Neutral Citation: [2022] UKFTT 199 (TC)

Case Number: TC08524

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/05117

Residence of an individual – application of Gaines-Coper and common law principles – discovery assessment – validity – application of s29 TMA and Tooth.

Heard on: 14-25 March 2022
Judgment date: 22 June 2022

Before

TRIBUNAL JUDGE BOWLER
JULIAN STAFFORD

Between

ERNEST BATTEN

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Nicola Shaw QC and Sam Brodsky of counsel instructed by MHA MacIntyre Hudson.

For the Respondents: John Brinsmead-Stockham and Edward Hellier of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant (referred to in this decision as Mr Batten) appeals against an assessment to income tax and capital gains tax for the tax year 2014-2015 issued by the Respondents ("HMRC") on the basis that Mr Batten was resident in the UK. Mr Batten's residence for tax purposes in that year falls to be determined under the statutory residence test ("SRT") contained in Schedule 45 to the Finance Act 2013. The application of those rules means that his residence position for 2014-2015 depends upon whether or not he was resident for the preceding three tax years. HMRC accept that Mr Batten was not UK resident for the tax years 2010-2011 and 2011-2012 because he went to Gibraltar to work full-time in those years; and in 2013-2014 applying the SRT. The parties agree that as a result of the SRT, Mr Batten's residence in the tax year 2014-2015 depends upon whether he was UK resident for 2012-2013. It is also agreed that his tax residence in 2012-2013 depends upon the application of the pre-SRT common law rules.

2. In essence, Mr Batten says that he left the UK on 21 March 2010 to live and work in Gibraltar and ceased to be UK resident at that point when his relocation gave rise to a distinct break in the pattern of his life. He says that he did not then resume UK residence until the tax year 2015-2016. HMRC say that either Mr Batten did not affect a distinct break in the pattern of his life in the UK when he left in 2010 to go to Gibraltar and only became non-resident as a result of the specific rules contained in s830 Income Tax Act 2007 ("s830") and the application of HMRC's guidance; or, if there was such a break, that when his circumstances in 2012-2013 are considered that break was no longer operative.

3. Mr Batten has also challenged the validity of the discovery assessment.

4. For the reasons set out in this decision we have decided that the assessment was validly issued and Mr Batten was resident in the UK for tax purposes in the tax year 2012-2013.

FORM OF HEARING

5. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video hearing system. A face-to-face hearing was not held because the hearing had been arranged during the pandemic and even though those circumstances had changed, rearranging the hearing to take place face to face would lead to substantial delay.

6. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

GROUNDS OF APPEAL

7. Mr Batten's grounds of appeal are:

   (1) Mr Batten was not resident in the UK under the SRT in the year 2014-2015. He was also not resident for the tax years 2010-2011, 2011-2012, 2012-2013 and 2013-2014;

   (2) the discovery assessment issued on 4 April 2019 was invalid because the requirements of s29(1) and (5) of the Taxes Management Act 1970 ("TMA") were not met.

BURDEN OF PROOF

8. Mr Batten has the burden of proving, to the normal civil standard of the balance of probabilities, that he was not UK resident in the tax year 2012-2013. HMRC have the burden of proof, applying the same standard, to show that the discovery assessment was valid.

THE APPLICATION OF THE SRT TO 2014-2015

9. The relevant statutory provisions are not in dispute between the parties and provide the reasons for why Mr Batten is in a somewhat unusual position of having been accepted as non-UK resident for the tax years 2010-2011, 2011-2012 and 2013-2014, but not for 2012-2013 and 2014-2015.

10. The SRT was introduced by Finance Act 2013 with effect from 6 April 2013.

11. Paragraph 3 of Schedule 45 sets out what is described as "The basic rule" as follows:

> 3 An individual ("P") is resident in the UK for a tax year ("year X") if—
>
> (a) the automatic residence test is met for that year, or
>
> (b) the sufficient ties test is met for that year.
>
> 4 If neither of those tests is met for that year, P is not resident in the UK for that year.
>
> The automatic residence test
>
> 5 The automatic residence test is met for year X if P meets—
>
> (a) at least one of the automatic UK tests, and
>
> (b) none of the automatic overseas tests.

12. There are then a series of automatic UK tests and automatic overseas tests set out. It is common ground that none of the automatic tests are met by Mr Batten.

13. It is then necessary to consider the alternative "sufficient ties test". Paragraph 17 provides that this test is met if a person does not meet any of the automatic tests but has sufficient UK ties for that year. Whether the person has sufficient UK ties in a particular tax year will depend on whether they were resident in the UK for any of the previous three years and the number of days that the person spent in the UK in the particular tax year.

14. Where a person was resident in the UK for one or more of the three years preceding the particular year under consideration (i.e., in this case 2014-2015) paragraph 18 identifies the number of ties that are sufficient according to bands of days spent in the UK. Where a person was not resident in the UK for one or more of the three years preceding the particular year under consideration, paragraph 19 identifies the number of ties that are sufficient according to a different set of bands of days spent in the UK. In essence, paragraph 18 results in the application of a lower threshold for a person to be UK tax resident than paragraph 19.

15. It is common ground that at all relevant times Mr Batten had two ties as prescribed by Schedule 45: a family tie because his wife lived in the UK; and an accommodation tie because he had a home available to him in the UK and he spent at least one night there. It is also agreed that none of the other UK ties is applicable to Mr Batten.

16. It is also common ground that in the tax year 2013-2014 Mr Batten was non-resident applying the SRT because he only spent 87 days in the UK and as a result the number of ties required for UK residence exceeded Mr Batten's ties whether paragraph 18 or paragraph 19 applied. (Under paragraph 18 three ties were required and under paragraph 19 four ties were required.)

17. It is accepted by the parties that in the tax year 2014-2015 Mr Batten fell into the band applying to a person who spends more than 90, but not more than 120 days in the UK, by virtue of having spent 116 days (judged in accordance with Schedule 45 by reference to midnight) in the UK.

18. If paragraph 18 applies to Mr Batten only two ties are required for him to be treated as UK resident; whereas if paragraph 19 applies to Mr Batten three ties are required for him to be treated as UK resident.

19. As a result, the case turns upon whether paragraph 18 or paragraph 19 of Schedule 45 applies to Mr Batten for the tax year 2014-15.

20. In considering the three preceding tax years the only year in dispute is 2012-2013 for the reasons explained above.

THE APPELLANT'S CASE

21. We set out key elements of the detailed submissions made by Ms Shaw.

Residence

22. Ms Shaw submitted that there is one test to determine whether a person is non-resident which is whether the person made a distinct break in the pattern of their life in the UK. There are two means by which you can achieve that distinct break: you can achieve it by substantially loosening ties or by going to work full-time abroad (in the latter case relying upon s830). That is made clear by the Supreme Court decision in *R (on the application of Gaines-Cooper & another) v Revenue and Customs Commissioners [2011] UKSC 47*. This is in contrast to HMRC's position which is that there are two different ways of becoming non-resident: under the common law by loosening ties, or under s 830 by going abroad to work full-time.

23. It is common ground that applying either approach Mr Batten was non-resident for the two tax years in which he was working full-time in Gibraltar. After October 2011 (his first visit back to the UK after leaving in 2010) the pattern of his presence in the UK was as a visitor, not as an inhabitant. Mr Batten's pattern of residence for the intervening year (2012/13) was not "substantially different" (*HMRC* v *Combe* 17 TC 405). His return visits were limited and amounted to less than 91 days.

24. Ms Shaw submitted that account should be taken of the intention of the SRT (as shown by the consultation document issued before its enactment) to broadly recreate the outcome of the common law test. HMRC have not explained why Mr Batten's case falls outside the parameters of the vast majority of taxpayers in the ordinary run of events for whom the application of the SRT should provide the same answer as the application of common law. If Mr Batten's residence position for 2012-2013 were to be assessed by reference to the SRT, instead of by reference to the common law, he would be non-resident for that year under paragraph 18 of schedule 45 because he spent only 84 days in the UK in that tax year and had only two UK ties.

25. However, in applying the common law test the key principles set out by Richards J in the Upper Tribunal's decision in *HMRC* v *Glyn [2015]* UKUT 551 (TCC) should be applied. In particular, it is necessary to ask whether Mr Batten's usual abode was in the UK and to note that the quality of a person's presence in the UK must be assessed. In the context of a person who is UK resident, *Glyn* makes it clear that a taxpayer is unlikely to have ceased to reside in the UK unless there has been a definite break in the pattern of his life.

26. Ms Shaw submitted that the Supreme Court addressed the nature of that significant break in *Gaines-Cooper* and, in particular, the judgement of Lord Wilson, reviewing the previous case law, identified that to become non-resident the ordinary law requires a distinct break in the pattern of a taxpayer's life in the UK. To determine whether such a break had occurred mandated a multifactorial enquiry. He specifically noted that where, as in the case of *Combe,* a person left the UK in order to pursue full-time employment abroad it was likely from the fact of that employment that the taxpayer had made a distinct break in the pattern of his life in the UK. That makes clear that there are not two types of non-residence, as HMRC had sought to

argue. The full-time employment overseas is a means by which the distinct break can be achieved and dispenses with the need for the full multifactorial enquiry. Once that has occurred, UK residence is determined by the taxpayer's actions during the year in question. Furthermore, *Reed v Clark* [1985] STC 323 shows that an absence of one year is sufficient to give rise to a distinct break.

27. On any view Mr Batten's departure on 21 March 2010 and the subsequent 18-month absence from the UK is more than sufficient to establish the requisite distinct break as a matter of common law. Ms Shaw identifies and relies upon a list of steps that were taken alongside the relocation to Gibraltar for full-time employment.

28. Ms Shaw acknowledges that there are no direct authorities addressing the position of someone such as Mr Batten. Various cases have considered the question of whether a UK person has left the UK, or whether someone who has never lived in the UK has established an abode here, but Mr Batten fits neither of those patterns.

29. Ms Shaw submits that the question is whether having made the requisite distinct break and established himself as non-resident for 2010-2011 and 2011-2012, Mr Batten resumed or regained UK residence for 2012-2013. The fact that Mr Batten stopped working does not in and of itself mean that he became UK resident once more. It is necessary to look at Mr Batten's actions and the pattern of his presence in the UK in order to assess whether what in fact happened is that he resumed UK residence. Indeed, that is reflected by the application of the SRT in 2013-2014. Was the quality of his presence in 2012-2013 as an inhabitant or as a visitor? His presence was as a visitor for 2013-2014 and no difference can be identified for 2012-2013. Lord Wilson makes clear that limited return visits (of up to 90 days per year) are entirely consistent with being a non-resident returning as a visitor. Mr Batten did not seek to re-establish any of the ties with the UK that had been cut upon his departure on 21 March 2010.

30. Relevant ties to be considered are those which cause or necessitate an individual to return to the UK. Therefore, supporting Sunderland football club is not a tie to the UK if it is something that a person carries on or enjoys from overseas. It might be a UK tie if the person was coming back every week to watch the matches. A number of matters relied upon by HMRC as ties are not in fact such; for example, British citizenship or investments in the UK where day-to-day running of the business is left to others. Mr Batten left the day-to-day management of the care home business with his wife and his property portfolio with his daughter. They were not matters which caused him to return to the UK. However, Ms Shaw was unable to identify any authority for this approach in common law to considering what is and is not a relevant tie. She submitted that it was a matter which could be deduced, although the case of *Clark* indicates a distinction between ties which cause a person to return to the UK and those which do not.

Discovery assessment

31. Ms Shaw submits that the loss of tax is said to come about because Mr Batten was UK resident in 2012-2013. However, for the reasons described above, the cessation of his employment did not cause him to resume UK residence in 2012-2013 and therefore did not give rise to a loss of tax. Therefore the "discovery" that Mr Batten's employment ceased on 12 June 2012 was wholly immaterial to his residence position and therefore his tax liability.

HMRC'S CASE

32. Again, we set out key elements of Mr Brinsmead-Stockham's detailed submissions.

Residence

33. HMRC had made clear in their Statement of Case that they had only accepted that Mr Batten was not UK tax resident for 2010-2011 and 2011-2012 as a result of the application of

HMRC's guidance "HMRC 6". Mr Batten satisfied the requirements of that guidance and consequently HMRC was subject to the public law obligation to treat Mr Batten as non-UK resident those tax years. As the Supreme Court had noted in *Gaines-Cooper*, the application of HMRC 6 did not entail the need for multifactorial enquiry, in contrast to the analysis required for common law residence.

34. In essence, HMRC say that Mr Batten was UK resident for 2012-2013 on the basis that either:

> (1) he did not affect a "distinct break in the pattern of his life in the UK" by "substantially loosening" his ties in the UK such that he remained UK resident immediately prior to 6 April 2012 and consequently remained UK resident 2012-2013; and/or
>
> (2) even if Mr Batten was not UK resident for 2010-2011 and/or 2011-2012, he regained his former UK residence for 2012-2013 on a straightforward application of the pre-SRT law of residence, in particular, due to the fact that his full-time employment ended on 12 June 2012.

35. Mr Brinsmead-Stockham submitted that before the enactment of the SRT the concept of "residence" was not defined in UK tax legislation but was given its natural and ordinary meaning (*Levene v IRC* [1928] AC 217). An individual would be UK resident if the UK constitutes that individual's "settled or usual abode". The question is one of fact and must be analysed and answered separately respect of each individual tax year (*Levene*). However, in determining whether an individual is UK tax resident for any particular tax year it is legitimate to have regard to that individual's situation in prior and subsequent years as part of "one continuous story" (*Levene*).

36. Mr Brinsmead-Stockham submitted that the case of *Grace* shows that a taxpayer's connections to other countries are a relevant consideration. The courts have shown that there is a difference between the case where a British subject has established residence in the UK and then has absences from it and the case where a person has never had a residence in the UK. The taxpayer's intention is relevant but not determinative. The availability of living accommodation is a factor to be taken into account.

37. Mr Brinsmead-Stockham submitted that various principles relied upon by Ms Shaw in the case of *Glyn* do not apply as that case concerned "ordinary residence" rather than residence. It was also incorrect to rely, even indirectly, on the terms of the SRT given that it did not apply for 2012-2013. In any event, the consultation document on which Ms Shaw relied made clear that the SRT could change the residence analysis for some taxpayers.

38. Reference to the 91-day limit in IR20 and HMRC 6 by Ms Shaw is inappropriate given that the guidance is irrelevant to Mr Batten's common law residence status as made clear by Lord Wilson.

39. Mr Brinsmead-Stockham submitted that Mr Batten had very significant links to the UK in 2012-2013 and identifies a list of matters relied upon by HMRC. He submitted that a number of the matters on which Mr Batten relied to demonstrate a loosening of his ties with the UK either have very limited significance or are not substantiated by the evidence before the tribunal.

40. Reliance on *Reed v Clark* is misplaced as it concerned a taxpayer who was held not to be UK resident for a tax year in which he was completely absent from the UK.

41. Mr Batten's case has not relied upon s830. If that provision applied, the question of whether he had made a relevant "distinct break" from the UK prior to 6 April 2012 would be a

finely balanced question, although HMRC maintains that the extent of his links to the UK throughout the period of his employment would be sufficient to mean that he had not done so. However, on the basis that Mr Batten did not seek to rely upon s830, the links that he retained including his family home are plainly sufficient to conclude that he had not made a "distinct break".

42. Even if it was found that he had made a distinct break so that Mr Batten ceased to be UK resident prior to 6 April 2012, he was undoubtedly UK resident for 2012-2013. Section 830 cannot apply as his employment ceased in June 2012. As a result, the test for UK residence at common law must be applied on the basis that he had accommodation in the UK available to him for more than nine months of that tax year. In those circumstances, and given the other considerable links between him and the UK throughout the tax year, it is beyond doubt that the UK was a "settled or usual abode" for Mr Batten. The case of *Cooper v Cadwalader* 5 TC 101 demonstrates that the requirements for UK residence constitute a low bar. In effect, the mere fact of ceasing to be employed full-time overseas can cause a person to regain UK tax residence as a result of their accommodation in the UK being taken into account once again.

43. The case of *Combe* should be distinguished. It concerned the predecessor to s 829 ITA and whether the taxpayer had left the UK for the purpose only of occasional residence abroad. In addition, its facts are clearly distinguishable given that the taxpayer had no home, business, or family in the UK.

The discovery assessment

44. Mr Brinsmead-Stockham relies upon the Supreme Court decision in *HMRC v Tooth* [2021] STC 1049. In particular, whether an officer has made a discovery is a subjective test by reference to the actual officer. The officer had opened an enquiry into Mr Batten's self-assessment return and as a result of the letter sent by Mr Batten's representatives learnt that Mr Batten's employment had ended on 12 June 2012. Therefore, prior to issuing the discovery assessment, the officer had arrived at the subjective conclusion, or "discovered", that Mr Batten was UK resident for 2012-2013 and 2014-2015 and consequently his self-assessment for 2014-2015 omitted income and capital gains. That was an objectively reasonable conclusion based on the information provided to the officer. A hypothetical HMRC officer could not reasonably to have been expected to be aware of the fact that Mr Batten's employment ceased on 12 June 2012. His tax return for 2012-2013 simply recorded that he worked abroad full-time without qualifying that assertion, for example, by making a disclosure in the relevant white box. Mr Batten's case does not identify any basis on which a hypothetical officer would have been aware that Mr Batten's employment ended on 12 June 2012.

45. In relation to the argument put forward by Ms Shaw that the cessation of Mr Batten's employment did not cause him to resume UK residence, that appeared to relate to the question of whether the discovery assessment was substantively correct rather than whether it was validly issued.

46. In any event, however, the fact that Mr Batten's employment ended during 2012-2013 was relevant to his residence position because it meant that he did not fall within the terms of HMRC 6 and s830 could not apply to Mr Batten throughout 2012-2013.

THE EVIDENCE

47. We were provided with a PDF bundle of 2254 pages as well as a supplemental bundle of 86 pages. During the hearing a further 12 pages of evidence were admitted. An application had been made on behalf of Mr Batten for the admission of specific additional evidence and as an exceptional matter, in the circumstances of this case, HMRC did not object to the application. We also heard oral evidence from Mr Batten, his wife, daughter and two sons.

48. We have been grateful to the parties for their efforts to identify agreed facts. A statement of agreed facts was provided to us before the hearing and, at the end of hearing evidence, we were provided with further written clarification by Mr Brinsmead-Stockham of which further parts of the evidence were accepted by HMRC. We have therefore identified in the findings those matters of fact which are agreed.

49. In relation to our assessment of the evidence we have considered the submissions made by the parties addressing the relative weight to be given to various parts of the evidence. In summary, HMRC submit that we should focus predominantly on the contemporaneous documents, and give less weight to the witness statements produced subsequently, relying upon the case of *Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3560 (Comm)*. Ms Shaw submits that HMRC have misconstrued *Gestmin* and that we should consider all the evidence, assessing the veracity of the witness evidence alongside the documentary evidence. Furthermore, she submits that it is in reality not a dispute about the facts but about the application of the law to them.

50. Whilst a large proportion of the facts of this case are agreed by the parties there are significant matters, on which we must make findings of fact. To do so we agree with Ms Shaw that we must consider all the evidence. That is made clear in the decision of the Court of Appeal in *Kogan v Martin & Ors (Rev 1)* [2019] EWCA Civ 1645 (at para 88), where it is said that the *Gestmin* guidance does not prevent reliance upon witness statements.

> "A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon *all* of the evidence."

51. The same emphasis on the duty to consider all of the evidence and determining the weight to be given to it was stated in *BXB v Watch Tower and Bible Tract Society of Pennsylvania and Trustees of the Barry Congregation of Jehovah's Witnesses* [2020] EWHC 156 (QB**)**, although the fallibility of memory was noted in the context of what has also been described in *Gestmin* as the tendency of people to develop a narrative after the event.

52. We perceived signs of that tendency on various occasions. For example, Mr Batten and his daughter sought to minimise his links to the UK and at times this coloured the presentation of their evidence so that, for instance, Emma Batten was reluctant to admit that she and her father discussed the property business when they spoke by telephone.

53. We have addressed these matters more specifically as they arise in our findings of fact, but as a general matter where evidence provided in Witness Statements and/or orally was inconsistent with contemporaneous documents, we gave greater weight to the latter unless the inconsistency was explained.

54. In relation to certain matters, in particular letters sent by Mr Batten to various people on his departure to Gibraltar, Mr Brinsmead-Stockham submitted that the lack of signed copies meant that we should give less weight to the evidence from Mr Batten that he had sent them. This resulted in an uncontested application made on behalf of Mr Batten for further evidence to be provided. That evidence included a few more copy letters. Overall, we found Mr Batten's evidence regarding the letters to be consistent and we made no adverse inference as a result of a lack of copies of signed letters. There was ample evidence that letters had been sent, not least in the form of acknowledgements from some recipients. However, where there is evidence in the bundle that an institution or body continued to correspond with Mr Batten at Parsonage Farmhouse we have concluded that no letter was in fact sent by him to notify relocation; or, if sent, the lack of action by Mr Batten in response to the recipient's inaction means that the address change was of no practical importance to Mr Batten.

55. Ms Shaw submitted that it would be unjust to make adverse inferences from any perceived lack of evidence relating to facts and matters not in dispute. We agree. Therefore, for example, given that HMRC have accepted that Mr Batten went to Gibraltar to carry out duties under his contract of employment no adverse inference should arise as a consequence of the lack of documentation regarding his employment activities.

56. Ms Shaw chose not to cross-examine HMRC's witnesses - Mrs Morritt and Ms Stowe - and their evidence was taken as read. We accordingly give that evidence full weight.

AGREED FACTS AND FINDINGS OF FACT

57. For ease of reading, we have set out the agreed facts in relation to each matter initially, followed by our own findings of fact.

Background

Agreed facts

58. Mr Batten is a British citizen who was born in the UK in 1957. He lived in the UK (and nowhere else) for more than half a century until 21 March 2010.

59. Mr Batten spent some time, after leaving school, as an apprentice professional footballer for Charlton Athletic FC. He continued as a semi-professional footballer until 1998. He then qualified as a Football Association coach and has been actively involved in football coaching, particularly youth coaching, since that date.

60. In 1985 he started a property lettings business and in 1988 a care home business. In 1992 the care home business was expanded when he sold the original care home facility and bought the Little Oyster Holiday Camp which was redeveloped as a care home for adults with physical and learning disabilities.

61. In 1995 his wife, Mrs Batten, took over sole day-to-day management of the Little Oyster care home business. The role involved the coordination and oversight of a large body of staff. By the time Mr Batten went to Gibraltar in 2010, Little Oyster provided a 64-bedroom facility with a staff of 100 carers, cleaners and catering staff.

62. In 2001 Mr and Mrs Batten moved into their family home, Parsonage Farmhouse, which they jointly own, and to which Mr Batten has returned when in the UK.

Move to Gibraltar

Agreed facts

63. In 2008 during a visit to Gibraltar Mr Batten enquired about buying a holiday home and learned about the shortage of care home places there. In November 2009 he made a two-day trip to Gibraltar to explore the idea of opening a care home business and in the following month he decided to move there, purchasing a two-bedroom apartment ("Apartment 801") in December 2009. The property is approximately 80 m² with two bedrooms and Mr Batten employed a company in Spain to furnish it for him. Having had meetings with an estate agent and a local Gibraltar lawyer, Mr Batten had concluded that there was a significant opportunity to open a privately run care home in Gibraltar and had decided that he needed to relocate there in order to research and pursue this possibility either in Gibraltar or southern Spain.

64. At the end of December 2009 Mr Batten engaged the firm "PKF".

65. Meanwhile in May 2008 his grandson, who was later diagnosed as severely autistic when young, was born. At some point in Mr Batten's grandson's first few years his father Ian separated from his mother. Mrs Batten helped her grandson's mother find a home close to Parsonage Farmhouse so that she could help with her grandson's care. She has been closely involved with her grandson's care throughout.

66. On 2 March 2010 Mr Batten's daughter, Emma Batten, was added as a signatory on the Barclays bank accounts used for the UK property investment business income and expenses and her address was added as the postal address for those accounts.

67. On 15 March 2010 the Little Oyster care home business was transferred to a company called Little Oyster Ltd ("LOL"). Mr Batten is the sole shareholder of LOL and he and his wife are its only directors. On the same date Mrs Batten's employment with LOL commenced at a salary of £45,000 per annum.

68. On 21 March 2010 Mr Batten drove to Gibraltar with his personal possessions in his Mercedes Coupe 320. His employment with LOL commenced at a starting salary of £250,000 per annum. Mr Batten retained his UK bank accounts when he moved to Gibraltar on the basis that there did not seem to be any reason to close them and some, such as those used for the property business, were in regular use.

69. Mrs Batten remained in the UK living at Parsonage Farmhouse, continuing to run the LOL business and assisting with the care of her grandson. In the middle of 2014 her brother was diagnosed with cancer which gave further reason for her to spend most of her time in the UK.

Our findings

70. PKF were Mr Batten's tax advisors at the time of his move to Gibraltar.

71. Prior to leaving for Gibraltar Mr Batten registered with the Gibraltarian tax authorities and paid tax there for the years 2009 to 2015 of around £29,000 per annum.

72. Evidence in a letter from HMRC confirms Mr Batten submitted form P85 "Leaving the UK" shortly before March 2010 in which he said that he would be going to Gibraltar to carry out market research/business development on behalf of his employer, LOL which would be carried out under a separate contract of employment for 2-3 years.

73. As explained earlier, we have generally given full weight to Mr Batten's evidence about letters sent by him as a matter of housekeeping on or around his departure to Gibraltar, although we note that the statements for an HSBC account used for his property lettings business and referred to later in this decision continued to be sent to Mr Batten at Parsonage Farmhouse. We therefore find that he wrote to:

(1) his borough council to register as an overseas voter, although he did not in fact vote while in Gibraltar and indeed does not generally do so;

(2) his doctor and dentist;

(3) the Post Office to redirect his post to Gibraltar. The redirection stayed in place for two years from 25 March 2010 before lapsing;

(4) cancel his gym membership at Sheppey Leisure Centre. However, when he visited the UK he continued to use the same gym by purchasing a pass allowing access on a weekly or monthly basis;

(5) his credit card company, NS&I, AA Savings and various other banks where he had accounts, to change his address;

(6) the insurance company providing insurance for Parsonage Farmhouse asking that they add Mrs Batten as joint policyholder. In fact, she has been the principal policyholder since March 2010 and has continued to be so since Mr Batten's return to the UK;

(7) DVLA although he retained his UK driving licence which continued to state his address as Parsonage Farmhouse;

(8) the FA Coaches Association to get the address of the Gibraltarian Football Association;

(9) Sunderland AFC to cancel his membership. He has not rejoined the supporters club since returning to the UK;

(10) his pension provider to notify change of address;

(11) his private health insurance provider. Mr Batten told us that the insurance covered Gibraltar and Spain and accepted (albeit after initially considering in cross-examination that it did not) that it "may well have covered the UK" as well;

(12) to HMRC under the non-resident landlord scheme. On that form he stated that he planned to be outside the UK for three years from 21 March 2010;

(13) utilities and TV licensing to transfer the accounts into Mrs Batten's name. There is no evidence that the accounts were transferred back to Mr Batten's name on his return to the UK in 2015.

74. Shortly after arriving in Gibraltar, Mr Batten:

(1) obtained a civilian registration card which enabled him to access local government services, public transport and public leisure facilities. It can also be used instead of a passport at the Gibraltar/Spain border;

(2) opened a current account and savings account in Gibraltar.

75. In spring 2009 Mr Batten had finished his coaching position as reserve team manager at Ashford Town FC. In November/December 2009 he did not take on another role because he was planning to move to Gibraltar.

Employment in Gibraltar

Our findings

76. Mr Batten formally reported to the LOL board every 3 to 6 months about his progress in researching the feasibility of a care home in Gibraltar. He had quickly ruled out the city centre as a suitable location and in June and July 2010 viewed three potential sites. He met with local government officials including a meeting on 21 June 2010 to present a proposal for a 60-bedroom care home facility.

77. One of the three potential sites was identified as being particularly attractive for a care home and in July 2010 Mr Batten engaged a Gibraltarian firm of architects to draw up plans. In August 2010 he asked a UK architect with special expertise in the construction care homes also to design a facility for the site. Meetings were held that summer and on 23 September 2010 Mr Batten submitted, on behalf of LOL, an expression of interest in the site. However, while waiting for a response, he discovered through contacts that the site had been sold to a local developer.

78. Meanwhile, Mr Batten had been visiting potential places in southern Spain, but to no avail.

79. At the end of 2010 Mr Batten was put in contact with the Chairman and secretary of the Alzheimer's Society in Gibraltar, and a local benefactor. Following a meeting in April 2011 (together with Mrs Batten) he carried out research into the viability of a specialist residential care facility. In May 2011 Mr Batten approached NatWest for funding and in June 2011 asked his accountant to prepare some projections.

80. On 21 March 2011 the LOL board (consisting of Mr and Mrs Batten) awarded Mr Batten a bonus of £1.25 million.

81. On 1 April 2011 Mr Batten's salary was increased to £520,000 per annum.

82. On 10 October 2011 Mr Batten made his final report to the board of LOL. In that report he recommended that LOL should proceed with plans to provide a new residential care home in Gibraltar, subject to securing a suitable site. Following that report, on 21 October 2011, the LOL board awarded Mr Batten a bonus of £900,000 and decided to terminate his employment. By the end of 2011 Mr Batten felt that he had concluded his assignment in Gibraltar. Therefore the October decision was followed up on 12 December 2011 by LOL giving Mr Batten six months' written notice of the termination of his employment. His employment therefore ceased on 12 June 2012. During his notice period he continued to search for suitable development sites. However, ultimately as he said himself, his efforts came to nothing and no expansion of LOL's business in Gibraltar or southern Spain took place.

83. HMRC have not challenged the extent to which Mr Batten's employment was in fact "full-time employment" in the first six months of 2012 and we therefore find that Mr Batten's employment was full-time until 12 June 2012.

84. On 12 November 2012 a board meeting of LOL resolved to pay an interim dividend.

85. On 2 April 2013 the board of LOL resolved to pay a final dividend.

86. In addition to his salary, Mr Batten received bonus payments for his work in Gibraltar. In total he received £1,509,725 in the tax year 2010-2011, £1,122,823 in the tax year 2011-2012 and £100,000 in the tax year 2012-2013. These amounts were paid into his Gibraltar bank account and Gibraltarian tax was paid on them.

87. In addition, he received dividends from LOL of:

(1) £82,000 in 2012-2013;

(2) £700,000 in 2013-2014;

(3) £950,000.20 14-2015.

88. In 2011 Mr Batten made a loan of £500,000 to LOL on which interest accrued at a rate of 5% per annum.

89. Mr Batten said that he engaged the firm of PKF to draw up a "business plan" for him relating to the opening of a care home in Gibraltar. As we commented at the hearing, the term "business plan" is somewhat ambitious for the minimal document prepared. It was prepared by PKF and simply repeats what Mr Batten told PKF. No financial projections or statements are included. It would not have served as a business plan for banks or investors and we conclude that it was produced by PKF in order to provide greater evidence of the substance of Mr Batten's employment. We should be clear again at this point that there has been no challenge the substance of that employment by HMRC and we have been provided with ample evidence that Mr Batten carried out real activities in Gibraltar when employed by LOL.

LOL

Our findings

90. Mr Batten was the sole shareholder and Managing Director of LOL. His wife was the other director. Although his wife managed the company's business day-to-day, we find that management and control of the company was exercised by Mr and Mrs Batten together as shown by the board minutes of LOL which record the taking of strategic decisions such as the renewal of planning permission for an additional 40 beds, the approval of the loan of 500,000 from Mr Batten to LOL, care quality inspections by local and governmental associations, occupancy rates and the approval of a refurbishment programme being extended. Mr Batten's management oversight was also recognised by Mr and Mrs Batten in their oral evidence.

91. Board meetings in March and October 2011 as well as November and April 2013 were held in Gibraltar.

92. The annual returns submitted to Companies House for the time while Mr Batten was in Gibraltar recorded him as "usually resident" in the UK.

Life generally in Gibraltar

Agreed facts

93. On 17 June 2010 Mr Batten purchased a second two-bedroom apartment ("Apartment 804") in the same development as Apartment 801 as an investment. Initially it was used to accommodate visiting family and friends, but after the first year was let on a long-term lease. The apartment is still owned by Mr Batten and let by him.

94. In August 2010 Mr Batten's younger son, George, moved to live with his father in Apartment 801. George had just finished college and did not have a job, so decided to join his father in Gibraltar. He found work as a waiter and spent a lot of time with his father socially.

95. In April 2011 Mr Batten's elder son, Ian, moved to live in southern Spain, about 1 ½ hours' drive from Gibraltar. At the end of October 2011 Ian Batten returned to the UK for a few months before returning in January 2012 to live in Apartment 801 with Mr Batten and George Batten for six months having obtained a job locally. Later in the summer of 2012 Ian Batten moved back to live in southern Spain as before.

96. In late 2014 Ian and George Batten moved back to the UK permanently.

97. On 13 February 2015 Mr Batten flew back to the UK. He returned to the family home, Parsonage Farmhouse, where he and Mrs Batten continue to live.

98. The apartments in Gibraltar have been retained. Mrs Batten continues to visit and has since also bought a villa in Estepona in Spain. When she visits that villa she takes the opportunity to spend a couple of nights in Gibraltar.

99. While in Gibraltar much of Mr Batten's social life centred upon football and social functions put on by the local gym which he attended daily. Mrs Batten regularly visited Mr Batten in Gibraltar every other weekend. She also joined him in Gibraltar for Christmas and New Year in 2010, at Easter and bank holidays and for two weeks in the summer. On many occasions she took their grandson with her. Mr Batten's father visited him in Gibraltar a couple of times and his daughter, Emma, visited twice per year. Other extended family members and friends also visited him in Gibraltar.

100. Ian and George Batten joined a local amateur football team in Gibraltar and in March 2012 Mr Batten agreed to take on the role of assistant coach.

Our findings

101. Mr Batten registered his car locally on 18 March 2011.

102. Although in Mr Batten's Witness Statement he says that he registered with a doctor and dentist locally, in fact it became clear in the course of cross-examination that he used the services of a private doctor and private dentist who did not require registration and were available for anyone, including tourists, to use.

103. Mr Batten joined the southern Spain branch of Sunderland football club which screened games at the weekend for supporters in a bar in Benalmadena where his son Ian lived.

104. In the autumn of 2010 Mr Batten started to assist with local junior football training. He felt he did not have the time to commit to being a full-time coach but would assist when he could.

105. The evidence from George and Ian Batten clarified the circumstances of their time in Gibraltar and southern Spain and we find as follows on the basis of that evidence.

106. Ian owned and operated a fish pedicure business in Benalmedena which operated from April to November (the tourist season) in 2011-2014. It was funded initially by Mr Batten and Ian gradually paid his father back over time. In the autumn of 2011 he returned to the UK when the tourist season had ended. He returned early in 2012 to live with his father and brother because he had obtained a job in Gibraltar taking telephone bets for a betting company but left in around July in order to go back to Benalmadena and the fish pedicure business. In subsequent years he returned to the UK to live in Parsonage Farmhouse from October until March.

107. Benalmadena is approximately 1 ½ hours by car from Gibraltar. When living there Ian Batten would try to get to Gibraltar to join his father and brother in a local football team and managed to do so about once every month to 6 weeks. Overall, he would visit his father about once per month while living in Benalmadena. His mother would visit and stay with him in Benalmadena at least once per month and would bring his son to stay with him in Benalmadena for a couple of weeks in school holidays. It was bigger accommodation than his father had in Gibraltar and had its own pool so it was ideal for Ian Batten's son and mother to join him there. Ian Batten, his mother and son would go for day trips to Gibraltar to see Mr Batten.

108. George Batten was at a loose end after college and liked the sound of spending some time in Gibraltar. He also set up a fish pedicure business in Spain. He found the closest Spanish tourist location outside Gibraltar for the business, having been unable to find a space for it in Gibraltar. It was about half an hour's drive from Gibraltar and ran from June 2012 through to September 2012. He then operated the pedicure business from a different site in another Spanish town in 2013 and 2014 during the tourist seasons.

109. During his time in Gibraltar George Batten would return to the UK for visits of a few days or a week or two.

110. When Ian or George came back to the UK they stayed in the family home of Parsonage Farmhouse. When Ian left Spain in October 2014 he moved back into Parsonage Farmhouse and remained there until he later bought a property in September 2019. George moved back to live there for a few months before moving into his own place. Both Ian and George have regularly visited Gibraltar since leaving in 2014, staying in the family apartment.

111. Mr Batten registered to vote locally although he never exercised that vote. He told us that in fact he was not a person inclined to vote in any elections, but thought that registering to vote in Gibraltar may assist in his discussions with local politicians.

Days in Gibraltar and the UK

Agreed facts

112. Between 21 March 2010 and 1 October 2011 Mr Batten did not return to the UK. He returned on 1 October 2011 to make funeral arrangements for his mother and take care of her affairs. He returned to Gibraltar on 6 October 2011, the day after her funeral.

113. In the course of the tax year 2011-2012 Mr Batten spent a total of 69 days in the UK (using a midnight count). After the visit made in October 2011 for his mother's funeral, he then returned for three more visits on 2 November 2011 to 27 December 2011, 30 December 2011 to 1 January 2012 and 6 to 8 January 2012 to see his family.

114. In the course of the tax year 2012-2013 he spent 84 days in the UK (using a midnight count) across four separate visits: 26 April 2 11 May 2012, 7 to 8 August 2012, 3 December

2012 to 16 January 2013 and 7 to 31 March 2013. The August trip was to attend the London Olympics and otherwise he returned to see family.

115. In 2013-2014 he spent a total of 88 days in the UK (using a midnight count). In each case the visits were to see family.

116. In 2014-2015 he spent a total of 116 days in the UK (using a midnight count). One trip made in January 2015 was for the funeral of his brother-in-law, but otherwise the purpose of his trips was to visit family. When he flew back to the UK on 13 February 2015, having ceased to live in Gibraltar from that date, he had spent 76 days in the UK.

Our findings

117. Schedules have been provided on behalf of Mr Batten showing his whereabouts from April 2012 to April 2014. The schedules provide further relevant facts as follows:

(1) in the tax year 2011-2012 Mr Batten was in Gibraltar from 6 April 2011 to 1 October 2011 when he returned for six days. He then went back to Gibraltar until 2 November 2011 when he came back to the UK until 26 December 2011. After a brief three-day trip back to Gibraltar he returned to the UK on 30 December 2011 and remained here until 7 January 2012 with the exception of a two-day trip to France on 4 and 5 January 2012. He then returned to Gibraltar for the remainder of January 2012 before going to Dubai for 10 days (with two days travelling). He returned from Dubai to Gibraltar and remained there until 5 April 2012. He spent a total of 283 days in Gibraltar and 12 days outside both Gibraltar and the UK;

(2) in the tax year 2012-2013 Mr Batten continued to be in Gibraltar from 6 April 2011 - 2 December 2011 except for a trip to the UK of 15 days in April/May 2012 and one day in August 2012. He then returned to the UK from 3 December 2012 to 15 January 2013 before going to Dubai on 16 January 2012 until 5 February 2013 and then Thailand from 6 February 2013 until 6 March 2013. From Thailand he returned to the UK from 7 March 2013 until 30 March 2013, before returning to Gibraltar from 31 March 2013 until 5 April 2013. He spent a total of 231 days in Gibraltar with 50 spent outside both Gibraltar and the UK;

(3) in the tax year 2013-2014 Mr Batten was in the UK from 6 April 2013 until 20 April 2013. He then returned to Gibraltar until 14 November 2013 when he returned to the UK until 4 January 2014 with the exception of two days spent in France on 9 and 10 December 2013. At the end of that time in the UK, Mr Batten went to Thailand from 5 January 2014 until 4 February 2014, returning to the UK from 5 February 2014 until 15 February 2014. He returned to Gibraltar from 16 February 2014 until 28 February 2014 before making a two-day trip to the UK. He then returned to Gibraltar for five days before returning to the UK with three out of the next four days spent in the UK and one in France. He went back to Gibraltar for three days and then again came back to the UK again managing his time so that three out of the next four days were spent in the UK and one in France. Three further days were spent in Gibraltar before one day in the UK and one day France, followed by two more days in Gibraltar, and a return to the UK with three out of the next five days spent in the UK and two in France. He then returned to Gibraltar from 31 March until 5 April 2014. He spent a total of 240 days in Gibraltar with 38 spent outside both Gibraltar and the UK.

118. Further evidence shows that in 2014-2015 Mr Batten spent 202 days in Gibraltar and 47 outside both Gibraltar and the UK.

119. These findings show that Mr Batten spent large chunks of time in the UK around Christmas and New Year in each year apart from 2010-2011. In 2012-2013 he followed his

Christmas/New Year break in the UK with time spent in Dubai and Thailand before returning to the UK until 30 March 2013. We consider it to be more likely than not that his return to Gibraltar from 31 March 2013 until 5 April 2013 with an immediate return on 6 April 2013 took into account the change of tax year on 6 April 2013, but that does not detract from the facts as to the number of days he was in the UK and not in the UK.

120. Being able to take longer periods of time away from Gibraltar from the winter of 2012 onwards is consistent with his work in Gibraltar ceasing earlier that year and with the fact that his sons' fish pedicure businesses stopped in the winter months. Indeed, Ian Batten returned to the UK in those months.

121. In 2013-2014 we see the use of overnight trips to France using Eurotunnel. In each case Mr Batten would buy a ticket to book him onto the train leaving the UK around 22:30. Given the hour's difference he would arrive in Calais around midnight French time (but 11 pm UK time). He would then briefly stay in Calais to get the train back leaving Calais around 01:45 am. Indeed, as we noted with Mr Batten at the hearing the timing was such that he had little time to do more than turnaround at Calais and check-in for his return train. We consider that it is not a coincidence that Mr Batten would have spent more than 90 days in the UK if it had not been for his Calais trips. He was clearly acutely aware of the day count and the guidance provided by HMRC (to which we refer later) which stated that visits of less than 91 days were necessary in order to rely on non-UK tax residence after leaving the UK to work abroad as an employee.

122. There is no criticism of Mr Batten in doing this in order to manage his day count, but as we explain later it is relevant in the context of recognising that the trips to France were for that particular function and should not be viewed as indicating any reduction in his links to the UK in and of themselves.

Further findings made by us regarding connections to the UK

123. When Mr Batten returned to the UK he stayed at Parsonage Farmhouse. It is and has always been since their acquisition, jointly owned by Mr and Mrs Batten and the family home. This was the place where Ian and George Batten returned both during their time in Gibraltar and when they left Gibraltar.

124. Mr Batten retained the UK mobile telephone contract and telephone number for which he added a "bolt on" for international use while in Gibraltar. He retained that number because he had had it for many years and it was a number on which his business and other contacts would call him.

125. Mr Batten was always able to drive at least one car in the UK when he was here. He was insured to drive his wife's car.

126. Mr Batten retained his ability to vote in UK elections from overseas.

127. He continued his support of Sunderland Football Club from overseas by joining a local supporters club and watched the matches in a local bar, generally with one or both of his sons.

128. Mr Batten had several bank accounts in the UK while in Gibraltar. Several were barely used. However, accounts used for rental receipts and property expenses as well as several savings accounts with significant balances were operated by Mr Batten:-

(1) in the calendar year 2011-2012 rents were paid into an HSBC UK account for one property (a pub) and at least one other property which Mr Batten let. Some bills were also paid from this account in that period. Statements for this account continued to be sent to Mr Batten at Parsonage Farmhouse in that year and until 10 April 2015, although

by September 2015 they were being sent to Gibraltar. The evidence does not show that Emma Batten was co-signatory on this account;

(2) two Barclays UK accounts operated as the main accounts for the income and expenses of the property lettings business. Statements were sent to Mr Batten c/o his daughter's address. The account remained in his name but his daughter was co-signatory;

(3) a NatWest UK account was used for purchase of properties. Emma Batten did not have authority to operate this account. Therefore the payments were made by Mr Batten and he had complete control over the account. Mr Batten confirmed in his oral evidence that the statements show that: on 16 June 2011 a purchase was made involving a transfer of nearly £27,000; on 16 April 2012 Mr Batten purchased a property for which a transfer of nearly £93,000 was made; and on 25 April 2012 a further purchase was made involving a transfer of more than £302,000;

(4) two further Natwest UK savings accounts were operated by Mr Batten from 2010 to 2015 with large payments made into, and withdrawn from, them on numerous occasions;

129. We also find that £1 million was paid into Mr Batten's Gibraltar savings account on 4 April 2013.

Property lettings business

Agreed facts

130. In 2004 Mr Batten's daughter, Emma, became involved in the management of the UK property investment business. By then he had built up a large portfolio of residential properties, mostly in Sheerness, which he let. Emma became involved in every aspect of the business, from identifying new acquisitions to negotiating the price, managing refurbishment works and resolving any landlord and tenant issues that might arise.

Our findings

131. Emma Batten (and her two daughters with whom Mr Batten has a normal close relationship as grandfather) remained in the UK and, as accepted by HMRC, was actively involved in the day-to-day running of her father's residential letting business. Mr Batten used letting agents to manage a property in Chelsea and four properties in Soho were jointly managed by Emma and a commercial agent, but the rest of his portfolio was managed on a day-to-day basis by Emma. She was paid a commission of the rents paid of around 12% when Mr Batten left for Gibraltar in March 2010. Emma Batten confirmed that this was broadly in line with the rates payable to third party lettings agents and that she regarded herself as effectively a letting agent for her father.

132. Emma Batten told us that she had authority to purchase properties on behalf of Mr Batten, although this terminology somewhat belied the reality. Her evidence and that of her father's overall made clear that he trusted her judgement when she identified properties, but she would talk through potential purchases with him and he would have been able to make the ultimate decision not to proceed. Indeed, all purchases were made using Mr Batten's money and from an account which he controlled. It was an account for which Emma was not a signatory.

133. Despite the efforts made by Mr Batten and his daughter in their oral evidence to diminish the role of Mr Batten in this business, Emma Batten did recognise that her father had oversight over investment decisions and was consulted if there was to be a disposal or new properties were identified. It was acknowledged (albeit with some reluctance) by his daughter that their regular telephone conversations occurring 2 to 3 times per week would not only cover family matters, but would also pick up any matters of note relating to the lettings business.

134. Furthermore, it was not until 28 June 2013 that a Power of Attorney was granted to Emma by her father. That provided that she had the power to act on her father's behalf to grant tenancies, to collect rents and deposits, to manage the properties and to take action including court action to recover possession of property or sums due to her father. On the basis of Emma Batten's explanation to us at the hearing we find that this Power of Attorney was granted because she needed to apply to the court for a possession order and attend court.

135. On the basis of Emma's oral evidence we find that the operation of the UK property investment business and the roles of Emma and her father have remained broadly the same since his return to the UK.

136. In the tax year 2009-2010 Mr Batten owned and let 32 properties, but this increased in the tax year 2010-2011 to 37. That number remained constant until 2013-2014 when a further seven properties were added to the portfolio. In 2014-2015 Mr Batten made 34 disposals of UK properties to a company set up to hold them. Mr Batten confirmed that the transfers were made at that time to lock in gains on the properties without paying UK capital gains tax on the disposal. We are satisfied that the evidence shows that Mr Batten was directly and closely involved with acquisitions and disposals and that none of these transactions were carried out by Emma Batten.

137. Overall, we are therefore satisfied that Mr Batten continued to be actively involved in the property lettings business and to continue to be the person who ultimately made investment decisions in relation thereto.

The property development

Agreed facts

138. In May 2013 land was purchased by Mr Batten and a development project was started at a location close to his other UK property interests called "The Broadway". That land was developed into three houses which were sold in May and June 2015.

Our findings

139. The planning application was submitted by architects on Mr Batten's behalf on or before 31 May 2013 (shown by the architect's letter). The architect's invoice shows that the architect had visited the site, prepared drawings and agreed and submitted a planning application prior to 31 May 2013. It is therefore more likely than not that some of this work would have been carried out prior to the end of May 2013.

140. Mr Batten received the original plans for development, the initial estimate, and subsequent detailed estimates on request by him. Invoices were sent to him in Gibraltar and he paid for the works. He received regular updates from the builders doing the work and Mrs Batten would visit the site for around 30 minutes per day as she went to and from work at Little Oyster, in order to keep an eye on progress. Mr Batten confirmed at the hearing that the development was "fundamentally" part of his property business.

141. We recognise that most of the activity on this development took place after the tax year 2012-13. However, as we explain in the discussion later, activities before and after the relevant tax year can be relevant in assessing a person's residence status.

Sheppey United football club

Agreed facts

142. In late 2012 (confirmed by Emma Batten at the hearing to be November 2012), whilst in Gibraltar, Mr Batten was contacted by Mr Smith who was an acquaintance of Mr Batten's brother-in-law. Mr Batten's brother-in-law was managing a local youth team at Sheerness football club and Mr Smith had approached him with a view to trying to re-establish a senior

football club there. He required a sports ground with stands and floodlighting. Mr Batten's brother-in-law had told Mr Smith that Mr Batten owned a local sports ground with planning permission for floodlighting and so Mr Smith approached him about using that ground. Mr Batten agreed to make the sportsground available at a peppercorn rent and to help fund the development of the ground. He had previously actively participated in the youth football scene on Sheppey and was keen to give something back to the local community.

Our findings

143. In recognition of Mr Batten's contribution to the club in early 2013 he was appointed honorary co-chairman. Emma Batten was appointed a director of Sheppey United on 6 February 2013, which is a position she continues to hold. She was also given 50% of the shares in Sheppey United by the club.

144. The evidence in a letter from Mr Batten's representatives to HMRC shows that after he returned to the UK he became the team's unpaid team manager and an unpaid club director in June 2015. He then acquired 25% of the shares of the club on 7 November 2015. By 31 May 2015 the amount lent to the club was in excess of £100,000. Although Mr Batten told us in cross-examination that he thought the amount lent initially would have been much smaller, he could not provide any indication of the amounts or provide any reliable indication of when he made the first loan to the club.

145. The evidence at the hearing from Mr Batten and Emma Batten about Emma Batten's involvement in the club was an example where we found that they were particularly concerned to seek to minimise the involvement of Mr Batten. Mr Batten was very vague about how his daughter became a director of the club saying he thought it was something to do with one of the directors wanting to "lose their shares". When asked about her interest in football he described her as having been dragged along to games all her life but did not convey a sense of a person who was, as an adult woman, independently a passionate fan. He acknowledged in cross-examination that he and his daughter would talk about Sheppey United when she was a director- what was happening, their results and how they were getting on - but denied that she was effectively his representative on the board.

146. Emma Batten told us that the shareholding came about as a result of the fact that she had struck up a friendship with Mr Smith, the ground was part of the portfolio of properties with which she was involved, she enjoyed football and enjoyed the involvement and she and Mr Smith had daughters who went to school together. However, later in cross-examination Emma Batten said that the shareholding was not necessarily offered to her because she was involved with managing the portfolio of properties although she did not perceive it as being linked to her father's financial assistance to the club. When specifically asked about whether when she went to board meetings she would discuss matters with her father in advance, again her response was quite vague, but recognised that they would discuss the club and its issues in the general conversations which they were regularly having. Although she denied being Mr Batten's representative on the club's board, she eventually put it this way: "I was physically here and dad wasn't".

147. By 31 May 2015, just three months after returning to the UK, Mr Batten had invested more than £100,000. Although he told us that the amounts were lent by him gradually in small amounts from the start of 2013, it is clear that significant amounts of money were being provided by him. Those monies came from him and not from his daughter. There is no evidence to show that she was effectively accessing his account to provide the funds to the club.

148. We find the vague linkage to the gift of shares and the directorship for Emma to friendship with Mr Smith without any link to the provision of the ground and funding by Mr

Batten to be lacking plausibility. We recognise that evidence may be found to be lacking plausibility and yet for us to rely upon it to make findings of fact; but the more implausible evidence is, the more that supporting evidence is required in order to rely upon it. We are satisfied that given the evidence overall from Mr Batten and his daughter that the gift of a 50% shareholding in the club and appointment as a director was directly linked or, at the very least, prompted by, the provision of the ground and finance by Mr Batten. We also find that he and his daughter regularly discussed the club and matters arising in relation thereto. It would be quite extraordinary, given Mr Batten's lifelong involvement with football and considerable experience, for his daughter not to look to her father in this context and for him to simply stand back from involvement in a matter which was clearly close to his heart while in Gibraltar.

Tax motivation

149. Although Mr Batten recognised that the transfer of his property portfolio took place in order to crystallise gains while he was resident overseas, he was otherwise frequently reluctant to acknowledge tax motivation in any of his actions in the relevant periods. His answer when asked about tax -related matters was generally that he did not recall and he generally sought to minimise any suggestion of tax motivation for his actions, although in cross-examination he somewhat reluctantly accepted that he was aware that he would get favourable tax treatment as a non-resident. We address the implications of tax motivation later, but we note at this point that with the exception of considering evidence regarding Mr Batten's intentions after his employment ceased in Gibraltar, whether or not his move to Gibraltar was or was not tax motivated does not affect our conclusions as to whether he was UK resident in 2012-13/2014-15.

150. However, for completeness we make the following findings regarding tax motivations and awareness. We find on the basis of Mr Batten's evidence in cross-examination that PKF gave him advice about becoming non-resident, the incorporation of LOL and the transfer of the Little Oyster business to that company. Whereas Mr and Mrs Batten shared ownership of the Little Oyster business (which was operated through a partnership) 80/20 respectively, after the transfer of it to LOL Mr Batten held 100%. That of course made complete sense in the context of him becoming non-resident and extracting money from the company outside the UK tax net.

151. At times Mr Batten's reluctance to recognise the influence of tax factors was in sharp contrast with the documentary evidence before us; for example, in relation to journeys to Calais. Evidence in the bundle shows that Mr Batten would drive to the Eurotunnel terminal in Folkestone and take a train to Calais shortly before midnight, returning shortly afterwards after midnight UK time. As noted previously, there is no adverse conclusion resulting from doing so. However, it is abundantly clear that Mr Batten did so in order to ensure that he could minimise the number of midnights in the UK for the purposes of the tax residence tests.

152. Mr Batten accepted in cross-examination that he was aware that he could dispose of assets without triggering Capital Gains Tax if he remained resident outside the UK for five years "in the last couple of years in Gibraltar". In fact, he transferred his property portfolio to a wholly owned company on the basis that he would be treated as being overseas for five years and could generate a tax-free uplift in base cost; i.e., any gains on the property portfolio to the date of transfer would not be taxed. He then returned to the UK as soon as he reasonably could on 13 February 2015 whilst seeking to stay under the band threshold of 120 days. By that point he had spent 76 days in the UK. The remainder of the tax year took him to 116, just four short of the cut-off of 120 for the next day count band in the SRT rules. If the 120-day band had applied it would have caused him to be UK resident under both Paragraph 18 and paragraph 19 Schedule 45.

153. Mr Batten is an astute businessman and the evidence overall shows that he was acutely aware of the potential tax advantages from being non-UK resident. He extracted a very large amount of money as employment income and bonuses amounting to approximately £3 million, even though his efforts whilst working for LOL in Gibraltar achieved nothing.

Intentions regarding residence in Gibraltar

154. We recognise that Mr Batten gave evidence that he had investigated buying a larger property in Gibraltar in order to live there permanently with Mrs Batten. However, this claimed intention did not explain how the plan would fit with Mrs Batten's clear involvement with, and commitment to, their grandson. In addition, none of the other witnesses described Mr Batten looking to buy such a property, or doing anything else to stay in Gibraltar longer term. While Mr Batten's children described him as settled into the lifestyle while he was there, that in itself does not describe an intention to remain, let alone to make the family home Gibraltar. Given that an intention to establish the family home there would have been a matter of some importance we consider that the absence of evidence, such as estate agent particulars for the properties in which Mr Batten says he was interested, should be taken into account by us. Considering the evidence overall, we conclude that we should give the reference made by Mr Batten to looking for a permanent home less weight.

Mr Batten's interactions with HMRC

155. We refer to the findings above regarding Mr Batten's notifications sent to HMRC in 2010 when he moved to Gibraltar.

156. Mr Batten filed his self-assessment tax return for the tax year 2012-2013 on time or before 31 January 2014. In that return he ticked the box which states, so far as relevant:

> "if you work full-time abroad".

157. However, by the time of completion of his self-assessment tax return Mr Batten was not working full-time abroad. Nothing was added in the white boxes to explain that he had stopped working full-time abroad on 12 June 2012.

158. The tax return for 2013-2014 did not ask that question as the new SRT rules were in place. Mr Batten indicated that he was not resident in the UK for 2013-2014.

159. Ms Stowe is the officer who opened an enquiry on 27 December 2017 into Mr Batten's 2015-2016 tax return. She had noticed a substantial drop in his property income for that tax year compared to other years and that he held fewer properties, but no disposals have been declared by him. After discussions with her manager it was decided that an enquiry should be opened.

160. In correspondence with HMRC Mr Batten's advisers wrote on 13 July 2018 that details of Mr Batten's employment had been provided separately in relation to an enquiry into the tax affairs of LOL. That was in a letter of 30 January 2014 regarding LOL's tax return. Mrs Morritt states that it was from this letter that she learned about the cessation of Mr Batten's foreign employment and given that this evidence was not challenged we find that Mrs Morritt's review of that letter was the source of the "discovery" about Mr Batten's employment. Mrs Morritt's unchallenged evidence is that this discovery was made on 26 July 2018. Mrs Morritt was not aware of the letter of 30 January 2014 previously because it was a letter sent in the context of enquiries into LOL's tax affairs and not Mr Batten's.

161. Mrs Morritt then wrote to Mr Batten's advisers on 10 August 2018 requesting further information on matters including his residence. A response was provided on 20 September 2018 and on 9 October 2018 Mrs Morritt's manager sought advice regarding Mr Batten's residence from within the specialist department in HMRC. The advice was that Mr Batten was

UK resident in 2012-2013. Consequently, Mrs Morritt wrote to Mr Batten's advisers on 14 November 2018 to confirm HMRC's view.

162. Mr Batten's advisers responded on 6 March 2019 saying that he was non-resident because he had "envisaged an indefinite break with the UK" at the time of leaving the UK. Mrs Morritt did not accept the representations and therefore concluded that Mr Batten was UK resident in the tax year 2012-2013 and therefore also (under the SRT rules) for the 2014-2015 tax year. Accordingly, she raised the discovery assessment which is the subject of this appeal on 4 April 2019.

THE LAW

The validity of the assessment

163. The power to issue the assessment is contained in Section 29 TMA which stated in s29(1) that:

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

164. Section 29(3) provides that where the taxpayer has made and delivered a return under s8 TMA (as Mr Batten did), s29(1) cannot apply unless one of two conditions is satisfied. HMRC rely upon the condition set out in s.29(5) TMA, which provides so far as relevant that a discovery assessment may be issued if:

> "at the time when an officer of the Board—
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return … in respect of the relevant year of assessment … the officer could not have been reasonably expected, on the basis of information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

165. Section 29(6) TMA defines when information has been "made available" to an officer of the board as including any information which:

> (a) … is contained in the taxpayer's return … in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return …

166. Section 29(7)(a) TMA provides that the reference to a taxpayer's return in s.29(6):

> "includes … a reference to any return of his … for either of the two immediately preceding chargeable periods".

167. The application of these rules was considered by the Supreme Court in *Tooth* which tells us that:

(1) the provision in s29 is concerned with the state of mind and knowledge of the particular officer who claims to have made a relevant discovery (at [69];

(2) the concept of an actual officer discovering something involves an actual officer having a particular state of mind in relation to the relevant matter, which requires the application of a subjective test. There is also an objective test, in that mere suspicion of an under-assessment of tax is not sufficient and the belief which the officer forms regarding the under-assessment has to be one which a reasonable officer could form (at [72]);

(3) a discovery within the meaning of s29(1) of the TMA may consist simply in a new appreciation of the legal significance of a set of circumstances (at [75]);

(4) It is perfectly possible, as a matter of ordinary language, to speak of someone making a discovery for himself or herself even if it is something already known to others (at [78]);

(5) the condition in s29(5) operates by reference to the state of mind of a particular hypothetical officer of the Board dealing with the taxpayer's case at a particular point in time (either when the time limit for commencing an enquiry into a return made under s8 or s8A TMA expired or when he informed the taxpayer that he had completed his enquiries into the return) (at [68]).

Residence

168. We have explained earlier why the SRT requires a decision regarding the residence of Mr Batten in 2012-2013. That is a year to which the SRT did not apply. As a result, we must apply the relevant common law principles.

169. It is not in dispute that the starting point for reference to the principles governing the treatment of residence is the case of *HMRC v Glyn* [2016] STC 1020 (at [43]-[50]), where David Richards J summarised the relevant legal principles surrounding "residence" and "ordinary residence" by referring to the decision of Lewison J in *HMRC v Grace* [2009] STC 213. The principles applying to ordinary residence are not relevant to this case but those relating to residence are as follows:

> 'i) The word "reside" is a familiar English word which means "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place": *Levene v IRC* [1928] AC 217 at 222. This is the definition taken from the Oxford English Dictionary in 1928, and is still the definition in the current online edition;
>
> ii) Physical presence in a particular place does not necessarily amount to residence in that place where, for example, a person's physical presence there is no more than a stop-gap measure: *Goodwin v Curtis (Inspector of Taxes)* [1998] STC 475 at 480;
>
> iii) In considering whether a person's presence in a particular place amounts to residence there, one must consider the amount of time that he spends in that place, the nature of his presence there and his connection with that place: *IRC v Zorab* (1926) 11 TC 289 at 291;
>
> iv) Residence in a place connotes some degree of permanence, some degree of continuity or some expectation of continuity: *Fox v Stirk*; *Ricketts v Registration Officer for the City of Cambridge* [1970] 2 QB 463 at 477; *Goodwin v Curtis (Inspector of Taxes)* [1998] STC 475 at 481;
>
> v) However, short but regular periods of physical presence may amount to residence, especially if they stem from performance of a continuous obligation (such as business obligations) and the sequence of visits excludes the elements of chance and of occasion: *Lysaght v IRC* [1928] AC 234 at 245;

> vi) Although a person can have only one domicile at a time, he may simultaneously reside in more than one place, or in more than one country: *Levene v IRC* [1928] AC 217 at 223;…
>
> …xiii) Where a person has had his sole residence in the United Kingdom he is unlikely to be held to have ceased to reside in the United Kingdom (or to have "left" the United Kingdom) unless there has been a definite break in his pattern of life: *IRC v Combe* (1932) 17 TC 405 at 411.

170. *Grace* also approved of statements in the case of *Shepherd v Revenue and Customs Comrs* [2005] STC 644 which identified that:

> (1) the duration of an individual's presence in the UK and the regularity and frequency of visits are facts to be taken into account. Birth, family and business ties, the nature of visits and the connections with the UK may or be relevant;
>
> (2) the availability of living accommodation in the UK is a factor to consider as shown by the case of *Cooper v Cadwalader*, (although this is subject to legislation now contained in s830 as described later in this decision);
>
> (3) the fact that an individual has a home elsewhere should be addressed in the multifactorial enquiry, but it must be recognised that a person may reside in two places (*Cooper* and *Levene*).

171. As noted in *Glyn*, the Supreme Court decision in *Gaines Cooper*, and in particular the judgement of Lord Wilson, provide important observations and guidance on the issue of residence more generally. Lord Wilson's judgement was the subject of detailed submissions from both Ms Shaw and Mr Brinsmead Stockham and is therefore something to which we give particular attention.

172. Lord Wilson set out the development of the common law regarding residence explaining (at [14]) that:

> "an individual who has been resident in the UK ceases in law to be so resident only if he ceases to have a settled or usual abode in the UK…the phrase "a distinct break"… is not an inapt description of the degree of change in the pattern of an individual's life in the UK which will be necessary if a cessation of his settled or usual abode in the UK is to take place"

173. Lord Wilson explained that a distinct break "mandates a multifactorial enquiry". The need for "severance of social and family ties" identified by Moses LJ in the Court of Appeal pitched the requirement at too high a level, although it encompassed a substantial loosening of social and family ties.

174. We have been referred to the case of *Combe*, in particular by Ms Shaw, because it dealt with the position of a taxpayer who ceased to be non-UK tax resident where the matter in dispute was whether he had returned to UK residence. It is the only case considering a returner. However, Lord Wilson made clear the context of *Combe*. The case was concerned with the application of the occasional residence rules. Mr Combe had gone to the USA on a three-year apprenticeship. He had no home in the UK and when he returned he stayed in hotels. At the end of the apprenticeship in the USA he returned to the UK in October and spent two trips in France for a couple of weeks on each occasion for his work before the end of the tax year. HMRC maintained that Rule 3 of Schedule E, as the legislation was then written, applied which treated a British citizen who had left the UK as remaining UK tax resident if he left "for the purpose only of occasional residence abroad". The Commissioners rejected HMRC's

contention and the decision of the Court of Session was that their conclusions as matters of fact should not be disturbed.

175. Ms Shaw has acknowledged in her skeleton argument that one of the court in *Combe* expressed some reservations about Mr Combe being treated as non-resident in the year in which he returned to the UK:

> "[Mr Combe] was fortunate in escaping chargeability to Income Tax for the last of the three years. The facts seem to me to show that [his] residence in this country was, during that year, substantially different, both in character and duration, from that of the two preceding years; but the other view of [his] residence in this country, the view taken by the Commissioners, I cannot see to be an unreasonable one."

176. We consider that *Combe* adds little to the jurisprudence in *Glyn* and *Gaines-Cooper*, even though it is the closest authority to the situation in this case of a person ceasing to be UK resident and returning. Ultimately, the basis of the court's decision in *Combe* was that the taxpayer's residence was a matter of fact and the conclusions of the Commissioners were within the bounds of reasonable decisions even though at least one noted the issues regarding the last year. The facts however, were notably different, not least because Mr Combe had no home in the UK (or indeed any business or family links).

177. However, its relevance is described by Lord Wilson who makes clear that *Combe* (and then *Reed v Clark*) led to the formulation of the distinct break principles and also to the result (at [21]) that:

> "if a taxpayer left the UK in order to pursue employment abroad which was full-time, it was likely not only that he would cease to be a UK resident but also that he would escape being deemed still to be a UK resident under the statutory provision. For, from the fact that the employment was full-time, it was likely to follow that he had made a distinct break in the pattern of his life in the UK. By s 11 of the Finance Act 1956 the position of the full-time employee or other worker abroad was strengthened by a provision (now in effect contained in s 830 of the 2007 Act) that, in determining whether he remained resident in the UK, regard should not be had to any place of abode in the UK which he maintained for his use. As I will demonstrate at [36], below, the Revenue also sought to eliminate any remaining element of doubt about the proper treatment of the full-time employee abroad by providing in the booklet that, subject to specified conditions of ostensibly simple application, he would—definitely—be treated as not resident, nor ordinarily resident, in the UK. In his case, therefore, the Revenue was dispensing with the need for the multifactorial inquiry."

178. This description of the operation of s 830 and HMRC's approach thereto is of particular importance in this case given the relevance of HMRC's treatment of Mr Batten as non-resident for 2010-2011 and 2011-2012 as a result, they say, of applying the guidance in HMRC 6, not the common law tests. Lord Wilson addressed the predecessor to HMRC 6, IR20 referring to the matters which the guidance identified as relevant for a taxpayer and said (at [45]):

> "He will surely have concluded that these general requirements in principle demanded – and might well in practice generate – a multifactorial evaluation of his circumstances on the part of the Revenue albeit subject to appeal. If invited to summarise what the booklet required, he might reasonably have done so in three words: a distinct break."

179. Notably, in this case it is HMRC submitting that they were bound to apply the guidance in HMRC 6 as a matter of public law duty, with the result that Mr Batten was treated as non-

resident in 2010-2011 and 2011-2012; while at the same time Mr Brinsmead-Stockham submits that the test of non-residence is to be determined by the common law and when that is done Mr Batten should be found to remain UK resident in those years. We have set out the relevant text from HMRC 6 for reference in the Appendix to this decision.

180. We are clear that having regard to the authorities and, in particular, the Supreme Court in *Gaines-Cooper*, there is, as both parties submitted one common law test for residence which must be applied by us to determine the position of Mr Batten.

181. As stated in *Glyn* (at [98]):

> "One effect of the decision of the Supreme Court is that the issue whether a person has ceased to be resident in the UK is to be determined by reference to the common law tests, not by reference to the contents of IR20."

182. There is no reason why that statement should not also be applied in relation to HMRC 6. In fact, despite the approach of HMRC to Mr Batten's tax treatment in 2010-2011 and 2011-2012, the requirement to apply the common law was relied upon by both parties.

183. Returning to the application of s 830, the provision states (so far as relevant):

> "830 Residence of individuals working abroad
>
> (1) This section applies for income tax purposes if an individual works full-time in one or both of—
>
> (a) a foreign trade, and
>
> (b) a foreign employment.
>
> (2) In determining whether the individual is UK resident ignore any living accommodation available in the United Kingdom for the individual's use...
>
> ... (4) An employment is foreign if all of its duties are performed outside the United Kingdom.
>
> (5) An employment is also foreign if in the tax year in question—
>
> (a) the duties of the employment are in substance performed outside the United Kingdom, and
>
> (b) the only duties of the employment performed in the United Kingdom are duties which are merely incidental to the duties of the employment performed outside the United Kingdom in the year. "

184. Section 830 does <u>not</u> say that an individual working in full time employment overseas is to be treated as non-UK resident. Instead, it provides that the individual's living accommodation in the UK is left out of account and this means that the multifactorial assessment leaves out of account that accommodation while the individual is in full-time employment overseas. We note that this is only for the purposes of income tax. HMRC have not sought to argue that in considering Mr Batten's position for capital gains tax in 2014-2015 the SRT should be interpreted with reference to the residence position of Mr Batten for capital gains tax purposes in 2012-2013. In any event, given Lord Wilson's description of the development of the common law residence test we consider that the distinct break principles he described in paragraph 21 of the judgement should be applied for both capital gains tax and income tax purposes.

185. We consider that there are two questions for us: did Mr Batten cease to be UK resident in 2012-13 or before; and if he ceased to be UK resident prior to 2012-13 had he become UK resident again in 2012-13? For the reasons we explain in the discussion section of this decision

we have concluded that Mr Batten ceased to be UK tax resident in 2010-2011 and therefore the second of these questions must also be addressed.

186. Notably, Mr Gaines-Cooper in the case of *Gaines-Cooper* argued before the Commissioners that the relevant inquiry was not whether he had become non-resident in the UK in 1976 but whether, having then become non-resident, he had again become resident in the UK in any of the later years of assessment. We recognise that the Supreme Court decision was not an appeal of that decision before the Commissioners, but was instead an appeal of the separate judicial review application made by Mr Gaines-Copper and another to rely on HMRC's guidance. However, Lord Wilson, in his description of the principles applying to consideration of tax residence, specifically noted the background of the appeal to the Commissioners in the context of considering the available accommodation rules set out in legislation, which, prior to 1993, had applied not only to employees working full time overseas but also to those who had become non-resident and who had then challenged HMRC's contention that they had become resident once more in the UK. There was no suggestion in Lord Wilson's judgment that (after those available accommodation rules ceased to exist), the rules for those who had ceased to be UK resident and then later returned to the UK should be different.

187. Indeed, neither party has identified any different principles which should apply in this case, although Ms Shaw submits that applying the approach in *Combe* Mr Batten's pattern of residence for 2012-2013 was not substantially different to that in the preceding years. We come back to this submission later.

188. Ms Shaw made reference in her submissions in various contexts to the fact that Mr Batten did not return to the UK for 91 days or more in any of the tax years after he had left for Gibraltar. This picks up on the guidance in HMRC 6. However, as we have explained above, we must apply the common law and s 830 to determine whether Mr Batten ceased being UK tax resident. Given the clear statements in both *Glyn* and *Gaines Cooper* we see no basis to deviate from this approach and apply the guidance in HMRC 6 to determine whether Mr Batten had become UK tax resident again.

189. Furthermore, HMRC 6 itself, even if taken into account, makes clear that the 91-day rules apply only to the years in which a person is employed full time overseas. Therefore, at most, reference to that limit would only be relevant under the terms of HMRC 6 for the tax years 2010-2011 and 2011-2012.

190. Viscount Sumner's judgment in *Levene* confirms that a taxpayer's tax residence should be determined on an annual basis. In *Combe* the potential for the taxpayer being found to be non-resident for two years and resident for one year applying the same principles was envisaged by the court. It is legitimate however, to have regard to the taxpayer's situation in prior and subsequent years as part of "one continuous story" (Lord Sumner in *Levene* at [227]).

191. *Reed v Clark* shows that a person may be motivated by the avoidance of tax and still be found to be non-resident for tax purposes. The question is whether the taxpayer has made a distinct break in the pattern of their life, even if that was only ever intended to be for one year in order to avoid tax. Nicholls J said:

> "Artificial tax avoidance schemes do not find much favour with the courts today. In this case the position, as I see it, is that when deciding issues of residence, ordinary residence and occasional residence all the reasons (including any desire to avoid a liability to United Kingdom income tax) underlying a person's being in a particular place are part of the overall picture. They are part of the material to be looked at and considered when deciding those issues. The presence of a tax avoidance intention may help to show, for

> instance, why a person went abroad at all, or at the particular time he did, how long he intended to remain away, or where his home in fact was in the year of assessment. But residence abroad for a carefully chosen limited period of work there (if that is what the facts establish) is no less residence abroad for that period because the major reason for it was the avoidance of tax."

192. Tax motivation is therefore not irrelevant and, in particular can be an indicator of how long a person intends to remain outside the UK.

193. We turn now to other authorities to which the parties have referred us.

194. As Ms Shaw submitted, a non-resident can make visits to the UK without becoming resident here. Ms Shaw referred us to the case of *Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) where it is noted that HMRC's practice was that a person coming to England for more than 91 days was not automatically regarded as UK tax resident. However, we consider the case takes the position of someone such as Mr Batten no further in and of itself. As noted in the case visits to the UK do not "automatically" cause a person to be UK tax resident, whether previously UK tax resident or not. The correct approach is the multifactorial enquiry considering all the circumstances.

195. One factor to which particular weight has been given by many of the authorities is the existence of a home in the UK. This was most notable in the case of *Cooper v Cadwalader* where an American, ordinarily resident in New York, rented a house and shooting rights in Scotland for about two months in each year, although he was entered in the valuation roll as tenant of the property and it was maintained available for his return at any time. The Lord President concluded that the decision of the Commissioners to allow the appeal was wrong, deciding that a taxpayer's occupation was not of a casual or temporary character, but was substantial and, as regards some of its incidents, continuous (at page 105); and further relied on the fact that the taxpayer had a residence always ready for him if he should choose to come to it. This case was described as an "overwhelming" one by Rowlatt J in *IRC v Zorab* in confirming that the nature of a taxpayer's connections with this country must be assessed. *Cadwalader* was also described by the Court of Appeal in *Grace v HMRC* [2009] STC 2702 as a case where only one result was possible on the facts as found

196. Conversely, it is notable that in the case of *Combe*, the taxpayer did not have any home in the UK.

197. That is not to say that availability of accommodation is somehow determinative in its own right. All of the circumstances must be considered. Therefore in *Levene* where the taxpayer did not have any fixed residence in the UK, but returned for about five months each year in order to obtain medical advice, visit relatives, take part in religious observances and deal with his income tax affairs, the Commissioners' decision that he was resident in the UK was confirmed as a finding of fact being sufficiently supported by the evidence. Notably the House of Lords in *Levene* described *Cooper v Cadwalader* as being a "comparatively simple" case in contrast to the situation where a person has no home or establishment in any country, but lives his life in hotels or at the houses of his friends and in particular where such a person spends a part only of his time in hotels in the UK and the remaining and greater part of his time in hotels abroad.

198. Similarly, in the case of *Lysaght* the House of Lords confirmed that a decision of the Special Commissioners that a taxpayer was resident in the UK where he had previously been resident in England and had left to live permanently with family in Ireland and had no definite place of abode in England, but came to England solely for business meetings every month, remaining here for about a week on each occasion, was a finding of fact sufficiently based on

the evidence. It was observed by Lord Warrington that the strongest factor against the Special Commissioners' decision was that the taxpayer's permanent home was in Ireland.

199. In the case of *Grace* the court re-emphasised the importance of looking at all relevant factors together. In that case it was noted that *Lysaght* provided substantial support for HMRC's view that the taxpayer was resident in the UK given that regular periods of physical presence may amount to residence although, importantly, the court was clear that they do not necessarily lead to this conclusion. That was in the context of a taxpayer who worked as an airline pilot who had bought a house in South Africa which he regarded as his home and in which he intended to retire and who came to the UK only to enable him to perform his duties as a British Airways pilot, but who had retained his house in the UK. As it was concluded that the Special Commissioners had misdirected themselves regarding the correct approach to be taken, the case was remitted (as it was not a simple case such as *Cadwalader)*. The balance between the evidence regarding the taxpayer's presence in the UK using the house he had retained here, as well as related factors connecting him to the UK, and his connections with South Africa needed to be carried out by the fact-finding court.

DISCUSSION

Validity of the assessment

200. We are satisfied on the basis of Mrs Morritt's evidence as explained in our findings of fact that on 26 July 2018 she made the discovery that Mr Batten was no longer employed full-time overseas. None of Mr Batten's returns had given any indication that his foreign employment had ceased in June 2012. Indeed, his tax return for 2012-2013 expressly stated that he was still employed full-time overseas. We see no basis on which a hypothetical HMRC office could reasonably have been expected to be aware of the cessation of Mr Batten's employment before Mrs Morritt's attention was drawn to the letter written regarding LOL's tax position. Indeed, Ms Shaw has not sought to argue the contrary.

201. We consider that Mrs Morritt's belief that Mr Batten's liability to tax had been understated as a result of discovering the cessation of his full-time employment overseas was a reasonable one for her to make for the following reasons.

202. As explained in this decision full-time employment overseas means that a person's available accommodation in the UK is not taken into account in assessing their residence status. Case law has shown that available accommodation is a significant factor to be considered in such an assessment. Furthermore, while Mr Batten's advisor's letter of 6 March 2019 set out various details regarding Mr Batten's move to Gibraltar, the information provided was not such as to make it unreasonable for Mrs Morritt to conclude that Mr Batten was resident in the UK in 2012-2013.

203. Ms Shaw has submitted that the discovery of Mr Batten's employment having ceased on 12 June 2012 was wholly immaterial to his residence position and therefore his tax liability. We do not agree. As we explain in our description of the law and below, the fact of Mr Batten's employment ceasing meant that s 830 no longer applied and the accommodation available for his use in the UK was to be included in the multifactorial enquiry to determine his tax residence. That does not mean that his cessation of employment automatically resulted in him becoming UK tax resident, but that event gave rise to consideration of a significant factor in that enquiry.

204. The fact that Mr Batten had ceased to be employed full-time overseas was therefore highly material to his residence position, albeit not determinative.

205. We can conceive of situations where a highly relevant factor is discovered but further discussions with the taxpayer and/or their advisers means that in fact it would not be reasonable to conclude that the factor meant that the taxpayer's liability to tax had been under assessed.

The relevant issue then is the reasonableness of a subsequent discovery assessment raised by an HMRC officer, not whether a relevant discovery had been made. However, that is not the situation here for the reasons we have explained.

Residence

Did Mr Batten make a "distinct break"?

206. For the reasons we now explain we have decided that the multifactorial enquiry shows that Mr Batten made a distinct break in the tax year 2010-2011 and as a result became non-UK resident in that year.

207. Mr Brinsmead-Stockham submitted that Mr Batten had not relied upon s830. We consider that s830 has not been referred to in Mr Batten's case concerning his residence situation in 2012-2013 because it could not apply in that year. That does not limit us in applying it in the previous years when he was working full time in Gibraltar.

208. Mr Batten had left the UK by the start of the tax year and in 2010-2011:

(1) He made no visits to the UK;

(2) he was working full-time as an employee of LOL and therefore his available accommodation at Parsonage Farmhouse is left out of account;

(3) he had bought and lived in a property in Gibraltar. His family including his wife saw him there and not in the UK;

(4) he had no intention of returning to the UK in that year or shortly thereafter. The evidence in his P85 shows that he expected to be in Gibraltar for 2-3 years when he left the UK.

209. We have found that Mr Batten maintained numerous links to the UK, aside from the accommodation which is disregarded by us in accordance with s 830, such as presence of family, (most notably his wife, daughter and grandchildren); continued involvement in his property lettings business, and the management of the care home business as explained in the findings above, continuation on the electoral roll as an overseas voter, and retention of bank accounts. However, we consider that the relocation to Gibraltar taken together with the circumstances of his new employment there, looking for opportunities to expand the care home business, gives rise to the necessary degree of change in the pattern of Mr Batten's life in the UK for a cessation of his settled or usual abode in the UK to have taken place. We note that Mr Batten had taken steps such as changing the address for his post and informing various institutions with which he dealt that he had moved, but these steps were merely incidental to, and consistent with, his relocation to Gibraltar.

2011-2012

210. Although Mr Batten visited the UK in 2011-2012 for 69 days he continued to work full-time as an employee of LOL and therefore his available accommodation at Parsonage Farmhouse continued to be left out of account. He continued to live in his property in Gibraltar with family visiting him there as before and we are satisfied that he had no intention of returning to the UK in 2011-2012. The result is that when the multifactorial enquiry is conducted for this year the conclusion remains that a distinct break continued despite some visits to the UK.

2012-13

211. Shortly after the start of the year Mr Batten's employment with LOL came to an end after the expiry of his six-month notice period on 12 June 2012. From that point onwards Mr

Batten's accommodation at Parsonage Farmhouse must be included in the multifactorial enquiry. Therefore from that point we balance the following factors:

(1) Mr Batten had accommodation at his family home which was available for him at all times. His wife lived there and ran the house while he was not there. It was therefore a home which was constantly ready for him and it was the family home to which his sons would also return;

(2) although Mr Batten had bought an apartment in Gibraltar and his son Ian was living with him (and for the first few months George Batten had joined them) the family home remained Parsonage Farmhouse to which all of them returned when in the UK. There was no sense conveyed to us of the apartment in Gibraltar becoming another family home. Mr Batten had only taken a small carload of possessions to Gibraltar and even though we recognise that, as we were consistently told, much of Mr Batten's time was outside when in Gibraltar, he recognised himself that were he to permanently relocate it would not serve as a family home. The apartment had an area of only 80 square metres. When Mrs Batten took their grandson for visits she would generally stay with her son Ian in his larger accommodation in Benalmadena and only make day trips with Ian and her grandson to see Mr Batten;

(3) Mr Batten returned to the UK and stayed at Parsonage Farmhouse for 84 days across four separate visits: 26 April to 11 May 2012, 7 to 8 August 2012, 3 December 2012 to 16 January 2013 and 7 to 31 March 2013. The August trip was to attend the London Olympics and otherwise he returned to see family. Between 16 January 2013 and 7 March 2013 he was in Thailand and Dubai. However, this must be viewed in the context of the fact that he spent a total of 231 days in Gibraltar with 50 spent outside both Gibraltar and the UK;

(4) he was able to use at least one car when he came back to the UK;

(5) Mr Batten had continued his support of Sunderland Football Club from Gibraltar;

(6) Mr Batten remained on the UK electoral roll as an overseas voter, although he also registered to vote in Gibraltar;

(7) Mr Batten had bought a second apartment, in the same complex in Gibraltar as the apartment in which he lived, which he had started to let. He has retained that apartment after returning to the UK;

(8) Mr Batten continued to have active UK bank accounts, but also set up a current and savings account in Gibraltar;

(9) Mr Batten had obtained a civil registration card in Gibraltar to enable him to access services;

(10) he had redirected post for two years to Gibraltar. This redirection therefore had ceased by April 2012, but by that time any senders of note could have been informed of his new postal address. We have found that that occurred and therefore correspondence such as that for his credit card would have been continuing to be sent to Gibraltar;

(11) he continued, much as he had done before leaving the UK in 2010, to be actively involved in his properties letting business. Whilst day-to-day operation was left to his daughter, he had overall control of whether properties were bought or sold. He bought two properties at the start of the 2012-2013 tax year. Emma Batten was unable to pursue litigation relating to the tenancies (the Power of Attorney not being granted until June 2013);

(12) Mr Batten was the sole shareholder and managing director of LOL and as we have found was actively involved in the management and control of that company with his wife. That continued, through the form of a company, the position which had been in practice since 1995 when Mrs Batten had taken over day-to-day management of the business;

(13) very soon after the end of the tax year Mr Batten purchased the property in the UK for development. He was sent plans and estimates in Gibraltar, but the fact of this development is indicative of Mr Batten's focus once more on activity in the UK after ceasing employment with LOL;

(14) similarly, in the course of 2012-2013 Mr Batten entered into the arrangements with Sheppey United Football Club for them to use a ground owned by him, had started to lend the club funds, and had been appointed honorary chairman. By February 2013 his daughter had become a director and 50% shareholder and we have found that this was directly linked to her father's involvement. Importantly, in the context of the balance we are carrying out, the involvement with Sheppey United reflected Mr Batten's long-standing and close attachment to that community which was still ongoing. That is not to ignore the fact that Mr Batten participated in social life in Gibraltar. He joined a gym there and went to social events there. He played football there with his sons and in March 2012 took on the role of assistant coach for a local team.

212. Given the authorities to which the parties have referred and the principles set out therein which we must apply, we conclude that when all of his circumstances in 2012-2013 the conclusion is that Mr Batten was UK tax resident in 2012-2013. When the multifactorial enquiry no longer takes into account full-time employment overseas and account is taken of the available accommodation at Parsonage Farmhouse, we consider that the result is that Mr Batten was UK tax resident. We consider that the distinct break came to an end in 2012-13.

213. We also consider that, even if the distinct break was only considered to cause the cessation for UK residence, when the general principles set out in the authorities are considered, Mr Batten's "settled or usual abode" was at Parsonage Farmhouse.

214. Our conclusions are reached by us with no account being taken of any tax motivation. As explained above tax motivation does not alter the fact of a person's residence. However, given our role as a fact-finding tribunal and the relevance of tax motivation in considering a person's intentions identified by the case of *Reed v Clark*, as well as the relevance of past and future years in identifying the "one continuous story", we also find that Mr Batten remained in Gibraltar after his employment with LOL finished with the intention of receiving cash from LOL through bonuses and dividends without UK tax and then realising gains on his property portfolio without a tax charge.

215. Considering the evidence overall we find that while Mr Batten was happy to have a second home in Gibraltar, which he and the family continue to use to this day, he did not have an intention to make Gibraltar his home longer term. He enjoyed the lifestyle in the summer months in Gibraltar when the place was buzzing, but he spent much of the winter months away from Gibraltar from 2012 onwards, with a considerable period over Christmas and New Year in the UK. He never took additional possessions beyond those initially transported in his relatively small car and as the years passed he returned more frequently to the UK, to the extent that he engaged in the brief runs to Calais to reduce his midnight count here. His "home" in the truest sense of that word, with all that encapsulates in the context of accommodation and a centre of life, was in the UK.

216. We recognise that the result is untidy. Mr Batten was non-resident in 2010-2011 and 2011-2012, UK resident in 2012-2013, non-resident in 2013-2014 and UK resident in 2014-2015. However, the rules are applied on an annual basis and consequently such results can and will arise.

217. We also recognise that the application of the SRT to the tax year 2012-2013 would have produced a different result. However, those rules are not applicable to that year. While we recognise that the SRT was designed to incorporate sufficient elements that it would generally produce the same result as the preceding common-law, codification of common law principles will, by nature, produce some differing results. Indeed, the consultation documents to which Ms Shaw referred us recognise just that. More importantly, there is no basis on which we can apply the SRT retrospectively.

Consequential findings for 2014-2015

218. As a result of finding that Mr Batten was UK tax resident in 2012-2013, the application of the SRT in 2014-2015 means that he is also UK tax resident in 2014-2015.

CONCLUSION

219. For all the reasons set out we have decided that Mr Batten's appeal should be dismissed. He was UK tax resident in 2014-15 and the assessment issued on 4 April 2019 is confirmed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

TRACEY BOWLER
TRIBUNAL JUDGE

Release date: 23 JUNE 2022

APPENDIX

Extract from HMRC 6

8.5 Leaving the UK to work abroad as an employee

If you are leaving the UK to work abroad full-time, you will only become not resident and not ordinarily resident from the day after the day of your departure, as long as:

• you are leaving to work abroad under a contract of employment for at least a whole tax year

• you have actually physically left the UK to begin your employment abroad and not, for example, to have a holiday until you begin your employment

• you will be absent from the UK for at least a whole tax year

• your visits to the UK after you have left to begin your overseas employment will

– total less than 183 days in any tax year, and

– average less than 91 days a tax year. This average is taken over the period of absence up to a maximum of four years.

8.6 Returning to the UK after working abroad

If you were not resident and not ordinarily resident when you were working abroad and you return to the UK when your employment ends, you will be not resident and not ordinarily resident in the UK until the day before you return to the UK. You will become resident and ordinarily resident on the day you return to the UK unless you can show that your return was simply a short visit to the UK between two periods of full-time employment abroad.

However, if you have previously been resident in the UK and are returning to become resident here again after a period of residence abroad, you might need to consider whether your absence from the UK was a period of 'temporary non-residence'. If you were temporarily non-resident in the UK, this may affect your liability to UK tax when you return to become resident in the UK again.

8.7 Changes to your employment when abroad

If your circumstances change while you are abroad, for example there is a break in full-time employment, you might no longer meet the requirements of paragraph 8.5 and so remain resident and ordinarily resident in the UK. You must tell us about such changes by contacting your tax office.

You must also tell us when you return to the UK at the end of an overseas employment, even if you are planning to go abroad again to work under a new contract of employment. You must do this even though you see your return to the UK as temporary and for a very short period. You should tell us this information by contacting your tax office.