Neutral Citation: [2013] IEHC 398

THE HIGH COURT

REVENUE

[2011 No. 1120 R]

BETWEEN

DENIS O'BRIEN

APPELLANT

AND

JOHN QUIGLEY

INSPECTOR OF TAXES

RESPONDENT

Judgment of Ms. Justice Laffoy delivered on 6th day of September, 2013.

The proceedings and procedural background

1. The background to this Case Stated was that during the tax year 1999/2000 the appellant disposed of 5,734,000 shares in Esat Telecom in exchange for loan notes in BT Hawthorn Limited valued at €285,927,994. In December 2000 the loan notes were disposed of by the appellant to Chase Bank Plc for a net consideration of €284,830,824. The disposal gave rise to a potential capital gains tax liability of €56.86m for the tax year 2000/2001 (6th April, 2000 to 5th April, 2001), in addition to liability on certain other capital gains arising on the disposal of other assets. On 8th October, 2002 the respondent raised an assessment to capital gains tax on the appellant in the sum of €57,848,753 for the tax year 2000/2001.

2. The appellant appealed the assessment. The appeal was heard by Ronan Kelly (the Appeal Commissioner) on 7th, 8th and 30th July, 2003. In an oral decision communicated to the parties on 26th September, 2003, the Appeal Commissioner effectively allowed the appeal by agreeing with the arguments advanced on behalf of the appellant.

3. The respondent being dissatisfied with the determination of the Appeal Commissioner, the Appeal Commissioner was requested by letter dated 1st October, 2003 to state a case for the opinion of the High Court pursuant to s. 941 of the Taxes Consolidation Act 1997. The question of law for the determination of the Court set out in the Case Stated, which is dated 16th December, 2011, is:

> "Whether, having regard to the evidence given and the facts found by me as aforesaid, I was correct in holding that 6 Raglan Road, Ballsbridge, Dublin 4 was not a permanent home available to the appellant for the tax year 2000/2001 for the purposes of Article 4.2 of the Ireland/Portugal Double Taxation Convention".

Article 4.2 of Ireland/Portugal Double Taxation Convention

4. By virtue of the Double Taxation Relief (Taxes on Income) (Portuguese Republic) Order 1994 (S. I. No. 102/1994), the Convention entitled "Convention between Ireland and the Portuguese Republic for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income" (the Convention), the text of which is set out in the schedule to the Order, was given force of law in this jurisdiction.

5. To put Article 4 thereof in context, Article 1 of the Convention provides that the Convention "shall apply to persons who are residents of one or both of the Contracting States". Article 1, which is headed "Personal Scope", is contained in Chapter 1, which is headed "Scope of the Convention", as is Article 2, which is headed "Taxes Covered". Article 4 is contained in Chapter 2, which deals with definitions. Article 3 contains general definitions. Article 4 is headed "Resident" and provides as follows:

> "1. For the purpose of this Convention, the term 'resident of a Contracting State' means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. But this term does not include any person who is liable to tax in that State in respect only of income from sources in that State.
>
> 2. Where, by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his status shall be determined as follows:
>
> (a) he shall be deemed to be a resident of the Contracting State in which he has a permanent home available to him; if he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident of the Contracting State with which his personal and economic relations are closer (centre of vital interests);
>
> (b) if the Contracting State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode;
>
> (c) if he has an habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident of the State of which he is a national;
>
> (d) if he is a national of both Contracting States or of neither of them, the competent authorities of the Contracting

States shall settle the question by mutual agreement.

3. Where, by reason of the provisions of paragraph 1, a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident of the Contracting State in which its place of effective management is situated."

The appellant, being an individual who was a resident at the material time of both Contracting States, paragraph 2 of Article 4 applied to him. The case made by the appellant before the Appeal Commissioner and in this Court was that, by virtue of the application of paragraph 2(a), in the tax year 2000/2001 he was not deemed to be a resident of Ireland, because Ireland was not a Contracting State in which he had "a permanent home available to him". The term "permanent home available" is not defined in the Convention, nor is any of its three components.

Principles of interpretation of Convention

6. The relevant principles of interpretation applicable to the construction and application of a Double Taxation Convention, such as the Convention, were considered by the High Court (Kelly J.) *in Kinsella v. Revenue Commissioners* [2011] 2 I.R. 417, where, in the context of the application of a Double Taxation Convention with Italy dating from 1971 and incorporated into Irish law in 1973, it was stated (at para. 41):

"This State acceded to the Vienna Convention on the Law of Treaties with effect from the 6th September, 2006. Even before that event it is clear from the decision of Barrington J. in *McGimpsey v. Ireland* [1988] I.R. 567 that in interpreting an international treaty the court ought to have regard to the general principles of international law and in particular the rules of interpretation of such treaties as set out in articles 31 and 32 of the Vienna Convention."

7. The decision in *McGimpsey v Ireland* concerned a constitutional challenge to the Anglo-Irish Agreement of 15th November, 1985. In that case, it was held by the High Court that an international treaty must be interpreted having regard to international law and such interpretation should not be coloured by reference to the Constitution. In his judgment, Barrington J. stated (at p. 582):

"An international treaty has only one meaning and that is its meaning in international law. Its interpretation cannot be coloured by reference to the Constitution. The approach to the interpretation of post constitutional statutes laid down in *East Donegal Co-Operative Society v. The Attorney General* [1970] I.R. 317 can have no application to the interpretation of a treaty. For guidance on this subject one must look to the general principles of international law and in particular to the rules of interpretation set out in article 31 of the Vienna Convention on the Law of Treaties. Ireland, admittedly, is not a party to that convention, but article 31 is acknowledged to have codified the relevant principles of interpretation."

8. Article 31 of the Vienna Convention is headed "General rule of interpretation". Paragraph 1 of Article 31 provides:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

Paragraph 2 elaborates on what the context for the purpose of the interpretation of a treaty shall comprise and paragraph 3 sets out what shall be taken into account together with context, neither of which paragraphs is of any particular relevance for present purposes. Paragraph 4 provides that a special meaning shall be given to a term if it is established that the parties so intended.

9. Article 32 of the Vienna Convention, which is headed "Supplementary means of interpretation" provides:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

10. In *Kinsella v. Revenue Commissioners*, having outlined the provisions of Articles 31and 32 of the Vienna Convention, Kelly J. stated (at para. 44):

"In accordance with what is prescribed by the Vienna Convention, I must therefore interpret the Convention in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the Convention's object and purpose. Where such an interpretation leaves the meaning of the Convention ambiguous or obscure or leads to a manifestly absurd or unreasonable result then recourse can be had to supplementary means of interpretation. These means of interpretation could, in an appropriate case, include the OECD Model Convention with respect to Taxes on Income and Capital (the Model Convention) as well as the commentaries thereon."

That passage, in my view, clearly sets out the proper approach to be adopted in interpreting and applying a Double Taxation Convention. It was the approach adopted by the Appeal Commissioner on the appellant's appeal.

11. In the Case Stated (at para. 13), the Appeal Commissioner stated:

"In reaching my determination, I was satisfied that Barrington J. in *McGimpsey v. Ireland* . . . sets out the manner in which general principles of interpretation of international law, and in particular the rules of interpretation set out in Article 31 of the Vienna Convention on the Law of Treaties should be approached. Article 31 takes a purposive approach to the interpretation of legislation which is different to the approach generally followed in interpreting taxing statutes. It is this purposive approach that I have applied in relation to this hearing."

Indeed, on the hearing of the Case Stated, counsel for the respondent submitted that the Appeal Commissioner in that passage had identified the correct methodology for construing Article 4(2) of the Convention. However, it was submitted that, having identified the correct methodology, the Appeal Commissioner proceeded to fall into error by applying a literal construction to Article 4(2).

The Court's function on the Case Stated
12. The function of the High Court when determining, on the hearing of a case stated, whether a particular decision was correct in law and the principles to be applied by it are well settled. The position was summarised as follows by Blayney J., with whom the other Judges of the Supreme Court concurred, in *Ó Culachain v. McMullan Brothers Ltd*. [1995] 2 I.R. 217, where he stated (at p. 222):

> "In the light of these statements of the law it seems to me that when a court has before it a case stated seeking its opinion as to whether a particular decision was correct in law, the following principles apply (I refer in them to a case stated by a judge, as is the position here, but they apply equally where the case is stated by the Appeal Commissioners or by any other party) –
>
> (1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.
>
> (2) Inferences from primary facts are mixed questions of fact and law.
>
> (3) If the judge's conclusions show that he has adopted a wrong view of the law, they should be set aside.
>
> (4) If his conclusions are not based on a mistaken view of the law, they should not be set aside unless the inferences which he drew were ones which no reasonable judge could draw.
>
> (5) Some evidence will point to one conclusion, other evidence to the opposite: these are essentially matters of degree and the judge's conclusions should not be disturbed (even if the court does not agree with them, for we are not retrying the case) unless they are such that a reasonable judge could not have arrived at them or they are based on a mistaken view of the law."

13. As regards those principles, it was submitted on behalf of the respondent that the Appeal Commissioner breached the principles at (3), (4) and (5) in the passage quoted above, in that he adopted a wrong view of the law, he drew inferences which no reasonable Appeal Commissioner should draw, and he arrived at conclusions that a reasonable Appeal Commissioner could not have arrived at, being conclusions based on a mistaken view of the law.

14. In the Case Stated the Appeal Commissioner addressed two matters which had been raised for his determination by way of preliminary issue. The first related to on whom the onus of proving whether or not the appellant had, at the material time, a "permanent home available" in Ireland within the meaning of Article 4(2)(a) of the Convention fell. He determined that the onus lay on the appellant. No issue was raised on that determination on the Case Stated. Secondly, he was required to determine whether the two tests in Article 4(2)(a), namely, the "permanent home available" test and the "centre of vital interests" test should be addressed together or sequentially. He determined that "the permanent home available" test should be determined first. He determined that issue in favour of the appellant, holding that the appellant did not have a permanent home available to him in Ireland in the tax year 2000/2001, which, in effect, disposed of the matter. However, it is common case that, if this Court were to determine that the Appeal Commissioner erred in law in his determination, the matter would have to be remitted to the Appeal Commissioner to determine the second test, the "centre of vital interests" test.

15. It is also appropriate to record that the Appeal Commissioner stated in the Case Stated (at para. 13) that the standard of proof which he had applied was "on the balance of probabilities". No issue was taken on the Case Stated as to the application of that standard.

The factual background
16. In setting out the factual background, the Court must rely on the facts as set out in the Case Stated. In fact, the Appeal Commissioner has comprehensively outlined the evidence adduced by the parties before him at the hearing of the appeal in the Case Stated. In summarising the factual background below, the relevant paragraphs of the Case Stated will be indicated.

17. The appellant's private residence in Ireland was at 77, Wellington Road, Ballsbridge, Dublin, 4 for a number of years prior to his marriage, and it became the family home of the appellant and his wife after their marriage. The appellant and his wife ceased to reside there in early February 2000 when they moved to Portugal. Subsequently, those premises were the subject of an arm's length letting agreement and, at the time of the hearing of the appeal, that property was still let. The Appeal Commissioner recorded that the respondent did not argue that 77, Wellington Road was available to the appellant (para. 8.3).

18. The house to which the appellant and his wife moved to in Portugal in February 2000 had been built by him in 1998 on a site which he had purchased in 1996. The Appeal Commissioner recorded that the appellant and his family had their home during the relevant period in this house in Portugal (para. 8.4). The Appeal Commissioner also recorded that the appellant was tax resident in Portugal for the year 2000/2001 and that his residence status had been accepted by the Portuguese taxation authorities. The Appeal Commissioner further recorded that the appellant's taxation status in Portugal was not contested by the respondent. However, the respondent's position was that the appellant was a resident of both Ireland and Portugal for the purposes of Article 4.1 of the Convention, the respondent's position being that a property at 6, Raglan Road, Ballsbridge, Dublin, 4, was a permanent home available to the appellant for the tax year 2000/2001 (paras. 3.1 and 3.2).

19. The history of the appellant's involvement with (to use a neutral expression) 6, Raglan Road in accordance with the evidence given by the witnesses on the appeal is recorded in detail by the Appeal Commissioner in the Case Stated. In summary, by a contract dated 10th February, 2000 made between Peter White and Laetitia White, the then owners of 6, Raglan Road, of the one part, and Parteney Limited, a company controlled by the appellant, of the other part, Parteney Limited contracted to buy 6, Raglan Road. The purchase was completed on 10th May, 2000. The kitchen units, including the in-built Aga cooker, did not form part of the sale and were removed from the house by the vendors prior to the completion of the purchase (paras. 8.7 and 8.8).

20. Extensive building works, which had been commissioned by Parteney Limited, were carried out to 6, Raglan Road after the purchase was completed. Opening-up works commenced in June 2000 and the house was subject to increasingly invasive opening-up works from June to September 2000 and remained in the opened-up stage from then until the contract work commenced the following January 2001, at which point, as the project architect involved described it in his evidence, the premises became "a hard hat site". The contract works were in progress throughout the calendar year 2001 (para. 8.9 and para. 9.7). The Appeal Commissioner outlined the evidence given by various witnesses called on behalf of the appellant, who had been retained in connection with the building and refurbishment works: three architects; an electrical engineer; a civil construction engineer; a quantity surveyor; and a representative of the firm engaged to carry out refurbishment and joinery work and, in particular, work to the sixty windows in the house, thirty eight of which were completely replaced (paras. 9.1.1 to 9.1.7).

21. In early 2002, the appellant's wife took a one-year lease commencing on 14th February, 2002 of 6, Raglan Road from Parteney Limited. Thereafter, the appellant and his wife and children occupied the house during the course of their visits to Ireland. The house was vacated by them on 13th March, 2003 (para. 8.12). The extensive building works which Parteney Limited had commissioned had been completed and the house had been decorated and fitted out to exacting and high-quality specifications before the appellant and his family went into occupation of 6, Raglan Road. The house had been fully furnished (some of the furniture from 77, Wellington Road having been in storage since February 2000) and an extensive garden-landscaping programme had been carried out. All of the works had been finished in the weeks immediately prior to the commencement of occupation, subject to the completion of the snag list by the contractors, which was finalised post-commencement of the occupation (para. 8.13).

22. The only evidence adduced by the respondent was the evidence of Mr. White and Mrs. White, who had purchased 6, Raglan Road in 1985 and who had lived in it as their family home up to 10th May, 2000, apart from a six month period in 1990. The various repairs and improvements to the property which had been carried out by Mr. White and Mrs. White including roof slating, electrical wiring, plumbing, window repairs, heating systems and decoration and internal lay-out and the installation of a new kitchen and bathrooms were outlined (paras. 9.12.3 et seq.). The thrust of the evidence was to demonstrate that 6, Raglan Road was in good and habitable condition in May 2000. The Appeal Commissioner summarised Mrs. White's evidence (at para. 9.13.10) to the effect that when she and her husband left the house in May 2000 they were happy to have been living there and wanted to continue. She could have seen herself and her husband living there for years to come. The house was habitable when they left, although she accepted that other people were entitled to alter it.

23. The Appeal Commissioner, having heard the evidence of the appellant and his wife, recorded that neither the appellant nor his wife nor his family had resided in 6, Raglan Road at any time prior to the end of the tax year under review, the 2000/2001 tax year (para. 8.11). The Appeal Commissioner also recorded that 6, Raglan Road was acquired on behalf of the appellant "as in investment", although, at the time of purchase, both the appellant and his wife had it in mind that it could potentially at some stage in the future be used as a family home. The appellant acknowledged, under cross-examination, that he and his wife could have, if they had so chosen, moved into the house at the time of purchase, but that the house would not have been suitable for his family (para. 9.1.2).

24. The appellant's wife gave evidence that her home was in Portugal and that was where she lived. Her "stuff" (meaning her and her family members' personal belongings, including items no longer in use and in storage) was in Portugal and that was where her home was. Her two children were going to school in Portugal. When her friends wrote to her they wrote to her address in Portugal (para. 9.1.7).

Findings of the Appeal Commissioner

25. Having outlined what he considered to be the approach to be adopted by him in paragraph 13, as quoted earlier, the Appeal Commissioner recorded that in his oral decision he agreed with and adopted the arguments advanced by the appellant. He set out his findings as follows:

> (a) He was satisfied that the property "was acquired by the appellant for investment purposes and with the idea that it might be used as a family home in the future" (para. 13.1).
>
> (b) The notion of "home" in the context of the "permanent home available" test is a residential premises "upon which people have put their own stamp and where they have lived for some time and where they had their 'stuff'" (para. 13.2).
>
> (c) Neither the appellant nor his wife nor his family had resided in 6, Raglan Road at any time prior to the end of the tax year 2000/2001. He was satisfied that the appellant "did not make his mark or put his stamp on" the premises during the period in question (para. 13.3).
>
> (d) Works were being carried out to 6, Raglan Road from June 2000 to the end of 2001 and, therefore, he concluded that the premises were not "a home of the appellant either before or during the tax year 2000/2001". Therefore, it could not be said that the appellant had "a permanent home available to him" at 6, Raglan Road in that period (para. 13.4).
>
> (e) Because of the absence of kitchen units and equipment in May 2000, the opening-up works between June 2000 and September 2000 and the contract works which commenced in January 2001, he was satisfied that the house could not reasonably be regarded as "available" in the sense of a "permanent home available" to the appellant during the tax year 2000/2001 (para. 13.5). The fact that the works were carried out at the request and choice of the appellant did not alter the situation. The property was not a "permanent home available" (para. 13.6).

OECD Commentary on Article 4

26. Article 4 of the Convention is a verbatim replication of Article 4 of the OECD Model Convention. The Court was referred to the OECD Commentary on Article 4 of the OECD Model Convention published in September 1992. In line with the observations of Kelly J. in *Kinsella v. Revenue Commissioners*, this Court may have recourse to the Commentary and, indeed, both parties invoked it in their submissions.

27. Having identified that paragraph 2 of Article 4 relates to the case where, under the provisions of paragraph 1, an individual is a resident of both Contracting States, the Commentary continues (at para. 10):

> "To solve this conflict special rules must be established which give the attachment to one State a preference over the attachment to the other State. As far as possible, the preference criterion must be of such a nature that there can be no question but that the person concerned will satisfy it in one State only, and at the same time it must reflect such an attachment that it is felt to be natural that the right to tax devolves upon that particular State."

There the Commentary identifies the necessary qualities of the preference criterion: certainty of outcome in what has become known as the "tie-breaking" task; and reflection of the underlying objective, being to identify the State which has the "natural" entitlement to tax the individual.

28. The Commentary goes on to point out (in para. 11) out that Article 4 gives preference to the Contracting State in which the individual has a permanent home available to him, observing that this criterion will frequently be sufficient to solve the conflict. The Commentary (in para. 12) then explains sub-paragraph (a) of paragraph 2 as follows:

> "Sub-paragraph (a) means, therefore, that in the application of the Convention (that is, where there is a conflict between

> the laws of the two States) it is considered that the residence is the place where the individual owns or possesses a home; this home must be permanent, that is to say, the individual must have arranged and retained it for his permanent use as opposed to staying at a particular place under such conditions that it is evident that the stay is intended to be of short duration."

The "concept of home" is then addressed (in para. 13), where it is stated:

> "As regards the concept of home, it should be observed that any form of home may be taken into account (house or apartment belonging to or rented by the individual, rented furnished room). But the permanence of the home is essential; this means that the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily of short duration (travel for pleasure, business travel, educational travel, attending a course at a school, etc.)."

In quoting that passage in the Case Stated (at para. 10.3.4) the Appeal Commissioner underlined the words "at all times continuously", which were also emphasised by counsel for the appellant.

29. The Commentary then goes on to address the situation in which the individual has a permanent home in both Contracting States. However, the issue with which the Court is concerned on the Case Stated is whether, as a matter of law, the Appeal Commissioner was correct in his finding that in the tax year 2000/2001 the appellant did not have "a permanent home available to him" at 6, Raglan Road, so that the question as to the appellant's liability to capital gains tax in this jurisdiction for that tax year was disposed of, so that the application of the second limb of paragraph (a) and paragraphs (b) and (c) did not arise, nor was settlement by mutual agreement in accordance with paragraph (d) necessary.

The authorities cited

30. Of the multiplicity of authorities from other jurisdictions cited by counsel for the parties, I consider that it is sufficient to address only two authorities, each of which was a decision of a forum in New Zealand. The Appeal Commissioner, clearly on the basis of the submissions made on behalf of the appellant, attached particular significance to the first. The Appeal Commissioner did not consider the second, which was heavily relied on on behalf of the respondent on the hearing of the Case Stated, because it dates from 2011.

31. The first is the decision of the Supreme Court, Auckland in *Geothermal Energy New Zealand Ltd. v. Commissioner of Inland Revenue* [1979] 2 NZLR 324. In that case the Court was considering the application of a statutory provision of the income tax code in New Zealand to New Zealand nationals who were working in foreign countries and staying there for a period of at least fifteen months. The statutory provision was in the following terms:

> "A person other than a company shall be deemed to be resident in New Zealand within the meaning of this Part of this Act if his home is in New Zealand."

While the judgment of Beattie J. on the application of that provision is enlightening, it has to be borne in mind that it is a judgment which was concerned with the interpretation of a statutory provision, not a treaty provision, in accordance with the rules of interpretation of domestic law, not in accordance with the rules of interpretation of international law. Further, the word "home" was not qualified in the relevant statutory provision.

32. In his judgment, Beattie J. contrasted the essence of the concept of "domicile" and the essence of the concept of "home", stating that the essence of the concept of "home" can be gleaned from the major dictionaries, citing various definitions. A similar approach was adopted by the Appeal Commissioner in the Case Stated (paras. 10.2.2 et seq.). Beattie J. concluded (at p. 342) that the word "home" unqualified by an adjective such as permanent is a very different concept from "domicile", characterising "home" as –

> ". . . simply the location of what for the present constitutes the centre of gravity of the domestic life of the taxpayer – the axis around which his domestic life revolves.

33. The Appeal Commissioner quoted, in part, the following declarations made by Beattie J. at the end of his judgment, where, having stated that the issues were neither abstract nor academic but he was concerned with real questions of fact, continued:

> "(a) Section 241 . . . is exhaustive in its definition whether applied to a person or a company.
>
> (b) The essence of the 'home' criterion as used in s. 241(1) is the centre of gravity for the time being of the life of the person concerned. It will usually be where his wife and children reside. If he has no such family, or is separated, divorced or single, then the place where the normal course of his life occurs will apply – that is, the centre of his interests and affairs.
>
> (c) Though 'home' needs some degree of permanency, it does not connote 'permanent home' in the sense making it similar to the concept of 'domicile'. The distinction should also be drawn between the place that has become the centre of gravity and that which is merely used for some ephemeral or transient purpose.
>
> (d) 'Home' under s. 241 should not be regarded as synonymous with the ownership of any interest in a house or property. It should in my opinion be construed qualitatively."

Despite the very fundamental features which distinguish the task which Beattie J. was performing and this Court's task on the Case Stated, which have been adverted to earlier, I am of the view that the judgment of Beattie J. does give guidance as to the meaning of "home", when used in the context of the determination of liability for tax in a particular jurisdiction. In particular, paragraph (b) in the last passage from his judgment quoted above does represent the ordinary meaning of "home". Accordingly, I consider that it was appropriate for the Appeal Commissioner to have had regard to the judgment.

34. It is interesting to note en passant that, in discussing what was necessary to establish "residence", Beattie J. cited the judgment of the former High Court in *Iveagh v. Revenue Commissioners* [1930] I.R. 386 and, in particular, a passage from the judgment of Sullivan P. (at p. 415), in which Sullivan P. stated that, in view of the fact that at no time during the two years under consideration by him was the late Earl of Iveagh in this country, he was not a person residing in Saorstát Éireann in those years. Apart from being an interesting distraction, however, the citation has no relevance to the issue on the Case Stated.

35. The later New Zealand authority relied on by counsel for the respondent is the decision of the Tax Review Authority, Wellington

Registry, in *FFF v. Commissioner of Inland Revenue* [2011] NZTRA 8. In that case, the applicant, referred to as "the disputant", at the end of a distinguished banking career, was offered a top management role for his banking group in Fiji with about a five year term. Taxation issues having arisen, the Authority had to determine the application of a provision (Article 4(2)(a)) of the Double Taxation Convention between New Zealand and Fiji, which was precisely in the same terms as Article 4(2)(a) of the Convention. Judge P. F. Barber, as Taxation Review Authority, identified the issues he had to determine as being whether, in the five relevant income tax years (2002 – 2006), the disputant was resident in Fiji for the purposes of Fiji tax; and, if so, given that he was also a New Zealand resident, how did the tie-breaker rules prescribed in Article 4 of the relevant Double Taxation Convention apply to him.

36. The material facts of that case were that, during the relevant period, while in Fiji the disputant lived in houses which were furnished and provided to him by his employer, but he also maintained a family home at Saint Heliers in Auckland, New Zealand. However, he had embarked on building works at his Saint Heliers home, at first by way of renovation with a view to letting, but the project grew into one of extension of the residence. Nevertheless, it was meant to be a six month project from May 2003 but matters dragged on. Indeed, the story has a familiar ring in this Court, in that the builder went into liquidation and a new builder had to be engaged. The disputant and his wife had at all times retained ownership of the property in Saint Heliers and on the disputant's return to New Zealand, on completion of his secondment, he and his wife returned to live at that property as their family home.

37. In addressing the question whether the disputant had a permanent home available to him in New Zealand, Judge Barber stated that the fact that for a period, as a result of the renovation work they had arranged to have done in the exercise of their power of control, the dwelling in Auckland may have been temporarily uninhabitable did not mean that it ceased to be a permanent home available to the disputant in New Zealand within the meaning of those words in Article 4(2). Judge Barber (at para. 50) stated that he agreed with the reasoning of counsel for the Commissioner of Inland Revenue that, at material times, the disputant's family home at Saint Heliers remained a permanent home available to him in New Zealand within the meaning and application of Article 4(2)(a); and, on the totality of the evidence, the disputant had failed to demonstrate otherwise. That finding was preceded by an outline of the submissions of counsel for the Commissioner of Inland Revenue to the effect that the evidence was clear that, at all material times, the disputant had a personal link to the Saint Heliers home in the respects outlined (at para. 49), namely:

> (a) that it had been his family home since 1992;
>
> (b) he had lived in the house with his wife, and their two daughters prior to his departure for Fiji;
>
> (c) he had retained ownership of it, met outgoings over it and for the provision of services to it and, on his permanent return to New Zealand, had returned to it as his family home;
>
> (d) a compelling inference was that the renovation work carried out on the house during his absences from New Zealand was to enhance the property as his family home in retirement and after his return from Fiji, the disputant and his wife continued to live in the Saint Heliers home as their family home;
>
> (e) at all material times the Saint Heliers home was within the disputant's ownership, possession and power of disposition and it had remained his postal address in New Zealand; and
>
> (f) the disputant's contention, in cross-examination, that he had intended to sell the Saint Heliers home or let it was contradicted.

38. Counsel for the appellant emphasised the factual differences between the position of the disputant in the *FFF* case and the appellant. The house in Saint Heliers had been the home of the disputant and his wife prior to his secondment to Fiji, but 6, Raglan Road had never been the home of the appellant or his wife or family either before or during the 2000/2001 tax year. A further distinction was that the disputant in the *FFF* case was held not to have a permanent home available in Fiji within the meaning of Article 4. This aspect of the decision was addressed in his judgment (at para. 56), where Judge Barber set out the relevant factors which led to that conclusion. In the various dwelling houses he occupied in Fiji during his secondment the disputant was simply a lodger; the houses were leased from their respective owners by his employer, not by him; he did not even live in one house all the time; if he had been lawfully dismissed, he would have had to vacate the then current house; and it was irrelevant that, from time to time his wife and other family members came to stay with him temporarily. Counsel for the appellant submitted that that finding confirmed the status of the house in Saint Heliers as a permanent home available to the disputant by virtue of his prior occupation. By contrast, the appellant in this Case Stated had a permanent home available to him in Portugal at the material time and he never resided in 6, Raglan Road either prior to or during the relevant time.

39. Counsel for the respondent drew heavily on the judgment in the *FFF* case. For completeness, I propose to quote a passage towards the end of the judgment of Judge Barber, which was opened by counsel for the respondent. Having stated, that, obviously, the point of Article 4 was to overcome a tie-breaker situation where a person was both resident in New Zealand for the purposes of New Zealand tax and resident in Fiji for the purposes of Fiji tax, Barber J. stated (at para. 80):

> "Firstly, the tie-breaker situation can be resolved if the individual has a permanent home available to him in one of the states (New Zealand or Fiji), because he would then be deemed to be solely a resident of that particular state. As I have already explained above, the only permanent home available to the disputant was in New Zealand. If one were to absolutely stretch a point and, somehow, find that he also had a permanent home available to him in Fiji, even though his home there was very much a temporary arrangement, then, in terms of Article 4(2)(a) the issue would be whether in either state he had the closest personal and economic relations i.e. the centre of vital interests. The disputant was earning his income in Fiji but his assets were substantially in New Zealand including his superannuation provisions and his personal relations were closest to New Zealand and I have dealt above with that and economic relations. In my view, he not only had his permanent home available to him in Auckland, New Zealand, but also his centre of vital interests was there."

That passage, although in general terms, clearly illustrates the difference between the disputant's position and the appellant's position.

40. The decision in the FFF case has been addressed in some detail because counsel for the respondent attached so much weight to it, submitting that the Appeal Commissioner erred in law in failing to construe Article 4(2) in the manner contended for on the respondent's behalf, submitting that the correct approach is that adopted in the FFF case, in which it was held that the disputant's family home remained a permanent home available to him within the meaning and application of Article 4(2)(a), notwithstanding that renovation work was carried out on the house during his absences. I consider that the reliance by the respondent on the decision in the FFF case is misplaced. That decision turned on the facts in that case, which are clearly distinguishable from the factual situation

with which the Appeal Commissioner was concerned.

41. In addressing, and reaching conclusions on, the submissions of the respondent as to the application of Article 4(2)(a) to the issue which was before the Appeal Commissioner and which is now before the Court, I propose focusing on the OECD Commentary on Article 4 of the OECD Model Convention referred to earlier and on the academic work which I found most helpful of all of the documents put before the Court by the parties (no less than fifty five in number), namely, Vogel on Double Taxation Conventions (3rd Ed., 1997).

Conclusions on construction and application of Article 4(2) as contended for by the respondent
42. Referring to paragraph 10 of the OECD Commentary, which has been quoted earlier, it was submitted on behalf of the respondent that each of the tie-breaker tests in Article 4(2) falls to be applied with a view to identifying which of the two Contracting States has the right to tax the individual in question. The preference criterion selected by Contracting States which adopt Article 4 of the OECD Model Convention is to give preference to the Contracting State in which the individual has a permanent home available to him. One must assume that in making that selection the Contracting States consider that it reflects an attachment such that it is natural that the right to tax devolves upon that Contracting State. None of the foregoing submissions can be gainsaid; undoubtedly, having regard to Article 31 of the Vienna Convention, the words "permanent home available" in Article 4(2)(a) must be interpreted in accordance with the ordinary meaning to be given to them in their context and in the light of the objective and purpose of Article 4.

43. At a more specific level, it was submitted on behalf of the respondent that the Appeal Commissioner erred in law in his interpretation of those words on a number of grounds. First, it was asserted that he took what amounted to a literal, narrow approach to the words, thereby failing to apply the test for the purpose of identifying the Contracting State with the natural right to tax the appellant during the 2000/2001 tax period. Secondly, it was submitted that he erred in construing each of the three words discretely, rather than viewing the three word phrase in a compendious fashion to ascertain which Contracting State has the right to tax the appellant. Thirdly, it was submitted that the Appeal Commissioner had failed to construe the "permanent home available" test purposively and contextually within the meaning and application of Article 4(2) and its specific object of preferring one of the two Contracting States as the "natural" tax jurisdiction. None of those submissions stands up to scrutiny when assessed against Vogel's analysis of Article 4.

44. In outlining the function of Article 4(2), Vogel (at para. 68, p. 246) gives the following informative overview of the intended effect of the application of Article 4(2):

> "Art. 4(2) determines residence solely for the **purpose of applying the convention** . . .. A person is **deemed** to be a resident of that State which is determined in the order of precedence given in Art. 4(2)(a) to (d). In so far as *Wassermeyer, F.,* . . . takes the term 'deemed' to imply something 'fictitious' relating only 'to residents in one of the two Contracting States' this line of thinking cannot be accepted . . .. For Art. 4(2) presupposes that the individual is a resident of **both** Contracting States . . . and all that it determines is the **primary right** of the State with which the person's ties are closest. Rather than establishing a (fictitious) residence not existing under domestic law, it merely attaches residence under treaty law to **additional criteria**. Nor is it correct to talk of a **conflict rule** . . .. Rather than determining which of the two domestic law should be applied, Art. 4(2) supplements the residence criteria of domestic law by adding **autonomous** terms for the purpose of applying the convention." (Emphasis in original).

By way of explanation, in that passage "autonomous" means not by reference to domestic law.

45. In considering the first criterion in the order of precedence in Article 4(2), the availability of a permanent home, Vogel considers each of the components discretely. 46. In relation to "home" he states (at para. 70, p. 247):

> "**Home and foyer d'habitation** – or in German: '*Wohnstätte*' – are **houses** or **apartments** belonging to or rented by the individual, or even only rented furnished rooms . . .. All three terms describe the living accommodation of individuals. . . . Differing from the objectively determinable concept '*Wohnstätte'*, ['home' and '*foyer d'habitation'*] each additionally contain an element of **personal link with the accommodation** . . .. Being 'the seat of domestic life and interests', the 'home' concept is somewhat similar to the 'centre of vital interests' used in Art. 4(2)(a) . . .. This **subjective** interpretation of 'home' and '*foyer d'habitation'* should be accepted even for interpreting the German version '*Wohnstätte'*, because it is in line with the purpose of Art. 4(2), viz. to have regard to an intensive link with one of the two contracting States." (Emphasis in original).

It was submitted on behalf of the respondent that there is no requirement that to be a permanent home available, a house must have an individual's "stamp" on it, or that he must have his "stuff" in it, or that the individual must have lived in it some time or at all. The last element of that proposition is at variance with the Vogel statement that the concept of "home" contains an element of personal link with the accommodation and, in my view, is incorrect. The absence of an individual's "stamp" or his personal belongings may connote an absence of the necessary element of personal link.

47. As to the meaning of "permanent", Vogel states (at para. 71, p. 247):

> "A home is **permanent** only if the individual intended it, and kept it available, for his permanent use. An occasional stay, the reason for which may make it one of short duration (travel for pleasure, business travel, educational travel, attending a course at a school, etc.), does not constitute a permanent home . . .. In respect of its size and amenities, the home must offer the taxpayer a dwelling commensurate with his standard of living . . .. The element of **time** ('permanent') does not relate to the owning or possessing, but rather to the **using of the home as such** . . .. 'Permanent' should in this connection be understood in an objective sense to be the opposite of 'for a limited period'. . . .." (Emphasis in original).

While it is true, as counsel for the respondent submitted, that Article 4(2) encompasses the possibility that an individual may have a permanent home in each of the two Contracting States, it is not the case, as was submitted on behalf of the respondent, that the Appeal Commissioner erred in law in importing the concept of occupancy into the concept of "permanent home available". In particular, it is not the case that a residential property, such as 6, Raglan Road, can be a "permanent home available" to the individual without being occupied, as asserted on behalf of the respondent. That is clearly at variance with the commentary in Vogel. It is also at variance with paragraph 12 of the OECD Commentary quoted earlier, which sets out the requirement that the individual must have arranged and retained the accommodation for his permanent use.

48. In addressing the concept of "available", Vogel stated (at para. 71a, p. 248):

> "The individual has **available to him** . . . a permanent home if he has arranged to have the dwelling available to him at all times continuously . . .. The term 'to have available', which, in the sense of 'possessing', presupposes **actual power of**

> **disposition** . . . encompasses both the right which the master of the house has and the right of its owner or tenant to determine occupancy of the dwelling . . . . In contrast thereto the **length of the individual's stay** in the dwelling is of **no** or of only little importance . . .. For, according to Art. 4(2)(b), an individual's 'habitual abode' is not to be determinative unless the taxpayer has a 'permanent home' in **both** or neither of the Contracting States." (Emphasis in original).

It was submitted on behalf of the respondent that a home can be "available" without ever being actually availed of and that it is the availability of the premises, and its capacity to be used as a residence, which suffices to bring it within the concept of "permanent home available" for the purposes of Article 4(2)(a). That submission ignores the meaning which is to be attached to "home" and to "permanent", for the purposes of Article 4(2)(a). In particular, it ignores the words to which the Appeal Commissioner added emphasis in paragraph 13 of the OECD Commentary quoted earlier – "at all times continuously", which Vogel reiterates.

49. To recapitulate on the core facts, Parteney Limited acquired title to and possession of 6, Raglan Road on completion of the purchase from Mr. White and Mrs. White on 10th May, 2000. While the appellant admittedly controlled Parteney Limited, it was a separate and distinct legal entity from the appellant, although neither the parties nor the Appeal Commissioner properly attached any significance to that factor of domestic law. When Parteney Limited acquired and got possession of 6, Raglan Road, its condition was that the kitchen units and a built-in Aga cooker had been removed. Further, at that time, May 2000, the appellant and his wife and family had been residing in their home in Portugal, which they treated as their family home, for three months. Neither the appellant, nor his wife, nor his family resided in 6, Raglan Road from the time it was acquired by Parteney Limited until almost two years later in February 2003, after the expiry of the material tax year, 2000/2001. In the interim, Parteney Limited commissioned, and there were implemented, extensive building and refurbishment works, which have already been summarised.

50. On the basis of those facts, having regard to the proper application of Article 4(2)(a), I consider that the Appeal Commissioner was correct in making the following findings:

> (a) The residential property at 6, Raglan Road was not the home of the appellant within the meaning of that concept in Article 4(2)(a), because there was no element of personal link whatsoever between the appellant and the accommodation, although ownership and possession of it had been acquired by the appellant, through the medium of a company which he controlled, as an investment.
>
> (b) Even if, contrary to that finding, 6, Raglan Road was the home of the appellant, it was not a permanent home within the meaning of Article 4(2)(a). The facts as found by the Appeal Commissioner are contradictory to there having been any intention on the part of the appellant that those premises would be used, or kept available for the permanent use of the appellant. Further, the Appeal Commissioner found that the appellant did not regard those premises as suitable for his family, when they were acquired by Parteney Limited.
>
> (c) As a matter of fact, the appellant had not arranged to have 6, Raglan Road available to him at all times continuously. On the contrary, Parteney Limited, no doubt at the instigation of the appellant, had commissioned works, which were implemented, and which rendered those premises unavailable for residential use at any time from June 2000 to February 2002.

54. The reasoning underlying the following propositions advanced on behalf of the respondent, in my view, is fundamentally flawed:

> (a) that 6, Raglan Road was a permanent home available to the appellant once he acquired it as a habitable dwelling, which, it was asserted, was a fact established by his own evidence, and that the state which he caused the house to be put into subsequently did not alter the fact that it was his to be used as a home from 10th May, 2000 onwards and, thus, was a "permanent home available" for the purposes of Article 4(2);
>
> (b) that the fact that, as a result of refurbishment work initiated at the appellant's direction, in exercise of his power of control thereover, 6, Raglan Road was rendered progressively uninhabitable during 2000/2001 does not mean that it ceased to be a permanent home available to him in Ireland;
>
> (c) that the appellant's decision to commence the refurbishment works which made 6, Raglan Road uninhabitable during part of the tax year 2000/2001 did not alter the status of the house as a permanent home available to him in that tax year;
>
> (d) that during the tax year 2000/2001, 6, Raglan Road remained the permanent home of the appellant by remaining continuously in his control and at his disposition and the nature and extent of the refurbishment works embarked upon was a function of the permanent nature of the appellant's control over the property; and
>
> (e) that 6, Raglan Road was at the appellant's disposition and, therefore, available to him from completion of the sale on 10th May, 2000.

The focus by the respondent on –

> (i) the acquisition of 6, Raglan Road in May 2000 by a company controlled by the appellant,
>
> (ii) the control which the appellant exercised in relation to its refurbishment and use, and
>
> (iii) the notion of total control over it and it being at the disposition of the appellant,

as the foundation of its status as a permanent home available to the appellant within the meaning of Article 4(2)(a) is wholly misconceived. Assuming, as was the case, that the appellant had total control over 6, Raglan Road and that it was exclusively at his disposition from 10th May, 2000 to 5th April, 2001, he undoubtedly had a residential property available to him which he could deal with in any way he wished. If he so wished, he could have refurbished it and let it, or refurbished it and sold it, or, alternatively, re-sold it in the condition in which it was when it was acquired. What he did not have was a "permanent home" within the meaning of Article 4(2). At the risk of unnecessary repetition, the respondent has failed to recognise that the "permanent home available" test involves two conditions, in addition to the "available" for use condition, namely, that the place of abode should be permanent and that it should meet the concept of a "home".

55. I am satisfied that, in making the determination he made, the Appeal Commissioner did not adopt a wrong or mistaken view of the

law, nor did he draw inferences which no reasonable Appeal Commissioner would arrive at.

Answer to question for determination

56. The answer to the question for determination by the Court is as follows:

> "Having regard to the evidence given and the facts found by the Appeal Commissioner, he was correct in holding that 6 Raglan Road, Ballsbridge, Dublin, 4 was not a permanent home available to the appellant for the tax year 2000/2001 for the purposes of Article 4.2 of the Ireland/Portugal Double Taxation Convention."