Appeal number: TC/2014/01209

Income Tax – (i) ordinarily resident; (ii) section 16 ITEPA: what year(s) was a payment "for"; (iii) payment on cancellation of share options – from what employment did it arise.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANTHONY MACKAY **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE CHARLES HELLIER

Sitting in public at The Royal Courts of Justice, London on 15, 16, 17, 20, 24 and 25 March 2017

Patrick Way QC and Imran Afzal instructed by Pinsent Masons LLP for the Appellant

Christopher Stone and Rory Cochrane, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mr Mackay appeals against closure notices for the tax years 2005/6, 2006/7 and 2007/8, (the "disputed years"), and against HMRC's determination of 15 July 2013 that he was ordinarily resident in the UK in each of those years.

2. It was common ground that three issues arose:

(1) the Ordinarily Resident issue: HMRC contend (and determined) that Mr Mackay was ordinarily resident in the UK in each of the disputed years. Mr Mackay contends that he was not so resident;

(2) the UURBS issue. Mr Mackay had received a payment on his removal from an unapproved unfunded retirement benefit scheme (the "UURBS"). The issue was in which year or years the payment should be treated as arising for income tax purposes; and

(3) the Share Option issue. Mr Mackay received a payment on the cancellation of some share options. The issue was how that payment should be taxed, if at all. If Mr Mackay was ordinarily resident in the UK when the payment was made its taxation depended upon whether or not Mr Mackay was employed only by Instinet Europe, a UK company.

3. The parties asked me to give a decision in principle on each of these issues: anticipating that they would subsequently be able to agree the figures. This is thus a preliminary decision.

4. In what follows I address each of these issues in succeeding sections. I make findings of fact relevant to each issue at the beginning of the relevant section. Some of the factual findings in relation to earlier issues are also relevant to later issues.

5. I heard oral evidence from Mr Mackay, from his wife Deborah Mackay, from Mark Howarth who had been employed by the Instinet group of companies (together "Instinet") from 1997 and who had worked with Mr Mackay when he too was employed by Instinet, and from Kevin Farrell who had worked for Instinet from 2004, and who, from 2007 had been the chief administrative officer for Instinet (a role which included oversight of human resources and other functions). I had a witness statement also from Samuel Harding who was unable to give oral evidence because of the illness of his wife, and who had known Mr and Mrs Mackay socially at relevant times. I also had a statement of agreed facts and copies of correspondence and other documents.

1. The Ordinarily Resident Issue.

6. It was common ground, and clear to me, that Mr Mackay was UK resident in each of the disputed years. The issue was whether he was ordinarily resident in those years.

1.1 Factual findings.

7. I find the following facts.

(a) Origins, work and family.

8. Mr Mackay was born in 1960 in Sydney Australia. His childhood and education were in Australia and his mother and siblings still live there. He is an Australian citizen and holds an Australian passport.

9. At university Mr Mackay's interests turned towards finance, and in December 1980 he started a summer job at Jacksons, a Sydney stockbroker. He was then offered a job with Jacksons and stayed with them until 1988: after working as a trading assistant he became a very successful analyst and had a reputation for the use of IT.

10. Mr Mackay met the future Mrs Mackay in 1984. They lived together in Sydney from 1986 and after Jacksons transferred Mr Mackay to their Hong Kong office in late 1987 she also moved to Hong Kong.

11. Mr and Mrs Mackay married in June 1988 at Poole, Dorset where Mrs Mackay's parents then lived.

12. After the wedding Mr Mackay returned to Hong Kong. Between July 1988 and June 1989 he worked for James Capel as an Asian resources analyst.

13. Mrs Mackay become pregnant with their first child. She travelled to the UK in May 1989 so that the child could be born here.

14. In June 1989 Mr Mackay's position with James Capel in Hong Kong ended and Mr Mackay sought a new job. He started his search in Australia, but fruitlessly.

15. Their first son was born in July 1989. At that time Mrs Mackay's mother became ill with cancer. Apart from the birth of their son it was not a good month. Mr and Mrs Mackay thought it would be best to stay in the UK to find their feet again.

16. Mr Mackay found a position with Robert Fleming in London in 1989. This was the first in a series of positions with London financial institutions between 1989 and 1994. In those positions he worked in Australian and Asian stockbroking.

17. In 1989 Mr and Mrs Mackay purchased a house in Chiswick where they lived. In 1991 their second son was born.

18. Mr Mackay did not regard his career in London between 1989 and 1994 as successful. That was a shock after the comparative success of his career in Australasia[1]. He attributed part of his lack of success to a lack of connection to, and to the culture of, the London financial community.

19. In November 1994 Mr Mackay secured a move with his then employer to a position in Hong Kong. He moved to Hong Kong to take up his new post and Mrs Mackay and the children joined him there in late 1995. By that time Mr Mackay had moved to the employ of Instinet in Hong Kong and it appeared that his career had started to flourish again.

20. However Mr and Mrs Mackay soon came to the conclusion that they wished their children to be brought up and educated in the UK. Mrs Mackay was also an only

[1] I have used "Australasia " in this decision to encompass Hong Kong, Asia and Australia

child of aged parents who lived in Bournemouth. Mr Mackay and Mrs Mackay came to an agreement. She would go to London with the children and he would provide for his family by pursuing his career, then in Hong Kong. They bought a house in Kingston in Surrey in 1997 and Mrs Mackay and the children moved there in July 1997 of that year.

21. Slightly over a year later in October 1998 Mr Mackay was transferred to the London office of Instinet as head of Asian equities with a mandate to develop Australasian stock trading in Europe.

22. Mr Mackay held this position (travelling from time to time back to Hong Kong) for 1 year and 10 months until August 2000. He then moved to a more senior post with Instinet in Hong Kong.

23. When Mr Mackay moved to Hong Kong in August 2000 his wife and family remained in the UK. During the first period of living in different parts of the world – in 1997 and 1998 - they had developed ways of keeping in touch and, although they both regretted the lack of contact with each other and of Mr Mackay with their children, they thought it best that Mrs Mackay and the children should remain in the UK.

24. In 2002 Mr Mackay moved from Hong Kong to Instinet Japan as President and CEO of that company.

25. In March 2004 Mr Mackay purchased a flat in Hong Kong, and in December 2004 he was granted a permanent right of abode in Hong Kong.

26. Then also in December 2004 he was posted to the UK. (He told me that at the time of his move to the UK in 2004 he regarded the right of abode in Hong Kong as "part of his plan B").

27. On leaving Instinet Japan in December 2004 Mr Mackay moved to Instinet London as global head of equities (his “First Role”). He returned to living with his family in Kingston, arriving just before Christmas 2004.

28. In June 2005 he took up the role of managing director and President of Instinet Europe (his “Second Role”). The role was based in London. He held this role until 17 October 2007 when he moved to Hong Kong working as CEO of Chi-X Global (a subsidiary of the then holding company of Instinet).

(b) Instinet

29. Mr Mackay worked for Instinet companies from 1995. Over that period there were changes in the ownership and structure of the Instinet group.

30. In 1995, when Mr Mackay joined Instinet, it was a 100% subsidiary in the Reuters group. Its companies provided agency and brokerage services to equity dealers and traders around the world, and its senior management was centred in the USA. There were two parts to the Instinet business: (1) the electronic trading system and (2) the brokerage business.

31. In about 2001 a restructuring of the Instinet group resulted in part of the share capital of the Instinet sub holding company being floated on NASDAQ, with the remaining majority holding being retained by Reuters.

32. In late 2003 Mr Mackay became aware that Reuters were considering selling their remaining stake in Instinet. Mr Mackay was also aware that in Europe Instinet had been losing money, although the Asian business had, under his tutelage, turned the corner. His role on his move to London in January 2005 was to assist in turning round the fortunes of the European business. A purchaser might acquire either or both of these businesses and might amalgamate the acquired business with its own.

33. Reuters' plans to do something with Instinet were made public in November 2004.

34. Thus Mr Mackay's return to London in January 2005 was against the background of a potential reorganisation or sale of all or part of the Instinet business in which he was working. Mr Mackay said that his security of tenure was subject to the possibility that a purchaser (of whole or part) would dismiss staff. He said that he saw it as "very likely" that he would be made redundant on the sale or when his work was done.

35. In the first half of 2005 discussions were held between Reuters and a number of potential buyers of the Instinet business. In late April 2005 terms were agreed between Reuters, NASDAQ and Silver Lake Partners (a US private equity entity) for the sale (the "First Sale") of Reuters' controlling stake in Instinet to NASDAQ. This was to be followed by the sale by NASDAQ of the brokerage business (to which Mr Mackay was attached) to a Silver Lake Partners' vehicle in which the senior management team of Instinet in New York had a stake.

36. The sale to NASDAQ and Silver Lake Partners completed in December 2005 and shortly thereafter many Instinet staff were dismissed.

37. Silver Lake Partners set about managing the brokerage business of Instinet with a view to selling it on. From April 2005 Silver Lake was involved in the review of the business; they exercised formal control from December 2005. By 2006 Silver Lake was negotiating with three potential buyers. On 1 November 2006, some 18 months after the First Sale Agreement and a little less than a year after the completion of the acquisition, Silver Lake Partners agreed to sell the majority of the business (including the part to which Mr Mackay was attached) to Nomura. That sale completed on 1 February 2007.

38. I accept that once Mr Mackay knew of the First Sale he considered that it was likely that a sale of the business by Silver Lake Partners would take place within a few years.

(c) Mr Mackay's activities within Instinet in the disputed years (from January 2005 to October 2007).

39. Mr Mackay's work in this period, particularly initially, consisted of managing the growth of Asian side of the business including the dealing in Asian securities by European traders. Mr Mackay had Asian securities trading responsibilities and his role

required communication with Instinet personnel (and sometimes clients) in Asia, as well as in Europe.

40. When Mr Mackay started work at Instinet in London in January 2005 his primary mission as global head of equities was to try to increase the profitability of the European business. He was expected to devote half his time to the European business and half to the US and Asian limb of the business. Mr Mackay described this post as his First Role.

41. The First Role lasted for six months until June 2005 when he was told that Europe and Asia would be split into two separate businesses. He was invited to become managing director and president of the European side - Instinet Europe. He called this his Second Role. This role lasted for 2 years and 4 months until September 2007.

42. Towards the middle of 2006 Mr Mackay was asked to develop the Chi-X business - a pan European alternative stock exchange. It was as CEO of this business that he returned to Hong Kong in 2007.

43. In his First Role Mr Mackay retained many Asian regulatory and management responsibilities. He spoke regularly to his replacement in Japan. He said that he spent a significant amount of his time travelling to Asia. I was not able to reconcile that last statement with the schedule prepared by Mr Mackay and his advisers of his whereabouts in the disputed years which, although it showed travel to Asia during the currency of the Second Role, showed only one trip to Asia in the period of the First Role. I accept that the information used to compile the schedule may, through caution, have omitted a trip to Asia, but I conclude that although Mr Mackay did undertake foreign visits may have travelled to Asia more than once, such travel was not significant in the period of his First Role.

44. In the 6 month period of the First Role Mr Mackay spent some 18 nights out of the UK on Instinet business, about one night in 10. That represented some 15-20% of his working days.

45. Mr Mackay's Second Role, as its title suggests, focused on Europe. He became responsible for dealing with regulation and reporting in Germany, France and Switzerland. These roles required physical presence from time to time in these and other European locations. He found the necessary European commuting gruelling. At the same time he maintained some Directorial and regulatory responsibilities in Asia. Later on in this period he had six meetings in the USA (see also the section on the Share Options).

46. In the period from July 2005 to October 2007, a period of 28 months, in which Mr Mackay was in his Second Role, he spent about 180 nights out of the UK on Instinet business. That is about one night in five, and represents some 30-40% of his working days being spent abroad. These journeys included ones to Zurich, Paris, Rotterdam, Frankfurt and Madrid each lasting a day or so, but also three longer spells of a week or so in Asia and the half a dozen trips to the US. In the same period he spent some 85 nights abroad on holiday.

47. It was clear to me that Mr Mackay's First and Second Role involved a significant commitment of time and energy and an unusual amount of foreign travel.

(d) Homelife: December 2004 to October 2007.

48. In the period 2000 to 2004, when he was based in Hong Kong and then Japan, Mr Mackay came to UK every 4 to 6 weeks and stayed with his family in Kingston. Some of his bank and credit card statements and other official post was also sent there.

49. From December 2004, when Mr Mackay came to work in the UK, until October 2007 he lived with his family in Kingston. This was his only permanent address. On weekdays when he was in London he rose early and returned late. At weekends he was often tired and brought work home. Mr Mackay had a space in the house to use as an office. He was away from home on Instinet business for about one night in five on average in the period, (although the proportion of away nights grew from about 15% as the period progressed).

50. His wife and children had developed their own routines during the period 2000 - 2004, when he had been in Hong Kong and Japan, and had become a close-knit group. They were unwilling to try to fit around him and change their routines when he would be away a lot and might be posted abroad again in the future.

51. Mr Mackay put parent/teacher evenings and other school functions in his diary but work often took precedence and he missed at least some of them. He was not a committed regular attendee at school sports matches and the like. Although when in the UK he spent the majority of weekends with his family and they did things together, he was often jet lagged or tired and had periodicals and papers to read. He did not regard himself as having been a good father and thought that his commitment to work had harmed his wife and children.

52. Although there was at least one occasion when his wife and children had holidayed without him, he went with the family or with some of them on more than 10 overseas holidays in this period. While on holiday there was often work he needed to attend to – emails, phone calls and the like.

53. In 2007 when Mr Mackay was posted to Hong Kong his sons were 16 and 18.

(e) Written employment contracts

(i) 1995 to 1998: Hong Kong

54. Mr Mackay's first Instinet employment contract was with Instinet Pacific Services and dated 31 July 1995. His employment was to be in Hong Kong and the contract was terminable by three months' notice on either side.

55. That contract was superseded by a further contract with Internet Pacific Services of 7 August 1997. His employment was to be in Hong Kong and the contract was terminable by three months notice on either side.

(ii) 1998 to 2000 London

56. On 20 August 1998 Mr Mackay entered into a contract with Instinet UK (later renamed Internet Europe). His employment was to be principally in the UK starting on the 20 August 1998. It was terminable by three months' notice on either side.

(iii) 2000 to 2004: Hong Kong and Japan

57. It appears that there was a formal contract with Internet Pacific Services of 28 August 2000 made when Mr Mackay moved to work in Hong Kong at that time. No copy had been found.

58. Mr Mackay's posting to Japan in 2002 was recorded in a letter and terms and conditions of 29 August 2002 with Instinet Europe Ltd (formerly Instinet UK) expressed to supersede the contract with Instinet Pacific Services. The terms and conditions indicate that the arrangement was expected to last 12 months (in fact it lasted two years) and that the UK would be treated as his home base. There is no indication of a notice period.

59. The letter of 29 August 2002 indicates that the full terms of the assignment were those in the terms and conditions "along with your principal UK contract". I conclude that when or at some time after Mr Mackay went to Hong Kong in 2000 he had not only a contract with Instinet Pacific Services but also some form of contract with Instinet Europe.

(iv) 2005 to 2007: London

60. A service agreement of 15 April 2005 between Instinet Europe and Mr Mackay recalled his continuing (from 1 January 2005) to act in his First Role as head of equities in London. This contract contained more complex termination provisions which among other things provided that if the company terminated the employment otherwise than by reason of Mr Mackay's fault ("cause") Mr Mackay would be entitled to 12 months' salary and bonus. No notice period on either side was specified.

61. By a service agreement with effect from 31 August 2005 Instinet Europe appointed Mr Mackay to his Second Role in London. The contract contains improved termination provisions entitling Mr Mackay to 18 months salary and 150% of the average annual bonus if the company terminated without cause. Again no notice period is provided on either side.

62. Mr Mackay said, and I accept, that it was a condition of the First Sale (to NASDAQ) that all employees had written employment contracts. Mr Mackay did not have a formal contract with Instinet when he arrived in the UK on 1 January 2005 and took the opportunity to negotiate a contract with advantageous termination provisions given his concern that he might be made redundant as part of the sale or shortly thereafter. Initially Instinet offered terms which provided for a fixed term to 31 December 2005 and then continuation on three months' notice. Mr Mackay said that he wanted an "evergreen" contract which had no term or notice provisions but provided, like the contracts of other senior managers, for between 3 and 24 months salary and bonus if Internet terminated without "cause" – which would include dismissal as a result of closure or reorganisation. He was successful in this endeavour as the summary in the preceding paragraph shows. The first of these contracts was signed seven days before the agreement for the First Sale was made.

63. Mr Stone points out that the draft of the contract initially offered to Mr Mackay in relation to the First Role had a fixed 12 month term and thereafter was terminable on three months' notice on either side. It contained the enhanced termination rights but only if the company terminated without "cause" in the first 12 months. Thus Mr Stone says that the contract Mr Mackay actually obtained offered him better terms only if his employment continued beyond 31 December 2005. That, he says, indicates that at the time of the negotiation (January to April 2005) Mr Mackay did not expect to be made redundant before 1 January 2006.

64. Mr Mackay said that although these contracts were for an indefinite term (neither a fixed term, nor with any notice period) they should not be regarded as permanent but as recognising the flexibility given to Instinet to terminate at any time without notice, albeit subject to a cost.

65. I agree with Mr Stone: Mr Mackay's negotiation of the evergreen contract terms indicated that he thought in April 2005 it was a realistic possibility that his employment in the UK would continue for more than a year. That is consistent with his evidence that when he took the Second Role he thought that it would last 18 months. But I also accept that it could have been summarily terminated at any time after that date.

(v) Location and Travel.

66. I have described the contracts by reference to time and location and have recorded the place of work specified in the contract. I accept however that these positions required significant travel to Europe, Asia and the USA. I also accept that whilst based in London Mr Mackay had responsibilities in and for the Australasian business.

(f) Uncertainty

67. I have accepted that Mr Mackay's employment with Instinet in the UK between 2005 and 2007 could have been summarily terminated. I now address how likely that may have been.

(i) January 2005 to April 2005

68. Mr Mackay says that when he started work in London in January 2005 there was a finite but undefined time period for one of two outcomes: either Instinet would be sold, or it would be shut down. Reuters' plan to sell was made public in November 2004. In January 2005 he was aware that UBS were looking at the business: he knew that a buyer could want Instinet technology, but not its people. He considered he would be subject surplus to their requirements. He said that he gave a "very very very low probability" to being kept on by purchaser (although in the event that did happen).

69. Mr Mackay said that in January 2005 in his First Role his "absolute position was that he would not be in the UK for more than three years, and [his] ... expectation of how the business would be [was] that it would be a much shorter period of time ... about a couple of months. But as far as the assignment is concerned, ... an estimate of a couple of years was probably ... accurate".

70. I consider that Mr Mackay's "couple of months" to be an exaggeration. He was coming to the UK to sort out the "mess", as Mrs Mackay put it, in the European business and to apply to it the skills he had used to turn the Asian business around. That assignment would, as he acknowledges take at least a couple of years. It would be only if Reuters (or a purchaser) took some precipitate action before the end of that period that the task might be terminated early. It is true that Mr Mackay knew in late 2004 that Reuters were considering their options, but bringing in Mr Mackay to improve the European picture suggested a longer timeframe for the fruition of this plan than a few months. Mr Mackay's previous sojourns in Hong Kong and Japan had each been for two years. That suggests a commensurate time span for his role in the UK. That Mr Mackay considered that it was a possibility that the role would continue for at least a year was evidenced by the point Mr Stone made about the negotiation of the terms of the contract for the First Role. Mr Howarth also told me that the sale did not have a fixed timetable: it was a complex sale process and the timings would be uncertain and lengthy.

71. But Mr Mackay assented to the proposition that he was going to be in the UK for as long as the owner of Instinet wanted to continue to employ him here or until he resigned, adding that he made clear he would resign before the end of three years in the UK.

72. I conclude that between January and June 2005 there was a non-negligible possibility that Mr Mackay's contract would be summarily terminated during 2005 but that Mr Mackay's intention was to continue working for Instinet until his contract was terminated or three years expired.

(ii) April 2005 to October 2007

73. After the First Sale Agreement was signed in April 2005 Mr Mackay said that: (a) there were conditions to be satisfied prior to completion, and in the period before completion there were real concerns that the conditions would not be satisfied and (b) Silver Lake Partners took effective control of the Internet brokerage business.

74. Mr Howarth, in describing the role of the senior management team in the period of a sale process described how the role broadened to enabling potential buyers to talk to senior management, but agreed that the managers would just carry on for the time being.

75. After April 2005 Silver Lake Partners looked at the profitability of various parts of the business and considered possible options. A number of senior staff were dismissed. It would have been natural for Mr Mackay to worry about his future tenure in this period, and I accept that he did.

76. But on 9 June 2005 after various discussions between and with senior management Mr Mackay was told that Silver Lake Partners had decided to keep his part of the business open and to appoint him to his Second Role. Mr Mackay said that at this juncture he told his wife that he was likely to continue to be working in the UK for about 18 months.

77. As I shall explain later, after this Mr Mackay played a role in marketing the business to potential buyers. That activity took place at meetings in New York (and in late 2006 and early 2007 he travelled to the USA about six times for this purpose).

78. The Second Sale was agreed in November 2006 and completed in February 2007.

79. I consider that whilst there was uncertainty as to the eventual timing and outcome that by July 2005 Mr Mackay was reasonably certain – or had reasonable grounds to be so – that he would be in employment with Instinet until the end of 2006.

(g) Intention.

80. In 2004 a significant amount of Mr Mackay's past earning were held as equity interests in Instinet. He said that if he had resigned he would have lost most of that value but that if there was a takeover, or if he was made redundant the equity rights would vest. This was a factor which played a prominent part in inducing him to take the London job. It seems likely that this was also a factor which would have motivated him to stay in Instinet employment until it was taken over or he was dismissed (unless of course a new employer offered a compensatory package).

81. Mr Mackay said however that throughout the period of the disputed years his intention was to go back to Hong Kong and that he planned to stay no longer than three years in the UK. He said that in negotiating his contract with Instinet in 2005 he sought a contractual commitment that he would be transferred to Hong Kong within three years of his arrival but that Instinet were unwilling to make that commitment. He says that if he had not been transferred he would have resigned. In 2005 he completed an HMRC form indicating that his expected stay would be for only 2 to 3 years.

82. I accept Mr Mackay intended to stay in the UK for no more than three years and that such was his intention throughout his time of residence here. Whether he had that intention because three years was all he could bear of living in the UK, or because his heart was in Australasia, or because he thought, or had been advised, that three years had some tax magic is immaterial. That was his intention.

83. I conclude that when Mr Mackay came (albeit reluctantly) to the UK at the end of 2004 his intention was to continue to work for Instinet in such position as it required, whether in the UK or elsewhere, but in the UK for no more than 3 years in any event.

84. In the second half of 2005 Mr Mackay was accepted by Silver Lake as part of the core executive committee and told that an option scheme would be set up to incentivise key individuals. In September 2005 he began working on preliminary allocations – the allottees were to be those who had the skill and knowledge to help sell the business. After the First Sale completed in December 2005 in the first quarter of 2006 Mr Mackay was further involved in the allocation of options. In April 2006 Mr Mackay was given options over shares in the Silver Lake acquisition vehicle. The rights under these options vested as to 25% in December 2005 and as to the remainder by 36 monthly instalments thereafter. Vesting was accelerated on a takeover. If Mr Mackay resigned the unvested options would lapse. These options could be (and in the event were) extremely valuable.

85. I conclude that it was likely that after the autumn of 2005 Mr Mackay intended to remain an employee of Instinet, if necessary in the UK, until Silver Lake's sale took place. Were the sale not to have happened by the end of 2007 and had he been

asked to stay in the UK beyond 2007, I am not completely convinced that he would have resigned and left the UK: it might have depended on the financial incentive to stay.

1.2. The Appellant's Arguments

86. Mr Way draws seven principles from the authorities.

87. *First*, that the basic meaning of "ordinarily resident" is that given by Lord Scarman in *Shah v Barnet London Borough Council* [1983] 2 AC 309 where he said (at 343):

> "Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man'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 for the time being, whether of short or of long duration."

88. *Second*, the word "ordinary" is similar to "habitual". In *Shah* Lord Scarman said (at 342):

> "I agree with Lord Denning MR that in their natural and ordinary meaning the words mean "that the person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration." The significance of the adverb "habitually" is that it recalls two necessary features mentioned by Viscount Sumner in *Lysaght's* case, namely residence adopted voluntarily and for settled purposes."

89. Likewise in *Tuczka v HMRC* [2011] STC 1438 the Upper Tribunal accepted that the authorities showed that there was "a common core of meaning" in ordinary and habitual residence.

90. *Third*, "ordinary" means something which is not "extraordinary". In *IRC v Lysaght* 13 TC 511 Viscount Sumner had said (at 527-8):

> "My Lords, the word "ordinarily" may be taken first. The Act on the one hand does not say "usually" or "most of the time" or "exclusively" or "principally", nor does it say on the other hand "occasionally" or "exceptionally" or "now and then", though in various Sections it applies to the word "resident", with a full sense of choice, adverbs like "temporarily" and "actually". I think the converse to "ordinarily" is "extraordinarily", and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not "extraordinarily"."

91. *Fourth*, he says that intention is relevant in determining whether a person is ordinarily resident. To work out whether a person has a settled purpose in the UK one must ask: why is the person here? That requires looking at the person's mind together with all the other relevant evidence. He cites Lord Scarman in *Shah* where (at 344), having said that there were only two respects in which intention was relevant and that one of those was voluntary presence he said:

> "And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. That is not to say that the "propositus" intends to

stay where he is indefinitely; indeed his purpose while settled may be for a limited period. Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled".

92. Mr Way says that the relevance of intention is also apparent from *Carey v HMRC* [2015] UKFTT 0466. In that case the First-tier Tribunal were considering when the taxpayer in that case ceased to be ordinarily resident (which they took as meaning to have an abode in the UK voluntarily adopted for settled purposes as part of the regular order and pattern of his life) and said:

> "[48]….Where a person is leaving the UK, his intentions as to his future plans must be relevant in assessing what his settled purpose is, as regards whether he ceased to have an abode in the UK voluntarily but for settled purposes as part of the regular order and pattern of his life."

93. He says this is reinforced by the decision in *Ward v HMRC* [2016] UKFTT 114 in which the tribunal accepted that Mr Ward had in June or July 2009 a clear intention to return from the UK to Australia very shortly and so concluded that the pattern of his life did not demonstrate a settled purpose to remain in the United Kingdom. It said that it was fortified in that conclusion by a number of other matters, one of which was the short term nature of Mr Ward's applications for extensions to his work permit which evidenced that Mr Ward's settled purpose was to return to Australia as soon as possible, and the other was that there was a succession of events which led to the extension of Mr Ward's time in the UK none of which it found were sufficient to conclude that despite his continuing clear intention to return to Australia as soon as possible the ordinary pattern of his life was to be resident in the United Kingdom.

94. Mr Way says that, this concentration on intention does not involve a confusion between ordinary residence and domicile. The two concepts look at different things. He accepts that intention is the fundamental ingredient in relation to domicile. By contrast, he says that in relation to ordinary residence one is looking to determine the purpose for a person's presence in a country. In that respect intention is relevant but it is not the sole relevant factor. Instead one must look at all the relevant evidence, given it appropriate weight, and form a view.

95. *Fifth*, a determination of ordinary residence is not simply a matter of a day count. In *Levene v IRC* 13 TC 486 Viscount Cave stated (at 506-7):

> "The suggestion that in order to determine whether a man ordinarily resides in this country you must count the days which he spends here and those which he spends elsewhere, and that it is only if any year the former are more numerous than the latter that he can be held to be ordinarily resident here, appears to me to be without substance. The expression "ordinary residence" is found in the Income Tax Act 1806 and occurs again and again in the later Income Tax Acts, where it is contrasted with usual or occasional or temporary residence; and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences."

96. *Sixth*, there must (as the last sentence of the foregoing quote indicates) be a degree of continuity. In *Shah* Lord Scarman said (at 344) that the purpose of living

where one does must have "a sufficient degree of continuity to be properly described as settled". In *Genovese v HMRC* Spc 00741 the Special Commissioner said (at paragraph 44) that "it appears to me that in order for a pattern to be described as "habitual", it must continue for a sufficient length of time".

97. Mr Way says that to be ordinarily resident a person's residence must be part of his ordinary pattern of life, and if circumstances keep changing and result in extensions to the time in the UK it is inappropriate to add together the entire period and conclude that it reflects a pattern of life in the UK (see the extract from *Ward* quoted above).

98. *Seventh*, in assessing ordinary residence one must look at the "continuous story" including what happened in years subsequent to those in question. In this respect, he cites Viscount Sumner in *Levene* (at 501):

> "It is suggested that the Commissioners misdirected themselves in point of law, because they took into account, with regard to the earlier years, conduct which only occurred subsequently. I agree that the taxpayer's chargeability in each year of charge constitutes a separate issue, even though several years are included in one appeal, but I do not think any error of law is committed if the facts applicable to the whole of the time are found in one continuous story. Light may be thrown on the purpose with which the first departure from the United Kingdom took place, by looking at his proceedings in a series of subsequent years. They go to show method and system and so remove doubt which might be entertained if the years were examined in isolation from one another."

99. Applying these seven principles Mr Way says that in determining Mr Mackay's purpose the tribunal must consider his mind together with all the other relevant evidence, e.g. the short-term nature of the roles he was to fulfil, the prospect of redundancy, and the two sales of the Instinet business. The evidence demonstrates that Mr Mackay's purpose was to be in the UK for a short-term project followed by a return to Asia. There were in fact a series of short-term projects although that was not anticipated at the outset, and each time Mr Mackay undertook a new project his purpose remained to complete the short assignment and then leave the UK. These were not settled purposes. Further, he resolved before coming to the UK that in any case he would leave the UK within three years, even if this required him resigning.

100. In relation to whether Mr Mackay's purpose was settled he says one must ask if his purpose for being in the UK fitted with the pattern of his life and was ordinary or habitual, so that it can be described as a settled purpose. On the facts Mr Mackay's purpose for being in the UK was not a settled purpose. On the contrary the pattern of his life was firmly established abroad and his time in the UK consisted of only two years and ten months during which he fulfilled short-term roles which did not flow from one another.

101. He also says that although Mr Mackay lived in the UK between October 1998 and August 2000, that period did not reflect the habit of his life and it cannot therefore be said that he resumed such a habit during the disputed years.

1.3 HMRC's arguments

102. Mr Stone says that the appellant's case is founded on the incorrect assumption that one should consider the pattern of the appellant's life over its entire course, and as a result, seeing his time in the UK between 2004 to 2007 as a "blip" in that pattern.

103. He says that Mr Mackay's residence in the UK did not arise from some fortuitous cause such as illness but from the decision to accept employment and period. He notes the passage quoted above from Viscount Cave's speech in *Levene* (at 507) in which he contrasts ordinary residence with usual or temporary residence and says that it connotes residence with "some" degree of continuity and apart from accidental or temporary absences, and then continues:

> "So understood the expression differs little in meaning from the word "residence" as used in the Acts"

and he says that the tribunal must look for some degree of continuity and is not required to rest its conclusion on the condition that there must be residence for an indefinite permanent period. Mr Mackay's residence was not occasional or fortuitous.

104. In contrast to Mr Way's citations from *Carey* he cites Lord Warrington at 510 in *Levene* where he says that the usual ordering of a man's life "must be judged by what he does in that and the preceding years only".

105. He says the correct approach is that in *Tuczka* in which the FTT, in a decision approved by the Upper Tribunal, said that the appropriate course

> "is to look back over the period of the individual's stay in the UK and ask whether the purpose appears to have been settled without going into a detailed exercise of examining the individual's state of mind at various stages during the stay"

106. Mr Stone says that *Ward* was wrongly decided. He says that the FTT failed to consider whether Mr Ward had a settled purpose of staying in the UK because of the needs of his girlfriend, her parents and his new baby. He says that in describing Mr Ward's purpose as being "to return to Australia as soon as possible" the FTT confused intention and purpose. The FTT he says fell into the error urged by Mr Way in this case, namely focussing on long term intention rather than the reasons that Mr Ward was in the UK and whether for the time being in the UK was part of the regular order of his life.

1.4 Discussion

107. I accept Mr Way's first three propositions.

108. I note that the purpose of which Lord Scarman speaks is the purpose for residence, not a purpose of residing.

109. I also accept his fourth proposition that intention is relevant to whether there is a settled purpose. But, as Lord Scarman puts it, a purpose for a limited period may be a settled purpose. The issue is whether the purpose has a "sufficient degree of continuity to be properly described as settled" and intention is relevant to that question.

110. As I have recorded, Mr Way relies on *Ward v HMRC [2016] UKFTT 114* in which the tribunal found that in July 2009 Mr Ward had an intention to return to

Australia "very shortly"; it also found that he had returned his furniture and car to Australia. It said that the "pattern of [Mr Ward]'s life at that stage did not demonstrate a settled purpose to remain in the UK"; but Mr Stone says that *Ward* was wrongly decided. He says that the FTT confused purpose and intent and wrongly focussed on long term intention.

111. It seems to me that *Ward* is best understood in the context of each successive extension of Mr Ward's stay. Each extension was short. During the extension his purpose was to work in the UK, but his intention was that he should return to Australia at the end of the period. The nature of his purpose was so affected by his intention to leave the UK in a few months that the purpose for being in the UK could not be called settled. So seen it is a case about the length of time necessary for a purpose to be "settled".

112. Your intention to do something is different from the reason you do it. You intend to work for only 4 weeks; your purpose in going to your office is to work there. Your intention to do it for only 4 weeks illuminates whether your purpose is settled or not.

113. In this context Mr Stone notes that in *Genovese* the Special Commissioner drew eight principles from Lord Scarman's speech at 345 F-G in *Shah*. The eighth was that the "test requires objective examination of immediately past events and not [of] intention or expectation for the future". I do not think that such a broad conclusion may be drawn from the cited passage in *Shah*. It concerned the language of the particular statute being considered which required looking back over three years. A complete disregard of future intention at a particular time seems to me to be contrary to Lord Scarman's formulation of the common law test.

114. I agree too with Mr Way's fifth proposition that ordinary residence is not simply a matter of day count. But this does not mean that day count is irrelevant. Where you are on most days is one indication of where it is ordinary to find you and what is the regular pattern of your life at that time.

115. I also agree with Mr Way's Sixth proposition that there must be a degree of continuity of purpose. That is different from continuity of presence.

116. Mr Way says that if circumstances keep changing it is inappropriate to add together the entire period and conclude that it reflects a pattern of life in the UK. I agree that if a person came to the UK for the purpose of working for 4 weeks, and then decided to have a 4 week holiday touring the UK, and then stayed for a further 4 weeks to court a new friend, that his or her purpose might not be described as settled. That is because the purpose for being here changes.

117. But if a person is employed to do one task which is expected to last 2 years and then is told that that task is no longer needed but he is wanted to do another, his residence in the UK remains in my view for the purpose of fulfilling his employment obligations and can be a settled purpose.

118. As to Mr Way's Seventh proposition I do not regard Viscount Sumner as saying that the overall pattern of a person's life is relevant to the question of whether or not he is ordinarily resident. Rather he is saying that it is legitimate to treat what happens at a later time as confirming a conclusion or remove a doubt in relation to a

conclusion reached on the facts applicable to an earlier time. In other words, if at a later time a person ceased to have a particular purpose that might call into doubt a conclusion that the purpose was held earlier in a settled manner; but if the purpose remained held it would remove the possibility that later events might show that the earlier assessment was wrong.

119. That is not the same as looking at a continuous story. The focus is only on what was ordinary at times in the years concerned.

120. As Mr Way said in reply, one of the principal differences between the parties may be described as a difference as to the effect to be accorded to "for the time being" in Lord Scarman's famous statement that ordinary residence was residence adopted "voluntary and for settled purposes as part of the regular order of his life for the time being ...". Mr Way says that "for the time being" qualifies "settled purposes", whereas the heart of HMRC's case is that those words qualify "regular order of his life". HMRC's case is that the regular order of Mr Mackay's life in 2004 to 2007 was residence in the UK; Mr Way says that Mr Mackay's settled purpose was at all times (and so for the time being) in that period to depart from the UK as soon as possible.

121. Lord Scarman's speech is not be approached as legislation, but Mr Way's dichotomy helpfully illuminates what appears to me to be a crucial question, which is whether in determining whether a person is "ordinarily" resident one asks the question in relation to a particular time (or an interval preceding a particular time) or across the wider pattern of a person's life.

122. Mr Way says that on HMRC's approach a tourist in the UK for a month would be ordinarily resident because *for the time being* the regular order of his life would be to be in the UK. That cannot he says be right, and that means that the wider pattern must be considered.

123. For the reasons which follow I have come to the conclusion that in determining what is ordinary, settled or regular, at any time in a tax year, regard should not be had to the pattern of a person's life or his long-term intentions, but rather to his habits and purpose at that particular time or in a comparatively short period before it (that is to say short as compared to the pattern of his life). That is for the following reasons.

124. First, as Lord Scarman says in *Shah* at 340G, ordinary residence is not a term of art in English law. Likewise Lord Warrington in *Levene* says (509) the words have no technical meaning. The question is therefore what the statutory words intend. Section 21 ITEPA and related provisions speak of a tax year "in which the employee is …ordinarily resident".

125. I find some pointer in the word "ordinarily": the Act does not create a concept of "ordinary residence", rather it asks the question whether a person is ordinarily resident. 'Ordinarily' thus qualifies the verb "is" and so one's attention is directed principally to what is going on, not to the status of an individual or long term intentions or acts. Further the provision does not require the taxpayer to be ordinarily resident "for" the tax year but at some time "in" it. Thus whether someone is ordinarily resident must be capable of determination at a particular time. That suggests to me that the statutory condition is satisfied if it was ordinary at that time for him to be resident at a particular time, and does not require an assessment of

whether in the ordinary course of his life he was resident at that time. It thus requires an assessment of the ordinary course of his life at that time only.

126. On this basis I would find that Mr Mackay was ordinarily resident in the UK in the disputed years. In those years the ordinary course of his life was that he was resident in the UK. This was his base both for work and domestically. It was to the UK he returned from holidays, from work and from travel. On an ordinary day (in an extraordinary life) you would find him at work in the UK or at home in the evening and at weekends. This was his habit, pursued of his own choice and it did not alter over an appreciable period. This course of life became his ordinary clothing shortly after his arrival in December 2004 and continued until September 2007. Throughout that period he may have intended this course of life to end within three years, and he may have been concerned that the reason for his presence here may suddenly have been terminated by his dismissal but while he was here and kept his job he was ordinarily here.

127. Of course "ordinarily" requires some tract of time for assessment. I discuss this below, but it seems to me that after Mr Mackay came to work in the UK the ordinary course of his life became apparent within a couple of months and then continued. By March 2005 his presence and activity in the UK was the ordinary pattern of his life at that time.

128. If the approach I have adopted is wrong it seems to me that the same result arises if I follow the exegesis of the expression in the authorities. I start with Lord Scarman's test.

129. First, it was clear that Mr Mackay had voluntarily (even if reluctantly) come to the UK to work.

130. Second, I find that he was here for settled purposes.

131. A purpose of fulfilling the duties of an employment was one of those referred to by Lord Scarman. That was also held to be the taxpayer's purpose in *Grace*.

132. I find that a major reason that Mr Mackay was in the UK was in order to perform the duties of his employment with Instinet. Those duties may have changed in the period, but his purpose was to fulfil the duties of his employment. That was therefore a substantial purpose for his residence. He may have had other related or unrelated purposes, for example to earn money, but a major purpose was to carry out the duties of his employment with Instinet.

133. I would describe that purpose as settled. There may have been uncertainty about how long that employment would continue but there was no evidence that suggested that Mr Mackay was at any time dithering about leaving that employment or thinking that he might at any time not turn up to fulfil his duties. Nor was the employment of a fixed short term; nor did Mr Mackay intend to resign after a short interval. I draw a distinction between the purpose of a person to work here for say 4 months and the purpose of the person who comes to the UK to work for say three years but whose employment may, or even is likely to, terminate after 4 months. I consider that the latter is capable of being settled and the uncertainty as part of the regular order of his life.

134. I do not think Mr Mackay's purpose of performing the duties of his employment can be described as casual. The duties in his First Role involved turning round a loss making part of the business. That is not a casual endeavour. He saw his Second Role as having an 18 month horizon. That is not casual. Nor do I conceive fulfilling either Role as a temporary purpose. Temporary in the context of employment suggests something intended, planned or expected to be much shorter than 18 months, not something which merely *might* be shorter.

135. It is true that Mr Mackay may also have had a settled intention to leave the UK, but that was a long term intention not a purpose for being resident. I do not think it could be said that his purpose for being in the UK was in order that he could leave it, and even if it could I consider that he also had the concurrent settled purpose of being in the UK to perform the duties of his employment. As Lord Scarman said at 344C:

> "and there must be a degree of settled purpose. That purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose."

136. To be properly described as settled a purpose must have sufficient degree of continuity: that must mean both continuity of holding the purpose (one which alters from day to day is not settled) but also as regards the duration of the thing which is purposed. It is the need for a purpose to be by reference to an appreciable period before it can be called settled which means that the tourist who comes to the UK for only a couple of weeks not ordinarily resident here. The period for which he intends to stay means that his purpose for being here is not settled.

137. What indications of time span are in the authorities?

(1) In *Levene* Sargant LJ (498) said that the habit of Mr Levene's life through the preceding five years had been its ordinary course. Viscount Cave in *Levene* spoke of "residence in a place with some degree of permanence" and said that ordinary residence as he understood it differed little in meaning from the word "residence": a comment which suggests that he did not consider that the tract of time need always be very long. Lord Warrington said that it was impossible to restrict its connotation to its duration.

(2) In *Lysaght* 5 years residence was sufficient.

(3) In *Shah* students were held to be ordinarily resident over the three years after they had entered the UK for their education.

(4) In *Tuczka* the Upper Tribunal considered the discussion of the meaning of habitually resident in *Nessa v Chief Adjudication Officer* in which Lord Slynn had said that a person could not be habitually resident until he had taken up residence and lived there for a period. He said that had to be an appreciable period of residence but accepted that a month could be an appreciable period of time. The Upper Tribunal accepted that an appreciable period of time of residence was necessary but said that it need not be long. Thus even if habitual residence and ordinary residence were the same, it did not make a difference in that case.

In *Tuczka* the Upper Tribunal regarded the critical question as being when did the purpose of Dr Tuczka have a sufficient degree of continuity to be regarded as settled [20]. The FTT had found that after coming to the UK in the spring of

1997, Dr Tuczka's purpose became settled during 1998 - 99. The Upper Tribunal agreed with this conclusion [25] and said that the FTT had applied the correct test.

(5) In *Reed v Clark* Nicholls J said (at 345) that in his view "a year is a long enough period for a person's purpose of living where he does to be capable of having a sufficient degree of continuity to be properly described as settled".

138. The period for which Mr Mackay intended or expected to be in the UK from the beginning of 2005 was in my view long enough to be regarded as settled on the basis of these indications, and became settled by March in that year.

139. Third I find that between 2005 and 2007 it was part of the regular order of Mr Mackay's life at that time (that is to say for the time being) to be UK resident. It was to the UK he came home on most nights and in the UK that he spent most weekends and in the UK where his office was. It was hence he went abroad for temporary purposes and it was to the UK that he returned.

140. I now turn to other guidance. In *Levene* Viscount Cave LC said:

"I consider "ordinary residence" connotes residence in a place with some degree of continuity apart from accidental or temporary absences" [507]

141. In the period 2005 to 2007 Mr Mackay was away from the UK on many occasions, but they were all short and all apart from a couple were less than a week. All could be fairly described as temporary. But apart from these absences Mr Mackay was in the UK with a substantial degree of continuity.

142. In *Lysaght* Viscount Sumner said (at 528)

"I think that the converse to "ordinarily" is extraordinarily", and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not extraordinary"."

143. Would it have been extraordinary to find Mr Mackay present and resident in the UK in the disputed years? It seems to me that it would not have been - neither during the working week nor at weekends nor in the evenings at home. It is true that he may have been away or busy at some or all these times, but it would not have been extraordinary to find him here.

144. In the same case Lord Buckmaster said (535):

"and if residence be once established "ordinarily resident" means in my opinion no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life."

145. Was Mr Mackay's residence here "casual or uncertain"? It was certainly not casual. It was uncertain in the sense that if his employment terminated he might leave the UK to find work elsewhere but it was not uncertain in the sense that on any particular day before the end of the period he was contemplating leaving the UK before his post with Instinet terminated.

146. Mr Way pointed to:

(i) the continual uncertainty about Mr Mackay's frequently changing employment position. I do not consider that a degree of uncertainty as to whether a purpose can continue prevents the purpose from being settled.

(ii) that fact that he was engaged in a series of short term contracts in quick succession. I did not think this a fair characterisation. There were two contracts. The first was capable of lasting at least a year, the second 18 months. Under the second contract Mr Mackay's duties changed towards the end when he assumed responsibility for Chi-X. The change in Mr Mackay's duties between the First and Second Roles and the transition to Chi-X did not indicate a change of purpose but simply a change of the duties which he was called on to perform in pursuit of that purpose.

(iii) the fact he anticipated returning to Asia within three years. To my mind Mr Mackay's purpose was to work for Instinet in the UK for no more than three years. The three year limitation does not prevent that purpose from being settled.

(iv) the fact that he was often abroad. I did not find this persuasive. He was not living abroad but working there or on holiday. He came back to the UK for longer spells between trips abroad.

(v) the fact that his presence did not materially affect how his family led their life. I did not regard this as relevant.

1.5 Ordinarily Resident: Conclusion

147. I find that Mr Mackay was ordinarily resident in the UK in the disputed years.

2. The UURBS Issue

148. In 2005/6 Instinet Europe paid Mr Mackay £500,000 pursuant to a Deed of Discontinuance relating to the rights he held under an Unapproved Unfunded Retirement Pension Deed of 26 August 1999 ("the 1999 Deed").

149. The parties were agreed that the payment constituted general employment related earnings within section 62 ITEPA, but differed in relation to the tax year or years to which the payment is attributable. HMRC say that it is attributable to, and taxable income of, 2005/6, when it was received; the Appellant says that it is attributable to, and must be spread across, the years in which the entitlement to the pension rights accrued.

2.1 Findings of fact.

150. The letter of 31 July 1995 offering Mr Mackay employment with Instinet Pacific included the paragraph:

> "You will be eligible to participate in the Reuters Pension and Life Assurance Schemes, upon commencement of your employment. Should you decide to join the scheme you will contribute 6% and the company will contribute 10% of your salary."

I heard nothing which suggested that Mr Mackay did not decide to join the scheme and I conclude that it was likely that he did.

151. Clause 14 of Mr Mackay's contract with Instinet Pacific of 7 August 1997 said:

"You have chosen to become a member of the Vista compensation pension plan [corporate] ... you will be enrolled in the plan effective 8 August 1997. [It then set out the precise amount of the contributions that Instinet Pacific would make to the plan over the following years and a provision for Mr Mackay to make fixed monthly payments to the plan]."

152. Clause 14 of the terms of Mr Mackay's employment with Instinet Europe of 20 August 1998 provided that:

"On joining the company you will become a contributory member of the Reuters pension Fund unless you give notice to the contrary. The employee contribution is 6% of salary."

153. On 22 March 1999, some six months after starting work in the UK, Reuters wrote to Mr Mackay explaining that his pension benefits under the Reuters Pension Fund were limited by reference to a (final) salary of £90,000, and explaining that the benefits on salary above that figure would be "provided through the Company's UURBS".

154. On 25 March 1999 Instinet UK wrote to Mr Mackay saying that his contract was amended so that his salary would be reduced by 6% of the excess of what it would otherwise have been over the pensionable earnings cap that applied from time to time.

155. In a deed of 26 August 1999 (the "1999 Deed") between Instinet UK and Mr Mackay, Instinet UK agreed that it would provide Mr Mackay with the benefits which would have been provided under the Reuters Pension Fund had the cap not applied less the benefits which were in fact payable under that scheme. The deed provided for Mr Mackay to waive 6% of his salary above the cap. Clause 6.3 of the Deed provided:

"the pension provided under [this Deed] will be commutable to the same extent as if it were provided under the [Reuters Pension Fund]."

156. On April 2005 Reuters agreed to sell Instinet. The sale was completed in December 2005. In the meantime, on 31 August 2005 Mr and Mrs Mackay (since Mrs Mackay was a potential beneficiary of the UURBS) executed a Deed of Discontinuance with Instinet Europe (Instinet UK) reciting the forthcoming sale, and saying that:

"As the company and Mr Mackay have to discontinue the [benefits under the 1999 Deed] the terms and conditions of Mr Mackay's employment [have] changed. To ensure Mr Mackay is compensated for the loss of this benefit the company has agreed to pay Mr Mackay £500,000 in full and final settlement ..."

157. The deed then provided for clause 6.3 to 1999 Deed be varied so that it read:

"the pension ... will be commutable on discontinuance of the [UURBS] (at which point Mr Mackay will automatically retire under the [UURBS])…."

158. The UURBS was then expressed to be discontinued. The parties agreed the value of the pension under the UURBS was £500,000. The company agreed to pay to Mr Mackay:

"under Clause 6.3 of the [UURBS] Deed as his commuted pension payable on his retirement under the [UURBS] triggered by ... discontinuance. Such

payment is in complete satisfaction of the beneficiaries' entitlements under the [UURBS]".

159. An Employment Term Sheet of 31 August 2005 recorded that Mr Mackay would be paid £500,000 for the "forfeiture of entitlement to his Retirement benefits".

160. The figure of £500,000 had been set following advice from Lane, Clark & Peacock, actuaries to Instinet Global Services, in a letter of July 2005.

161. In that letter Lane, Clark & Peacock say that they understand that the company was considering offering Mr Mackay a cash payment for giving up his rights to any further benefit from the UURBS and described their understanding of the benefits promised to Mr Mackay under the scheme. They say:

> "as Mr Mackay joined the Reuters Pension Scheme] in 1994 [which it is agreed is a typo for 1995], his pension is based on an accrual rate of one sixtieth of salary for every year of pensionable service."

162. They then calculate (on the basis of nine years and 10 months service with Instinet): the pension which Mr Mackay would have been entitled to on retirement under the Reuters Scheme if the cap did not apply, the actual pension payable at retirement under the scheme, and the difference - being the pension payable on retirement under the UURBS.

163. They then set out four methods on which the company's liability might be valued. These calculations produce amounts between £115,000 and £210,000. They then say that an insurance company could not be found which would agree to take on an obligation to pay deferred benefits of this type but if it were, then on the basis of the type of variables an insurance company would use, the amount it would require in order to provide those benefits would be between £450,000 and £500,000.

164. Mr Mackay said, and I accept, that 80% of the payment was paid offshore and 20% in the UK since up to the time of the Deed he would have worked outside the UK for 80% of the time he had worked for Instinet companies. He said that the payment was presented to him as giving him the cash equivalent of the transfer value of his pension.

165. I did not see the terms of the Reuters Pension Scheme. I concluded from Lake, Clark & Peacock's letter that it provided for the payment of a pension (which I think it is likely would have been paid monthly) at retiring age computed as

X/50 x final salary,

where X was the number of years the member had been a member of the Reuters Pension Scheme.

166. I conclude that under the 1999 Deed Mr Mackay had a right to top up pension payable at monthly intervals commencing on retirement.

167. From the reference in the clause 6.3 of the 1999 Deed I concluded that the Reuters Pension Scheme also had provision for the making of a payment in commutation of the rights under the scheme to a pension.

168. Because I had no details of the Reuters Pension Scheme, it was not clear to me how the cap affected the pension which would have been payable under it in respect of membership prior to 1999. The 1999 Deed referred to the imposition of a cap by Finance Act 1989. I was not taken to that provision but I note that para 20 Sch 6 FA 89 provides that the rules of an approved scheme shall limit the benefits under the scheme by capping what would otherwise be treated as the employee's final remuneration.

169. I think it likely that it was not until 1999 that Mr Mackay's actual salary exceeded the cap. Thus until then the capping provision would not have affected him. On the terms of the 1999 Deed the effect of membership of the scheme prior to 1999 would be taken into account in calculating the top up pension. The benefits afforded by the Deed therefore took into account those years but the benefits in respect of those years were conferred as a result of Mr Mackay's employment in 1999.

2.2 HMRC's argument.

170. Mr Stone says:

(1) the UURBS is not a contributory scheme. There was no fund from which the benefits were provided. The salary waiver was not a contribution to any fund but simply a reduction in the appellant's salary. The payment cannot be said to be "in respect of" annual 6% contributions.

(2) Only two variables are relevant to the Lake, Clark & Peacock valuation: the length of service and basic salary at the deemed the retirement state. The amount and number of the reductions in his salary were irrelevant to the benefits.

(3) The contemporaneous documentation showed that the payment was to compensate Mr Mackay for a detrimental change in the terms of his employment. That was evidenced by:

(a) how Lake, Clark & Peacock started their letter;

(b) The words of the Employment Term Statement; and

(c) the Deed of Discontinuance itself said that the terms and conditions of Mr Mackay's employment had changed and the company had agreed to make a payment for the loss of benefit.

171. Thus Mr Stone said the payment was not in respect of the past but in respect of the change in the employment rights in the year 2005/6. In this respect he relied on *Bray v Best* and *Brumby v Milner*.

2.3 The Appellant's arguments.

172. Mr Way says that the calculation of the payment, the terms of the Deed of Discontinuance, the Employment Term sheet, the fact that some of the payment was be paid overseas reflecting overseas service, and Mr Mackay's understanding of the payment all point to the payment being "for" the nine and a bit years of his accrued service with Instinet companies. It was just to spread it over those years.

2.4. The applicable statutory provisions.

173. Part 9 ITEPA provides for a charge to tax on any pension paid by a person in the UK. Instinet Europe was a person in the UK. The payments it would have made under the UURBS would have been pension payments and taxable in the manner required by these provisions. The payment made to Mr Mackay was not a pension and not taxable under those rules. As I have said the parties agree that the sum was general earnings for the purposes of section 62.

174. Section 16 IETPA provides:

> (1) "This section applies for determining whether general earnings are general earnings "for" a particular tax year for the purposes of this Chapter.
>
> (2) General earnings that are earned in, or otherwise in respect of, a particular period are to be regarded as general earnings for that period.
>
> (3) If that period consists of the whole or part of a tax year, the earnings are to be regarded as general earnings "for" that year.
>
> (4) If that period consists of the whole or part of two or more tax years, the part of the earnings that is to be regarded as earnings "for" each of those years is to be determined on a just and reasonable apportionment."

175. (And by virtue of section 35 TMA 1970 such income is assessable within four years after receipt).

2.5 Discussion.

176. The parties referred me to the discussion in *Hamblett v Godfrey* [1997] STC 60 of a payment made to an employee of GCHQ in relation to the withdrawal of trade union membership rights. It was held at the payment came "from" the employment because it came from the change in the conditions of employment.

177. I was also referred to *Bray v Best* [1989] STC 159 in which a payment from a trust which was an emolument fell into tax in a particular year only if it was "for" that year. Lord Oliver (at 166G) said that he would say that the periods to which any given payment is to be attributed depended on all the circumstances including its source and the intention of the payer.

178. I drew only limited assistance from these cases. That was because the terms of section 16 ITEPA contain their own expansion of the meaning "for" a particular period: general earnings that are earned in, or otherwise in respect of, a particular period are to be regarded as general earnings for that period.

179. If, therefore, I come to the conclusion that any part of the sum of £500,000 was paid in respect of, or earned in, a particular year I am bound to conclude it was "for" that year.

180. It seems to me that on executing the Deed of Discontinuance the rights which Mr Mackay gave up had two aspects. The first of these was the right to receive in the future periodical payments topping up those payments to which he was entitled under the Reuters Pension Scheme as a result of his membership up to the date of the Deed. These were accrued rights: all Mr Mackay had to do to receive them was to live to his retirement age. I shall call them "vested rights". They were affected by the amount of his final salary but otherwise their calculation was fixed. The second was the right to

accrue, as one of the perquisites of his employment, future enhancements to the amounts of that pension by virtue of his continued membership of the scheme.

181. These two elements appear in the Deed of Discontinuance itself. Whilst in the passage noted by Mr Stone it refers to the changes in the terms and conditions of the employment, clause 6.4 describes the payment as a commutation of Mr Mackay's accrued pension rights.

182. I do not consider that the phrase in the 31 August 2005 Employment Terms Sheet "payment … for the forfeiture of entitlement to retirement benefits" leads to a different conclusion. There were two aspects to the benefits which were to be forfeit.

183. I am not persuaded that the unfunded nature of the scheme or the 6% reduction in salary are materially relevant to determining to which aspects of the payment the £500,000 is reasonably attributable: the vested rights to a pension were earned by working for Instinet and being a member of the scheme. As Mr Stone says there was no fund held on trust for the participants as a result of the scheme, but the company's obligations under the 1999 Deed arose from working for Instinet, not payment into a fund.

184. I conclude that part of the £500,000 was paid in respect of (and therefore "for") Mr Mackay's renunciation of his right to accrue future enhanced levels of pension, and part was paid for renouncing the vested right to the top up pension to which he would have been entitled on retirement had he resigned on the date of the Deed.

185. The Lane, Clark & Peacock letter seeks to value the accrued right but makes no express reference to the value of the right to be accorded greater benefits. Their valuations of the liability of the company are based on years worked and salary in 1999 and make no reference to future salary levels or further years of membership. Their estimate of what an insurance company would charge for taking on the obligation is substantially higher than their valuation of the liability. That suggests to me that the difference between the highest figure for the liability of £210,000 and the figure of £450-500,000 derives at least in part from the effect of uncertain levels of future final salary. As a result I do not view the figure of £450-500,000 as representing the value of Mr Mackay's accrued rights in 1999 had he ceased to be a member at that date.

186. At the time the Deed of Discontinuance was executed, the amount of pension to which he was entitled on retirement was calculated with respect to the years he had been a member of the Reuters Pension Scheme. Had it been paid it would, in my view, have been no misuse of language to say that a part of that pension was earned from each year's work and was therefore "in respect of" that year's work.

187. A payment in commutation of a right to a series of payments seems to me to be fairly described as being in respect of the same things as the elements of the series were in respect of. It may also be said to be in respect of the agreement to renounce the individual payments but it remains in respect of those vested obligations to make payment and in respect of each of the years in which they were earned.

188. I therefore conclude that that part of the £500,000 which can be justly attributed to the renunciation of the vested future pension was paid "for" the years in which that right was earned by Mr Mackay's service.

189. Mr Mackay became eligible for top up payments on the execution of the 1999 Deed in August 1999 and continued to earn increases in the period until August 2005. That is a period of six years. Earlier I came to the conclusion that it was not until 1999 that Mr Mackay's service with Instinet gave rise to benefits under the 1999 Deed and that the benefits were therefore in respect of service from 1999 onwards. The part of the payment in respect of those years must be apportioned between them justly. Given the annual accrual of 1/60ths, I conclude that it would be just to apportion one sixth of that part of the £500,000 relating to vested benefits to the years 2000/01 to 2004/5, 7/72nds to 1999/2000 and 5/72nds to 2005/6.

190. What part of the £500,000 related to the vested benefit and what part to rights to future enhancement?

191. Lake, Clark & Peacock's letter sets out four different methods which could be used to determine the amount to be offered. These four methods give answers which reflect the liability of the company to make the future payments and vary between £115,000 and £210,000. Having done these calculations they then address what would have to be paid to an insurance company in return for a commitment to pay the pension at retirement. They say that no insurance company would be willing to take on the liability for making such a deferred pension but estimate a figure, based on the kind of assumptions which insurance companies normally made, which was between £450,000 and £500,000.

192. The disparity between the calculated figures and the insurance company figure suggested to me that it was not shown that the latter figure does not allow for the effect of increases in Mr Mackay's (final) salary between 2005 and retirement, and allows some uncertainty as to whether that figure reflects the chance of the accrual of future qualifying years after 2005.

193. There are two other features of Lake Clark & Peacock's calculations on which I should comment. They are made on the basis of Mr Mackay's (then) nine years and 10 months service with Instinet companies and assume that all that period counts for the Reuters Pension Scheme. However between August 1997 and 31 July 1998 Mr Mackay's pension was not with the Reuters scheme but with Vista. Thus part of the value (and about 1/9) prescribed by Lake Clark & Peacock does not reflect a liability under the UURBS.

194. In considering the split of the £500,000 between the two parts I also bear in mind that both Mr Mackay and Instinet may have considered in August 2005 that Mr Mackay's future tenure with Instinet might be limited as a result of the acquisition and anticipated future sale by Silver Lake Partners. 18 months or more of further accrual of value in his pension might have been reasonably expected by both sides but not more than five years.

2.6 UURBS: Conclusions

195. Putting this together I conclude that £400,000 of the £500,000 payment was for the renunciation of the vested rights which had been earned in the years 1999 to 2005 (and should be apportioned as indicated in above) and the remainder was in respect of, and should be apportioned to, the renunciation of the earning of future enhanced pension entitlements after the date of the Deed.

196. As regards the renunciation of future enhancements it seemed to me clear that this sum could only have been, and was, earned in 2005/6. It was in respect of the renunciation of those rights in that year.

3. The Share Option Payments.

197. In April 2006, following the completion of the First Sale in December 2005, Mr Mackay was granted options over shares in Instinet Incorporated (the vehicle through which Silver Lake Partners held Instinet).

198. When Silver Lake Partners' sale of the Internet business was completed in February 2007, Mr Mackay's options were cancelled and he received a large payment representing a portion of the difference between the price at which Silver Lake Partners had sold and that at which it had bought.

199. There was no dispute that the share options were securities options within the meaning of Chapter 5 Part 7 ITEPA but the Appellant argues that even if he was ordinarily resident in the UK in 2006/2007, the options were granted by reason of his employment with Silver Lake Partners (or possibly Instinet Incorporated) and the duties of that employment were performed wholly outside the UK, with the result that part of the sum received was not within the charge to tax because it was not remitted to the UK.

3.1 The relevant legislative provisions

200. The effect of section 476 and 477 in Part 7 ITEPA is that the amount realised on the release for consideration of Mr Mackay's options counts as employment income. But section 474 provided that Part 7 did not apply to a securities option if:

> "…at the time of the acquisition, the earnings from the employment were not (or would not if there had been any) general earnings to which section 15 or 21 applies."

201. At that time section 21 applied to general earnings for any year in which an employee was resident and ordinarily resident but not domiciled except to the extent that the earnings were chargeable overseas earnings within section 23. Section 23 (2) provided the general earnings were overseas earnings and (and so chargeable overseas earnings) for a year if:

> "(a) in that year the employee was resident and ordinarily resident but not domiciled in the United Kingdom, and
>
> (b) the employment is with a foreign employer, and
>
> (c) the duties of the employment are performed wholly outside the United Kingdom."

202. HMRC accept that Mr Mackay was for these purposes not domiciled in the UK. Accordingly if "the employment" was with a foreign employer and all the duties were performed outside the UK any earnings from it would not fall within section 21, and, as a result, the sum received on the cancellation of the options would not fall within Part 7. The question is: what was "the" employment?

203. Section 471 provides that Part 7 applies to a securities option where the right or opportunity to acquire it "is available by reason of an employment of that person."

Such an option is an “employment-related securities option”. Section 471 (3) provides:

> "(3) A right or opportunity to acquire a securities option made available by a person’s employer or a person connected with a person's employer is to be regarded ... as available by reason of an employment of that person [unless certain presently irrelevant conditions are satisfied]."

Thus no causal link is required between the grant of the option and the employment, and an option granted by a connected party of the employer is treated as employment related.

And section 471 (5) provides:

> " (5) In this Chapter - ... "the employment" means the employment by reason of which the rights or opportunity ... is available.”

204. Mr Way did not dispute that Instinet Incorporated or Silver Lake Partners were connected with Instinet Europe. Thus if Instinet Europe was the only person by which Mr Mackay was employed the effect of section 471 (3) would be that Mr Mackay's acquisition of the option would be treated as being by reason of his employment with Instinet Europe. In that case, since income from that employment with Instinet would be general earnings falling within section 21, section 474 would not disapply Part 7.

205. The appellant argues that the acquisition of the option was available by reason of Mr Mackay's employment with Silver Lake Partners or Instinet Incorporated (there was a little uncertainty over which), a foreign employer, and that all the duties of that employment were undertaken in the USA, so that section 474 disapplies Part 7.

206. This argument relies on a conclusion that the acquisition of the options was not also to be treated as being available by reason of Mr Mackay's employment with Instinet Europe.

207. Mr Way says that if as a result of section 471 an acquisition of an option could be regarded as available by reason of two different employments, then for the purposes of deciding whether section 474 applies you have to decide which employment is relevant. He says that that the approach to answering that question is given by cases such as *Hochstrasser v Mayes* in which the causing cause of a benefit was sought, or as Mr Way put it, the “driving force” for the benefit.

208. Section 474 speaks of "the" employment, whereas section 471 is couched in terms of "an" employment. It seems to me that there are a number of possible interpretations of the interaction of these sections when there is more than one employment by reason of which an option is or is to be treated as employment-related:

> (1) the first is Mr Way’s approach which relies upon the identification of the employment, the “driving force” from which the grant of the option in substance sprung;
>
> (2) an alternative is an approach which applies section 474 to each relevant employment so that if it applies to any one relevant employment Part 7 does not apply to the option;

(3) another approach is to read "employment - related securities option" as being specific to the particular employment by virtue of which it is employment-related, so that an option by reason of one employment is a different employment-related securities option from one by reason of another employment. On this approach section 474 may apply in relation to an option which is securities related by reference to one employment and so disapply Part seven in relation to that option and that employment, but may leave the operation of Part 7 unaffected in relation to the same option and a different employment.

209. Each of these approaches contains the seeds of anomalies. The first approach leaves uncertain what happens when "really" there are two relevant employments; the second approach may mean that a single overseas employment would take an option which in fact is granted in part in connection with a UK employment outside Part 7; and the third gives rise to the converse problem. The difficulty is the lack of any provision in section 474 permitting some just and reasonable attribution.

210. I tend to the view that the third of these approaches is correct, but these difficulties arise in this case only if Mr Mackay was in fact employed by Instinet International or Silver Lake Partners.

3.2 Evidence and Findings of Fact

211. After the Second Sale completed Silver Lake Partners were the majority shareholder in Instinet Inc, the holding company for Instinet.

212. In April 2005 or shortly thereafter Mr Mackay was told by the CEO if Instinet that he would be looked after “real well” if he helped get a good price for the sale of the business.

213. In 2006 about 38 senior Instinet employees including Mr Mackay were granted options over or acquired shares in Instinet Inc. The majority of those employees were in the USA.

214. The reason the options were granted to these employees was because Silver Lake Partners did not have the management or operational personnel to run the business and wished to retain and motivate those people whose presence and activities would assist in maximising the price it hoped to obtain on eventual sale (Mr Mackay described it as wanting the “ongoing and special commitment” of those people).

215. Mr Farrell said that the members of this group of senior employees remained employed by the Instinet entity which had previously employed them, and that Instinet Inc or Silver Lake Partners had no employees. He said that he did not regard the members of the group as having been employees of Instinet Inc.

216. Mr Farrell was among the group of 38 who received options in 2006.

217. Mr Farrell appended a copy of a letter to his witness statement in which he had recorded the entities in the Instinet group for which Mr Mackay had worked. This list did not include Instinet Inc. Mr Farrell told me that he had compiled it from information on Mr Mackay’s personnel file.

218. Mr Farrell had become chief administrative officer of Instinet in 2007, having previously held other posts in the business.

219. Some doubt is cast on Mr Farrell's evidence that there were no employees of Instinet Inc by a regulatory statement filed in the USA which indicates that four very senior employees were to become employees of that company. But from his evidence I conclude that it is unlikely that any of the group of 38 other than those four entered into formal contracts for the provision of their services to Instinet Inc or Silver Lake.

220. The Options were granted to Mr Mackay by an Option Certificate executed on 20 April 2006. The Certificate provided for two tranches of Options. 25% of each Tranche vested one year after grant and the balance thereafter in 36 monthly instalments, but, in the case of the second tranche only, subject to further conditions. On a qualifying sale of Instinet Inc all options vested. On vesting an option could thereafter be exercised. If Mr Mackay's Employment ceased (other than on events such as death) the unvested options were forfeit. ("Employment" was defined as employment by Instinet Inc or any subsidiary).

221. The amounts paid on the cancellation of the options represented part of the gain on the Silver Lake's sale of Instinet. The monies paid to Mr Mackay derived from Silver Lake Partners and not from the profits of the Instinet group. Part of the payment to Mr Mackay was made by Instinet Global and part by Iceland Corp through payroll payments separate from Instinet's regular payroll processing.

222. Mr Mackay was a little vague as to whether the employment which he submitted that he had was with Instinet Inc or with Silver Lake Partners. To some extent he regarded them as one and the same entity. In a large group structure that is unsurprising: it may be difficult to know what hat someone wears if they have a position with more than one company. I did not consider that this slight vagueness detracted from his evidence. If he was employed by either of those entities his case was the same. All he needed to show was that he was employed by one of them.

223. Mr Mackay took part in meetings conducted in the USA explaining to potential buyers the nature of the business and its technology. He had five meetings in New York in the autumn of 2006 and one in early 2007 before the agreement for the sale. He was told not to visit the New York office when he was in the USA on these meetings and not to tell European staff about his activities because of commercial confidentiality.

224. I also note that Mr Mackay had participated in the preparation of financial projections based on third party ownership of Instinet and a "massive restructuring". That work could have been useful to a potential purchaser from Silver Lake Partners. Mr Mackay did not indicate that the work had been done wholly in the UK.

225. After the sale to Nomura had been agreed Mr Mackay had a meeting with Nomura in London. He said that he did not regard it as part of his role in helping Silver Lake achieve the best price because it happened after the sale was agreed.

226. I think it likely that both Mr Mackay's activities in the UK and Europe running part of the Instinet business and also the information and impression he was able to convey at New York meetings would have affected to some degree the price a purchaser would pay.

3.3 HMRC's submissions

227. Mr Stone did not embark on analysis of section 474. His case was that Mr Mackay had not shown that he was employed by Instinet Inc or Silver Lake Partners. As a result he said that his only employment was with Instinet Europe. The earnings of that employment were general earnings which fell within section 21. As a result Part 7 applied and the sum received was taxable.

3.4 The Appellant's submissions

228. My Way accepted that s.471 ITEPA 2003 is applicable: the Share Options were available "by reason of an employment of [Mr Mackay]". However, given that Mr Mackay was employed by both Instinet Europe and Silver Lake Partners, he said that one had to decide which employment were the Share Options "by reason of". The answer was Silver Lake Partners. The Share Options were "by reason of" that employment because they were Mr Mackay's remuneration for his employment by Silver Lake Partners.

229. He relies on *Hochstrasser v Mayes* 38 TC 673 where it was said (at 709) that for a profit to be taxable as an emolument it is not enough for the Crown to establish that the employee would not have received the sum on which tax is claimed had he not been an employee. The tribunal must be satisfied that the service agreement was the "causa causans" and not merely the "sine qua non of the receipt of the profit". He draws a parallel between "from" and "by reason of".

230. Although Mr Mackay would not have received the Share Options payment had he not been employed by Instinet Europe (in other words that employment was a necessary ingredient), that employment would only be a "sine qua non" and not the "causa causans" of the payment. Instead it was the employment with Silver Lake Partners which was the "causa causans" (i.e. the driving force) and in turn the share option payment was "by reason of" *that* employment.

231. Mr Way said that the following features indicated that (what I shall call) the "real cause" of the receipts was the Silver Lake employment:

(1) Mr Mackay regarded himself as having a Sale Role distinct from his existing Second Role in Europe. That Sale Role was to assist with the sale of the Instinet business to potential buyers and to achieve a profitable sale of the business His work for Silver Lake Partners was separate and distinct to the duties expected under his role for Instinet Europe.

(2) The incentive was explicitly linked to the net proceeds derived by Silver Lake from the sale of the business, not the operating profits of Instinet. By this mechanism the interests of Silver Lake Partners and the 38 senior executives, including Mr Mackay, were aligned.

(3) The Sale Role was carried out for the benefit of Silver Lake Partners, not Instinet Europe or even Instinet Incorporated, and the cost of the remuneration received by Mr Mackay was borne by Silver Lake Partners.

(4) The Sale Role was conducted in the USA and not in the UK or Europe, and separately from his UK work and under conditions of confidentiality

(5) Any activities Mr Mackay performed in the UK/Europe in connection with the second engagement (his US role) were purely incidental to this engagement (see s.39 ITEPA), such as arranging meetings to be held in the US.

(6) The ultimate purchaser was Nomura, a Japanese financial institution, and the other two final bidders were US based financial institutions. There was no European connection to the sales process.

(7) Mr Mackay reported to a senior member of Silver Lake Partners as part of this role, who was a hierarchical level above the normal line manager that he would report to.

(8) This payment was separate from Mr Mackay's regular employment income from Instinet Europe Ltd.

232. Mr Way submits that the fact that Mr Mackay did not have a written employment contract with Silver Lake Partners does not mean that he was not employed by that entity. The work was done for the benefit of Silver Lake Partners, not Instinet, and he was paid for that work with monies which came from Silver Lake Partners. Mr Mackay was aware that contracts could be made orally or by conduct. And from a practical perspective all Mr Mackay was concerned about was that he was paid for the work he was instructed to do. The Options Certificate gave him that comfort; a distinct written employment contract was not necessary.

3.5 Discussion

233. I would regard Mr Mackay as an employee of Instinet Inc (or Silver Lake Partners) if he had an agreement or arrangement with that entity under which he agreed to render such of his services as were agreed between them in return for consideration and that entity exercised a measure of control of what he did. Such an arrangement could be formal and in writing, oral or by conduct or by a mixture of those means.

234. The following considerations indicate to me that it was unlikely that there was an agreement or an arrangement of that sort.

235. First, Mr Mackay was unable to say when the arrangement started. That suggests to me that there was no exchange in which an understanding of reciprocal obligation was reached.

236. Mr Mackay explained that he had had conversations with chief officers of Instinet Inc or Silver Lake who told him about the bidding process, and told him that he would be granted options. It was explained that Silver Lake wanted the commitment of certain managers and their help with the sale of the business. He said he was told "we will call on you when we need you to help us sell the business". That to my mind fell short of a commitment by Mr Mackay to render his services in return for a consideration.

237. Second, there was no indication in the Option Certificate that Mr Mackay had any form of mutual reciprocal arrangement with Instinet Inc or Silver Lake Partners to render his services. That document is formally and legally drafted and provides a unilateral obligation of Instinet Inc. It refers to Mr Mackay's employment by Instinet Inc or any subsidiaries, but it imposes no service obligations on Mr Mackay. If Mr

Mackay had agreed to render his services in exchange for the option to Instinet Inc then it is surprising that that agreement is not contained in that document.

238. Third, the duties carried out in having discussions with possible purchasers whether in the UK or the USA could, in my view, have been carried out in performance of Mr Mackay's obligations under his service agreement with Instinet Europe. That contract envisages that he would carry out functions for other group companies (which could include Instinet Inc and Silver Lake Partners):

(i) his appointment was not only as President of Instinet Europe but also as executive vice president of another company in the group, Instinet Global;

(ii) by clause 3.4 of that agreement he was required to devote the whole of his time to the affairs of Instinet Europe and of any associated company (which would include Instinet Inc and Silver Lake partners). Thus he could already be required to render services to those companies;

(iii) by clause 3.6 he could be required to carry out his employment duties on behalf of any associated company.

239. In this context I note that clause 3.1 of that agreement requires Mr Mackay to perform such other duties "customarily" assigned to persons in his position consistent with the position and as the Board may specify. I place no reliance on that clause: there was no evidence that the Board had specified any such duties and I heard no evidence that the activities Mr Mackay performed at meetings in the USA with potential purchasers were "customary" for a person in his role.

240. Fourth, the purpose of the grant of the options was to retain senior staff in the Instinet business and to encourage them to participate in the selling of the business potential purchasers. That purpose it seems to me was achieved by the terms of the options which delivered rewards whose value depended upon the success of those activities. Thus there was no need to agree formally or informally with the option holders that they would assist in the process. The incentive to work came from the grant. The grant was not consideration for the work. Nor was there any commercial need on the part of the selected managers for them to *agree* to assist Silver Lake Partners in the venture.

241. The grant of the options was not a payment for services rendered or to be rendered; it was an incentive to act in a particular way. It was not a requirement to act.

242. Mr Mackay says that assisting in the sale of the business was a function separate from his role as President of Instinet Europe, and that in this different capacity he was tasked with boosting the sale price of the Instinet business. I accept that the activities at meetings in the USA were different from those he usually performed for Instinet and that they would benefit of Silver Lake Partners (as well as himself and the other option holders) but it does not seem to me that the confidentiality of those activities or the fact that they took place in the US rather than another country points to Mr Mackay being an employee of Instinet Inc or Silver Lake Partners, rather than Instinet Europe.

243. I therefore find that Mr Mackay was not an employee of either of those companies.

244. Had I concluded that Mr Mackay was an employee of Instinet Inc or Silver Lake Partners I would not have concluded that all the duties of that employment were performed outside the UK. That is because I see no basis for distinguishing between the meetings in the USA and the work in managing the European business: both pursued with commitment would help maximise any sale price. The options provided incentives for both activities.

245. As a result it is unnecessary for me to decide whether the causing cause or real cause of the receipt of the monies under the cancellation of the options was employment with Instinet Inc or Silver Lake partners on the one hand or with Instinet Europe on the other. There was only one employment. The options were granted by a connected party. The options are therefore to be treated as being acquired by reason of the employment with Instinet Europe. As a result Part 7 ITEPA applies.

4. Conclusions

246. I conclude that:

(1) Mr Mackay was ordinarily resident in the UK in the disputed years;

(2) £400,000 of the £500,000 UURBS cancellation payment was paid for the years 1999 to 2005 apportioned between them as described in para [189] above, and £100,000 for the year 2005/6;

(3) The share option cancellation payment was in respect of the acquisition of the options acquired by reason of employment with Instinet Europe and not any other company.

5. Rights of Appeal

247.This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 20 JULY 2017

This Decision has been amended to correct clerical mistakes and accidental slips or omissions in accordance with Rule 37.