statement and their own assessment that this was "the obvious" reason why the house was retained.

63. In my judgment, the challenge by HMRC to this finding, and to the consequential finding that use of the London house in the interim was simply a convenient by-product of its retention, is well-founded. There is no proper basis in the evidence for

a conclusion that there was a single, dominant or fundamental reason for the retention of the London house or for the implicit finding that the other reasons given by or on behalf of Mr Glyn were not of real significance. In particular, the evidence did not permit the FTT to conclude that interim use of the London house by Mr Glyn was not a real or significant reason for its retention.

64. I conclude therefore that this ground of appeal is established but I will consider later its impact.

Ground 2

65. HMRC submit that, in determining whether Mr Glyn had ceased to be resident in the UK, the FTT impermissibly applied a test of whether his return visits to the UK were for a single, settled purpose. They submitted that this was an error of law which materially affected their decision.

66. I have earlier referred to the judgment of Lord Wilson in *Gaines-Cooper* in which he analysed the use of the expression "settled purpose" in relation to visits to the UK and made clear that presence or absence of a settled purpose was not determinative of whether a person resident in the UK had ceased to be so resident.

67. At [118] of the Decision, the FTT identified three tests on which they should concentrate predominately. The first was whether Mr Glyn had made a distinct break in his former way of life when he started to reside in Monaco in April 2005. The second test was whether the London house remained a habitual abode "and more particularly a habitual abode in the UK for a settled purpose". The third test included whether Mr Glyn's periods of presence in the UK were or were not "for a settled purpose".

68. At [167], which I have already cited, the FTT concluded that none of the purposes for which Mr Glyn visited the London house in 2005/06 "was settled, in the sense that he absolutely had to be there, and there regularly". They continue:

> "We conclude, however, that the fact that he did visit for various purposes, often more than one on a short visit, and that none were required or vital, undermines the claim that his presence in the UK was accounted for by any settled purpose."

69. One of the FTT's conclusions in [173] as regards the time spent by Mr Glyn in the UK during 2005/2006, was:

> "it is significant that the Appellant's presence was not for any settled purpose, but for varied purposes, several often being combined on one occasion, and none of them habitual or essential."

Likewise, in [174] the FTT stated that Mr Glyn never stayed at the London house "for a settled purpose" but, rather, "visits were made for various different purposes, often two or more being combined, and virtually none were fundamentally required".

70. HMRC submit that, in considering whether Mr Glyn had a settled purpose for his visits to the UK after April 2005 the FTT were applying a legally irrelevant criterion. The existence of one or more settled purposes for visits to the UK may be relevant to determine whether a person is "ordinarily resident" in the UK (see propositions (vii) (x) and (xii) in the list stated by Lewison J in *HMRC v Grace*) and to the application of certain statutory provisions. HMRC submit that it is not relevant when considering whether a person resident in the UK has ceased to be so resident. This is not a case where the issue is whether a person who is not resident in the UK has become so resident.

71. There is nothing in the authorities which, in my judgment, justifies the view that the existence of a settled purpose, or equally a single or fundamental settled purpose, is relevant in the case of a person such as Mr Glyn when assessing the impact of his return visits to the UK. This is made clear by Lord Wilson in *Gaines-Cooper* at [18] where he states that "the concepts of settled purpose and settled abode are clearly different". Lord Wilson further stated at [41] that in *Reed v Clark* [1986] Ch 1, Nicholls J described "the settled purpose not as a route to becoming non-resident but as the means by which the taxpayer who had become non-resident escaped being treated otherwise under what is now Section 829 of the 2007 Act".

72. Mr Way QC for Mr Glyn did not dispute that it was irrelevant to ask whether Mr Glyn had a settled purpose, or a single or dominant purpose, for his return visits to the UK. He submitted that the FTT were merely determining the reasons for Mr Glyn's visits to the UK in assessing whether a distinct break had been made. It was simply shorthand adopted by the FTT. While Mr Way described it as an "unfortunate" phrase to use, he submitted that the FTT did not mean to apply it as a test. Rather, it was used in contrast to visits resulting from "the elements of chance and of occasion" to which Viscount Cave referred in *Lysaght v Commissioners of Inland Revenue* [1928] AC 234.

73. Viscount Cave contrasted those elements with the "continuous business obligation" which required Mr Lysaght to come to England from his home in Ireland each month for a week. Although he had no permanent place of residence in the UK and stayed in hotels, it was his regular visits attributable to his continuous business obligation that resulted in the finding that he was resident in the UK, as well as Ireland. It does not seem to me that the FTT were using the phrase "settled purpose" as a synonym for "continuous obligation" but, if they were, they would in my judgment have been wrong to do so. The fact that Mr Lysaght's continuous business obligation required him to make regular monthly visits to the UK was relevant to whether he was resident in the UK, but the absence of a continuous obligation on the part of Mr Glyn to make visits to the UK is not determinative or even relevant as to whether he remained resident in the UK after April 2005.

74. Mr Way relied on the explanation given by Judge Nowlan for the use of the expression "settled purpose" in paragraph 8 of the Decision to refuse permission to appeal:

> "I accept that the notion of 'settled purpose' is to be contrasted with the 'temporary purpose only' that a possible 'arriver' may be claiming in order to sustain that he was protected by section 336 from becoming UK resident. It is nevertheless the case

> that in considering facts relevant to a 'departer' the quality of presence, and the reason why an intending 'departer' seeks to explain his limited presence in the UK is all relevant. In this context, and bearing in mind the central feature that residence is geared to 'habitual presence', 'having a settled abode', and 'dwelling permanently or for a considerable time'… it is certainly relevant to consider the circumstances that occasioned visits to the UK."

75. I would not take issue with anything there said by Judge Nowlan, nor I think would HMRC. The fact however remains that in a large number of places in the Decision under appeal, the FTT addressed, as a relevant issue, whether Mr Glyn had a settled purpose, or a single or dominant purpose, for his visits to the UK. I do not think that these references can be explained as an unfortunate expression, intended in fact to apply a different test. It follows that, in my judgment, HMRC make good their submission that the FTT adopted and applied a legally irrelevant test when considering the significance of Mr Glyn's return visits to the UK. As Lloyd LJ said in *Grace* at [18], which I have earlier cited, the enquiry which the FTT had to undertake involved assessing the duration of Mr Glyn's presence in the UK and the regularity and frequency of his visits, the nature of the visits and his connection with this country. The reasons for those visits are, in my judgment, relevant but what is irrelevant is whether they demonstrated any settled purpose.

Ground 3

76. It is clearly of central relevance in this case, as the FTT acknowledged, that Mr Glyn retained the family home in London and used it on his visits to the UK after April 2005. HMRC submit that the FTT focused on the wrong issues in relation to the retention of this property. Instead of focusing on the effect that its retention and continued use had on the assessment of the quality of Mr Glyn's presence when he was in the UK, the FTT focused on the irrelevant consideration of his dominant reason for retaining the property and on speculation as to what he would have done if he had believed that its continued use would undermine his tax planning.

77. The FTT addressed the significance of the retention of the London house in paragraphs 158-167 of the Decision. The heading to those paragraphs ('The significance of the retention of 50 Circus Road, and the related issue of whether visits made to it were for a settled purpose') contains the error of law identified by Ground 2. I have already referred to paragraphs 158-162 when considering Ground 4, holding that there was no evidential basis for the finding by the FTT that the dominant reason for the retention of the property was so that Mr and Mrs Glyn could resume living there again permanently when they returned to the UK.

78. There is again no basis in the authorities for considering that the reasons for the retention of a house in the UK, still less the dominant reason for doing so, are relevant to whether the individual continued to be resident in the UK. There might be some circumstances in which it had some relevance, but in a case such as the present where Mr Glyn returned on a number of occasions to his house in London, the issue is to determine whether the frequency and nature of his visits, and generally the quality of his presence in the UK, meant that he continued to be resident in the UK. The FTT

were wrong as a matter of law to consider that this was "a very important point" as they said at [108] of the Decision.

79. Having focused on the dominant reason for the retention of the London house in paragraphs 158-162, the FTT went on in this section of the Decision to concentrate on other questions which, with respect, were also irrelevant.

80. At [164], the FTT said:

> "The point that seems to us to be very instructive is the invariable description of the Appellant's personality in the respect that when he set about achieving some objective, he pursued that objective single-mindedly. We have little hesitation in concluding that had the Appellant thought that using 50 Circus Road during his visits could have damaged his very clear objective of sustaining non-UK residence, he would indeed have stayed at hotels and quite possibly reduced his visits."

This speculation has no legal relevance. The focus should be on what Mr Glyn in fact did during the relevant period not what he might have done if his understanding of the relevant law had been better.

81. At [165], the FTT returned to the question of a settled purpose. They said:

> "The inference that we were expected to draw during the hearing, certainly by the Respondents, was that it was utterly vital to both the Appellant and Sarah that they should live at 50 Circus Road, still treat it as a habitual home, with life there remaining a settled purpose. We reject that notion. 50 Circus Road was retained almost entirely for the reason that we have indicated. Having retained it, they might as well use it during visits, particularly as they thought that such use was of little tax significance. But the notion that it was critical to them to live there, allegedly then demonstrating that it was a settled abode for a settled purpose, is totally unrealistic."

This is an unfortunate passage, because it was no part of HMRC's case that Mr Glyn should have a settled purpose for staying at the London house on his visits when he was in the UK, still less that it was critical to Mr and Mrs Glyn to live there for a settled purpose. The point which the FTT appear to regard as important in determining that Mr Glyn was not resident in the UK is, as a matter of law, irrelevant.

82. I have already cited paragraph 167 containing the conclusion of the FTT on the significance of the retention of the London house. With respect to the FTT, it focuses on considerations which are either not relevant or only marginally relevant and fails to address the relevant consideration of the nature and quality of Mr Glyn's visits to the London house and of his presence in the UK in deciding whether he had ceased to be resident in the UK.

83. Mr Way on behalf of Mr Glyn did not so much justify the approach adopted by the FTT in these paragraphs but submitted that it could be seen that in some of these paragraphs and elsewhere in the Decision the FTT had addressed the nature and quality of Mr Glyn's presence in the UK and his use of the London house. In my judgment, HMRC establish Ground 3.

Ground 5

84. HMRC's submission is that, in considering whether Mr Glyn had made a distinct break when he took up residence in Monaco in April 2005 and had sufficiently loosened his links with the UK, the FTT took into account irrelevant considerations and failed to take into account relevant considerations. They also submit that the FTT made findings which were not justified by the evidence.

85. There are some criticisms of the Decision which I do not consider to be well-founded.

86. First, HMRC submit that the FTT focused exclusively on day count and the search for a single or dominant settled purpose for Mr Glyn's visits to the UK and failed to consider the current and habitual nature of those returns. Day count is a relevant factor and it was right of the FTT to take it into account. The FTT were well aware that there were 22 separate occasions in 2005/2006 on which Mr Glyn returned to the UK and stayed at the London house.

87. Secondly, the evidence as to the amount of time spent by Mrs Glyn in London and her initial opposition to living in Monaco, to which HMRC submitted that the FTT should have paid more attention, is relevant only to the extent that one of the reasons for Mr Glyn coming to London and staying at the London house was to be with his wife. He gave evidence to that effect and it is true that the FTT do not appear to have taken it into account. However, I consider this to be a minor point, because the FTT were clearly right that for most of the year Mr and Mrs Glyn were together either in Monaco or on holiday elsewhere.

88. Thirdly, HMRC criticise the FTT for not taking properly into account Mr Glyn's admitted continuing business role after 5 April 2005. It may be a slight exaggeration to say, as the FTT does at [149], that there was "to all intents and purposes, a complete severance of the Appellant's former business role", but the evidence clearly justifies a conclusion that there was at least a substantial loosening of his business links.

89. There is, however, substance in other criticisms made by HMRC.

90. First, to take the least important first, the FTT dealt in one paragraph, at [150], with the effect of Mr Glyn's departure to Monaco on his social ties in the UK, leaving aside relations with close members of his family. There is force in the submission that the FTT overplayed the effect of the evidence. The statement that the consistent evidence of Mr Glyn and several of their friends was that his attendance at regular social Sunday dinners and other similar occasions "virtually ceased" does not stand well with his oral evidence that he saw "all of my friends whenever I could". Nor does it stand well with the significant number of other formal social occasions, often more than one each month, attended by Mr Glyn during 2005/2006. The evidence overall might justify the conclusion that there was, as the FTT found, a very

significant loosening of his social ties, but the assessment of the evidence for the purpose of reaching this conclusion is not balanced.

91. Secondly, the retention and use of the London house was, as the FTT acknowledged, clearly a very important factor in this case. The focus of the FTT's consideration should have been on the way in which Mr Glyn used the London house and the regularity with which he did so, rather than on the purpose, or dominant purpose, for which it was retained. Their consideration of this was limited to the observation in [163] that Mr Glyn used the London house on his visits "because it was certainly convenient to do so, and when he believed that it was not going to undermine his tax plan, it was obviously cheaper and perhaps slightly more pleasant than staying at hotels". I have earlier remarked that there was no evidence to support their conclusion stated in the next paragraph that, if he had known that using the London house might damage his tax position, he would indeed have stayed at hotels and quite possibly reduced his visits. But, in any event, this was simply not the point. The point to be examined was, as I have said, the nature and quality of his use of the London house on his 22 visits there during 2005/2006.

92. Thirdly, the FTT acknowledged that HMRC had raised "their most telling contentions" in relation to Mr Glyn's family ties. In his evidence, Mr Glyn stated that his family "is very important to me and we are very close" (paragraph 26 of his first witness statement). He continued:

> "Every Friday we would have a standing engagement amongst Sarah and I, Toby and Georgina that we would have dinner together, often also with my mother. My family and I are not religiously observant practicing Jews and we considered our Friday dinners as being primarily being a chance to get together as a family rather than as a celebration of our religion, not withstanding that it followed – in a secular way – the Jewish tradition of 'Shabbat'. These dinners would, prior to our emigration, take place at the Circus Road property."

93. Mr Glyn's case was opened to the FTT on the basis that the Friday evening dinners ceased after Mr Glyn went to Monaco in April 2005. The evidence showed that this was not the case and that there were 15 Friday evening dinners in 2005/2006, compared to 36 in the previous year, and that there was a similar pattern in each of the following four tax years. In addition, the major Jewish celebrations and, generally, the birthdays of the immediate family members were celebrated in London. The FTT considered the question of family ties in paragraphs 151-157 of the Decision. They concluded at [157] that "there was at least a significant loosening of ties, following the departure to Monaco, even as regards these close family occasions".

94. This conclusion was stated to be based on the following points:

> "• there was no evidence that the Appellant visited London principally or solely to attend the Friday night dinners. We accept that on many occasions, visits that were going to be undertaken for other reasons might very well be timed to enable the family to gather for the traditional Friday night dinners, but it as certainly

the case that virtually all the visits were designed for several purposes;

- there was no suggestion, when the Appellant and Sarah visited 50 Circus Road and hosted one of the dinners that Toby and Georgina would have seen much of their parents other than at the traditional dinner. When that dinner was an ingrained feature of Jewish family life, it seems odd to suppose that sustaining the Appellant's claim to have become non-UK resident should require that that invariable Jewish tradition should be abandoned or artificially restricted, particularly when the dinner might only have involved the family being together for two or three hours during a visit;

- we were told that the Appellant and Sarah were perhaps particularly keen to see that their children were stable and content because there had been a very disturbing and recent occasion when an ex-boyfriend of Georgina had attempted to murder Toby; and

- finally in terms of the two children progressively living more independent lives, it seems that their visits to Monaco (between two and four each in the year 2005/2006) were relatively short, and that there was a considerable indication that the children were much more likely to be holidaying independently at the Cannes apartment."

95. In my judgment, these reasons are, as a matter of law, flawed. As to the first reason, it is irrelevant that virtually all of the visits were designed for several purposes and that Mr Glyn's visits to London were not "principally or solely to attend the Friday night dinners". It is not a question of the purpose, or principal purpose, of the visits to London; it is a question of whether, having regard to what he did while he was in London and where he did it, he had ceased to be resident in the UK. As to the second reason, it is no doubt one of many relevant factors that Mr and Mrs Glyn would not have seen much of their children other than at the Friday night dinners but to pose as a relevant question, whether it is necessary to abandon or artificially restrict an invariable Jewish tradition in order to become non-UK resident, is again to raise an irrelevant consideration. It is, with respect, difficult to see any relevance in the third or fourth reasons to the issue to be decided.

96. In my judgment, the treatment by the FTT of the family ties of Mr Glyn after April 2005 and his use of the London house is, as a matter of law, flawed, as a result of taking account of irrelevant considerations and failing to focus properly on the relevant question.

97. HMRC also submit that the FTT took into account a number of irrelevant considerations in reaching their conclusion. I have earlier referred to and dealt with a number of these matters under other Grounds: the reasons for retention of the London house, the search for a settled purpose for Mr Glyn's return visits to the UK, the fact

that Mr Glyn was metering his visits so as not to jeopardise his claim to be non-resident and speculation as to the steps that he might have taken had he received different advice as to the requirements for achieving non-residence.

98. HMRC further submit that the FTT was impermissibly influenced by the terms of HMRC's booklet IR20 "Residence and non-residence: Liability to tax in the United Kingdom". The meaning, significance and effect of IR20 were the subject of the judicial review proceedings in *Gaines-Cooper*. One effect of the decision of the Supreme Court, affirming the Court of Appeal, is that the issue whether a person has ceased to be resident in the UK is to be determined by reference to the common law tests, not by reference to the contents of IR20. In particular, the limit on return visits to the UK of less than 91 days is not relevant to determining whether UK residence has ceased. Even under IR20, as stated by Moses LJ in the Court of Appeal at [56]:

> "The number of return visits does not establish non-residence… The number of return visits are important only to establish whether non-resident status, once acquired, has been lost."

99. The submissions of Mr Way QC on behalf of Mr Glyn before the FTT made clear that his case was based "at all times on the law and not on the law as described in the well-know booklet of IR20". Nonetheless, submissions were made on the contents of IR20 because, it was submitted, that they explained Mr Glyn's actions and showed that his intention was always to become non-resident.

100. The Decision contains a significant number of references to IR20. It appears from remarks made during the hearing by Judge Nowlan that he has strong views regarding the approach of HMRC to IR20 and residence, describing it in one respect as being "downright misleading". There is a flavour of these views in the Decision. Paragraph 9 refers to "the so-called guidance in HMRC's infamous publication IR20". Paragraph 15 refers to Mr Glyn being "lulled into the belief by the guidance of IR20" that he could make a limited number of return visits to the UK and that use of the London house would not prejudice his claim to be non-resident. Paragraph 107 states that Mr Glyn "not surprisingly" remarking during the hearing that HMRC had moved the goalposts in relation to the guidance in IR20. Paragraph 121 starts "Whilst we cannot rule out the possibility that we should perhaps conclude that a very great deal of the content of the publication IR20 was hopelessly misleading…" When the FTT came to state their conclusion in relation to the time spent by Mr Glyn in the UK during 2005/2006, they set out six bullet points including the following two points:

> "his time spent in the UK was, on any test, for a materially shorter period than the average of 91 days a year, very clearly indicated by HMRC in IR20;"

> "the Appellant clearly limited his time in the UK to comply with the 'guidance' given by IR20, and indeed ensured that he was well within that guidance, so that he was lulled into believing that his visits would not jeopardise his non-UK resident status by HMRC themselves and might otherwise have further restricted his non-essential visits to achieve his objective."

101. If Mr Glyn's desire to become non-resident for tax purposes had been a relevant factor of any significance in determining whether, as a matter of fact and law, he had become non-resident from April 2005, there would be some purpose to these repeated references to IR20. In the Decision at [107], the FTT said that Mr Glyn's reliance on IR20 had "one marginal relevance" which, it appears from [165], related to his use of the London house. Notwithstanding this, it appears from the conclusion stated in [173] that the terms of IR20, specifically in relation to the limit of less than 91 days, played a material part in their decision when it should not have done so. This is illustrated also by the overall conclusions stated in [174], one of which is that the days of presence in the UK in 2005/2006 is realistically counted as 65 days "manifestly fewer than those mentioned in HMRC's guidance in IR20".

Conclusion

102. The core of the FTT's decision is contained in paragraph's 127-174 of the Decision, under the heading "Our Decision – Applying the law to the facts". They consider a number of factors, many of which are plainly relevant and significant, in particular whether Mr Glyn had made a distinct break involving a substantial loosening of his family, social and business ties. But, as explained above, they also took into account irrelevant factors and they failed to have regard, or sufficient regard, to certain relevant factors. The FTT itself considered this to be a "borderline" case (see the Reasons for refusing permission to appeal at [10]). In such a case, the errors of law which I have identified mean that the Decision cannot stand. This is not a suitable case in which the Upper Tribunal can reach its own decision on the issue of residence or non-residence, nor did either party suggest that it could do so. In those circumstances, I shall remit the case for re-hearing by a differently constituted First-tier Tribunal. The parties agreed in the course of submissions that, in view of the transcripts of the extensive cross-examination of witnesses, it would be unnecessary for there to be oral evidence at the re-hearing.

The Hon Mr Justice David Richards

Release Date: **12 October 2015**