[2018] UKUT 378 (TCC)

Appeal number: UT/2017/0108

INCOME TAX – whether the taxpayer ordinarily resident in the UK – overseas workday relief – s.26 ITEPA 2003 – cancellation of share options – s. 23(2) ITEPA 2003 – whether appellant employed by a foreign employer – appeals dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ANTHONY MACKAY **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER
JUDGE GUY BRANNAN

Sitting in public at The Royal Courts of Justice, London on 25 September 2018

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

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

DECISION

Introduction

1. Mr Mackay appeals against the decision of the First-tier Tribunal ("**FTT**") (Judge Charles Hellier) dated 24 May 2017 as amended on 20 July 2017 (the **"Decision**").

2. In summary, this appeal raises two issues:

(1) whether Mr Mackay was ordinarily resident in the UK in the income tax years 2005-06, 2006-07 and 2007-08 (the "**disputed tax years**") ("**the ordinary residence issue**"); and

(2) whether Mr Mackay was liable to income tax in respect of the cancellation of certain share options ("**the share option issue**").

3. The FTT dismissed Mr Mackay's appeals on both issues. We should note that the appeals before the FTT also dealt with an issue related to a payment in respect of an unapproved unfunded retirement benefits scheme. The FTT, broadly, upheld Mr Mackay's appeal on this question, which therefore (no cross-appeal having been lodged by HMRC) was not in issue before us.

4. Judge Hellier granted permission to appeal on certain grounds (including the ordinary residence issue and the share option issue) in a decision dated 3 August 2017.

5. We were informed that Mr Mackay had sought permission to bring a claim for judicial review against HMRC's refusal, following the issue of the Decision, to reapply IR20 in his case and find that notwithstanding the Decision he should be treated as not ordinarily resident. We understand that permission to bring the claim was refused at an oral hearing by Whipple J on 13 September 2018. We mention this because, at the hearing before us, HMRC relied on submissions made on behalf of Mr Mackay when applying for permission to bring a claim for judicial review.

6. For the reasons given later in this decision, we affirm the FTT's decision and dismiss Mr Mackay's appeals.

The Facts

Ordinary residence

7. The facts found by the FTT were, save in respect of one issue, not in dispute. That one issue related to whether the FTT's conclusion that the ordinary course of [Mr Mackay's] life became apparent by March 2005 such that he was ordinarily resident by that time (Decision [127] and [138]) was supported by evidence.

8. The following summary of the facts is taken from the Decision and references in square brackets are to the relevant paragraphs of the Decision.

9. It is common ground that for tax purposes Mr Mackay was, at all times material to these appeals, not domiciled in the UK and that he was resident in the UK in each of the disputed tax years.

10. Mr Mackay was born in Sydney, Australia and his childhood and education occurred in Australia. He holds Australian nationality. Mr Mackay has spent the majority of his adult life living and working outside the UK, first in Sydney and then Hong Kong. (Decision [8]-[10])

11. Mr and Mrs Mackay married in the UK in June 1988, having previously lived in Sydney and Hong Kong. In July 1989, their first son was born in the UK, Mrs Mackay having previously travelled to the UK in May 1989 so that their child could be born there. (Decision [10]-[15])

12. At that time, Mrs Mackay's mother, who lived in the UK, became ill and the couple thought it would be best to stay in the UK. Mr Mackay found a position with a UK financial institution in London in 1989 and then held various positions with London financial institutions between 1989 and 1994, working on Australian and Asian stockbroking. (Decision [15]-[16])

13. In 1989, Mr and Mrs Mackay purchased a house in Chiswick where they lived. Their second son was born in 1991. (Decision [17])

14. Mr Mackay did not regard his career in London as successful and in November 1994 he secured a move with his then employer to a position in Hong Kong. Mr Mackay 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 become an employee of Instinet group of companies ("Instinet") and his career was flourishing. (Decision [18]-[19])

15. Mr and Mrs Mackay decided that they wanted their children to be brought up and educated in the UK and they decided that she would return to the UK with the children and he would continue to work in Hong Kong. They bought a house in Surrey in 1997 and Mrs Mackay and the children moved there in July 1997. (Decision [20])

16. Just over a year later, in October 1998, Mr Mackay was transferred to the London office of Instinet as head of Asian equities in order to develop the Australian and Asian stock trading in Europe. (Decision [22]).

17. Mr Mackay then moved back to Hong Kong in August 2000 in order to take up a more senior position with Instinet. Mr and Mrs Mackay thought it best that she and the children should remain in the UK at the family home. (Decision [23])

18. In 2002, Mr Mackay took up a new position with Instinet, moving from Hong Kong to Japan as President and CEO of Instinet Japan. (Decision [24])

19. Mr Mackay purchased a flat in Hong Kong in March 2004 and in December 2004 he was granted a permanent right of abode in Hong Kong. (Decision [25])

20. In the period 2000 to 2004, when Mr Mackay was based successively in Hong Kong and Japan, Mr Mackay came to the UK every 4 to 6 weeks and stayed with his family. (Decision [48])

21. In December 2004, Mr Mackay was posted to the UK as head of global equities with Instinet London. His primary goal was to increase profitability of the European business, which had been losing money. He returned to live with his wife and family in Surrey just before Christmas 2004. (Decision [27], [32] and [40])

22. When he took up his post in London in January 2005 (the **"First Role"**), Mr Mackay was aware that the majority owners of Instinet, Reuters, had been considering selling all or part of the Instinet business in which he was working. He considered it very likely that he and other members of staff of Instinet would be made redundant if a third party bought the business. (Decision [32] and [34])

23. Mr Mackay spent some of his time travelling to Asia in this First Role. There was some doubt as to exactly how much time this occupied. The FTT concluded that his travel was not significant in the period. Nonetheless, in the course of his First Role in London, Mr Mackay spent some 18 nights out of the UK on Instinet business – approximately 15-20% of his working days. (Decision [43]-[44])

24. Mr Mackay performed the duties of this First Role until June 2005 when he was told that Instinet's Europe and Asia activities would split into separate businesses. He was appointed managing director and president of the European side of the business – Instinet Europe (the "**Second Role**"). This Second Role, which was based in London, lasted for two years and four months until September 2007. (Decision [41])

25. In the course of his Second Role, in the period from July 2005 to October 2007, Mr Mackay spent about 118 nights out of the UK on Instinet business, representing some 30-40% of his working days. Many of his destinations were in Europe but there were also three longer spells of a week or so in Asia and half a dozen trips to the US. In addition, Mr Mackay, in the same period spent some 85 nights abroad on holiday. (Decision [46])

26. Mr Mackay entered into a written contract of employment dated 15 April 2005 with Instinet Europe in respect of his First Role as head of global equities. This contract contained termination provisions which, *inter alia*, provided that if Instinet Europe terminated his employment otherwise than for cause (i.e. by reason of Mr Mackay's fault), he would be entitled to 12 months' salary and bonus. No notice period was specified. (Decision [60])

27. The FTT noted that Mr Mackay negotiated his contract so that it contained advantageous termination provisions given his concern that he might be made redundant as part of the sale of the Instinet business. The FTT found that Mr Mackay's negotiation of, what he described as, the "evergreen contract terms" indicated that Mr Mackay thought in April 2005 that it was a realistic possibility that his employment in the UK would continue for more than a year. This was consistent with Mr Mackay's evidence that when he took on the Second Role in London in July 2005 he thought it would last at least 18 months. The FTT also accepted that Mr

Mackay's employment contract could have been summarily terminated at any time after that date (April 2005). (Decision [62] and [65])

28. Subsequently, Mr Mackay entered into a second contract of employment with effect from 31 August 2005 reflecting the fact that Mr Mackay had been appointed to his Second Role with Instinet Europe in London. (Decision [61]). This contract contained improved termination provisions entitling Mr Mackay to 18 months' salary and 150% of the average annual bonus if the company terminated his employment without cause. Again, no notice period was specified. (Decision [61])

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

30. The sale to NASDAQ and Silver Lake was completed in December 2005 and shortly thereafter many Instinet staff members were dismissed, but Mr Mackay was retained. (Decision [36])

31. Shortly thereafter, in 2006, Silver Lake was negotiating with three potential buyers of the brokerage business. On 1 November 2006, some 18 months after the First Sale by Reuters, Silver Lake agreed to sell the majority of the business (including the part in which Mr Mackay worked) to Nomura. That sale completed on 1 February 2007 **("the Second Sale")**. (Decision [37])

32. The FTT accepted that once Mr Mackay knew of the First Sale in April 2005 he considered that it was likely that a sale of the business by Silver Lake would take place within a few years. (Decision [38])

33. 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 Instinet business that he moved back to Hong Kong on 17 October 2007 and was then based in Hong Kong. (Decision [28] and [42])

34. Noting that Mr Mackay's employment with Instinet in the UK between 2005 and 2007 could have been summarily terminated, the FTT then proceeded to consider how likely that may have been. (Decision [67])

35. Mr Mackay had said that in January 2005 his expectation was that he would not be based in the UK for more than three years and, in fact, for a much shorter period; "about a couple of months." The FTT considered this to be an exaggeration and that bringing in Mr Mackay to improve the European business suggested a longer timeframe which was more commensurate with the timeframe of his previous assignment in Hong Kong i.e. two years. (Decision [70])

36. The FTT concluded 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." (Decision [72])

37. Next, the FTT considered the position from April 2005 to October 2007. Reviewing the evidence, the FTT concluded:

> "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." (Decision [79])

38. The FTT accepted that 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 in the UK. (Decision [82])

39. Further, the FTT concluded that when Mr Mackay came to the UK in December 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 three years in any event. (Decision [83])

40. In the second half of 2005 Mr Mackay was included as part of a core executive committee established by Silver Lake and told that a share option scheme would be set up to incentivise key individuals. Mr Mackay started working on preliminary share option allocations in September 2005. He was further involved in the allocation of options after the First Sale of Instinet was completed in December 2005. 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 un-vested options would lapse. These options proved to be extremely valuable. (Decision [84])

41. The FTT concluded 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 of the Instinet business took place. If the sale had not happened by the end of 2007 and had he been asked to stay in the UK beyond 2007, the FTT was not completely convinced that he would have resigned and left the UK: it might have depended on the financial incentive to stay. (Decision [85])

Share option issue

42. Following the completion of the First Sale in December 2005, Mr Mackay was granted options over shares in Instinet Inc. (the vehicle through which Silver Lake held Instinet). (Decision [197])

43. The options were granted on 20 April 2006. At that time, Mr Mackay was employed by Instinet Europe Ltd pursuant to an employment contract dated 31 August 2005 relating to his Second Role. (Decision [220])

44. When Silver Lake sold the Instinet business in 1 February 2007 to Nomura, Mr Mackay's options were cancelled and he received a large payment (£6,873,857) representing a portion of the difference between the price at which Silver Lake had sold and that at which it had bought ("**the Share Option Payment**"). (Decision [198])

45. We understand that it is common ground that 57% of the Share Option Payment was remitted to the UK and was chargeable to income tax. The question before the FTT was whether the balance of the Share Option Payment was chargeable to income tax.

46. We set out later in this decision the relevant statutory provisions.

47. These provisions give rise to the question whether the employment by reason of which Mr Mackay had the right to acquire the share options was with a "foreign employer" (i.e. an employer which was not resident in the UK or the Republic of Ireland) and, if so, whether the duties of that employment were performed wholly outside the UK. If *both* of those conditions were satisfied, the Share Option Payment was not chargeable to UK income tax except to the extent it was remitted to the UK.

48. After the completion of the Second Sale in February 2007, Silver Lake was the majority shareholder in Instinet Inc., which had previously been the holding company of Instinet. (Decision [211])

49. Earlier, in April 2005 (or shortly thereafter) Mr Mackay was told by the chief executive officer of Instinet Inc. that he would be looked after "real well" if he helped to get a good price for the sale of the Instinet business. (Decision [212])

50. In April 2006 approximately 38 senior Instinet employees, including Mr Mackay, were granted options over or acquired shares in Instinet Inc. The majority of these employees were in the USA. (Decision [213])

51. Silver Lake granted these options because it did not have the management or operational personnel to run the Instinet business and wished to retain and motivate those people whose presence and activities would assist in maximising the price it hoped to obtain on an eventual sale. (Decision [2014])

52. The evidence of Mr Farrell (who worked for Instinet from 2004 and who, from 2007 had been the chief administrative officer for Instinet[1]) was that members of this group of senior employees remained employed by the Instinet entity which had previously employed them, and that neither Instinet Inc. nor Silver Lake had any employees. He said that he did not regard the members of the group as having been employees of Instinet Inc. Mr Farrell produced a copy of a letter, compiled from information on Mr Mackay's personnel file, which recorded the entities in the Instinet group for which Mr Mackay had worked. The list did not include Instinet Inc. Mr Farrell was among the group of 38 employees who received options. (Decision [5] and [215]-[217])

[1] A role which included oversight of human resources and other functions.

53. The FTT noted some doubt about Mr Farrell's statement (that Instinet Inc. and Silver Lake had no employees) because there was a regulatory filing in the USA which indicated that four very senior employees were to become employees of Instinet Inc. Nonetheless, the FTT concluded that it was unlikely that any of the group of 38 (other than those four employees) entered into formal contracts for the provision that their services to Instinet Inc. or Silver Lake. (Decision [219])

54. As already noted (paragraph 40 above), when the options were granted in April 2006, the certificate provided for two tranches of options. 25% of each tranche vested one year after granting, with the balance thereafter in 36 monthly instalments (but in the case of the second tranche subject to further conditions). On a qualifying sale of Instinet Inc. all options vested and could then be exercised. If Mr Mackay's employment ceased (other than on events such as death) the unvested options were forfeited. The documentation defined "employment" as employment by Instinet Inc. or any subsidiary. (Decision [220])

55. The monies paid to Mr Mackay on the cancellation of his options were derived from Silver Lake and not from the profits of the Instinet group. Part of the payment to Mr Mackay was made by Instinet Global and part by a company called Iceland Corp through payroll payments separate from Instinet's regular payroll processing. (Decision [221])

56. The FTT considered that Mr Mackay's evidence was "vague" as to whether the employment for which he contended was with Instinet Inc. or with Silver Lake. The FTT noted that Mr Mackay tended to treat them as one and the same entity and found that this vagueness did not detract from his evidence. In any event, Mr Mackay simply needed to show that he had been employed by one of these entities. (Decision [222])

57. Mr Mackay took part in meetings conducted in the USA explaining to potential buyers the nature of the Instinet 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 Second Sale was concluded. He was told not to visit the New York office when he was in the USA for these meetings and not to tell European staff about his activities because of commercial confidentiality. (Decision [223])

58. Mr Mackay participated in the preparation of financial projections based on third-party ownership of Instinet and a "massive restructuring". That work would have been useful to a potential purchaser from Silver Lake, but Mr Mackay did not indicate that the work had been done wholly in the USA[2]. (Decision [224])

59. After the Second Sale had been agreed, Mr Mackay had a meeting with Nomura in London. Mr Mackay said that he did not regard this as part of his role in helping Silver Lake agree the best price, because this meeting took place after the sale had been agreed. (Decision [225])

[2] The FTT, at [224], referred to work having been done "wholly in the UK". In context, that must have been a typographical error; the reference must have been intended to have been to work done wholly in the USA.

60. The FTT found 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. (Decision [226])

The FTT decision

Ordinary residence

61. The FTT accepted a number of propositions put forward by Mr Way on behalf of Mr Mackay. (Decision [107])

62. First, the basic meaning of "ordinarily resident" was that given by Lord Scarman in *R v Barnet London Borough Council ex parte Shah* [1983] 2 AC 309 ("*Shah*") 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."

63. Secondly, referring to *Shah* (*per* Lord Scarman at 342), the FTT considered that the word "ordinary" was similar to "habitual". The FTT also referred to the decision of the Upper Tribunal in *Tuczka v HMRC* [2011] STC 1438 (Roth J and Judge Wallace) ("*Tuczka*") where the Tribunal, at [12], accepted that the authorities showed there was "a common core of meaning" between ordinary and habitual residence. (Decision [88]-[89])

64. Thirdly, the FTT considered that "ordinary" meant something which was not "extraordinary" (*IRC v Lysaght* 13TC 510 *per* Viscount Sumner at 527-8) ("*Lysaght*"). (Decision [90])

65. The FTT also accepted the fourth proposition put forward by Mr Way to the effect that intention was relevant in determining whether a person was ordinarily resident. Relying on Lord Scarman in *Shah*, the FTT considered, however, that a purpose for a limited period could be a settled purpose. The issue was whether the purpose had a "sufficient degree of continuity to be properly described as settled" and the FTT considered that intention was relevant to that question. (Decision [109]-(113])

66. As regards Mr Way's fifth proposition, the FTT accepted that ordinary residence was not simply a matter of "day count", although day count was relevant. (Decision [114])

67. The FTT also accepted Mr Way's sixth proposition, viz. that there must be a degree of continuity of purpose and considered that that was different from continuity of presence. Mr Way argued that if circumstances kept changing it was inappropriate to add together the entire period of residence and conclude that it reflected a pattern of

life in the UK. The FTT accepted that if the purpose for being in the UK changed, Mr Way's argument had some merit. However the FTT concluded that if a person was employed to do one task which was expected to last two years and then was told that the task was no longer needed but he was wanted to do another task, his residence in the UK remained for the purpose of fulfilling his employment obligations and that that could be a settled purpose. (Decision [115]-[117])

68. Mr Way's seventh proposition was that in assessing ordinary residence it was necessary to look at the "continuous story" including what happened in years subsequent to those in question. Mr Way cited the speech of Viscount Sumner in *Levene v IRC* 13 TC 486 ("*Levene*") (at page 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."

69. The FTT did not consider Viscount Sumner to be saying that the overall pattern of a person's life was relevant to the question whether or not he is ordinarily resident. The FTT considered that it was legitimate to treat what happened at a later time as confirming the conclusion or to remove a doubt in relation to a conclusion reached on the facts applicable to an earlier time. That was not the same as looking at a "continuous story". The focus was only on what was ordinary at times in the years concerned. (Decision [118]-[119])

70. As regards the issue whether the words, in Lord Scarman's speech in *Shah* (quoted at paragraph 62 above), "for the time being" qualified "settled purposes" (as Mr Way contended) or the "regular order of his life" (as HMRC argued), the FTT observed that Lord Scarman's speech was not to be approached as legislation. The crucial question was whether, in determining whether a person was ordinarily resident, it was necessary to ask the question in relation to a particular time (or an interval preceding a particular time). Mr Way had argued that on HMRC's approach a tourist visiting 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. (Decision [120]-[122])

71. The FTT's conclusion was that in determining what was 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 the particular time or in a comparatively short period before it (that is to say short as compared to the pattern of his life). (Decision [123])

72. The FTT reached this conclusion for the following reasons. First, ordinary residence is not a term of art in English law (*per* Lord Scarman in *Shah* at 340G). The question was therefore what the statutory words intended. Section 21 of the Income Tax (Employment and Pensions) Act 2003 ("**ITEPA**") and related provisions spoke of a tax year "in which the employee is … ordinarily resident." Decision [124]

73. The FTT noted that "ordinarily" qualified the verb "is" and directs attention principally to "what was going on, not to the status of an individual or long-term intentions or acts". Moreover, the provision did not require the taxpayer to be ordinarily resident "for" the tax year but at some time "in" it. Thus whether someone was ordinarily resident had to be capable of determination at a particular time. This suggested that the statutory condition was satisfied if it was ordinary at that time for him to be resident at a *particular* time and did not require an assessment as to whether in the ordinary course of his life he was resident at that time. (Decision [125])

74. The FTT then found that Mr Mackay was ordinarily resident in the UK in the disputed tax years:

> "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."

75. Alternatively, the FTT reached the same result on the basis of the authorities. (Decision [128])

76. Starting with Lord Scarman's speech in *Shah*, the FTT held that Mr Mackay had voluntarily (even if reluctantly) come to the UK to work. (Decision [129])

77. Secondly, the FTT found that Mr Mackay was here for settled purposes. (Decision [130]). The purpose of fulfilling the duties of an employment was one of those referred to by Lord Scarman. (Decision [131]) The FTT found that a major reason for Mr Mackay being 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 of his residence. (Decision [132])

78. The FTT concluded that that purpose was settled. Whilst there may have been uncertainty about how long Mr Mackay's employment would continue there was no evidence to suggest that he was at any time "dithering about leaving that employment or thinking that he might at any time not turn up to fulfil his duties." In addition, the FTT observed that the employment was not of a fixed short-term; nor did Mr Mackay intend to resign after a short interval. The FTT drew a distinction between the purpose of a person who came to the UK to work for four months and the purpose of a person who came to the UK to work for three years but whose employment may, or was even likely to, terminate after four months. The FTT considered that the latter was capable of being settled and the uncertainty was part of the regular order of his life. (Decision [133])

79. The FTT held that Mr Mackay's purpose in performing the duties of his employment could not be described as casual. His first role involved turning round a loss-making part of the Instinet business – that was not a casual endeavour. He envisaged his second role having an 18 month horizon. That too, in the FTT's judgment, was not casual. Furthermore, the FTT did not consider fulfilling either of Mr Mackay's two employment roles represented a temporary purpose. Temporary in the context of employment suggested something intended, planned or expected to be much shorter than 18 months, not something which merely might be shorter. (Decision [134])

80. Next, the FTT noted Mr Mackay's settled intention to leave the UK, but considered that this was a long-term intention and not a purpose for being resident. It could not be said that Mr Mackay's purpose for being in the UK was in order that he could leave it. In any event, the FTT considered that Mr Mackay also had a concurrent settled purpose of being in the UK to perform the duties of his employment, citing Lord Scarman in *Shah* at 344C. (Decision [135])

81. The FTT held that a settled purpose, for the purposes of ordinary residence, involved a sufficient degree of continuity. That meant both continuity of holding the purpose (one which altered from day-to-day was not settled) but also as regards the duration of the thing which was purposed. It was the need for a purpose to be by reference to an appreciable period before it can be called settled which meant that a tourist who came to the UK for only a couple of weeks was not ordinarily resident here. The period for which the tourist intended to stay meant that his/her purpose for being here was not settled. (Decision [136])

82. The FTT then considered the authorities in relation to the question of "timespan":

(1) In *Levene* (in the Court of Appeal 13 TC 486 at 498) Sargent LJ said that the habit of Mr Levene's life throughout the preceding five years had been its ordinary course. Viscount Cave LC in *Levene* spoke of "residence in a place

with some degree of permanence"[3] and said that ordinary residence differed little in meaning from the word "residence". The FTT considered this comment and expressed the view that Viscount Cave LC did not consider that the tract of time needed to be very long. (Decision [137(1)])

(2) In *Lysaght* five years' residence was sufficient. (Decision [137(2)])

(3) Next, the FTT observed that in *Shah* the students were held to be ordinarily resident over the three years after they had entered the UK for their education. (Decision [137(3)])

(4) In *Tuczka* the Upper Tribunal considered the discussion of the meaning of "habitually resident" in the House of Lords' decision in *Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937 ("*Nessa*") where Lord Slynn had said that a person could not be habitually resident until he had taken up residence and lived in the UK for a period. The FTT interpreted Lord Slynn's speech as implying that this had to be "an appreciable period of time" and that he accepted that a month could be an appreciable period of time. (Decision [137(4)])

(5) In *Reed (Inspector of Taxes) v Clark* [1985] STC 323 ("*Reed v Clark*"), Nichols 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." (Decision [137(5)])

83. In the light of these authorities, the FTT concluded that the period for which Mr Mackay intended or expected to be in the UK from the beginning of 2005 was long enough to be regarded as settled "on the basis of those indications, and became settled by March in that year." (Decision [138])

84. The FTT also found 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 that he came home on most nights and in the UK that he spent most weekends and in the UK where his office was based. It was from the UK that he went abroad for temporary purposes and it was to the UK that he returned. (Decision [139])

85. The FTT then considered other guidance found in the authorities.

86. In *Levene* Viscount Cave LC said (at 507):

> "I think that ['ordinary residence'] connotes residence in a place with some degree of continuity and apart from accidental or temporary absences."

87. The FTT concluded that in the period 2005 to 2007 Mr Mackay was away from the UK on many occasions, but they were all short absences and apart from a couple of occasions were for less than a week. The FTT concluded that these absences could

[3] Although we do not consider it material, the actual expression used by Viscount Cave LC (at 507) was: "The expression "ordinary residence" is found in the Income Tax Act of 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." (Emphasis added)

fairly be described as temporary. Apart from these absences, however, the FTT concluded that Mr Mackay was in the UK with a substantial degree of continuity. (Decision [140]-[141])

88. 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."

The FTT concluded that it would not have been extraordinary to find Mr Mackay present and resident in the UK in the tax years in question. (Decision [143])

89. Also in *Lysaght* Lord Buckmaster said (at 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."

The FTT considered that Mr Mackay's residence in the UK was not casual or uncertain. It was certainly not casual and it was only uncertain in the sense that if his employment terminated he might leave the UK to find work elsewhere. It was not, however, 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. (Decision [144]-[145])

90. The FTT then addressed specific arguments raised on behalf of Mr Mackay.

91. First, Mr Way pointed to the continual uncertainty about Mr Mackay's frequently changing employment position. The FTT did not consider that a degree of uncertainty as to whether a purpose can continue prevented that purpose from being settled. (Decision [146 (i)])

92. Secondly, it was argued that Mr Mackay was engaged in a series of short-term contracts in quick succession. The FTT did not consider this to be a fair characterisation. It noted that there were two contracts of which the first was capable of lasting at least a year and 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 duties in pursuit of that purpose. (Decision [146 (ii)])

93. Thirdly, it was argued that Mr Mackay anticipated returning to Asia within three years. The FTT held Mr Mackay's purpose was to work for Instinet in the UK for no more than three years. That three-year limitation did not prevent that purpose from being settled. (Decision [146 (iii)])

94. Fourthly, it was argued that the fact that Mr Mackay was often abroad was relevant. The FTT did not consider this persuasive. Mr Mackay was not living abroad but working there or on holiday. (Decision [146 (iv)])

95. Finally, it was submitted that Mr Mackay's presence did not materially affect how his family led their lives. The FTT did not regard this as relevant. (Decision [146 (v)])

96. For these reasons, the FTT concluded that Mr Mackay was ordinarily resident in the UK in the disputed tax years.

Share option issue

97. The FTT observed that it would have regarded Mr Mackay as an employee of Instinet Inc. (or Silver Lake) if he had 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 agreement could be formal and in writing, oral or by conduct or by a mixture of those means. However, the FTT concluded that it was unlikely that there was an agreement or arrangement of that sort. (Decision [233]-[234])

98. The FTT based its conclusion on the following considerations.

99. First, Mr Mackay was unable to say when the arrangement started. That suggested to the FTT that there was no exchange in which an understanding of reciprocal obligations was reached. The discussions between Mr Mackay and the chief officers of Instinet Inc. and/or Silver Lake fell short of a commitment by Mr Mackay to render his services in return for a consideration. (Decision [235]-[236])

100. Secondly, there was no indication in the option certificate that Mr Mackay had any form of mutual reciprocal arrangement with Instinet Inc. or Silver Lake to render his services. Although it referred to Mr Mackay's employment by Instinet Inc. or any subsidiaries, it imposed no service obligations on Mr Mackay. (Decision [237])

101. Thirdly, the duties carried out in having discussions with possible purchasers whether in the UK or the USA could have been carried out in the performance of Mr Mackay's obligations under his service agreement with Instinet Europe. That contract envisaged that he would carry out functions for other associated companies (which could include Instinet Inc. and Silver Lake). In particular, by clause 3.4 of the service agreement, Mr Mackay 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). By clause 3.6 of the agreement he could be required to carry out his employment duties on behalf of any associated company. (Decision [238])

102. Fourthly, the FTT found that 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 to potential purchasers. That purpose seemed to the FTT to have been achieved by the terms of the share options which delivered rewards, the value of which depended upon the success of those activities. The incentive to work came from the grant of the options. The grant was not consideration for the work. Moreover, there was no need on the part of the selected managers for them to agree to assist Silver Lake in the venture. Thus, the FTT concluded that 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 but was not a requirement to act. (Decision [240]-[241])

103. Finally, the FTT considered Mr Mackay's argument that assisting the sale of the business was a function separate from his role as president of Instinet Europe. The FTT accepted that the activities at meetings in the USA were different from those which he usually performed for Instinet and that they would benefit Silver Lake (as well as himself and the other option holders) but it did not seem to the FTT that the confidentiality of those activities or the fact that they took place in the USA rather than another country pointed to Mr Mackay being an employee of Instinet Inc. or Silver Lake, rather than Instinet Europe. (Decision [242])

104. Accordingly, FTT found that Mr Mackay was not an employee of either Instinet Inc. or Silver Lake. (Decision [243])

105. The FTT went on to say that if it had decided that Mr Mackay had been an employee of Instinet Inc. or Silver Lake, it would not have concluded that all the duties of that employment were performed outside the UK. That was because it saw 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 the sale price. The options provided incentives for both activities. (Decision [244])

106. Consequently, it was unnecessary for the FTT to decide whether the real cause of the receipt of monies under the cancellation of the options was employment with Instinet Inc. or Silver Lake on the one hand or with Instinet Europe on the other. As the FTT observed, there was only one employment. The options were granted by a connected party and were therefore treated as being acquired by reason of employment with Instinet Europe. (Decision [245])

Statutory provisions

107. For the disputed tax years, s. 26 ITEPA contained the provisions relating to overseas workday relief ("**OWR**") which, so far as material, were as follows:

> "(1) This section applies to general earnings for a tax year in which the employee is resident, but not ordinarily resident, in the United Kingdom if they are neither—
>
> (a) general earnings in respect of duties performed in the United Kingdom, nor
>
> (b) general earnings from overseas Crown employment subject to United Kingdom tax.
>
> (2) The full amount of any general earnings within subsection (1) which are remitted to the United Kingdom in a tax year is an amount of "taxable earnings" from the employment in that year.
>
> (3) Subsection (2) applies—
>
> (a) whether the earnings are for that year or for some other tax year, and

(b) whether or not the employment is held at the time when the earnings are remitted;

but that subsection has effect subject to any relief given under section 35 (delayed remittances: claim for relief) …"

108. It is to be noted that, unlike the previous income tax provisions relating to "foreign emoluments", OWR did not require a foreign employer or a separate overseas contract of employment. Instead, a non-ordinarily resident individual simply needed to work outside the UK and be paid for that work in a separate account abroad to escape UK income tax.

109. As regards the share option issue, it was common ground that by virtue of ss.476 and 477 ITEPA an amount realised on the release for consideration of Mr Mackay's share options counted as employment income. Section 474 ITEPA provided that the taxing provisions of 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 20 applies."

110. In the disputed tax years s.21 ITEPA applied to general earnings for any year in which an employee was resident and ordinarily resident but not domiciled except to the extent of the earnings were chargeable overseas earnings within s. 23 ITEPA. Section 21 provided:

"(1) This section applies to general earnings for a tax year in which the employee is resident and ordinarily resident, but not domiciled, in the United Kingdom except to the extent that they are chargeable overseas earnings for that year.

(2) The full amount of any general earnings within subsection (1) which are received in a tax year is an amount of "taxable earnings" from the employment in that year.

(3) Subsection (2) applies—

(a) whether the earnings are for that year or for some other tax year, and

(b) whether or not the employment is held at the time when the earnings are received.

(4) Section 23 applies for calculating how much of an employee's general earnings are "chargeable overseas earnings" for a tax year, and are therefore within section 22(1) rather than subsection (1) above."

111. Section 23 ITEPA, so far as material, provided:

"(1) This section applies for calculating how much of an employee's general earnings for a tax year are "chargeable overseas earnings" for the purposes of sections 21 and 22.

(2) General earnings for a tax year are "overseas earnings" for that year if—

(a) in that year the employee is resident and ordinarily resident, but not domiciled, in the United Kingdom,

(b) the employment is with a foreign employer, and

(c) the duties of the employment are performed wholly outside the United Kingdom."

Relevant authorities

112. It is, we think, unnecessary to engage in a lengthy review of all the relevant authorities. The leading authority on the question of ordinary residence is the speech of Lord Scarman in *Shah* and we quote extensively from that judgment below. In addition, the relevant authorities were helpfully summarised by Newey LJ recently in the Court of Appeal in *Arthur v HMRC* [2017] EWCA Civ 1756 ("*Arthur*").[4]

113. In *Shah* a local authority was obliged to provide grants for university study to students who were "ordinarily resident" within their areas but only if the student in question had been "ordinarily resident … in the United Kingdom" for the three years preceding the commencement of his or her course of study. Lord Scarman, delivering the unanimous judgment of the House of Lords, considered the earlier authorities and said (at page 342C-E):

> "Strictly, my Lords, it is unnecessary to go further into such case law as there is in search of the natural and ordinary meaning of the words. In 1928 this House declared it in general terms which were not limited to the Income Tax Acts. Lord Denning has re-affirmed it in 1981, thus showing, if it were needed, that there has been no significant change in the common meaning of the words between 1928 and now. If further evidence of this fact is needed (for the meaning of ordinary words as a matter of common usage is a question of fact), the dictionaries provide it: see, for instance, O.E.D. 3rd edition s. v. "ordinarily" and "resident". I, therefore, accept the two tax cases [*Levene* and *Lysaght*] as authoritative guidance, displaceable only by evidence (which does not exist) of a subsequent change in English usage. I agree with the Master of the Rolls 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 Lord Sumner in *Lysaght*'s case, namely residence adopted voluntarily and for settled purposes."

114. We note that there has been some debate in the authorities regarding the question whether "habitual" and "ordinary" residence are the same or slightly different concepts. It will be observed that Lord Scarman considered "habitual" residence simply to indicate the requirement that a person should be resident voluntarily and for settled purposes in order to be ordinarily resident.

115. Lord Scarman continued (at page 343G-H, 344B-F and 348F):

[4] *Arthur* was decided after the release of the FTT's decision in this case.

" 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 long duration.

…

There are two, and no more than two, respects in which the mind of the 'propositus' is important in determining ordinary residence. The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is.

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 the law requires is that there is a settled purpose. This 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.

The legal advantage of adopting the natural and ordinary meaning, as accepted by the House of Lords in 1928 and recognised by Lord Denning M.R. in this case, is that it results in the proof of ordinary residence, which is ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind. Templeman L.J. emphasised in the Court of Appeal the need for a simple test for local education authorities to apply: and I agree with him. The ordinary and natural meaning of the words supplies one. For if there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary, absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose.

An attempt has been made in this case to suggest that education cannot be a settled purpose. I have no doubt it can be. A man's settled purpose will be different at different ages. Education in adolescence or early adulthood can be as settled a purpose as a profession or business in later years. There will seldom be any difficulty in determining whether residence is voluntary or for a settled purpose: nor will inquiry into such questions call for any deep examination of the mind of the 'propositus'.

…

A further error was their view that a specific limited purpose could not be the settled purpose, which is recognised as an essential ingredient of ordinary residence. This was, no doubt, because they discarded the guidance of the *Levene* and *Lysaght* cases. But it was also a confusion of thought: for study can be as settled a purpose as business or

> pleasure. And the notion of a permanent or indefinitely enduring purpose as an element in ordinary residence derives not from the natural and ordinary meaning of the words 'ordinarily resident' but from a confusion of it with domicile."

116. In *Arthur* the entitlement to a tax credit turned on the question whether the appellant's husband was ordinarily resident in the UK. Mr Arthur arrived in the UK in October 2010 and was found to be ordinarily resident in the UK by April 2011. Newey LJ, delivering the judgment of the Court of Appeal, summarised at [16] the authorities on ordinary residence as follows:

> "Guidance on the meaning of "ordinarily resident" can be found in three decisions of the House of Lords: *Levene v Inland Revenue Commissioners* [1928] AC 217, *Inland Revenue Commissioners v Lysaght* [1928] AC 234 and *R (Shah) v Barnet LBC* [1983] 2 AC 309. Those cases provide authority for the following propositions:
>
> i) The expression "ordinary residence" "connotes residence in a place with some degree of continuity and apart from accidental or temporary absences" (*Levene*, at 225, per Viscount Cave LC);
>
> ii) "[T]he converse to 'ordinarily' is 'extraordinarily' and … part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not 'extraordinary'" (*Lysaght*, at 243, per Viscount Sumner). Consistently with this, "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 long duration" (*Shah*, at 343, per Lord Scarman);
>
> iii) "Ordinary residence" differs little from "residence" (*Levene*, at 222, per Viscount Cave LC). "Ordinarily resident" means "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" (*Lysaght*, at 248, per Lord Buckmaster);
>
> iv) A person can be resident in a place even though "from time to time he leaves it for the purpose of business or pleasure" and, conversely, "a person who has his home abroad and visits the United Kingdom from time to time for temporary purposes without setting up an establishment in this country is not considered to be resident here" (*Levene*, at 222-223, per Viscount Cave LC);
>
> v) A person can also be resident in a place even though he would prefer to be elsewhere. In *Lysaght*, Lord Buckmaster said (at 248):
>
> "A man might well be compelled to reside here completely against his will; the exigencies of business often forbid the choice of residence, and though a man may make his home elsewhere and stay in this country only because business compels him, yet none the less, if the periods for which and the conditions under which he stays are such that they may be regarded as constituting residence, as in my opinion they were in this case, it is open to the Commissioners to find that in fact he does so reside";

vi) A person may reside in more than one place (*Levene*, at 223, per Viscount Cave LC);

vii) "Ordinary residence" is not synonymous with "domicile" or "permanent home" (*Shah*, at 342-343 and 345, per Lord Scarman);

viii) "Immigration status" "may or may not be a guide to a person's intention in establishing a residence in this country" (*Shah*, 348, per Lord Scarman); and

ix) "There are two, and no more than two, respects in which the mind of the 'propositus' is important in determining ordinary residence": "[t]he residence must be voluntarily adopted" and "there must be a degree of settled purpose", which could potentially be "a specific limited purpose" (*Shah*, at 344 and 348, per Lord Scarman). Lord Scarman explained in *Shah* (at 344):

"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. This 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.""

117. Finally, in *Tuczka* the Upper Tribunal held at [11] that, in accordance with *Shah*, the concept of ordinary residence did not require an intention to live in a place permanently or indefinitely. The Tribunal also considered whether "ordinarily resident" and "habitually resident" had the same meaning. After referring to the decision of the House of Lords in *Nessa v Chief Adjudication Officer* [1999] 4 All ER 677, which indicated that the two concepts had "a common core of meaning" (*per* Lord Slynn of Hadley at 681), the Tribunal observed at [13]:

"Even assuming for the purpose of argument that "habitually" and "ordinarily" mean the same thing, we do not regard *Nessa* as in any way departing from Lord Scarman's clear rejection of any requirement to establish an intention to reside permanently or for an indefinite period. All that *Nessa* established in that regard is that a person would not qualify as "habitually resident" immediately on arrival, save in a case where he resumed his previous habitual residence. Some period of time is therefore needed to establish "habitual residence". But the fact that this period need not be long can be seen not only from Lord Slynn's reference to the observation of Butler Sloss LJ quoted above but from the resolution of the *Nessa* case itself. The House of Lords upheld the decision of the Court of Appeal that the case be remitted for rehearing before a social security appeal tribunal to determine whether the claimant had established habitual residence by the date of the initial tribunal hearing (i.e., 6 December 1994, and thus less than four months after her arrival in the United Kingdom) or "even earlier": see at 1943D."

Jurisdiction and general approach

118. There are two preliminary points that we should make.

119. First, appeals from the FTT to this Tribunal lie only on issues of law. As Lloyd LJ explained in *HMRC v Grace* [2009] EWCA Civ 1082, [2009] STC 2707, at [4], an appellant must show:

> "(1) that the decision is one to which 'no person acting judicially and properly instructed as to the relevant law could have come'; or (2) that the reasoning for the decision contains something which is on its face bad law and which bears on the determination".

120. Secondly, this appeal involves an evaluative decision which involved the weighing of detailed evidence against a legal standard – of ordinary residence – which is not defined by statute but rather by case-law. The FTT's decision, therefore, involved a classic "multifactorial" assessment by a specialist tribunal. The general approach which we should adopt in these circumstances was summarised by the Upper Tribunal in *HMRC v Arkeley Ltd* [2013] UKUT 393 (TCC) (Judges Berner and Clark) at [28]:

> "Where a decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, that will fall within the class of case in which an appellate court should not reverse the lower tribunal's decision unless it has erred in principle (*Proctor & Gamble UK v Revenue and Customs Commissioners* [2009] STC 1990, per Jacobs J at [9]–[10]; *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416, per Lord Hoffman at p 2423)."

Grounds of appeal and discussion – Ordinary residence

121. Before addressing the grounds of appeal, we should note that Mr Way introduced his submissions by arguing that it was important to keep in mind the distinction between persons who are "leavers" and those who are "arrivals". The distinction was between (a) someone who is a "UK Person" i.e. someone who lives permanently in the UK and leaves to go abroad for temporary purpose and then returns home to the UK, and (b) a person who is a "Foreign Person" i.e. someone who lives abroad, comes to the UK for a temporary purpose and then returns to his home abroad. Mr Way submitted that Mr Mackay fell into the second category. It was, he said, more difficult for a "Foreign Person" to be ordinarily resident than a "UK Person" to acquire that status.

122. The distinction was important because, as Mr Way explained, Mr Mackay was the type of person who should benefit from OWR (i.e. the relief contained in s.26 ITEPA). Mr Way argued that OWR was designed to facilitate matters for internationally mobile employees who came to work in the UK for short periods (i.e. up to 3 years). The fact that the Decision deprived him of OWR indicated that it was flawed.

123. In support of this argument, Mr Way quoted from a June 2012 Government Response ("the Response") to a consultation, commenced in June 2011, on a statutory definition of tax residence. This Response contained details of a proposal to put definitions of tax residence and ordinary residence on a legislative basis. The proposal was that OWR would be restricted to non-domiciliaries who had been non-resident in the UK for the previous three tax years. Mr Way drew our attention to certain statements in the Response which were as follows:

> "4.22 … in principle, [the Government] thinks that OWR should not be denied to non-domiciled employees unless they are settled in the UK. This implies that they should be more than simply UK resident for a number of years….
>
> 4.23 Instead individuals will not be eligible for OWR if they are "based" in the UK and it is reasonable to assume that they will continue to be based in the UK beyond the "three-year point". This point will be defined as the end of the second full tax year after the year in which they became resident. The Government proposes to outline a number of factors that would indicate that an individual is likely to be based in the UK beyond the three-year point and hence ineligible for OWR. These are:
>
> - purchasing a home in the UK (with "home" being more than simply the purchase of the property);
> - reaching an understanding that employment duties will be performed in the UK beyond the three-year point (either under one or a succession of contracts); or
> - entering into other commitments in the UK that indicate an intention to be based in the UK beyond the three-year point.
>
> 4.24 It is not currently proposed that any of these factors would conclusively indicate that an individual is based in the UK and be denied OWR. Instead they would be indicative and there would be a presumption that, if they applied, the individual would be denied OWR unless they could show that they did not intend to be based in the UK beyond the three-year point."

124. Mr Way accepted that, ultimately, Parliament did not adopt these legislative proposals. Nonetheless he argued that the draft legislation provided a useful insight because it was intended to replicate the previous common-law position.

125. We think that we can deal with this argument briefly.

126. Section 26(1) ITEPA specifies that one of the requirements which Mr Mackay had to satisfy in order to be entitled to OWR was that he was not ordinarily resident in the UK during the disputed tax years. The concept of "ordinary residence" is explained in the authorities considered above. Parliament did not enact a statutory definition of ordinary residence but has left it to the tribunals and courts to apply the common law definition of ordinary residence.

127. To say that Mr Mackay should be treated as non-ordinarily resident because he ought to be entitled to OWR is, as Mr Way to some extent recognised, to put the cart

before the horse. Mr Mackay is only entitled to OWR if in the relevant years he was not ordinarily resident in the UK. If he was ordinarily resident in the UK, he was not entitled to OWR. The question, therefore, is whether Mr Mackay was ordinarily resident and that question must be determined by weighing and evaluating the relevant facts in accordance with guidance provided by the authorities.

128. Nonetheless, we would be minded to accept Mr Way's initial proposition that potentially there could be a difference in some cases between a "leaver" and an "arrival". In our view, however, this can be no more than a factual difference which is to be taken into account in considering all the circumstances of a particular case.

Ordinary residence – first ground of appeal

129. In addition, Mr Way argued that in order for Mr Mackay to be ordinarily resident in the UK, his residence had to be habitual, for a settled purpose and not on an extraordinary basis. In this case, however, it was submitted that Mr Mackay lived and worked abroad and came reluctantly to the UK for a temporary period. His intention throughout was to work in the UK (and outside the UK) as his duties required and he would remain in the UK for no more than three years. In fact, Mr Mackay left the UK after two years and 10 months. Thus, Mr Way argued that Mr Mackay's residence in the UK was not habitual but, rather, extraordinary.

130. Mr Way submitted that the FTT erred in holding that the appellant was ordinarily resident in the disputed tax years. The FTT failed to apply the law correctly taking account of:

(a) Mr Mackay's intention that he should remain in the UK for no more than three years (Decision [82]); and

(b) the fact that Mr Mackay did leave the UK within three years. (Decision [28]).

131. Having concluded that Mr Mackay's intention was to continue to work in the UK for no more than three years, Mr Way submitted that the FTT should have held that he was non-ordinarily resident.

132. Mr Way referred to HMRC's practice in IR20 which, he said, contained a "three-year rule", viz that it was necessary to decide to stay in the UK for at least three years from the date of arrival in order to be treated as ordinarily resident. Nonetheless, Mr Way accepted that this Tribunal did not have jurisdiction to apply IR20 in the resolution of this appeal. In other words, it was necessary to apply the relevant authorities to determine the meaning of ordinary residence rather than to apply IR20.

133. Mr Stone, on the other hand, noted that in parallel (and unsuccessful) proceedings seeking permission for judicial review, it had been argued on behalf of Mr Mackay that this Tribunal's decision in *Tuczka* "meant that for common law purposes, the widely accepted 'three-year rule' could no longer be relied upon as a guide to the point at which a taxpayer had acquired [ordinary residence] status." Mr Stone also observed that in those arguments it had been accepted on behalf of Mr

Mackay that the relevant case-law demonstrated that a taxpayer could become ordinarily resident "in as little as a year".

134. We accept Mr Stone's submission that the authorities indicate that there is no "three-year rule". The authorities cited by the FTT (in Decision [137]) in our view clearly indicate that there is no prescribed minimum period by which a taxpayer will become ordinarily resident in the UK. In each case, it is a question of fact to be determined in all the circumstances of the case. We note that in *Arthur*, the appellant was held to be ordinarily resident in the UK even though he had come to the UK to live with his wife and child approximately six months beforehand. In *Nessa* Lord Slynn considered that a month could be "an appreciable period of time" for the purposes of establishing habitual residence. Furthermore, in *Reed v Clark* Nichols J (at page 345) expressed the view that "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." Finally, in *Tuczka* the Upper Tribunal, after reviewing the relevant authorities, said at [17]:

> "On behalf of Dr Tuczka, it was submitted in the alternative that, even if ordinary residence did not require an intention to reside in the United Kingdom for an indefinite period, an intention to reside here for only 2½ years, or 33 months, was too short to constitute a "settled purpose". However, we consider that that submission is equally unsustainable in the light of the authorities that we have discussed."

135. In our judgment, the FTT's approach in considering Mr Mackay's settled purpose of residing in the UK by reference to an "appreciable period" (Decision [126] and [137]) was correct. The FTT's conclusion (at Decision [138]) that the period for which Mr Mackay intended or expected to be in the UK from the beginning of 2005 was long enough to be regarded as settled seems to us entirely consistent with the authorities. In particular, the factors listed by the FTT (in Decision [126] – quoted at paragraph 74 above) were factors which were relevant and which were supported by the evidence before it. We see no reason to interfere with the FTT's assessment of the evidence and its application of the case-law.

136. Moreover, we consider that Mr Way's reliance on Mr Mackay's intentions (to stay in the UK for less than three years) does not take account of the emphasis in the authorities on a taxpayer's purpose, rather than his or her subjective intentions.

137. In *Shah* Lord Scarman (at page 343G) said:

> "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 long duration."

138. It is, therefore, essential to establish a taxpayer's *purpose* and to ascertain whether that purpose was *settled* when considering the question of ordinary residence. We observe, also, that Lord Scarman explicitly stated that a settled purpose, as part of the taxpayer's "regular order of life", could be of long or short duration.

139. We accept Mr Stone's submission that the taxpayer's subjective intention, rather than his or her settled purpose, has a relatively limited role. It informs the question whether the taxpayer's purpose is settled. This point was made clear by Lord Scarman in *Shah* when he said (at page 344E):

> "The legal advantage of adopting the natural and ordinary meaning … is that it results in the proof of ordinary residence, *which is ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind*. Templeman L.J. emphasised in the Court of Appeal the need for a simple test for local education authorities to apply: and I agree with him. The ordinary and natural meaning of the words supplies one. For if there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary, absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose." (Emphasis added)

140. Further, Lord Scarman said (at page 344G):

> "An attempt has been made in this case to suggest that education cannot be a settled purpose. I have no doubt it can be. A man's settled purpose will be different at different ages. Education in adolescence or early adulthood can be as settled a purpose as a profession or business in later years. There will seldom be any difficulty in determining whether residence is voluntary or for a settled purpose: *nor will inquiry into such questions call for any deep examination of the mind of the "propositus"*. (Emphasis added)

141. In *Arthur* Newey LJ, referring to Lord Scarman's speech in *Shah,* stated at [16]:

> "ix) "There are two, and no more than two, respects in which the mind of the 'propositus' is important in determining ordinary residence": "[t]he residence must be voluntarily adopted" and "there must be a degree of settled purpose", which could potentially be "a specific limited purpose" (*Shah*, at 344 and 348, per Lord Scarman). Lord Scarman explained in *Shah* (at 344):
>
> "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. This 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.""

142. The FTT found (at Decision [130]-[136]) that Mr Mackay was present in the UK for settled purposes. It held that a major reason that Mr Mackay was in the UK – his purpose for being here – was in order to perform the duties of his employment with Instinet and that that purpose was settled (Decision [132] and [133]). Carrying out the duties of an employment was, as Lord Scarman observed, one of the purposes which could, with the necessary degree of continuity, result in a taxpayer's purpose

being settled. The FTT carefully distinguished between the purpose for Mr Mackay's presence in the UK and his intention to leave the UK (before the expiry of three years) (Decision [135]). That intention did not prevent Mr Mackay of having a settled purpose of residing in the UK in order to perform the duties of his employment in the meantime. We are satisfied that the FTT applied the correct test and we see no basis upon which we should interfere with its conclusion.

143. Accordingly, we reject the first ground of appeal in respect of the ordinary residence issue.

Ordinary residence – second ground of appeal

144. The FTT at [125] held:

> "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."

145. Mr Way described this as a "snapshot" approach for which there was no authority. Indeed, he argued that on the FTT's view an individual would automatically become ordinarily resident on arrival without consideration of the fuller picture and that this was contrary to authority (e.g. *Shah*, *Lysaght* and *Levene*). Moreover, the FTT's approach would render OWR illusory.

146. Although we do not find as much assistance in the linguistics of the Act as the FTT, we think it is necessary to view the FTT's comments (at Decision [125]) in context. The FTT had already rejected the seventh proposition which Mr Way put to it, viz that in assessing ordinary residence it was necessary to look at the "continuous story" including what happened in years subsequent to those in question. In putting forward that proposition Mr Way had cited Viscount Sumner in *Levene* (at page 501). In rejecting that proposition, the FTT said:

> "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."

147. In our view, the FTT's approach was correct and in accordance with the authorities.

148. In *Shah* Lord Scarman addressed this point in his statement of principle (at page 343G):

> "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 long duration." (Emphasis added)

149. Thus, in our view, the FTT was entitled to examine Mr Mackay's ordinary residence status during the three tax years in question to determine "the regular order of his life for the time being."

150. We further consider that the FTT's approach was consistent with that of Newey LJ in *Arthur* where he said [at 35]:

> "When assessing whether an individual was "ordinarily resident" somewhere on a particular date, the focus must of course be on the position then, not at any later time. On the other hand, it is apparent from *Levene* that subsequent events are capable of being relevant: they may cast light on what the position was on the key day. That being so, I do not think the FTT can be criticised for referring, to the extent that it did, to events after 6 April 2011. It was entitled to consider them when deciding whether Mr Arthur was "ordinarily resident" on the date that mattered, 6 April."

151. This is effectively the same approach that the FTT adopted in [118] to which we have already referred.

152. In any event, we do not accept Mr Way's characterisation of the FTT's analysis as a "snapshot" approach. It is clear that the FTT took account of the ordinary course of Mr Mackay's life during the three tax years under appeal. The FTT said (Decision [127]):

> "… 'ordinarily' requires some tract of time for assessment."… [I]t 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."

153. The FTT therefore looked at Mr Mackay's circumstances and concluded that there was a sufficient degree of continuity such that he could be said to have a settled purpose. We see no error in the FTT's approach.

154. Finally, we should make it clear that we do not accept Mr Way's proposition that the FTT's approach would result in any individual automatically becoming ordinarily resident in the UK on arrival, for example a tourist. It is clear that a tourist would not have a settled purpose of residing in the UK.

155. For these reasons, we reject the second ground of appeal in respect of ordinary residence.

Ordinary residence – third ground of appeal

156. Mr Way argued that the FTT erred in law by holding that the fact that Mr Mackay performed his employment duties in the UK (Decision [134]) was an automatic indication of a settled purpose. The FTT's decision was, once again, at odds with the concept of OWR because if simply working in the UK was enough to make an individual ordinarily resident it would then follow that OWR could never be available. OWR was designed to apply in these circumstances, viz a person coming to work in the UK.

157. We do not accept Mr Way's characterisation of the FTT's decision on this point as correct; the FTT did not, in our judgment, decide that employment was an automatic indication of a settled purpose. The Decision considers in detail Mr Mackay's employment with Instinet in the UK between his arrival in December 2004 and his departure in 2007. For example, FTT carefully analysed the uncertainty surrounding Mr Mackay's employment from January 2005 to October 2007 (Decision [68]-[79]) and Mr Mackay's intentions in relation to that employment (Decision [80]-[85]).

158. The FTT then explained why it had concluded that Mr Mackay's purpose was settled (Decision [133]). The FTT accepted that there may have been uncertainty about how long Mr Mackay's employment would continue and noted that there was no evidence that Mr Mackay was considering leaving that employment or thinking that he might "not turn up to fill his duties." The employment, the FTT observed, was not of a fixed short-term and Mr Mackay did not intend to resign after a short interval. The FTT drew a distinction between the purpose of the person coming to work in the UK for, say, four months and the purpose of the person who comes to the UK to work for, say, three years even though in the latter case there was a risk that the employment would be terminated after four months.

159. Next, at [134] the FTT considered that Mr Mackay's purpose in performing the duties of his employment could not be described as casual. Instead, his duties involved, initially, turning round a loss-making business. Moreover, that was not a temporary purpose. The FTT considered in the context of employment that a temporary purpose suggested something intended, planned or expected to be shorter than 18 months – not something which merely *might* be shorter.

160. In addition, the FTT concluded (Decision [138]) that the period for which Mr Mackay intended or expected to be in the UK from the beginning of 2005 was long enough to be regarded as settled on the basis of the above indications.

161. In our view, the FTT carefully evaluated the nature of Mr Mackay's employment and the length of time which he expected to be in the UK. None of this can fairly be described as a decision to the effect that the performance by Mr Mackay of his employment duties was an "automatic indication of settled purpose." We see no reason for interfering with the FTT's decision.

162. Accordingly, we reject the third ground of appeal in respect of ordinary residence.

Ordinary residence – fourth ground of appeal

163. The FTT (at Decision [127]) stated:

> "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."

164. In addition, the FTT (at Decision [138]), in the context of a discussion about "the need for a purpose to be by reference to an appreciable period before it can be called settled", similarly concluded:

> "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."

165. Mr Way submitted that the FTT's findings (at Decision [127] and [138]), to the effect that the ordinary course of Mr Mackay's life became apparent by March 2005, was unsupported by the evidence. Essentially, Mr Way argued that that there was an absence of any notable or marked events occurring in or around March 2005 to indicate that the ordinary course of Mr Mackay's life rendered him ordinarily resident by that time.

166. In effect, Mr Way's fourth ground of appeal was an *Edwards v Bairstow* [5] challenge.

167. We think that we can deal with this ground of appeal quite shortly because in our view it has no merit.

168. As can be seen from our summary of the Decision, the FTT carefully examined the pattern of Mr Mackay's life, both as regards his domestic life and his employment, during the periods in question. From the primary facts found, the FTT made an evaluative assessment of when it was more likely than not that Mr Mackay's purpose of being in the UK became settled. There was, in our view, ample evidence before the FTT to support its conclusion that, after arriving in the UK in December 2004, the course of Mr Mackay's life had shortly thereafter become settled and that this became

[5] [1956] AC 14, [1955] 3 All ER 48, [1955] UKHL 3

apparent by March 2005. We see no error in the FTT's approach and no basis upon which we should interfere with its decision.

169. Moreover, the FTT specifically reviewed the events in relation to Mr Mackay's employment in the period January 2005 to April 2005 (Decision [68]-[70]). The FTT rejected Mr Mackay's evidence that his expectation that he would be in the UK "for a couple of months" but rather the assignment of turning around the UK business suggested a longer timeframe than a couple of months. It seems to us that these findings underpin the FTT's conclusion that that Mr Mackay's purpose was settled by March 2005. It cannot therefore be argued that there was no evidence to support the FTT's conclusion.

170. In any event, we accept Mr Stone's submission that this ground of appeal is somewhat illogical. It is true that there may have been no "notable" events in March 2005, as Mr Way put it. Instead, as we see it, the settled course of a person's life is more likely to be demonstrated by the routine events of that person's life rather than by remarkable or extraordinary events. The significance of March 2005 as a time *by which* the FTT considered Mr Mackay to have become ordinarily resident was not driven by any event or events in or around that particular month. It was material because it was only from 6 April 2005, the start of the tax year 2005-06, that HMRC were arguing that Mr Mackay had become ordinarily resident in the UK.

171. For these reasons, we reject the fourth ground of appeal in respect of ordinary residence.

The share option issue – first ground of appeal

172. In essence, Mr Mackay appeals against the FTT's decision that he was ordinarily resident in the UK for the tax year 2006/2007. If Mr Mackay was non-ordinarily resident in that year, then the result of OWR would be that monies paid to Mr Mackay in respect of the cancellation of his share options would not be subject to UK tax save to the extent that they were remitted.

173. It will be apparent that this simply raises, once again, the issue of ordinary residence. We have already dismissed Mr Mackay's appeal on this ground and it does not require further consideration under this ground of appeal.

The share option issue – second ground of appeal

174. In the alternative, Mr Way submitted that even if Mr Mackay was found to be ordinarily resident in the tax year 2006-07, he was still entitled to be taxed on a remittance basis (in respect of the proceeds from the cancellation of his share options) by virtue of the fact that he was non-UK domiciled.

175. It was common ground that the share options held by the appellant were "securities options" within the meaning of Part 7 Chapter 5 ITEPA. The effect of ss. 476 and 477 ITEPA was that the amount realised on the cancellation of the share options counted as employment income. Section 474 ITEPA provided that the taxing provisions of 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 20 applies."

176. During the tax year 2006-07 s. 21 ITEPA 2003 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 s. 23 ITEPA.

177. Section 23(2) ITEPA provided:

> "(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."

178. So far as material, s.721(1) ITEPA defined a "foreign employer" (the expression used in s. 23(2) ITEPA) as follows:

> " 'foreign employer' means—
>
> (a) in the case of an employee resident in the United Kingdom, an individual, partnership or body of persons resident outside the United Kingdom and not resident in the United Kingdom or the Republic of Ireland…."

179. To cut a long story short, therefore, in order to ensure that Mr Mackay's non-remitted proceeds from the cancellation of his share options were taxed on a remittance basis, according to Mr Way's alternative argument, it was necessary for Mr Mackay to establish that:

(1) he was employed by an employer resident outside the UK and the Republic of Ireland (a "foreign employer"); and

(2) that the duties of the employment were performed wholly outside the UK.

180. Under this ground of appeal, Mr Way submitted that the evidence was such that Mr Mackay's receipts from his share options could be identified only as being in respect of an employment with Silver Lake rather than with Instinet Europe.

181. The FTT made an error of law, according to Mr Way, in dismissing the possibility that Mr Mackay was employed by Silver Lake by seeking to find a specific time when the employment arrangements with Silver Lake started. Furthermore, an additional error of law, said Mr Way, consisted in the FTT seeking to apply rigid employment law observations to identify the existence of employment with Silver Lake. Instead, as a matter of general law, and specifically tax law, employment could come into existence orally, informally and without written agreement. The task of the FTT had been to identify the source of the payment; Mr Way submitted that this could only have been Silver Lake and thus the FTT had erred in carrying out this task.

182. Mr Way drew our attention to a number of factors which, he argued, supported his submission:

(1) Silver Lake was the majority shareholder in Instinet Inc. The appellant was told by the CEO of Instinet Inc. that he would be looked after "real well" if he helped to get a good price for the sale of the business (Decision [211]-[212]).

(2) In 2006 about 38 senior Instinet employees, including Mr Mackay, were granted options over, or acquired shares in, Instinet Inc. (Decision [213]). Mr Mackay was involved in the allocation of the proportions of share options to those who had a role in the Second Sale (Decision [84]). This demonstrated, according to Mr Way, a key role being played by Mr Mackay which was consistent with a separate employment with Silver Lake.

(3) The reason the options were granted was that Silver Lake "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 an eventual sale." (Decision [214])

(4) The monies paid to the appellant derived from Silver Lake and not the profits of the Instinet group (Decision [221])

(5) Finally, the FTT found (Decision 240]) that "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 to potential purchasers." The FTT also found that the grant of the options was to incentivise the employees to work. (Decision [240])

183. From these facts, Mr Way argued that it followed that Mr Mackay was engaged in a separate employment with Silver Lake. The FTT, having found that the grant of the options was an "incentive to work", erred in law by concluding that "the grant was not consideration for the work" (Decision [240]). An incentive to work was, by its nature, consideration for work and it therefore followed, according to Mr Way, that there was a separate employment with Silver Lake.

184. In addition, the FTT concluded (Decision [244]) that, if there was a separate employment (with Silver Lake), that the duties were not all performed outside the UK. Mr Way argued that the FTT had erred in reaching that conclusion which, he said, did not follow from its factual findings (at Decision [242]), viz:

> "I accept that the activities at meetings in the USA were different from those [Mr Mackay] usually performed for Instinet and that they would benefit Silver Lake…."

185. Thus, Mr Way argued that the FTT failed to consider the employment relationship of Mr Mackay in the context of someone whose employers understood that the requirements of OWR negated the need to have separate contractual and payroll arrangements in place (but nevertheless a necessary relationship existed). Furthermore, Mr Way submitted that the FTT failed to apply the ratio of *Hochstrasser v Mayes* 38 TC 673 ("*Hochstrasser*") which provided that it was necessary to look at the active cause (*causa causans*) of the payment and in effect to ignore surrounding but extraneous circumstances (the *sine qua non*). Mr Way contended that the FTT

should therefore have found that: (i) the taxable payment emanated exclusively from Silver Lake and (ii) that, consequently, the provisions of s. 23(2) ITEPA applied and (iii) that the earnings in question were overseas earnings and therefore subject to the remittance basis of taxation.

186. We note that in his submissions, Mr Way argued that the appellant had a separate employment with Silver Lake from which the share option cancellation payment was derived. Before the FTT it seems that Mr Mackay had argued that the employment could have been either with Instinet Inc. or Silver Lake. Mr Way accepted that Mr Mackay had not been employed by Instinet Inc. but argued that he was employed by Silver Lake.

187. We reject Mr Way's submissions on this ground of appeal.

188. There was no contract of employment with Silver Lake (nor any other contemporaneous document evidencing such an employment). Nonetheless, the FTT correctly observed (Decision [233]) that an employment could be "formal and in writing, oral or by conduct or by a mixture of those means." We consider that the FTT was correct in making those observations. An employment is a contractual arrangement between and employer and an employee. The contract, as the FTT observed, need not be in writing but could be formed orally or by conduct. The FTT made no error of law in so concluding.

189. The FTT (Decision [233]) noted that Mr Mackay was unable to say when the arrangements between him and Silver Lake started and considered that this suggested that "there was no exchange in which an understanding of reciprocal obligations was reached." In our view, in reaching that conclusion the FTT made no error of law. It simply referred to the fact that Mr Mackay was unable to say when his employment started as an indication that no such employment existed. We consider that no error of law was made by the FTT in drawing this inference.

190. Furthermore, Mr Farrell, a witness for Mr Mackay, gave evidence (Decision [215]) that neither Instinet Inc. nor Silver Lake had any employees and that the senior employees of Instinet who received share options (including himself and Mr Mackay) did not become employees of Instinet Inc. Although the FTT noted some doubt about Mr Farrell's evidence (Decision [219]), it concluded that none of the 38 senior executives who received share options (other than four employees noted in a regulatory statement filed in the USA by Instinet Inc.) entered into formal contracts for the provision of their services to Instinet Inc. or Silver Lake.

191. The FTT noted discussions between Mr Mackay and the senior executives of Instinet Inc. and Silver Lake (Decision [236]) but concluded that they fell short of a commitment by Mr Mackay to render his services in return for a consideration. In our view, that conclusion was open to the FTT on the evidence before it and it cannot be challenged successfully on appeal.

192. In any event, as the FTT observed (Decision [238]), under the terms of Mr Mackay's service agreement dated 31 August 2005 with Instinet Europe, he could be required to perform duties on behalf of other associated companies (which would

include Instinet Inc. and Silver Lake). Instinet Inc. or Silver Lake, this was entirely consistent with him remaining an employee of Instinet Europe.

193. Next, as regards Mr Way's submissions in relation to OWR, there was no evidence to support the argument that Mr Mackay's putative employers understood the requirements of OWR and, therefore, alleged awareness of these requirements cannot constitute evidence that an employment existed. Accordingly, in our judgment, the FTT's conclusion cannot be impugned on that basis.

194. As regards Mr Way's submissions in relation to *Hochstrasser*, we consider that *Hochstrasser* is simply irrelevant in the present context. *Hochstrasser* concerned the question whether a payment was an emolument from the employment or whether it was derived from another source (in that case, a housing scheme). It provides no guidance as to whether an employment existed. The FTT found that there was no employment with Silver Lake (or with Instinet Inc.) and therefore the share option cancellation payment cannot have been derived from that source.

195. For these reasons, we reject this second ground of appeal in respect of the share option cancellation payments.

Conclusion

196. The Decision of the FTT in this case was a careful and meticulous evaluation of factual background in relation to Mr Mackay's claim that he was not ordinarily resident in the UK in the disputed tax years and in relation to the payments in respect of the cancellation of his share option. The Decision discloses no material errors and, therefore, we dismiss this appeal.

Costs

197. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

JUDGE ROGER BERNER
JUDGE GUY BRANNAN

UPPER TRIBUNAL JUDGES

RELEASE DATE: 22 November 2018