



Neutral Citation: [2022] UKFTT 00356 (TC)

Case Number: TC08609

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

Appeal heard at Taylor House, 88 Rosebery  
Avenue, London EC1R 4QU, with some  
participants attending remotely

Appeal reference: TC/2016/07008

*INCOME TAX – residence – whether Appellant had ceased to be resident in the UK – application of UK-Belgium DTC – held – Appellant remained resident in the UK – application of COVI limb of tie-breaker resulted in Appellant being deemed to be resident in the UK and not Belgium – appeal dismissed*

**Heard on:** 24 November to 10 December 2021

**Judgment date:** 30 September 2022

**Before**

**TRIBUNAL JUDGE JEANETTE ZAMAN**

**Between**

**KEVIN MCCABE**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Nicola Shaw KC and Samuel Brodsky, counsel, instructed by Mazars

For the Respondents: Christopher Stone and Charlie Hill. counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### INTRODUCTION

1. Mr McCabe appeals against closure notes issued by HMRC on 28 April 2016 under s28A(1) and (2) Taxes Management Act 1970 (“TMA 1970”) in relation to the tax years 2006-07 and 2007-08 (together, the “Relevant Period”). The closure notices amended Mr McCabe’s self-assessment returns for those years by charging him to income tax and capital gains tax (“CGT”) on the basis that he remained resident in the UK.

2. Mr McCabe’s appeal was made on the basis that he ceased to be resident in the UK on 4 April 2006, or at some time thereafter (but before 6 April 2008) and, if he did not, he was entitled to be treated as non-UK resident under the terms of the Belgium-UK Double Taxation Convention (the “DTC”) for the whole or part of the Relevant Period. His case was essentially that he left the UK on 4 April 2006 to live and work in Brussels (although his work took him to many overseas locations, as well as the UK) and that in so doing he sufficiently loosened his ties with the UK so as to effect a distinct break in the pattern of his life in the UK and became non-resident in accordance with the principles which have developed in the authorities. Alternatively, if he had not effected a distinct break on 4 April 2006, he had done so by 5 April 2008.

3. The parties have prepared a Statement of Agreed Facts (the “SoAF”) which is set out in full in the Appendix to this Decision. The structure of this Decision is as follows:

(1) Issues – As well as setting out the issues to be determined and burden of proof, I also set out the areas of common ground between the parties;

(2) Relevant law – this is primarily a summary of the case law principles set out by the Upper Tribunal in *HMRC v Glyn* [2015] UKUT 551 (TCC) (these being considered in further detail in the subsequent Discussion) and the text of Article 4 (the tie-breaker provision) of the DTC;

(3) Evidence – I describe in general terms the evidence before me and address key challenges to that evidence, namely as to the reliability of some of the witnesses and the accuracy of the electronic diary of Mr McCabe;

(4) Summary of submissions of the parties – this summary does not purport to set out in full the detailed written and oral submissions of Ms Shaw and Mr Stone, but provides context to the findings of fact which I have made and the application of the law to those facts;

(5) Findings of Fact – this section includes certain extracts from the SoAF together with additional findings I have made on the basis of the evidence before me. I had detailed evidence (both in the hearing bundle and from witnesses) as to the whereabouts and activities of Mr McCabe; and

(6) Discussion – I consider the authorities and apply the law to the facts as I have found them to reach my conclusions in relation to the question of residence in accordance with the common law and the application of the DTC.

4. The hearing took place over three weeks, and involved lengthy evidence and submissions. I had the benefit of a transcript of that hearing. In reaching my Decision I have taken account of all of the submissions of the parties and the evidence to which I was taken, although I have not found it necessary to refer to all of such submissions and evidence in setting out my findings of fact and reasons in this Decision.

5. For the reasons set out below, Mr McCabe’s appeal is dismissed.

## ISSUES

6. It was common ground that:
  - (1) prior to 4 April 2006, Mr McCabe was resident (and ordinarily resident) in the UK;
  - (2) for the tax years 2006-07 to 2013-14 Mr McCabe was resident in Belgium;
  - (3) Mr McCabe was UK resident from 3 May 2013; and
  - (4) Mr McCabe ceased to be resident in Belgium from 20 February 2014.
7. The issues for determination by this Tribunal are:
  - (1) whether Mr McCabe ceased to be resident in the UK on 4 April 2006, or (in the alternative) by 5 April 2008; and
  - (2) if he did not, whether he is entitled to be treated as non-UK resident under the terms of the DTC for the whole or part of the Relevant Period.
8. The closure notices issued by HMRC for the Relevant Period have increased the amount of tax due in each year. Quantum is in dispute between the parties, but it has been agreed that this issue is to be reserved until after determination of Mr McCabe's residence position. My decision is therefore a decision in principle only.
9. The burden of proof is on Mr McCabe to establish, on the balance of probabilities, that the assessments were excessive.
10. Mr McCabe has, separately from this appeal to the Tribunal, instigated the mutual agreement procedure under the DTC (as outlined at [54] to [58] of the SoAF) and commenced judicial review proceedings against HMRC, challenging the decision to uphold the closure notices upon review (and those proceedings have been stayed pending the outcome of this appeal).

## RELEVANT LAW

### Residence

11. Section 2(1) Taxation of Chargeable Gains Act 1992 ("TCGA 1992") sets out the persons chargeable to CGT and provided as follows:

"2. Persons and gains chargeable to capital gains tax, and allowable losses

(1) Subject to any exceptions provided by this Act, and without prejudice to sections 10 and 276, a person shall be chargeable to capital gains tax in respect of chargeable gains accruing to him in a year of assessment during any part of which he is resident in the United Kingdom, or during which he is ordinarily resident in the United Kingdom."

12. The Relevant Period pre-dates the statutory residence test. Whilst there were statutory provisions in force relating to residence (in s334 and s335 Income and Corporation Taxes Act 1988), neither party relied upon them.

13. Instead, residence is to be determined by reference to the case law principles on residence which have developed (ordinary residence not being a relevant issue in this appeal). Both parties agreed the statement of the law set out by David Richards J in *Glyn* cited below, although both Ms Shaw and Mr Stone emphasised that it was necessary to consider the facts of the various cases cited therein and to have regard to the principles drawn from them in such context. Those various cases are considered further to the extent necessary in the Discussion, but at this stage it is helpful to set out David Richards J's summary:

"[40] Although the residence of a person in the UK may create a liability under statute to income tax and capital gains tax, there is no statutory definition of

residence relevant to this appeal. Its meaning is to be derived from judicial decisions. The residence of a person under the common law may in certain circumstances be qualified by statutory provisions, in particular ss 334 and 336 of the Income and Corporation Taxes Act 1988, but those provisions are not directly applicable to the facts of this case.

[41] The authorities establish a number of relevant factors that have to be taken into account in deciding the question of a person's residence. The task of the FTT is to make findings of fact on the evidence before it as regards all the relevant circumstances and, applying the factors identified in the authorities, to determine, having regard to all relevant circumstances, whether or not the person has in the relevant period been resident in the UK.

[42] It is here worth mentioning two general points, neither of which were in dispute, that are of particular relevance in the case of Mr Glyn. First, it is entirely possible for a person to have more than one country of residence. A person previously resident in one country may take up residence in another country without losing his status of residence in the first country. Secondly, the approach to whether a person resident in the UK has ceased to be so resident is in some respects different from the approach to whether a person previously resident in another country has become resident in the UK.

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

'i) The word "reside" is a familiar English word which means "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place": *Levene v IRC* (1928) 13 TC 486 at 505, [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, 70 TC 478 at 510;

iii) In considering whether a person's presence in a particular place amounts to residence there, one must consider the amount of time that he spends in that place, the nature of his presence there and his connection with that place: *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] 3 All ER 7 at 13, [1970] 2 QB 463 at 477; *Goodwin v Curtis (Inspector of Taxes)* [1998] STC 475 at 481, 70 TC 478 at 510;

v) However, short but regular periods of physical presence may amount to residence, especially if they stem from performance of a continuous obligation (such as business obligations) and the sequence of visits excludes the elements of chance and of occasion: *Lysaght v IRC* (1928) 13 TC 511 at 529, [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) 13 TC 486 at 505, [1928] AC 217 at 223;

vii) “Ordinarily resident” refers to a person’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life, whether of short or long duration: *Shah v Barnet London BC* [1983] 1 All ER 226 at 235, [1983] 2 AC 309 at 343;

viii) Just as a person may be resident in two countries at the same time, he may be ordinarily resident in two countries at the same time: *Re Norris, ex p Reynolds* (1888) 5 Morr 111, 4 TLR 452; *Shah v Barnet London BC* [1983] 1 All ER 226 at 235, [1983] 2 AC 309 at 342;

ix) It is wrong to conduct a search for the place where a person has his permanent base or centre adopted for general purposes; or, in other words to look for his “real home”: *Shah v Barnet London Borough Council* [1983] 1 All ER 226 at 236 and 239, [1983] 2 AC 309, 345 and 348;

x) There are only two respects in which a person’s state of mind is relevant in determining ordinary residence. First, the residence must be voluntarily adopted; and second, there must be a degree of settled purpose: *Shah v Barnet London BC* [1983] 1 All ER 226 at 235, [1983] 2 AC 309 at 344;

xi) Although residence must be voluntarily adopted, a residence dictated by the exigencies of business will count as voluntary residence: *Lysaght v IRC* (1928) 13 TC 511 at 535, [1928] AC 234 at 248;

xii) The purpose, while settled, may be for a limited period; and the relevant purposes may include education, business or profession as well as a love of a place: *Shah v Barnet London BC* [1983] 1 All ER 226 at 235, [1983] 2 AC 309 at 344;

xiii) Where a person has had his sole residence in the United Kingdom he is unlikely to be held to have ceased to reside in the United Kingdom (or to have “left” the United Kingdom) unless there has been a definite break in his pattern of life: *IRC v Combe* (1932) 17 TC 405 at 411.’

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

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

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

‘Thus, the enquiry which she had to undertake involved assessing the duration of Mr Grace’s presence in the United Kingdom and the regularity and frequency of his visits, the nature of the visits and his connection with this

country. Equally, she had to take into account also his connection with South Africa, including his ownership and use of a house there, and his activities, ties and other connections there. She could not regard his ownership and use of a house there as conclusive that he did not reside in the United Kingdom, but it was a relevant factor to be taken into account.’

[47] The *Gaines-Cooper* case to which I have earlier referred was primarily concerned with the effect of IR20. However, the judgments in the Supreme Court, particularly that of Lord Wilson, contain important observations on the issue of residence more generally. After referring to the decision of the House of Lords in *Levene*, Lord Wilson continued at [14]:

‘Since 1928, if not before, it has therefore been clear that an individual who has been resident in the UK ceases in law to be so resident only if he ceases to have a settled or usual abode in the UK. Although, as I will explain at [19], below, the phrase “a distinct break” first entered the case law in a subtly different context, the phrase, now much deployed including in the present appeals, is not an inapt description of the degree of change in the pattern of an individual’s life in the UK which will be necessary if a cessation of his settled or usual abode in the UK is to take place.’

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

‘It is therefore clear that, whether in order to become non-resident in the UK or whether at any rate to avoid being deemed by the statutory provision still to be resident in the UK, the ordinary law requires the UK resident to effect a distinct break in the pattern of his life in the UK. The requirement of a distinct break mandates a multifactorial inquiry. In my view however the controversial references in the judgment of Moses LJ ([2010] EWCA Civ 83, [2010] STC 860 at [45]) in the decision under appeal to the need in law for “severance of social and family ties” pitch the requirement, at any rate by implication, at too high a level. The distinct break relates to the pattern of the taxpayer’s life in the UK and no doubt it encompasses a substantial loosening of social and family ties; but the allowance, to which I will refer, of limited visits to the UK on the part of the taxpayer who has become non-resident, clearly foreshadows their continued existence in a loosened form. “Severance” of such ties is too strong a word in this context.’

[49] Lord Wilson also discussed the concepts of a ‘settled purpose’ and a ‘settled abode’. At [18], he explained how Nicholls J in *Reed (Inspector of Taxes) v Clark* [1985] STC 323, [1986] Ch 1 had used the concept of residence for a settled purpose in contrast to ‘occasional residence’ for the purposes of what was then s 49 of the Income and Corporation Taxes Act 1970. The issue in that context was whether the taxpayer who had previously been resident in the UK had acquired more than ‘occasional residence’ abroad. It was not a test used to determine whether the taxpayer had retained residence in the UK. The concepts of settled purpose and settled abode were ‘clearly different’. As Lord Wilson said at [41]:

‘... Nicholls J was describing the settled purpose not as a route to becoming non-resident but as a means by which the taxpayer who had become non-resident escaped being treated otherwise under what is now s 829 of the [Income Tax Act 2007].’

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

‘But the underlying principle that the law has established is that it must be shown that there has been a distinct break in the pattern of the taxpayer’s life in the UK. The inquiry that this principle indicates is essentially one of evaluation. It depends on the facts. It looks to what the taxpayer actually does

or does not do to alter his life's pattern. His intention is, of course, relevant to the inquiry. But it is not determinative. All the circumstances have to be considered to see what light they can throw on the quality of the taxpayer's absence from the UK.”

## **DTC**

14. Article 1 of the DTC sets out the scope of the convention, which “shall apply to persons who are residents of one or both of the Contracting States”. Article 4 defines residence (so far as is relevant to an individual) for the purposes of the DTC as follows:

“(1) For the purposes 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; ...

(2) Where by reason of the provisions of paragraph (1) of this Article 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 State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);

(b) If the 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 State, he shall be deemed to be resident of the State in which he has an habitual abode;

(c) If he has an habitual abode in both 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 States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.”

## **EVIDENCE**

15. The hearing bundles were extensive. In addition to the contemporaneous documents, the parties had prepared various multi-coloured schedules of whereabouts. I also had the benefit of detailed written skeleton arguments and notes on the evidence from both parties.

16. In terms of witness evidence on which Mr McCabe relied:

(1) I had two witness statements from each of Mr McCabe and his two sons, Scott McCabe and Simon McCabe (whom with their permission I refer to throughout as “Scott” and “Simon” rather than by their title and surnames), all of whom gave evidence before me.

(2) Patrick Vangoidsenhoven, Ian Cameron, John Burnley, Paula Coppard and David Sayers had provided witness statements and gave evidence before me.

(3) I also had witness statements from John Millar, Dr David Oldroyd, Peter Watson, Darren Brining, David Sutherland and Linda Ross. HMRC did not require these witnesses to attend the hearing and be cross-examined on their evidence; their evidence was thus not challenged and is taken to be agreed.

17. Mr Stone challenged the reliability of the evidence of some of the witnesses. He submitted that:

(1) Mr McCabe's evidence was, at best, exaggerated and did not present a full and balanced picture, and at worst was not true. Mr Stone referred to the evidence which Mr McCabe had recently given in separate proceedings in *UTB LLC v Sheffield United* [2019] EWHC 2322 (Ch), in which Fancourt J had concluded that Mr McCabe's evidence in that appeal demonstrated an ability to turn any question that he was asked into an argument of his choice, said he was only able to recall events through the prism of his own subjective beliefs and understanding of how things were and was at times "disingenuous and less than fully frank". Mr Stone submitted that this was apt here as well – his submission was that Mr McCabe well understood the issues and the case he wants to present.

(2) Scott and Simon have a personal interest in the outcome of the appeal and sought to protect Mr McCabe's version of events.

(3) Ms Coppard, who had been Mr McCabe's personal assistant, was also focused on the evidence that she knew would assist Mr McCabe.

18. HMRC accepted that Mr Vangoidsenhoven, Mr Cameron and Mr Burnley were all straightforward in giving evidence.

19. Mr Stone drew attention to the absence of evidence from certain others, notably Sandra McCabe (Mr McCabe's wife) and, eg, Jason Rockett, the CEO of SUFC. In HMRC's skeleton argument Mr Stone had set out HMRC's position that it was appropriate to consider whether to draw adverse inferences from the decision not to call evidence from Mrs McCabe. However, whilst remaining critical of this absence of evidence (in both oral submissions and in his written closing), Mr Stone made it clear that HMRC were not asking the Tribunal to draw adverse inferences from the absence of evidence from certain individuals; however, he reiterated that the burden of proof is on Mr McCabe to establish what he was doing whilst in the UK and Mr Stone submitted that Mr McCabe needed to call more evidence to corroborate his own evidence in this regard.

20. In consequence, Mr Stone submitted that I should be cautious about accepting the evidence of Mr McCabe, eg as to handing over the running of the UK business to his sons, where this was not supported by contemporaneous documents. Mr Stone also challenged the accuracy of the electronic diary in the hearing bundle, in particular as to whether it contained all personal engagements of Mr McCabe, as the evidence in the hearing bundle did include handwritten diaries maintained by Mr McCabe for some (but not all) of the Relevant Period (covering only the calendar year 2006) and the handwritten diaries showed that Mr McCabe had sometimes played squash in Scarborough in late 2006 and these games were not shown in the electronic diary.

21. Ms Shaw was highly critical of these submissions, accepting that there were some issues of forgetfulness of details by Mr McCabe but submitting that this was attributable to the fallibility of memory. Ms Shaw submitted that witness evidence was given honestly and sincerely, and was supported by contemporaneous documents (including the diaries and financial statements), Mr Stone had not put allegations of dishonesty to the witnesses and their evidence should be accepted. As to the lack of evidence from, eg Mrs McCabe, Mrs McCabe is now in her seventies and Mr McCabe bears the burden of proof in this appeal and can choose which witnesses to call; there is a vast amount of evidence before the Tribunal, and this is not an appeal where there are matters to which only Mrs McCabe, or other individuals not called, could speak.

22. On the basis that Mr Stone confirmed that HMRC were not inviting me to draw particular adverse inferences from the absence of evidence from Mrs McCabe, and in any event recognising the merit in Ms Shaw's submission that it is for Mr McCabe to choose who to call



as witness (in circumstances where he gave evidence himself, as did his sons, as did various long-standing friends), I draw no such inferences. Instead, I remind myself throughout that Mr McCabe bears the burden of proof and that I must assess the reliability all of the evidence before me (both witness evidence and documentary).

23. I address first the diaries. The hearing bundle included both electronic and handwritten diaries. The handwritten diaries were maintained by Mr McCabe personally, whereas the electronic diary was maintained by Ms Coppard. Whereas the hearing bundle included a copy of the electronic diary entries for the entirety of the Relevant Period, the only handwritten diary was that for the calendar year 2006.

24. It was apparent from a comparison of the diaries in the period of overlap (ie 6 April 2006 to 31 December 2006) that there were a few instances where events in the handwritten diary were not included in the electronic diary, eg squash games that Mr McCabe played on Friday evenings in Scarborough in October 2006. On the basis of the evidence of Mr McCabe and Ms Coppard, as well as the evidence to which I was taken in the hearing bundle, I find:

(1) Ms Coppard would generally enter into the electronic diary meetings, conference calls and pre-planned events of which she was aware (and she would be aware of most as she would arrange the dial-in details for conference calls and video conferences). Ms Coppard had access to Mr McCabe's handwritten diaries to enable her to keep the electronic diary up-to-date.

(2) As regards pre-planned events, the electronic diary is generally an accurate record. The electronic diary includes not only board meetings and dinners and more formal parties, but also what appear to be shorter catch-ups over coffee or pre-dinner drinks.

(3) There are limitations to this approach, ie the diary will not record calls that Mr McCabe decided to make and then made at short notice by just making the call, or calls received.

(4) Similarly, I recognise that as Mr McCabe had access to separate office and conference facilities at La Manga, some calls (including video calls) that he arranged whilst there and were organised by staff at La Manga may not have all been recorded in his electronic diary.

(5) Mr McCabe's evidence was that some leisure and social activities in Brussels would not necessarily have been recorded if they had been arranged at short notice and he had free time. I accept that; however, I also conclude that some leisure and social activities during his time in Scarborough would not have been recorded for this same reason.

25. There is thus a limitation on the accuracy of the electronic diary. It was not perfect. However, overall I consider it to be a very good record of Mr McCabe's engagements and an accurate record of his travel over the Relevant Period. There was significant corroborating documentary evidence (eg as to flights, hotel invoices). There were two occasions where Mr McCabe changed his plans at short notice due to Mrs McCabe becoming ill, such that the planned engagements in the diaries did not take place; these were identified in Mr McCabe's witness statement and were not challenged.

26. A related point relates to the witnesses' recollection of events. Difficulties relating to the fallibility of memory have been thoroughly considered in the authorities. Such difficulties are pronounced here – not only by the passage of time (the hearing took place more than 13 years after the end of the Relevant Period), but also by the fact that the Relevant Period comprises the first two years of Mr McCabe's relocation to Brussels. His position is that he remained non-resident until he returned to the UK in May 2013 – he had an office at Bastion Tower

throughout and bought an apartment at Franklin Roosevelt; those later years are not the subject of this appeal, but I do bear in mind the difficulty which arises where a witness recalls a series of events having taken place some time ago. In the absence of documentary evidence, it is difficult to be confident that they related to, eg, 2007 rather than 2009 without some chronological landmark to assist with dating. This is particularly the case with the evidence of Scott and Simon, where their written and oral evidence covered matters which went beyond the Relevant Period.

27. I concluded that Scott and Simon were honest witnesses. Mr Stone challenged their involvement in the UK businesses (and whether they had taken over responsibility from Mr McCabe) and whether their connection, or time, with Mr McCabe, revolved around time together in the UK or Brussels or La Manga. Both Scott and Simon's evidence was that the diaries did not always record all participants in, say, a meeting or a call, and they attended more of the meetings with Mr McCabe than was stated on the face of the electronic diary; and that they had seen more of Mr McCabe in Brussels than was set out in the diary. As to this (and reaching no conclusion at this stage as to whether their involvement or participation amounted to having taken responsibility):

(1) The diary does not purport to record attendees for board meetings; I accept that where Scott and/or Simon were directors of the relevant company, they would have attended alongside the other directors.

(2) However, the diary entries do seek to list attendees for other meetings, including meetings with Scott or Simon (eg a meeting with Scott and Simon in Paris on 26 April 2006, a meeting with Scott and another person in Paris in July 2006, a video conference with Scott and Simon when Mr McCabe was in Brussels in October 2007). It is not the case that meetings involving just family were not diarised or that their involvement was not recorded. I accept that if Mr McCabe had arranged a meeting in the London office of the Scarborough Group and Scott or Simon were around they would often have been expected to attend – Mr McCabe took a very hands-on approach to growing the business of the Scarborough Group and I infer he expected the same from his sons, and this was part of the learning curve. However, Scott was based in York not in the London office, so this mainly applies to Simon in this context. As for social engagements, the diary does contain family social events (eg dinner with Mrs McCabe, Scott and Simon in Paris in April 2006, dinner with Simon in May 2006).

(3) I have already accepted that the diary may not capture all informal, short notice, engagements. This applies equally to personal engagements with Scott and Simon. However, given Mr McCabe's busy diary, and multitude of travel plans, I do not accept that it is realistic that Simon would have been travelling regularly to see his father in Brussels and that this not be recorded at all in the diary – no travel documents were adduced in evidence, and it would have been unwise for Simon to assume at any time that his father would be in Brussels – he would have needed to make calls to check Mr McCabe's own plans and I infer that meet-ups which ensued would have been in the diary. This is not to doubt Simon's honesty – he recalls meeting up with his father in Brussels on more occasions than recorded; but his father was in Brussels for more years than are in issue before me.

(4) I do note a specific limitation in the diary, which can be illustrated by the record of Mr McCabe having made a visit to Barcelona for two nights in March 2007. It is apparent from the evidence of the witnesses that this was Scott's stag weekend. That fact is not evident from the face of the diary; I read nothing adverse into this, as Mr McCabe would

have been well-aware of why he was flying to Spain. I do refer to it as it illustrates a limitation on the diary, namely that it records an answer to “where?” but not “why?”.

28. I found Mr McCabe’s evidence to be generally sincere and honest as regards his description of his travel and working arrangements, and his efforts to build the European business during the Relevant Period. I have not accepted his evidence in its entirety.

29. I have described above some of the contemporaneous documentation which was before me, notably Mr McCabe’s diaries. For some diarised meetings, the subject-matter of the meeting is described (in the form of “re [x]”, or it is described as a board meeting); however, for many the participants are listed but no further description or minutes are available. Mr McCabe was very keen to emphasise that the meetings he held in the UK related to the European business of the Scarborough Group, or other aspects of its international business. However:

(1) this is unrealistic as regards, eg, SUFC, an English football club (and I note in any event that Mr McCabe accepted where the meetings related to the relegation and Tevez affair);

(2) in many instances, such description of the meeting did not reflect the formal job title of the relevant attendees (eg Didier Tandy was the Head of UK Property at the Scarborough Group); and

(3) the passage of time since the Relevant Period, the fallibility of memory, particularly in circumstances where there were so many meetings with the key players and the difficulty of pin-pointing, years later, the subject-matter of a particular diarised meeting, means I am sceptical as to whether the subject-matter can be accurately recalled without diarised prompts, which were lacking in many instances.

30. I do accept that the discussions with key personnel would have gone beyond the confines of their formal role; Mr McCabe surrounded himself with people whose skills and opinions he valued, whom he had known for many years and trusted. By way of example, Mr Burnley, whose evidence was that he worked on UK construction projects, nevertheless accompanied Mr McCabe to Australia for the Valad discussions; no doubt this was part of what Mr McCabe referred to as the “social side of business”, and included attending the cricket, but does illustrate that job titles do not necessarily limit roles undertaken. This would also have applied to, eg, Mr Tandy.

31. Mr McCabe did accept where he could not recall particular events, or where his explanation in his witness statement was contradicted by his handwritten diary or other documents – although this related to whether he had ever played squash in Scarborough on a Friday night, and whether he had ever spent the night in the UK with Mrs McCabe during the Relevant Period. I considered that these were small points of detail wrongly recalled.

32. I accept the evidence of Mr Vangoidsenhoven, Mr Cameron, Mr Burnley and Ms Coppard as generally reliable. I accept that the evidence of David Sayers was honest; however, he acknowledged that he had not been involved before or during the Relevant Period but his evidence was instead based on his review of Mazars’ files. This does limit its reliability, and I take this into account when assessing his evidence.

#### **SUMMARY OF PARTIES’ SUBMISSIONS**

##### **Appellant**

33. Ms Shaw’s position was that Mr McCabe had left the UK on 4 April 2006, and he became non-resident at that time; alternatively, he became non-resident by 5 April 2008. If I were to

decide that he remained UK resident, Ms Shaw's position was that he should be deemed to be resident (only) in Belgium under the tie-breaker clause in the DTC.

34. Ms Shaw emphasised what she regarded as two unique features:

- (1) this appeal did not involve a dispute as to the relevant facts; the disagreement between the parties was as to how the law applied to the facts. Mr McCabe has provided a vast amount of information to HMRC since the enquiries were opened; and
- (2) the very limited extent of Mr McCabe's UK presence.

35. Ms Shaw's submissions on how to assess Mr McCabe's UK presence were:

- (1) The best metric to use is that which had been set out in IR20, this being used by HMRC at the time with the result that this is the information required by tax returns – ignore days of arrival and departure, look at whole days in UK. This reflects the quality of a person's presence.
- (2) The next best metric is to look at nights in the UK – this captures one important element of what it means to live somewhere, ie to sleep there. This midnight methodology has been adopted by the statutory residence test (not applicable for these tax years).
- (3) The least is to calculate every day and part day – this is not informative, and tells you nothing about the quality of the presence.

36. Ms Shaw referred to the principles set out by Lewison J in *Grace*, which were cited with approval on appeal, and have more recently been set out by David Richards J in *Glyn* at [43] (cited under Relevant Law above), drawing attention to the principles that:

- (1) physical presence in a particular place does not necessarily amount to residence in that place, eg if physical presence is no more than a stop-gap measure – this is looking at the quality of the presence; and
- (2) where a person has had his sole residence in the UK, he is unlikely to be held to have ceased to reside in the UK unless there has been a “definite break in his pattern of life” (this being drawn from *IRC v Combe*). As to this principle:
  - (a) Lord Wilson had explained the meaning of this in *Gaines-Cooper*, this also having been cited by David Richards J at [47] and [48] of *Glyn*. Lord Wilson stated that this requires a multifactorial inquiry, but this does not mean a “severance of social and family ties” (this pitching the requirement too high) but (at [20]) “The distinct break relates to the pattern of the taxpayer's life in the UK and no doubt it encompasses a substantial loosening of social and family ties; but the allowance, to which I will refer, of limited visits to the UK on the part of the taxpayer who has become non-resident, clearly foreshadows their continued existence in a loosened form. “Severance” of such ties is too strong a word in this context.”
  - (b) A retention of some UK ties is thus not inconsistent with a distinct break.
  - (c) The allowance to which Lord Wilson referred, of limited visits to the UK, was a reference to the fact that IR20 permitted visits to the UK of 90 days or less. Such a “limited” presence, of less than 90 days (excluding days of arrival and departure) was consistent with a distinct break, ie up to one quarter of the year.

37. Furthermore, a “tie” is not anything with a UK connection. It is something which causes or necessitates the taxpayer to return to the UK; it is not a tie if it can be enjoyed from overseas. The mere fact that family and business interests are in the UK is not in and of itself a tie to the UK.

38. Ms Shaw submitted that the error in HMRC's approach is to focus on Mr McCabe's presence in the UK in the Relevant Period; with only brief mention of life outside the UK – they essentially ignore Mr McCabe's life and business in Brussels and family time in Spain. Whereas Ms Shaw submits it is essential, when assessing the quality of Mr McCabe's presence in the UK, to look at the pattern of life before the Relevant Period and to consider the totality of his life during the Relevant Period, which must include his life outside the UK. Taking the full picture into account:

- (1) The overwhelming majority of Mr McCabe's time was spent outside the UK. This is in stark contrast with his whereabouts in 2004-05 (254 midnights in UK) and 2005-06 (273 midnights in UK). There was an 85% reduction in his UK presence on this metric.
- (2) The quality of his presence reduced dramatically, eg there was a 91% reduction in his presence in Scarborough compared to that in the two years before the move.
- (3) Look at his involvement in the businesses – he appointed and relied on management teams at Scarborough Group, Teesland/iOG and Sheffield United plc (“SUplc”) and SUFC; he reduced the number of directorships. These changes were vital to his ability to move to Brussels.
- (4) There was a significant reduction in his attendance at Sheffield United matches, and a reduction in his attendance at club-related events, with his role being passed on to others (family being represented by Mrs McCabe, usually accompanied by one or both of their sons).

39. The fact that Mr McCabe remained as owner of the Scarborough Group did not tie him to the UK causing him to return – there are known to be limited return visits.

#### **HMRC**

40. Mr Stone submitted that residence in Belgium gave Mr McCabe an opportunity to avoid CGT on the disposal of shares in the Scarborough Group to his sons on 3 April 2008. He had been advised that in order to avoid being charged to CGT under s10A TCGA 1992, he should be non-resident for at least five full tax years. The purpose of Mr McCabe's move to Belgium was to implement that advice and achieve a tax-free disposal. In implementing that advice, he took steps that were wholly artificial – eg putting the marital home into his wife's name and sleeping in a hotel just down the road, but continuing to use the home to spend time with his family.

41. HMRC accept that an individual can become non-resident under the common law, and treaty-resident under the DTC, even if residence in another country has been adopted for a tax-avoidance purpose. However, Mr Stone submitted that this fact colours the approach that the Tribunal should take to the issues before it - it calls into question whether Mr McCabe genuinely took the steps necessary to become non-resident under the common law and is directly relevant to the application of the DTC, one of the aims of which is to prevent fiscal evasion.

42. Mr McCabe is a UK national and had lived in the UK all his life. He accepted that he was UK resident as of 3 April 2006, and that he was UK resident again as of 3 May 2013. It was HMRC's case that Mr McCabe did not make the necessary distinct break with the UK, but rather he remained resident in the UK during the Relevant Period (irrespective of also becoming resident in Belgium); and that for the purposes of the DTC Mr McCabe was treaty-resident in the UK.

43. Mr Stone submitted that I should focus upon Mr McCabe's life during those years; and in particular his familial and social relationships, his business interests and professional life, his involvement with Sheffield United and his physical presence in the UK. Mr McCabe

retained significant ties to the UK throughout the Relevant Period, and accordingly remained resident here.

44. Mr Stone submitted that the following points taken from the authorities are relevant to the particular facts of this appeal:

(1) no duration is prescribed by statute and it is necessary to take into account all the facts of the case; the duration of an individual's presence in the UK and the regularity and frequency of visits are facts to be taken into account; also, birth, family and business ties, the nature of visits and the connections with this country, may all be relevant (*Zorab*);

(2) the fact that an individual has a home elsewhere is of limited consequence; a person may reside in two places but if one of those places is the UK, he is chargeable to tax here (*Cooper v Cadwalader; Levene*);

(3) there is a difference between the case where a British subject has established a residence in the UK and then has absences from it (*Levene*) and the case where a person has never had a residence in the United Kingdom at all, ie a difference between leavers and arrivers (*Zorab; Brown*); and

(4) in order to be resident in the UK, it is not necessary for an individual to have any accommodation available to him (*Lysaght; Levene*). If an individual does have accommodation available to him to use, what matters for residence purposes is that substantive fact rather than legal ownership of the accommodation (*Loewenstein v De Salis*).

45. On the facts, Mr Stone submitted that:

(1) physical presence is just one aspect of residence - it is necessary to understand the details of Mr McCabe's life – his habits and his connections with the UK, including business, which remained;

(2) Mr McCabe was essentially commuting to the UK to work, see family, watch Sheffield United matches and then returning to Brussels to sleep. He was able to do this as a result of the proximity of Brussels to the UK, and assisted by the existence of Eurostar and his use of a private plane. In consequence, looking at the number of nights spent in the UK is not the relevant lens. What he did is much more relevant than where he slept, compared with the position in the 1920s when a person must sleep where they worked; and

(3) Mr McCabe also had the family home at Deepdale available to him; he used it during the day. This adds a different complexion to the authorities.

46. HMRC did not dispute the Scarborough Group's focus on the growth of the European business, or Mr McCabe's role in that growth; but Mr Stone submitted that this does not prevent him from retaining UK residence. In particular, HMRC did challenge whether the focus on Europe was to the exclusion of the UK; and whether he had disconnected himself from the UK.

47. Mr Stone submitted that if UK residence is established (in accordance with his submissions), then, on application of the tie-breaker provisions in Article 4(2) of the DTC, the tie-breaker resolves in favour of Mr McCabe being resident in the UK:

(1) Mr McCabe had permanent homes available to him in both the UK and Belgium. His economic and social ties (his centre of vital interests) were closer to the UK and accordingly he was treaty-resident in the UK under Article 4(2)(a); or

(2) if (which neither party suggests) the Tribunal finds that Mr McCabe's centre of vital interests cannot be determined, he had habitual abodes in both the UK and Belgium under Article 4(2)(b) and, accordingly, was treaty-resident in the UK under Article 4(2)(c) because of his UK nationality.

#### **FINDINGS OF FACT**

48. The SoAF is set out in full in the Appendix. I have made additional findings of fact on the basis of the evidence before me below. These are set out by subject-matter below alongside some of relevant paragraphs from the SoAF.

49. To provide some context, I address briefly Mr McCabe's background and the establishment of the Scarborough Group, arrangements in Brussels during the Relevant Period (both as regards living accommodation and office accommodation used by Mr McCabe), the establishment of his personal service company, SRE, and the contracts it entered into, practical arrangements (including as to belongings, banking arrangements) relating to his relocation and Mr McCabe's residence in Belgium for Belgian tax purposes (including tax paid there).

50. I then make findings in relation to Mr McCabe's lifestyle before 4 April 2006, his decision to relocate to Brussels, his whereabouts during the Relevant Period and two preceding tax years and then matters in relation to his lifestyle during the Relevant Period (including family, social relationships and business and his pattern of travel during this time).

#### **Background and establishment of the Scarborough Group**

51. Mr McCabe grew up in Sheffield, attending school close to Bramall Lane, and has always been an avid supporter of Sheffield United FC and Yorkshire County Cricket Club. The SoAF records:

“1. Mr McCabe was born in Sheffield on 25 April 1948. He married Sandra McCabe on 14 August 1971. They have two sons – Scott (born in 1975) and Simon (born in 1977) – who live in the UK. As at 4 April 2006 they had one grandchild, Scott's son Charles, who was born on 19 September 2004. Scott's daughter Sophia was born on 11 January 2008.

2. Mr McCabe attended school at Duchess Road, Sheffield, then Hunters Bar Primary School and finally the Rowlinson Technical Modern School, Sheffield.

3. After leaving school at 16, Mr McCabe worked on a building site for a local contractor whilst attending night schools and training to become a Quantity Surveyor. He thereafter joined Ackroyd and Abbott who were bought by Bovis, a major national and international property developer, in the late 1960s, and joined Teesland Development Company Ltd (“Teesland”) in the early 1970s where he first worked on projects in continental Europe and in Saudi Arabia.

4. Mr McCabe subsequently established County Properties Ltd (“County”) in the mid-1970s which was the beginning of the longstanding relationship with the Bank of Scotland. County combined with Assam Trading Holdings Ltd in 1979 with the resulting entity focusing on international real estate.

5. In 1980 Mr McCabe established what would become Scarborough Property Group Plc (which together with members of its group from time to time is referred to hereafter as “the Scarborough Group”) to acquire real estate and carry out real estate services for third parties. The Scarborough Group's business initially focussed on the UK before undertaking its first project in mainland Europe through a joint venture (United Scarborough Estates Limited) to develop property in Belgium at Amerika House, Antwerp. That property was sold in 2002. Mr McCabe first acquired an interest in Sheffield

United Football Club (“SUFC”) in 1997 when he acquired an interest in approximately 1.4% of the shares in its parent company.

6. The Scarborough Group also acquired Teesland, which was subsequently listed on the London Stock Exchange in 2002 with the Scarborough Group retaining a significant interest. Teesland thereafter acquired iOGroup (“iOG”) – a property fund management company with offices in the Czech Republic, Denmark, France, Finland, Germany, Hungary, the Netherlands and Sweden.

7. The Scarborough Group and the Bank of Scotland established the joint ventures of Scarborough Continental Partners Ltd (“SCP”) and Sc€uro Ltd (“Sc€uro”) in late 2005 to acquire real estate assets in continental Europe. The Bank provided funds of over €700 million to SCP which acquired real estate in the Nordic countries, France, Germany, The Netherlands and elsewhere in mainland Europe. The principal activity of SCP was European commercial property investment.

...

15. An article in “Property Week” on 7 April 2006 reported Mr McCabe’s relocation to Belgium to create a European Headquarters in Brussels from which he would be responsible for managing the expansion of international business, particularly in Western and Central Europe and overseeing Teesland’s European expansion.”

52. Mr McCabe was the founder and chief executive of the Scarborough Group.

53. The Scarborough Group had, before the start of the Relevant Period, grown into a successful property development, property investment and leisure organisation with operations throughout the UK. These different businesses included:

(1) Forsyth plc, which was established in 1991 to offer serviced offices. It initially operated only in the UK only (and had over 40 venues in the UK), but in the early and mid-2000s it expanded to the Far East.

(2) Fairbriar Plc was a developer that had been placed into administration under previous owners, and which the Scarborough Group had then assisted Bank of Scotland (“BoS”) with rescuing in the 1990s. In May 2005, Fairbriar (with Mr McCabe as chairman) had secured financing from Fraser & Neave (“F&N”) (which was based in Singapore), who took a one-third interest in Fairbriar. F&N became an important international business partner of Mr McCabe and the Scarborough Group as they looked to more international and Far Eastern business opportunities.

(3) Teesland - After Teesland became a wholly-owned subsidiary of the Scarborough Group it was re-shaped into a fee-earning fund, asset development and property services group, and was listed on the London Stock Exchange in 2002. Mr McCabe remained as Chairman, and the Scarborough Group held a significant interest.

54. By the 2000s Mr McCabe was convinced that there were better prospects in overseas markets and he made a conscious effort to look for opportunities to expand within Europe and the Far East. This international expansion had included the first project in mainland Europe, namely the development at Amerika House (at [5] of the SoAF) and the expansion of the Scarborough Group into the Far East, with offices in Hong Kong and China.

55. There were two notable developments in this regard:

(1) the purchase by Teesland of iOG in 2004 with its network of offices in mainland Europe, and



(2) the joint venture between the Scarborough Group and BoS in late 2005, pursuant to which SCP was formed to invest in income-producing real estate within mainland Europe. BoS provided a large funding facility (of €700 million). Mr McCabe was responsible for leading and managing this project – SCP was to find and develop properties, and Teesland’s funds could invest in and manage those properties.

56. During the Relevant Period Mr McCabe would initially investigate and view potentially suitable real estate assets, with assistance from Mr Vangoidsenhoven (who was seconded to SCP by BoS for this role) and Teesland/iOG colleagues.

57. These efforts were successful:

(1) The financial statements of SCP record turnover and assets for the year ended 30 September 2007 of €47.2 million and €1 billion respectively, up from €18million and €845million for the (longer) accounting period ended 30 September 2006. By geographical region, the vast majority (99%) of this turnover related to the rest of Europe.

(2) Teesland/iOG also recorded growth over this time. The operational highlights for the year ended 30 June 2006 refer to the European funds, acquisition of commercial property in Nordic region and Germany, and the Chairman’s statement refers to the pace of transformation into a pan European property fund. Turnover grew from £30.6 million for the year ended 30 June 2006 to £38.4 million for the year ended 30 June 2007, but whereas turnover for the first period was £20.5/£10.1 between UK and rest of Europe, this proportion changed significantly to £17.9 million/£20.5 million the following year.

58. Mr McCabe’s evidence included that:

(1) he had decided that he needed to move overseas, and in particular to Brussels, to develop and grow this European business; and

(2) this decision led to the need to transfer responsibility for the UK businesses to others.

59. I assess that explanation further below, after making findings of fact in relation to Mr McCabe’s living accommodation in Brussels, the office set-up, his personal service company and practical arrangements in relation to his departure (including those concerning bank accounts and memberships).

### **Living accommodation in Brussels**

60. The SoAF records:

“8. In February and March 2006, Mr McCabe visited Belgium on five days prior to travelling to Brussels on 4 April 2006:

- on 16 and 17 February 2006 with Mrs McCabe when he viewed potential temporary living accommodation at The Golden Tulip Residence Parnasse and Marriott Executive Apartments;
- on 22 February 2006 when he viewed potential office accommodation including that at Bastion Tower where he established an office; and
- on 1 and 2 March 2006 when he stayed overnight at the Marriott Apartments where he lived for over three months from 4 April 2006.

...

13. For the period 4 April 2006 until 21 July 2006, Mr McCabe stayed in a rented apartment at the Marriot Executive Apartments, Brussels which he had viewed on 17 February 2006. The accommodation was leased for a three

month period with an option to renew for a further three months. It comprised two en-suite double bedrooms and living/dining room with kitchen area.

...

19. In May 2006, Mr and Mrs McCabe viewed a residential property at 1150 Woluwe St Pierre, Brussels and began the purchase process. However, on 30 August 2006 his lawyer advised him of significant problems with the title which would delay the purchase. On 16 October 2006 Mr McCabe offered to purchase a residential property, Ave Louise 541, Ixelles, Brussels, and on 27 October 2006 entered into an agreement to purchase the property within 4 months for €1.4 million. The property comprised 2 bedrooms, a sitting/dining room and kitchen. He moved there on 3 November 2006 following a down payment of €225,000 and completed the purchase on 19 February 2007. In May 2008 he sold that property and acquired another residential property of similar size at Franklin Roosevelt, Brussels at a cost of €900,000 which he occupied as a residence from that time. Mr McCabe sold the property in February 2014.

20. From 22 July 2006 until 9 November 2006 Mr McCabe stayed in an apartment at Le Meridien, Brussels which was available for the exclusive use of Mr McCabe throughout the period at a rate of €2,411 per week and was paid for by SRE as part of his taxable remuneration from the company.”

61. Mr and Mrs McCabe had viewed temporary apartment accommodation to give him time to choose a suitable place to buy in Brussels. Mr McCabe initially stayed at the Marriott executive apartments (until July 2006). Mr and Mrs McCabe did identify a suitable property to buy in May 2006, but that did not proceed. Mr McCabe moved from the Marriott to an executive apartment at Le Meridien, where he stayed until the beginning of November 2006, at which time he moved into an apartment he was buying at Ave Louise. That move turned out to be relatively short-lived – whilst the apartment at Ave Louise was centrally located, there were snagging problems and disruption resulting from nearby construction works. In May 2008 (ie after the Relevant Period) Mr McCabe sold that property and bought an apartment at Franklin Roosevelt – this duplex was larger, with a balcony, in what was regarded as a less exclusive area but better suited him. He retained that apartment for the time that he remained in Brussels.

62. As is apparent from the description above, Mrs McCabe was involved in the choice of Mr McCabe’s living accommodation in Brussels. There was insufficient evidence to enable me to conclude that she ever intended to be more than a visitor to this accommodation; there was some evidence that she had considered selling Deepdale but even that was expressed as being with a view to buying a smaller house within Scarborough.

#### **Office accommodation in Brussels and establishment of personal service company**

63. The SoAF at [8] includes a reference to Mr McCabe having viewed office accommodation at Bastion Tower, and continues to refer to the establishment of Mr McCabe’s personal service company, SRE:

“9. On 8 March 2006 a firm of Belgian lawyers, CMS DeBacker, began work to set up a Belgian company, Scarborough Realty (Europe) SPRL (“SRE”) for Mr McCabe. The Company’s Constitution was signed by Mr and Mrs McCabe at a meeting in Brussels on 5 April 2006 and registered with the authorities on 7 April 2006.”

64. Scott had assisted with the search for suitable office accommodation, visiting available office premises in Brussels. Mr McCabe viewed and decided to lease the offices at Bastion Tower; this was well-located and housed other reputable firms. SRE had three suites – this

included hot desks, set up with computers, for use by visiting colleagues and a boardroom was available with video conference facilities.

65. The lease agreement was dated 3 February 2006 with the tenant being Scarborough Development Group Management Ltd, for a three-month fixed term lease from that date. It was not signed on behalf of the tenant until 6 March 2006 (when it was signed by Mr Tandy). On 3 April 2006 an addendum was signed which changed the tenant to SRE, and Mr McCabe/SCP/SRE used the offices for seven years. Mr McCabe no longer had an office specifically designated for his use in the Scarborough Group's offices in the UK (either in Europa House in Scarborough or in London).

66. The SoAF records (at [23]) Mr McCabe's appointment as managing director of SRE, and SRE's turnover ([24] of the SoAF). Mr Vangoidsenhoven's secondment is set out at [25] of the SoAF.

67. Mr McCabe was appointed as managing director of SRE on 22 January 2007, which appointment was effective from 4 April 2006. The main mandates agreed to be undertaken by Mr McCabe included to detect and contact new partners, clients or customers on account of SRE, to search new markets and new investment possibilities for SRE and to fulfil and implement contracts signed by SRE. The contract provided for him to be paid fees of €18,600 per month, and this was his only salaried position until he joined the parent company boards of Valad as a non-executive director on 1 August 2007.

68. Mr Vangoidsenhoven's career had been in corporate banking, and he had been a director heading the corporate banking team of BoS in Paris. He was seconded by BoS to SCP for him to acquire real estate skills, to work with and assist Mr McCabe in developing SCP, and to draft a business plan for setting up a permanent BoS presence in Belgium. Mr Vangoidsenhoven's secondment involved him splitting his time between SCP and BoS, intended as a 60/40 split (he had other client files), but the SCP/SRE workload turned out to be such that most of his time was dedicated to SRE, and BoS were happy with that outcome. The secondment was initially for one year but in fact continued for two years (and Mr Vangoidsenhoven later joined the Scarborough Group in 2009).

69. SRE derived its income from various consultancy arrangements which it entered into with members of the Scarborough Group. The SoAF describes the consultancy agreement between SRE and SPC Group Plc:

“43. A consultancy agreement between SPC Group Plc and Scarborough Realty (Europe) SPRL dated 31 May 2006 was agreed under which Mr McCabe provided services to SPC Group Plc “in respect of (but not limited to) European and other non-UK property markets including undertaking research on behalf of the Company into the nature and state of those markets, the identification of potential acquisition and development opportunities within those markets and, with the approval of the Board, developing such opportunities on behalf of the Company, and establishing relationships with European property specialists and advisers on the Company's behalf, and providing such other services as may from time to time be agreed by the Company and SRE.”

44. The above consultancy agreement was amended on 11 September 2008, with effect stated to be from 1 March 2008, to increase the fee of Scarborough Realty (Europe) SPRL to reflect the increased level of service provided in respect of the property interests of SCP Group Ltd. For the year ended 28 February 2009 the fee was to be allocated to the activities in:

- The Far East €325,000

- Hungary €50,000
- India €25,000
- Australia €25,000
- Canada €25,000
- Europe (HBOS/Valad joint venture) €25,000.”

70. Additional consultancy agreements entered into by SRE included:

(1) A consultancy agreement with SUplc dated 9 May 2006 which referred to SUplc wanting to appoint SRE to provide various (according to the recitals) consultancy services in respect of European and other non-UK property markets. Clause 3 then provided that the services to be provided by SRE included making Mr McCabe available to act as executive director and Chairman of SUplc, making Mr McCabe available to carry out duties for any group company, or act as director of any group company, and such other activities as may be agreed. SRE agreed that Mr McCabe would be available for a minimum of 12 hours each week (and such hours as may reasonably be required by SUplc).

(2) A consultancy agreement with SDG Management Ltd dated 24 May 2006, with the same background as above, describing the services in clause 3 as the provision of consultancy services in respect of the European and other non-UK property markets, including research into the nature and state of those markets and identifying potential acquisition and development opportunities. No minimum number of hours per week was specified; instead, SRE agreed that Mr McCabe would be available for such number of hours as may reasonably be required. This agreement is very similar form to that with SPC Group Plc described in the SoAF.

(3) A consultancy agreement with Teesland plc dated 24 May 2006, again with the same background, and the services to be provided by SRE included making Mr McCabe available to act as executive director and Chairman of Teesland, making Mr McCabe available to carry out duties for any group company, or act as director of any group company, providing consultancy services in respect of the European and other non-UK property markets, including research into the nature and state of those markets and identifying potential acquisition and development opportunities and such other activities as may be agreed. SRE agreed that Mr McCabe would be available for a minimum of 12 hours each week (and such hours as may reasonably be required by Teesland).

71. The consultancy agreements entered into by SRE were of a broadly standard form, and although they had been modified to address particular aspects of Mr McCabe’s intended role (eg as Chairman of Teesland), the approach to describing his activities was very generic and, in the case of SUplc, I find it was also inaccurate – it is completely unrealistic to state that Mr McCabe’s role for the owner of a football club was to provide consultancy services in respect of non-UK property markets. Whilst I accept that these consultancy agreements were signed and the fee payments provided therein were made, I do not place any weight on the descriptions of services to be provided when assessing Mr McCabe’s activities over the Relevant Period.

### **Practical arrangements relating to departure to Brussels**

72. The SoAF describes Mr McCabe’s relocation as follows:

“11.On 29 March 2006 various items of luggage were transported from Scarborough to Mr McCabe’s rented accommodation at the Marriott Executive Apartments, Brussels.

12. On 4 April 2006 Mr and Mrs McCabe travelled on the 14:13 (UK time) Eurostar to Brussels, arriving at 17:37 (Belgian time).

...

17. Mr McCabe travelled to Brussels on 4 April 2006. He made the following arrangements:

a) He engaged the services of Serge Gielbartowicz, a Brussels resident, of FECAM SPRL, Clos de la petite Suisse, 1 – B-1140 Evere, as a driver. FECAM SPRL, which provided the services of Mr Gielbartowicz and the car he drove, was initially engaged from 4 April 2006 through the Marriot Executive Apartments for Mr McCabe and then directly by Mr McCabe from 1 May 2006. The monthly invoices for Mr Gielbartowicz's services averaged over €5,000.

b) He registered with Dr Zeiger, a local medical practitioner, of 26 Bd Maria Groeninckx de May, 1070 Brussels on 27 July 2006.

c) He registered with Dr Woitchik, a local dentist, of Avenue George Bergmann 113, 1050 Brussels on 27 July 2006.

d) He ceased to use and/or closed, as noted, the following UK bank and credit card accounts:

- Barclays account 8934 – closed 3 April 2006,
- Bank of Scotland account 5807 (joint) – account transferred into sole name of spouse 6 April 2006,
- Barclays account 9973 – closed 14 July 2006,
- American Express account 3742 895464 – closed 13 November 2006,
- Barclaycard account 4423 5000 (joint) – ceased to use 18 May 2006; spouse ceased to use December 2006; closed 1 March 2007,
- American Express account 3742 001017 – ceased to use May 2006; closed March 2007,
- Barclays account 4767 – closed 4 March 2008,
- Halifax PEP, share dealing account – no contributions made after 5 April 2006; closed 28 March 2008.

e) He did not close the following UK account:

- Halifax Cash ISA – no contributions made in the relevant years.

f) He opened the following accounts in Brussels:

- ING Euro Current account 310-1755565-48 – opened 8 May 2006,
- ING Euro Green savings account 375-4431914-63 – opened 8 May 2006,
- ING Credit card ref B/03-04916768-8 – opened 25 May 2006.

g) He terminated his Vodafone contract on 1 October 2006 and set up a Belgian phone from the Phone House on 22 June 2006.

...

27. Mr McCabe was a member of the Bath & Racquets Club in London and the associated George Club before he moved to Brussels. On 20 March 2006, Mr McCabe notified both clubs of his new address in Brussels and requested the Bath & Racquets Club to change his membership to that of an overseas

resident. In June 2010 both clubs confirmed that Mr McCabe's membership ceased in March 2006."

73. The luggage shipped by Mr McCabe to Brussels from Deepdale comprised seven parcels, namely four hanging garment boxes and three suitcases. These were his personal belongings, eg clothing. The house at Deepdale remained furnished, and Mrs McCabe continued to live there. Mr McCabe handed his keys to Deepdale over to his wife when he moved his belongings out of Deepdale; and I accept that he did not have keys to the house during the Relevant Period.

74. [17] of the SoAF above describes the steps taken in relation to UK bank accounts, credit cards and his phone contract.

75. Mr McCabe announced his intended relocation to Brussels, including by way of:

(1) Letters to key contacts sent in February 2006 to, eg, Ray Robertson, Head of Corporate Banking at BoS, and Dr Stanley Quek, the chief executive of F&N. The letter to Mrs Robertson included the statement "Rest assured however I will still be leading the UK team, albeit from a European base, for many years to come."

(2) At a board meeting of SUPlc on 3 March 2006 Mr McCabe informed the board that he was moving from Scarborough to Brussels, and that if activities in Brussels progressed as he expected it would become impractical for him to continue as Chairman, such that within 12 months it would be necessary for him to step down and hand over the role to his replacement.

(3) The article in Property Week (at [15] of the SoAF), which operated as a notification to the wider business community.

76. Mr McCabe's role in the growth of the European business was not challenged by HMRC. They did challenge whether he retained responsibility for the UK businesses. Whilst I note the language used in the communication to, eg, Mrs Robertson above, I consider it more important to assess what Mr McCabe actually did, as well as the actions and responsibilities of others, and I address that separately below.

77. Mr McCabe also took steps to cancel or notify his change of address to social clubs and gyms:

(1) [27] of the SoAF refers to the Bath & Racquets Club and George Club in London. This notification of change of address is not a cancellation of membership, but I accept Mr McCabe's evidence that he had not intended to continue to use these clubs as a member after this time (ie any visits would be as a guest of another member) and regarded his membership as having been cancelled from this point, and that he no longer paid membership fees to these clubs.

(2) In March 2006, he cancelled his membership of Holmes Place.

(3) He cancelled his membership of The Cricketers Club.

(4) He notified the Royal Institute of Chartered Surveyors of his change of address.

(5) He notified The RAC Club of his change of address, and in December 2006 confirmed that he did not want to take up Out of Town membership.

### **Residence in Brussels for Belgian tax purposes**

78. The SoAF records (at [14] and [21] to [24]) Mr McCabe's residence in Belgium, eligibility to work, registration for social security contributions, tax returns, payroll costs of SRE, amounts assessed to Belgian tax and tax paid by Mr McCabe in Belgium.

## **Before 4 April 2006**

79. Mr McCabe's pattern of activity prior to the Relevant Period involved the following:
- (1) He and Mrs McCabe had lived at Deepdale since 1990. They purchased the property in joint names, and on 11 June 2004 Mr McCabe transferred ownership of his share of the property to Mrs McCabe.
  - (2) He spent the majority of his time (whether measured by reference to midnights in the UK, or whole days or part days) in the UK. This remained the case in the two tax years immediately preceding the Relevant Period (as is described further under Whereabouts).
  - (3) Mr McCabe worked long hours, but tried to leave weekends free for social and family time in Scarborough – he would try to be in the Scarborough office at Europa House on a Friday, and finish in time for squash matches with friends (including Dr Oldroyd, Mr Watson, Mr Brining and others). They would have a drink and sometimes be joined by other friends, including Mr Cameron (another friend and near neighbour of Mr McCabe). The rest of the weekend routine evolved over the years, but was devoted to family and friends, and he tried to attend significant sporting events eg the Scarborough Cricket Festival and international cricket fixtures.
  - (4) In 2004-05 and 2005-06 Mr McCabe was spending more time during the working week in London, staying at a flat on Blandford Street in London. He had various social club and gym memberships in London (including The RAC Club, and squash club).
  - (5) He did travel overseas on business. In 2005-06 he travelled to India (for Forsyth), Singapore (for F&N and FairBriar), Hong Kong and China (for Scarborough Group), Hungary, Poland, Germany, Spain and Denmark (for Teesland).
  - (6) Mr McCabe had owned a villa at La Manga in Spain since the mid-1980s, and this was where he and Mrs McCabe would travel on holiday, albeit that for Mr McCabe this would usually be a working holiday. He maintained an office there, separate from the villa, and had access to staff. They were often joined by Scott and Simon, and their long-standing family friends would sometimes join them there as well.
  - (7) From the mid-1990s Mr McCabe attended the vast majority of Sheffield United home and away matches. The SoAF records the following:

“38. According to entries in Mr McCabe's diaries, during the 2005/06 tax year, prior to travelling to Brussels on 4 April 2006, Mr McCabe attended 45 SUFC football fixtures. In 2006/07 Mr McCabe attended 16 SUFC fixtures and in 2007/08 24 SUFC fixtures.”

## **Decision to relocate to Brussels**

80. As found above, Mr McCabe was responsible for the development and growth of the newly-founded business of SCP; and those efforts were successful.
81. Mr McCabe made the decision to relocate to Brussels – his evidence was that:
- (1) He made this decision in late 2005.
  - (2) Scarborough was not a suitable place from which to lead and manage an international group of companies.
  - (3) He considered the physical relocation necessary partly to give confidence to Scarborough's principal partner, BoS, that he would be wholly committed to their joint venture and would not be distracted by other aspects of the business, and in order to lead,

drive and make a success of the European expansion, in particular by leveraging the benefits provided by the Teesland/iOG merger in 2004.

(4) Brussels was an ideal location for living and as a headquarters because of its links to European cities (road, rail and air). He was familiar with the city, having been involved in an earlier development project there, and for him Brussels, ie not other cities in mainland Europe such as Paris or Frankfurt, was where he wanted and needed to be. It was the only location he had in mind.

(5) On the basis of advice received, Mr McCabe also concluded that the tax regime in Belgium would be suitable to his circumstances. He accepted that he knew that Belgium would not assess tax on a transfer of his shares in the Scarborough Group to his sons, describing this as a welcome consequence (but denying that this was his motive for relocating).

82. Mr Stone challenged this evidence as to the timing of the decision and the significance of tax (and in particular the absence of tax on capital gains in Belgium).

83. The geographic location of Brussels and its transport links is a matter of public knowledge. I accept that Mr McCabe could travel between Brussels and the rest of Europe (including the UK) by air (both on commercial flights and on the private plane to which he had access from October 2006), train or by road, Mr McCabe's driver, Serge Gielbartowicz, being available to drive him to the airport or, eg, to Luxembourg. There were plentiful convenient and time-effective routes available to him.

84. The significance of Mr Stone's challenge to whether the decision was made in late 2005 (which was Mr McCabe's evidence) or in early 2006 was partially that Mr McCabe had received tax advice from Mazars in early 2006 about UK residence and non-residence, and been introduced to Mazars' office in Ghent in February 2006.

85. There was no documentary evidence to support Mr McCabe's recollection that he had made the decision to move to Brussels in late 2005. In terms of evidence from other witnesses, Ms Coppard supported this timing (referring credibly to emails which she had seen at that time referring to an intended move, which had been of concern to her as she had been in her then current role for just one year, albeit that these emails were not in evidence); whereas Scott recalled having had a discussion with his father about moving abroad in January 2006, and agreed he would have been one of the first people with whom Mr McCabe would have discussed this (and Scott then helped with viewing potential office accommodation in Brussels in February 2006, recommending Bastion Tower as one good option, with terms for the lease being signed in March 2006 after Mr McCabe had visited and agreed it was the right location for his offices).

86. Mr McCabe's insistence and focus upon Brussels being his personal preferred location is potentially objectively difficult to understand and accept – the project at Amerika House had been sold in 2002, he had not made any visits to Belgium at all in 2004-05, and whilst he did make three trips there in the beginning of (calendar year) 2006 (these being the visits set out in the SoAF), he had not visited there earlier in 2005-06, and the three visits were very short - two involved an overnight stay, the other was en route from Spain to the UK that same day. However, my conclusion from Mr McCabe's evidence at the hearing was also that, whilst he did value receiving advice from trusted individuals, he was also accustomed to making decisions and acting upon them (as Simon expressed it, wanting everything to happen yesterday) – in consequence, I consider that concerns I may otherwise have about reasonableness of taking such a decision to prefer Brussels or the level of information available (including the lack of visits) should have some weight but would not necessarily override a contrary explanation, remembering the burden and standard of proof.



87. Mr McCabe took tax advice at the beginning of 2006. Claire Treacy, Scarborough Group's in-house tax adviser, assisted Mr McCabe with obtaining and implementing advice in relation to his relocation. He obtained tax advice from Mazars (before, during and after the Relevant Period) and also from counsel (Patrick Way KC). Ms Treacy was not called as a witness; and whilst I did have witness statements from David Sayers, a tax partner at Mazars (one prepared for the purposes of this appeal and one prepared and served in respect of the judicial review proceedings) and Mr Sayers was cross-examined on his evidence, Mr Sayers only started advising Mr McCabe in 2009. The evidence in Mr Sayers' witness statements as to advice given by Mazars was thus based on his review of Mazars' files (and he confirmed that he had had access to all of the files), only some of which material was exhibited and included in the hearing bundle.

88. Mr McCabe had a meeting with Robin Downie (a partner at Mazars) on 1 February 2006 to discuss the tax consequences of moving overseas and that meeting was attended by Ms Treacy as well as Mr McCabe. The documentary evidence of the advice obtained included the following:

(1) Letter from Mr Downie of Mazars to Mr McCabe dated 6 February 2006, setting out advice on residence and dealing with points which had (it said) been raised by Mr McCabe, including advising that:

(a) Selling Deepdale Avenue would demonstrate an intention of going abroad permanently, or it could be leased to a non-connected third party for five years.

(b) It is safer that the house not remain in family ownership.

(c) The difficulty with the flat in Blandford Street (which was owned by the Scarborough Group) was demonstrating it is not available for his use at a time when other members of the family continued to use it.

(d) Whilst HMRC practice is to disregard days of arrival and departure, if he regularly arrived early on Tuesday and departed in the evening on Thursday it would be difficult to assert that this only constituted one day in the UK.

(e) If he left the UK before 5 April 2006, achieved a full year of non-residence (to reassure himself it is possible) and then made gifts in March 2008, he then had three further years during which he would be required to remain non-resident.

(f) It would be helpful to resign as chairman or director of as many companies as possible, although Mazars appreciated he may want to remain as director of the principal companies.

(g) In the context of available accommodation, Mrs McCabe would need to move offshore with him, but her travel would not be restricted if there was no intention for her to seek to achieve non-residence.

(h) Mr McCabe should ensure that wherever he chose to settle he would not be caught by the CGT regime in that country.

(2) There was then a conference with Patrick Way KC on 4 April 2006, which considered proposals set out as to the relocation, and emphasised:

(a) Mr McCabe should consider the appropriateness of retaining his Chairman positions with Teesland and SUpIc;

(b) he should close his UK current account and cancel his UK credit card and redirect his post;

- (c) he should acquire accommodation in a personal capacity in Belgium of similar size and standard to the family home in the UK.

The note made clear that Mr McCabe's explanation was that he would be carrying out his duties for Teesland exclusively from outside the UK. Counsel also advised that Mrs McCabe did not need to sell Deepdale, but Mr McCabe must not stay there.

(3) Mr Downie wrote to Mr McCabe on 26 June 2006. In that letter, Mr Downie noted the advice that had been received from counsel but did set out his opinion that it was best that Mrs McCabe sell Deepdale and the Scarborough Group sell the flat it owned on Blandford Street (which had previously been used sometimes by Mr McCabe when he was staying overnight in London).

(4) A further conference with Mr Way was held on 25 October 2006 to discuss the facts and circumstances.

89. I am satisfied that, by mid-February 2006, Mr McCabe had decided that his relocation would be to Brussels. Mr Downie contacted Miguel Thibaut, a partner in Mazars' Ghent office, on 15 February 2006 to introduce the topic of a proposed relocation by Mr McCabe to Brussels (and there was no evidence of introductions being made to lawyers in other jurisdictions). However, I am not satisfied that Mr McCabe had made such a decision in late 2005:

(1) There no documentary evidence, and after so many years, and without such contemporaneous documentary evidence, I do not accept the reliability of this recollection from Mr McCabe.

(2) Mr Downie's letter of 6 February 2006, sent after a meeting with Mr McCabe, does not reflect Mr McCabe having told Mr Downie that he was only prepared to move to Brussels, or that this was his chosen place for relocation.

(3) Furthermore, Mr Sayers' witness statement (that which had been prepared for the judicial review) said Ms Treacy had been asked to consider whether there were jurisdictions in Europe that would suit Mr McCabe's requirements and that Mazars suggested a number of locations including Belgium. Mr Sayers confirmed that the files suggested that Belgium was not the only jurisdiction being considered; but said that he reached this conclusion based on the narrative for time entries which he had seen. Mr Sayers' evidence that Ms Treacy had been asked to consider whether there were suitable jurisdictions is not necessarily reliable – he was not involved at that time, and advice may have been sought to compare Belgium as an intended new home against other jurisdictions to ensure complete information as to advantages and disadvantages. Mr Sayers' phrasing in his witness statement was potentially speculation, in particular as to whether anyone had asked Ms Treacy to obtain this information, and giving evidence he sought to distance himself from this. I accept that Ms Treacy had asked Mazars for comparative information about different jurisdictions - I consider it is unlikely that Mazars would have spent time producing such information otherwise. She was discussing Mr McCabe's proposed relocation with him and I infer she would not have requested this information if by this time Mr McCabe had told her that Brussels was the only potential jurisdiction involved.

90. Mr McCabe referred to the Belgian CGT position as a "welcome consequence" of his relocation. I conclude this understates the position – I consider that the actions taken by Mr McCabe when following some of the advice obtained (eg ensuring he did not stay overnight at Deepdale, remaining outside of the UK for six months) demonstrate that he was seeking to ensure he was treated as non-UK resident for the Relevant Period, and had chosen Brussels as a jurisdiction both because he could operate from there (it being physically convenient for

travel to the UK and the rest of Europe) and because of the favourable tax regime. His intention at the time of his relocation was that he would give his shares in the Scarborough Group to his sons whilst non-UK resident and remain outside of the UK for more than five years, such that he would not be treated as temporarily non-resident.

91. Mr McCabe gave the shares to his sons on 3 April 2008 and has filed his tax returns on the basis that he had been non-resident for more than five years.

### **Whereabouts during the Relevant Period**

92. There was a significant amount of evidence as to where Mr McCabe spent his time during the Relevant Period. The SoAF recorded some of this information:

“28. According to the entries in Mr McCabe’s diaries:

- During the 2004/05 tax year, Mr McCabe spent 254 midnights in the UK and 111 midnights outside the UK.
- During the 2005/06 tax year, prior to travelling to Brussels on 4 April 2006, Mr McCabe spent 276 midnights in the UK and 89 midnights outside the UK (3 of which were in Belgium).

During the 2006/07 tax year, Mr McCabe spent 129 midnights in Belgium, 55 midnights in Spain and 37 midnights in Australia. He spent 33 midnights in the UK. According to entries in Mr McCabe’s diaries and supported by invoices from the various hotels and a witness statement 28 of these were spent in 5 different hotels, 4 were spent at the home of a friend and 1 at the home of his son Simon in London.

During the 2007/08 tax year, Mr McCabe spent 98 midnights in Belgium, 66 midnights in Spain and 44 midnights in Australia. He spent 43 midnights in the UK. According to entries in Mr McCabe’s diaries and supported by invoices from the various hotels 42 of these were spent in 10 different hotels and 1 was spent at the home of a friend.

29. On 30 April 2006 Mr McCabe travelled from Brussels to the UK. He arrived in the UK at 10:30 en route to Hong Kong, departing that evening at 21:15. While in the UK he watched SUFC play Crystal Palace in the final game of the season in which they secured promotion to the Premiership.

30. Mr McCabe did not visit the UK again until 5 October 2006.

31. Mr McCabe visited the UK on 46 occasions between 6 April 2006 and 5 April 2007. These visits resulted in Mr McCabe being present in the UK for some part of the day on 79 days and a further 4 occasions in transit where he did not leave the airport. During 2006/07 Mr McCabe was present in Belgium for some part of the day on 175 days. There were 223 entries in his diary relating to visits to the UK out of a total of 834 entries during the year to 5 April 2007.

32. In the 2007/08 tax year, Mr McCabe visited the UK on 53 occasions. These visits resulted in Mr McCabe being present in the UK for some part of the day on 94 days and a further 5 occasions in transit where he did not leave the airport. During 2007/08 Mr McCabe was present in Belgium for some part of the day on 135 days. There were 229 entries in his diary relating to visits to the UK out of a total of 816 entries during the year to 5 April 2008. These entries included business meetings, contact with business acquaintances, audio and video conferences and attending SUFC matches, amongst other matters.”

93. The above records the agreement which was reached as to the number of midnights spent in the UK in the two tax years preceding the Relevant Period, as well as the midnights during the Relevant Period (with additional information as to where the remaining midnights were spent during the Relevant Period). It was also agreed that having left the UK on 4 April 2006, Mr McCabe did visit the UK on 30 April 2006 (watching Sheffield United's final match of the season, a significant occasion as they had secured promotion to the Premier League) but did not visit the UK again until 5 October 2006. There was then information as to his visits to the UK for the remainder of the Relevant Period, which included information as to his presence for part days in both the UK and Belgium.

94. Mr McCabe's whereabouts is described throughout in the electronic diaries as they record not only planned meetings and conference calls but flight and other travel information, with reference to where Mr McCabe was staying each night. There are only a small number of occasions when the diaries do not include timings of Eurostar trains, eg 16 and 18 February 2007 and 13 May 2007.

95. Mr Stone did not challenge their accuracy in this regard (and Mr McCabe's witness statement had explained the couple of occasions where changes occurred as a result needing to change plans to spend time with Mrs McCabe when she became ill). I accept that the diaries are an accurate record of Mr McCabe's whereabouts, subject to those changes.

96. The parties had used this information to prepare various schedules of whereabouts:

(1) Days/part days in the UK (excluding part days in transit) – In 2006-07 Mr McCabe was present in the UK for some part of 79 days (compared with 175 part days in Belgium, 65 part days in Spain and 62 part days in Australia). In 2007-08 Mr McCabe was present in the UK for some part of 95 days, compared with 135 part days in Belgium, 74 part days in Spain and 72 part days in Australia. This is a tabular representation of the information in the SoAF (albeit with a correction, not apparently disputed, of 95 part days in the UK rather than 94 in the second year of the Relevant Period).

(2) Nights in the UK and nights in Scarborough –

(a) The number of midnights in the UK was set out in the SoAF. In each tax year in the Relevant Period, Mr McCabe spent more nights in each of Belgium, Spain and Australia (individually, not taking them together) than he did in the UK.

(b) In 2004-05, 149 of the 254 midnights in the UK were in Scarborough, increasing to 185 of 276 in 2005-06. In 2006-07, 19 of the 33 midnights in the UK were in Scarborough; and 11 of 43 in 2007-08. During the Relevant Period none of the nights in Scarborough were at Deepdale – they were in a hotel or at Mr Cameron's house.

(3) Whole days of presence – When calculated on the basis of whole days spent in a particular place (ie the IR20 methodology assessing days where Mr McCabe both woke up and went to sleep in that place), Mr McCabe spent 18 whole days in the UK in 2006-07 and 13 whole days in the UK in 2007-08. This contrasted with 234 whole days in 2004-05 and 251 whole days in 2005-06.

(4) Aggregation of part days – The number of days of any presence in the UK was recorded in the SoAF. There were two representations of this:

(a) HMRC had prepared a schedule which represented Mr McCabe's whereabouts across quarter days (with the first quarter being midnight to 6am) across the UK, Belgium, La Manga, Australia and Rest of the World, and then aggregating the information as to days of any presence in the UK and Belgium (ie

that agreed in the SoAF) as total number of quarter days. These showed 54.5 quarters in the UK and 113 in Belgium in 2006-2007 and 64.25 and 86 in the UK and Belgium respectively in 2007-08.

(b) For Mr McCabe, there was an alternative representation of total presence using part days, which broadly adopted a one-thirds approach, (midnight-8am, 8am-4pm and 4pm-midnight, with further splits in that final third if the final third did not otherwise accurately record where Mr McCabe slept that night). From October 2006 to April 2007, there were 42 weekdays on which Mr McCabe was in UK for the middle third, compared to Belgium at 30. In 2007-08, there were 57 weekdays on which Mr McCabe was in UK for that middle third, compared to 52 in Belgium.

97. It can be seen from the above that the parties disagreed as to the approach of using quarter days and then aggregating them (with Ms Shaw submitting that for every month in the Relevant Period the consequence of this approach was to over-state Mr McCabe's presence in the UK, the discrepancy being about 18% for February 2007).

98. It is inevitable that as soon as the information is sought to be illustrated in a multi-coloured table which fits onto one A3 sheet of paper for each tax year, then rounding is required and this will result in some level of inaccuracies. Mr Stone drew attention to some days where the effect of this rounding was to under-state Mr McCabe's presence in the UK. I agree that this is correct, but I also agree with Ms Shaw that, overall, this approach (because of the number of days on which Mr McCabe left the UK between 3pm and 4.30pm) has over-stated the number of hours he spent in UK. I bear this in mind throughout when assessing Mr McCabe's level of presence (time being only one feature of presence); generally, I considered that both sets of schedules showing part days (whether quarters or thirds) were helpful in seeking to illustrate the overall pattern of travel, and this is not outweighed by their inherent inaccuracies, particularly given that the electronic diaries provide a clear record, not affected by rounding, of the timing of arrivals and departures in the UK, Brussels and elsewhere.

99. The length of Mr McCabe's stays in the UK and elsewhere is also apparent from the evidence:

(1) In 2004-05, Mr McCabe stayed in the UK for a period of more than ten nights on 11 occasions; the following year (ie immediately prior to the Relevant Period), he spent more than ten continuous nights in the UK on 13 occasions. There were no stays of this length of time in the Relevant Period.

(2) During the Relevant Period most trips to the UK involving an overnight stay were for just one or two nights.

(3) This was also the case for Belgium, albeit that there were then more stays of three or four nights (and a few for longer periods). During the Relevant Period there were 32 occasions where Mr McCabe spent three or more nights in Belgium, and within this there were six occasions where he spent seven or more nights in Belgium.

(4) Looking at visits not involving an overnight stay – there were 98 visits to the UK, 53 of which did not involve an overnight stay; whereas for Belgium there were 85 visits, but only two of these did not involve an overnight stay.

100. Finally, on whereabouts, there was some evidence before me as to Mr McCabe's time in the UK in years after the Relevant Period, and in that respect I find that Mr McCabe's tax returns stated that:

- (1) in 2008-09 he spent 74 work days in the UK, and was in the UK on 57 occasions; and
- (2) in 2009-10 he spent 76 work days in the UK and was in the UK on 62 occasions.

#### **After 4 April 2006**

101. The description of Mr McCabe's whereabouts during the Relevant Period does not address the question as to what Mr McCabe was doing in the various locations, or how he conducted his business or personal life.

102. Mr McCabe's evidence included that:

- (1) He left their home in Scarborough, and scaled down real and meaningful ties with family, friends and business associates in the UK. Contact with family mainly took place abroad when they came to visit him in Brussels or at the family's villa in La Manga.
- (2) His visits to the UK were short, at irregular intervals, and he rarely visited Scarborough, and did not stay at Deepdale.
- (3) His visits to the UK reflected the importance of the financial involvement of BoS in the European project – he reported to their personnel in the UK, as they were restricted in their foreign travel.
- (4) Some business contacts did visit him in Brussels, and there were conference calls he conducted from Brussels, but it was sometimes convenient or courteous to meet them in London. London was a major draw for international contacts, and he is a great believer in developing relationships face-to-face.
- (5) He established a life and a home in Brussels. Moving to Brussels enabled him to remove the shackles of the UK day-to-day business. He remained as owner and retained responsibility and involvement as owner.
- (6) The electronic diary records calls and meetings; but it does not record all activities undertaken, eg reviewing papers, making unscheduled calls, receiving calls, preparing reports, and conducting research.

103. I make findings first as to Mr McCabe's travel pattern, a matter on which there was extensive cross-examination, and then address this and other evidence as to family, social and business relationships, including responsibility for the UK businesses.

#### **Travel pattern**

104. Having left the UK on 4 April 2006 with Mrs McCabe, Mr McCabe spent the next six months overseas, with the exception of one visit to the UK on 30 April 2006. On 30 April 2006, he flew from Brussels to Sheffield, had meetings with Jason Rockett (CEO of SUFC), and Mark Fenoughty, met with Neil Warnock (the team manager of SUFC at that time), then attended the last Sheffield United match of the season (at home to Crystal Palace). He did not stay in the UK overnight – he flew to London and then from Heathrow to Hong Kong.

105. His next return trip to the UK was on 5 October 2006. In this period from 4 April to 5 October 2006, Mr McCann's travel and activities included:

- (1) On Thursday 6 April he travelled to Luxembourg, meeting with Mr Tandy and Michael Chidiac of RealCorp and making a site visit to Ikaros Business Centre, returning to Brussels later that day before having drinks with two contacts who lived and worked in Brussels.
- (2) He spent 7 April to 17 April 2006 at La Manga.

(3) On 17 April he travelled from La Manga to Frankfurt, stayed overnight, met with Gary McCabe (no relation), Director of Real Estate at BoS on Tuesday 18 April, travelled from Frankfurt to Berlin that afternoon, had a meeting with Patrick Reich (of Bauwert, one of Teesland/iOG's JV partners in Germany) that evening, stayed in Berlin overnight, had meetings with Teesland/iOG on Wednesday 19 April, including the European board meeting and a board dinner, travelled back to Frankfurt on Thursday 20 April, inspected a property there, and met with Paul Mathias of BoS. On Friday 21 April he travelled from Frankfurt to Paris, had a meeting with Pierre Gevassi, BoS Head of European Real Estate, that evening, stayed in Paris that weekend, with a meeting (with Mr Burnley and Peter Gilman) in relation to Thorpe Park, a development in Leeds and two dinners in the diary. On Monday 24 April had several meetings in Paris, including with Dr Quek, and board meetings (for FairBriar and Teesland). Mrs McCabe, Scott and Simon had joined him in Paris and they had dinner together on Tuesday 25 April. He had a meeting with Scott and Simon on Wednesday morning, then met with various individuals from BoS. Mr McCabe travelled back to Brussels on Wednesday 26 April.

(4) On Thursday 27 April Mr McCabe travelled to Amsterdam, returning to Brussels, with a medical appointment in Brussels that evening (and on Saturday 29 April). Sunday 30 April was the date of the Sheffield United match at Bramall Lane, and he flew from Brussels to Sheffield, attended the game at Bramall Lane, flew to Heathrow that evening and then an overnight flight to Hong Kong.

(5) In Hong Kong in May 2006 he met with representatives from HSBC, Top Spring, Treasure Land, Mazars and Bank of China. He attended a cocktail party to celebrate SUFC's promotion.

(6) He flew back to Brussels on Friday 5 May, and spent the weekend in Brussels. There were various meetings, including on Monday 8 May the board meeting of SUFC/SUplc, which took place at Bastion Tower; the other directors had flown out. He flew to La Manga on Tuesday 9 May, then to Hong Kong on Sunday 14 May, returning to Brussels on 17 May.

(7) Mr McCabe spent 17 May to 26 May in Brussels. In that time he inspected properties in Belgium, had dinner with Simon on 18 May, and Mr Cameron visited him that weekend. During the following working week he met with Mickola Wilson (CEO of Teesland/iOG), attended board meetings for Teesland and FairBriar, and hosted a reception for the opening of the SRE office, and had a meeting with Mr Warnock, and dinner with Mr Warnock that evening accompanied by Mrs McCabe.

(8) Following another trip to La Manga at the end of May, Mr McCabe returned to Brussels (having dinner with Mr Tandy, met with Simon Capper (Finance Director of SUFC) in relation to SUFC China, and attended board meetings of Forsyth and SPC), went to Amsterdam for meetings, viewed properties in Belgium, travelled to Frankfurt (where he had meeting with BoS), returned to Brussels where he had dinner with the SUFC executive team, and went on holiday to Portugal with Mrs McCabe for a few days. Mr McCabe flew directly from Portugal to Hong Kong on 11 June (where he had various business meetings) and then flew from Hong Kong to Paris on Thursday 15 June (spending the weekend with family at Eurodisney) and returned to Brussels on Sunday 18 June.

(9) On Monday 19 June Mr McCabe travelled to Amsterdam (where meetings included some with Mr Rockett, a telephone call with Stephen McBride (Finance Director at Scarborough), a meeting in relation to Teesland and a meeting with Dr Quek in relation to Teesland and FairBriar). On returning to Brussels, he had meetings with Suzie

MacCagnan of UBS and Ms Wilson, had a call with Mr McBride and Mr Rockett in relation to SUFC and attended a ServCorp cocktail party in the evening.

(10) Mr McCabe then travelled to Valencia (for a working dinner in relation to a Spanish joint venture, followed by sailing and spending time with business associates), Berlin, Paris (where engagements included a SUFC dinner, SUplc board meeting, a meeting with Scott, and a family dinner on 3 July), Frankfurt, and went to La Manga from Thursday 13 July to Sunday 23 July,

(11) Mr McCabe returned to Brussels then had busy week in Brussels with meetings Monday 24 to Thursday 27 July (including property viewings, and a video conference with Scott and Simon in relation to family trusts), and travelled to Germany on Friday 28 July, Budapest in August, then a short holiday to Geneva with Mrs McCabe from Friday 11 to Monday 14 August.

(12) Mr McCabe returned to Brussels, and had meetings there on Monday 14 August (including with Mrs Robertson of BoS, and Ms Treacy and Mr Capper, Paul Richardson and Andy Richardson in relation to various Scarborough Group matters), he flew to Stockholm on Wednesday 16 August where he inspected various properties, then travelled on to Copenhagen before returning to Brussels on 17 August, and then travelled to Frankfurt the following day. Mr McCabe flew to Shanghai on Saturday 19 August, then to Hong Kong for various meetings, returning to Paris on Friday 25 August before flying to La Manga that evening.

(13) In September 2006 Mr McCabe flew from La Manga to Munich then to Hong Kong on Wednesday 13 September, with meetings with Mr Tandy and Mr McBride (and others), then flying to Perth on Friday 15 September, on to Sydney and it was in Sydney on Friday 17 September that he met with Clem Salwin of UBS (to whom he was introduced by Ms MacCagnan) and then being introduced to Steve Day of Valad on Monday 18 September. On Saturday 23 September he flew from Sydney to Singapore, met with Dr Quek and further meetings with F&N, and returned to Brussels on 26 September.

(14) He remained in Brussels, where meetings included a Thorpe Park board meeting, a meeting with Jane Gwillim-David (Chairwoman at Forsyth), Mr McBride and Cesidio di Ciacca (an in-house lawyer and adviser at Scarborough Group) in relation to the Scarborough Group, a conference call with UBS, and a meeting with Ms Wilson). Mrs McCabe joined him on Monday 2 October and on Thursday 5 October he flew from Brussels to Rufforth.

106. This was Mr McCabe's first trip back to the UK since 30 April 2006. Looking at how he spent the next few days:

(1) On 5 October 2006 Mr McCabe attended the launch event of the Lumiere development in Leeds; he had attended a meeting with the developer, KW Linfoot, and with the contractor on another project. He stayed overnight at a hotel in Leeds.

(2) The following morning he had a conference call with Mr Salwin of UBS. He then had a meeting with Paul Richardson in relation to the Scarborough Group.

(3) He travelled to Scarborough, where he spent the weekend, played squash on Friday afternoon, staying at a hotel in Scarborough for two nights before flying to Brussels at 5pm on Sunday 8 October.

(4) Mr McCabe spent Monday 9 October in Brussels (his meetings in Brussels were SUplc audit committee, then SUplc and SUFC board meetings, followed by a meeting



with Mr Vangoidsenhoven and Fortis about a new office opportunity), travelled to London on Tuesday morning (and had a meeting with John Rosenheim and Mr di Ciacca about two legal disputes, Ian Robertson in relation to SCAMP, and Andrew Darling in relation to SCP), flew to Amsterdam that afternoon (where he conducted a radio interview with Radio Sheffield in relation to SUFC, had dinner with representatives of Top Spring, stayed overnight in Amsterdam, had meetings with various people from Teesland on Wednesday), travelled to Berlin on Wednesday, flew to Brussels on Thursday, then flew to Rufforth on Friday morning, went to Leeds (where he had a conference call with Mr Salwin, Mr di Ciacca and Mr McBride, a meeting with David Wells in relation to the e-campus and finalised settlement of an old dispute with a contractor) then on to Scarborough to celebrate Simon's birthday (where he stayed overnight, and played squash), then to Manchester (watching Sheffield United play Manchester City, having meetings before the match with Terry Robinson and Mr Warnock), returning to Scarborough on Saturday evening, flew to Brussels on Sunday where he inspected a possible property to acquire in Zaventern as well as the apartment in Avenue Louise.

107. In the week of Monday 16 October, Mr McCabe flew to London that morning, attended meetings at Carlos Place (in relation to SUFC and then with Dr Quek), before meeting with Mrs Robertson then Eurostar back to Brussels where he had a drink with Gordon More, Mr Vangoidsenhoven and Michel Farin of Royal White Star. On Tuesday, he had a meeting with Alan Murray (non-executive of Teesland) and then Mr di Ciacca before inspecting office property at Zaventern and having dinner with two executives from BoS (Ian Robertson and John Feast). There were further meetings in Brussels, then Mr McCabe travelled to Paris, stayed overnight, then to London on Thursday 19 October and on to Brussels that evening before returning to London on Friday morning.

108. Thus, whilst Mr McCabe had remained outside the UK for six months after his relocation to Brussels (with the exception of the day trip on 30 April 2006), from 5 October his travel pattern changed and he was making regular trips, and spending a significant portion of each week in the UK. In October 2006 there were eight trips to the UK of varying lengths, some being day trips, the first having been for three nights.

109. There were five trips to the UK in the first half of November 2006, the second half of that month being spent in Australia. The extensive travel continued - Mr McCabe was travelling to and from Belgium (to France, and Germany in December 2006), but also travelling to the UK (with eight trips to the UK in December 2006). He spent Christmas in the UK in December 2006, having flown from Brussels to Southampton on Saturday 23 December, met with Mr Robinson and Mr Warnock, watched Sheffield United play Portsmouth away, and stayed overnight at a hotel in Scarborough. He watched Sheffield United play Manchester City on Boxing Day, then on Wednesday 27 December flew to La Manga.

110. Mr McCabe started January 2007 at La Manga, flew from Spain to Sheffield on Saturday 6 January (having a meeting with Ms MacCagnan and watching Sheffield United play Swansea), then on to Brussels where he spent Sunday 7 January in Brussels (having a working dinner in relation to the Valad transaction), then Monday 8 January in Brussels (attending a SUplc board meeting, and meetings with Ms Treacy, Mr Vangoidsenhoven and Mr Robinson). On Tuesday 9 January he had two meetings, then flew to Copenhagen, met with Michael Bruhn, and stayed overnight. There were further meetings in Copenhagen on Wednesday, then Mr McCabe flew to Stockholm, inspected a property, flew back to Brussels, had a conference call that evening in relation to the Valad transaction and on Thursday 11 January he travelled by Eurostar to London, had a meeting with BoS, then Ms Wilson and travelled back to Brussels. On Friday 12 January he had a meeting with the developer of his apartment, then other

meetings. He spent Saturday in Brussels, and on Sunday 14 January he flew to Munich (via Rufforth to collect Mrs McCabe) and on to Hong Kong. The Hong Kong trip was short and he returned to Brussels, spending several nights there but with three day trips to the UK, and on 25 January he flew to Australia. He was in Australia until 9 February, and his diary was full of engagements - with BoS, Valad, Mr Tandy, UBS, Dr Quek, as well as watching the cricket on Friday 2 February.

111. Notwithstanding that Mr McCabe was in Australia until 9 February 2007, he still made nine visits to the UK that month, although only two of them involved overnight stays (both being two nights each). Meetings in Brussels that month included meetings in relation to his apartment, a dinner in relation to Valad, meetings with Ms MacCagnan and representatives from Polygon in relation to their interest in Teesland/iOG, a meeting with Mr McBride and dinner with PwC, and a meeting Mr Farin (of Royal White Star). Meetings in London included some on the Valad transaction – an integration meeting and “Talk to Troops” at Mount Street, meetings with Ms Wilson, Mark Cherry, and Dr Quek, inspecting the City Square development in Liverpool, having lunch with directors at Liverpool FC and watching Sheffield United play Liverpool away.

112. Looking at the following months, March and April 2007 involve a similar pattern. In those months trips from Belgium were shorter (and included one to the UK from 15 to 18 March for Scott’s wedding), and the longest number of nights spent in one location at a time in March 2007 was in Brussels (six nights towards the end of the month, albeit with a day trip to the UK on 28 March). Evidence as to what Mr McCabe was doing at this time included:

(1) Meetings in London in March 2007 had included an integration meeting (in respect of the Valad transaction), management presentation on SCAMP/Teesland, a presentation on a new German fund, he met with Mr McBride and Paul Oliver, had meetings with Dr Quek and Ms MacCagnan, and gave a talk to the team in Edinburgh.

(2) April 2007 included a long weekend at La Manga from 7 to 11 April, with a longer trip there from 28 April to 8 May 2007. His visits to the UK in April (of which there were 11 short visits, the longest being for two nights) included meetings with Paul Richardson and Reade Griffith (of Polygon), Mrs McCabe’s 60<sup>th</sup> birthday party in Kensington, a conference call on the Valad transaction, he watched Sheffield United play West Ham in the FA Cup semi-final and attended the Player of the Year dinner in Sheffield.

113. Mr McCabe was at La Manga at the beginning of May 2007. One matter which is referenced in his diaries at this time concerned what was referred to as the Tevez affair. I summarise the events here so as to add context to the references to meetings attended by Mr McCabe. Sheffield United were relegated at the end of the 2006-07 football season having spent just one season in the Premier League. West Ham finished the season ahead of them with equal points but a superior goal difference (of one). West Ham were alleged to have broken registration/third party rules in relation to Carlos Tevez and Javier Mascherano. Mr McCabe had expected that the Premier League would deduct points from West Ham in respect of this breach; this would have prevented the Blades from being relegated. Instead, the Disciplinary Commission decided to fine West Ham and not deduct any points, with the consequence that Sheffield United were relegated rather than West Ham. Mr McCabe’s perspective was that there was significant shock at this decision, and as he saw it, West Ham were getting away with their breach of the rules. Sheffield United invoked the arbitration provisions, and the arbitration panel issued its decision in July 2007 - it determined that the decision was not outside the margin of discretion available to the Disciplinary Commission. Sheffield United sought leave to appeal to the High Court, but this was refused. They then

commenced civil proceedings against West Ham in respect of the losses resulting from their relegation. An arbitration hearing ruled in Sheffield United's favour, and in March 2009 the two clubs agreed a settlement (at a meeting held in Brussels).

114. Returning to Mr McCabe's travel pattern, he had travelled from La Manga to Brussels for three nights at the beginning of May, then to Budapest. On Saturday 12 May he flew back from Budapest to Sheffield for various media and strategy meetings. By this time the Premier League had decided to fine West Ham and not deduct points. Mr McCabe returned to Brussels on Sunday 13 May, came back to the UK on Tuesday 15 May, attended an all-staff meeting at Bramall Lane and held a press conference, before flying out to New York on Wednesday 16 May. There were six trips to the UK in May 2007.

115. There is a reduction in Mr McCabe's presence in the UK across June to September 2007:

(1) In June, he was already in the UK at the beginning of the month (having arrived on 31 May), but was in the UK on just three occasions that month. There were two separate trips to Australia that month, and he was in Brussels on just three short occasions, none for more than two nights.

(2) In July, there was just one visit to the UK, involving one overnight stay. He was at La Manga until 14 July and flew to Australia on 22 July. Coupled with other trips to Germany and the Netherlands, this meant there were just two occasions when he was in Brussels, each involving one overnight stay.

(3) August involved travelling to a greater number of destinations, but there were no prolonged visits. Mr McCabe was in the UK on five occasions, and in Brussels the same number of times (but the Brussels trips were longer, and included spending six nights there at the end of the month).

(4) There were two visits to the UK in September. It is noticeable that he had stayed overnight in the UK on 15 August, made a day trip to the UK on 30 August but did not then return until 26 September (for just one night) before making another day trip on 29 September. He had made a trip to the Far East at the beginning of the month, then two visits to La Manga (of ten and six nights).

116. There were four visits to the UK in October 2007 (before Mr McCabe then left on 18 October to head to Australia via Hong Kong). The meetings in the UK included those with Dr Quek and Mark Balchin, a meeting with Mr di Ciacca, meetings with legal advisers in relation to the Tevez affair, and a meeting in relation to a claim against a former director of FairBriar in which he was a witness. He later met with Peter Hurley and Mr Tandy at the George Club that evening. Mr McCabe then gave evidence at the High Court during this trip to the UK.

117. The trip to Australia was very active. Mr McCabe travelled first to Brisbane for meetings and then on to Sydney, where Mrs McCabe arrived to join him on Tuesday 23 October and they had a break for a few days, before the full diary of meetings resumed from Monday 29 October (still in Sydney), with various meetings with UBS and Valad. He left Sydney on Friday 2 November.

118. On returning from Australia, Mr McCabe spent several days in Brussels, with various meetings and conference calls, including meeting with Mr Vangoidsenhoven, and a working dinner with Mr Tandy. He flew to Sheffield (one of three trips to the UK in November 2007, where he attended various meetings including with Ms Wilson and Sir Bob Kerslake ahead of a press conference announcing the claim being brought against West Ham and then a dinner to mark the 150<sup>th</sup> anniversary of SUFC (which was also attended by his family)). The diary on Thursday 8 November is full of meetings – with Bryan Robson, Mr McBride, and dinner with the SUFC directors. The following morning, Mr McCabe flew from Doncaster to Frankfurt

and on to Toronto, spending seven nights in Canada. Mr McCabe was in Belgium on four occasions that month.

119. December 2007 involved five trips to the UK (including spending time with family over Christmas and attending football), but also included a lengthy trip overseas, leaving Brussels on 5 December, travelling via the UK to Hong Kong and Australia and then arriving back in the UK on 15 December and then travelling on to Brussels on 16 December.

120. Having spent Christmas in the UK, Mr McCabe flew to La Manga on 29 December 2007, staying there until 9 January, from where he flew to Brussels. Mr McCabe made six trips to the UK in January 2008, as well as a second trip to La Manga, alongside time he spent in Brussels and heading to the Far East at the end of the month. Time in both Brussels and the UK was busy. In Brussels he dealt with visa matters at the Australian embassy, had a dinner with Paul Thompson in relation to SUFC and then drinks with Paul Richardson and Mr Burnley. He hosted a meeting in relation to Thorpe Park, met with Ms Treacy and then attended a further tax meeting before a working dinner with Mr Rockett. In the UK he attended a SUplc board meeting, met with Paul Richardson and then Mike Samuels of Kaupthing, before attending a launch event in relation to Creative Sheffield, and attended the Sheffield derby match.

121. February 2008 began with Mr McCabe in Hong Kong, and he then travelled to the US and Canada before arriving in the UK on 9 February. There were five trips to the UK that month, but three of those did not involve an overnight stay, and the others involved just one night on each occasion. Noticeably, there was a further long-distance trip in the second half of the month - Mr McCabe flew to Australia on 17 February, returning to the UK on 27 (but spending most of the last few days of the month in Brussels).

122. In March 2008 Mr McCabe travelled to the US, France Canada, Hungary, the Netherlands and Singapore as well as spending time in Brussels and the UK. There were just three trips to the UK that month (only one overnight), and there was a continuous stay of a week in Brussels that month.

123. Mr McCabe was in Hong Kong at the beginning of April 2008, returning to Brussels for two nights and then making a day trip to the UK on 5 April.

### **Family relationships**

124. Mrs McCabe filed her tax returns on the basis that she was resident and ordinarily resident in the UK throughout the Relevant Period. Whilst she was not called as a witness, there was some evidence as to her own plans at that time, notably from Mr McCabe and Scott and Simon, as well as what can be inferred from the advice from Mazars and Mr Way:

- (1) Scott and Simon had already moved out of Deepdale several years before the Relevant Period – they had not all lived there together since 1996.
- (2) Mrs McCabe had been the sole legal owner of Deepdale since 11 June 2004.
- (3) Whilst there was evidence that Mrs McCabe had put Deepdale on the market, and Mr McCabe's explanation was that she was looking for a smaller home in Scarborough but did not receive a satisfactory offer for Deepdale, I am not satisfied that she had a firm intention to sell Deepdale and move elsewhere. In any event, she intended to retain a home in Scarborough.
- (4) Whilst Mr McCabe relocated to Brussels on 4 April 2006, in theory meaning that any time Mrs McCabe spent at Deepdale would be on her own, in fact both sons effectively moved back to stay with her at Deepdale for several months at different times and for different reasons:

- (a) Simon stayed at Deepdale between April and September 2006 whilst between homes, in the process of moving from Edinburgh back to London.
- (b) Scott, his future wife and their son, moved back to Deepdale in December 2006 whilst they were looking for a new home for themselves, and stayed there until April 2008.

125. Mr McCabe's evidence was that he had been fortunate that Mrs McCabe, to whom he has been married since 1971, has been very supportive, and that although she chose to stay in the UK, they maintained a strong relationship but rarely saw each other in the UK in the Relevant Period. On the basis of the evidence:

- (1) I accept that most of the time Mr and Mrs McCabe spent together was outside of the UK, primarily at La Manga (where they spent 48 nights together in 2006-07 and 59 in 2007-08). Mrs McCabe did regularly visit Brussels (spending 38 nights there in 2006-07, and 13 to 20 nights there in 2007-08), they went on holiday together overseas, eg to Portugal in June 2006 and Geneva in August 2006, and Mrs McCabe sometimes accompanied Mr McCabe on business trips, notably those to Australia and to Hong Kong in January 2007.
- (2) They spent a lot less time together in the UK than in the preceding tax years:
  - (a) They spent three to five nights together in the UK in 2006-07, and no more than one the following year (after Mrs McCabe's birthday party).
  - (b) Mr McCabe did visit Mrs McCabe at Deepdale on several occasions, spending days there over the Christmas periods, and they would go to some Sheffield United matches together.
- (3) They did celebrate significant family events together in the UK, including Mrs McCabe's 60<sup>th</sup> birthday party in April 2007 and Simon's birthday.
- (4) Although Mr McCabe spent time at Deepdale when he was in Scarborough during the Relevant Period, he did not sleep there, an arrangement that was referred to by Simon as "bizarre". This decision not to sleep at Deepdale was solely attributable to Mr McCabe following the tax advice he had received from Mazars and Mr Way; Mrs McCabe knew that Mr McCabe had been advised not to sleep at Deepdale during the Relevant Period, and would have given permission for Mr McCabe to sleep there if Mr McCabe had asked.

126. Mr and Mrs McCabe did spend time together in the UK in the Relevant Period; and I would describe this as occasional rather than rare.

127. Scott was based in York prior to the Relevant Period. Scott's evidence was that he spent time with his father most weekends - they would play squash, regularly watched football on TV, and enjoyed family dinners together. Scott's evidence was that after 4 April 2006 he would instead more typically go to Sheffield United matches on his own or with Mrs McCabe, and he spent time with his father in Brussels or at La Manga (as well as a short trip together to Eurodisney in June 2006).

128. I accept Scott's evidence as to the frequency with which he saw his father before the Relevant Period; I also find that they regularly spent time together at La Manga. I find that during the Relevant Period they spent time together as follows:

- (1) They spent most time together during holidays at La Manga.
- (2) Scott still saw his father in the UK - there were several business meetings together, they spent a handful of weekends together in Scarborough, attended Sheffield United

matches at Bramall Lane, and spent Christmas together both years and Mrs McCabe's birthday party.

(3) They did spend some time together in Brussels, but these occasions were less frequent. Whilst Scott's evidence was that he saw his father on more occasions in Brussels than those that were diarised, there was no documentary evidence of this and whilst I accept that there many have been some instances where Scott visited and it did not make it into the electronic diary, this would have been rare.

(4) There were also occasions where they met up elsewhere, eg in Paris in April 2006; the short break at Eurodisney in June 2006.

129. Simon had trained as a quantity surveyor, worked for a year in Epsom and then joined the Scarborough Group, working in the London office. He relocated to Edinburgh in 2002, getting to know the corporate side of the business and some of the BoS contacts – he worked with John Brophy and Mr di Ciacca whilst there. He worked on BoS's Scottish property portfolio which the Scarborough Group managed, and was based in Edinburgh for four years. He returned to London in 2006.

130. Simon's evidence was that he used to see Mr McCabe two to three times a week in the UK, mainly for work matters and then at football matches. They spent family time together at La Manga. His evidence was that after April 2006, they saw each other face to face about two to three times a month at best, and rarely at football matches.

131. I accept Simon's evidence as to the frequency with which he saw Mr McCabe prior to the Relevant Period. As to the Relevant Period:

(1) They continued to spend the most time together on holiday at La Manga.

(2) Simon met with his father in Brussels, both for meetings and had dinner together there. There were ten such occasions recorded in the electronic diary; I accept that there may have been a few additional occasions that were not recorded but, as with Scott, do not accept that there were further regular visits that neither Mr McCabe nor Ms Coppard recorded.

(3) Simon was based at Carlos Place in London, and Mr McCabe's diary shows he attended a large number of meetings there over the two years (almost one hundred). Both Mr McCabe's and Simon's evidence was that it was important to Mr McCabe (and Scott and Simon) that they join him for meetings as much as they were able, and given Simon's proximity I infer this would have happened on lots of occasions. This indicates that Simon would have seen Mr McCabe in London more often than he saw him in Brussels over the two years.

(4) They also met up elsewhere, including in Paris in April 2006.

132. Mr McCabe had other family in the UK – both his sister and that of Mrs McCabe, and their families, lived in Sheffield. There was no evidence that he saw them outside of the UK during the Relevant Period.

### **Social relationships and engagements**

133. Many of Mr and Mrs McCabe's long-standing friends were based in Scarborough or Sheffield. Many (eg Mr Cameron and Mr Watson) had children of a similar age to Scott and Simon and their families would spend time together at weekends. Mr McCabe regularly played squash with friends on Friday evenings in Scarborough (including with Dr Oldroyd and Mr Watson).

134. These habits and relationships changed considerably after 4 April 2006. I accept that Mr McCabe was rarely able to play squash with friends in Scarborough - he was only in Scarborough on a few weekends, and in 2007-08 there was a gap of more than eight months when he was not in Scarborough at all - and that Mr McCabe was no longer able to spend large parts of the weekend attending lunches and family barbecues with these family friends. The social relationships did not cease; Mr McCabe did continue to see some of his long-standing occasionally, often prompted by business, eg Mr Burnley was also a director of many of the Scarborough Group companies as well as being a family friend; Mr Cameron visited Mr McCabe in Brussels, and Mr McCabe stayed with him when he returned to the UK on the two occasions Mrs McCabe was ill. However, others fell away during this period and Mr McCabe did not see them at all.

135. Mr McCabe did attend some personal and social engagements in the UK:

- (1) He was able to meet up with friends whilst in Scarborough over Christmas in both years.
- (2) Many of their long-standing friends attended Mrs McCabe's birthday party in April 2007.
- (3) Mr McCabe did play squash with friends on a few occasions in the UK (either in Scarborough or in London), although this was a substantial reduction in comparison to preceding years.
- (4) Mr McCabe attended key events including the launch event for the Lumiere project in Leeds in October 2006, the Player of the Year Dinner at SUFC in April 2007, the dinner celebrating the 150<sup>th</sup> anniversary of the football club in November 2007, and the Creative Sheffield event in January 2008.
- (5) Mr McCabe's attendance at Sheffield United matches is set out in the SoAF. It is clear from the diary that he was able to attend not only home matches but also various away games (including at Liverpool, Manchester City and Portsmouth).

136. There were some key functions and social events in the UK that Mr McCabe no longer attended in the Relevant Period that he would previously have been expected to attend, including parties hosted by BoS, annual dinners (hosted by Property Week, Estates Gazette, RICS) and business conferences. Mr McCabe did not attend the promotion parties that were held in the UK to celebrate Sheffield United's promotion.

137. Mr McCabe attended social events in Brussels:

- (1) There were a couple of headline events, both in the early weeks in Brussels, namely a reception to celebrate the opening of SRE's offices, and a ServCorp party in June 2006
- (2) He would sometimes have lunch with Mr Vangoidsenhoven at weekends in Brussels, he met with Mr Gielbartowicz socially, having dinner with him and his family in November 2007.
- (3) He regularly had drinks and dinner engagements with friends and colleagues from the UK (including Mr Tandy, Mr Rockett, Mr Burnley and Mr Cameron).

138. The mixture of business and social continued overseas as well – Mr McCabe attended a cocktail party to celebrate Sheffield United's promotion in Hong Kong, he watched the cricket in Australia with Mr Burnley and Valad.

## **Wealth**

139. At the start of the Relevant Period, the vast majority of Mr McCabe's wealth was comprised of his ownership of the shares in the Scarborough Group. He also owned the villa in La Manga, as well as cars and other assets in the UK.

140. The key changes in the Relevant Period were:

- (1) In 2006-07 he bought the apartment at Ave Louise in Brussels – after the Relevant Period he sold this apartment and bought that at Franklin Roosevelt.
- (2) Following the transaction with Valad, he held redeemable loan notes in Valad as well as shares in the Australian parent company.

141. Mrs McCabe owned Deepdale and had other assets in her own name.

## **Responsibility for UK businesses**

142. Mr McCabe's evidence was:

- (1) He handed over responsibility for Scarborough's UK businesses, including to his sons, supported by the experienced real estate team in the UK led by Mr Tandy (Head of UK Property) and Mr McBride (Finance Director), and he appointed Mr Rockett as CEO of SUFC, who brought on board a senior management team at the football club.
- (2) He nevertheless retained responsibilities as owner of the Scarborough Group.

143. I accept that Mr McCabe had appointed management teams for the UK businesses prior to the Relevant Period. That does not necessarily mean that he had handed over responsibility, or that such responsibility, if handed over, had been handed over to his sons.

144. I have considered Mr McCabe's actions during the Relevant Period; the description of his travel pattern refers to a wide array of Mr McCabe's activities during this time, and it does not purport to be exhaustive but it is a fair illustration of the type and range of meetings and events he was attending in the various locations. From this, and from all of the evidence to which I was taken, I make the following additional findings.

## ***Directorships and board meetings***

145. Mr McCabe had reduced his directorships of UK companies (as set out at [40] to [42] of SoAF), and [42] of the SoAF also records that Mr McCabe was appointed a director of various non-UK companies during the Relevant Period:

“40. Between January 2006 and 4 April 2006, Mr McCabe reduced his UK directorships from 184 to 35, and was appointed to 4 other UK directorships during this time resulting in 39 UK directorships on 4 April 2006.

41. From 5 April 2006 to 5 April 2007 Mr McCabe resigned a further 14 UK directorships, leaving 25 as at the latter date.

42. Mr McCabe held the following directorships throughout the two tax years ended 5 April 2008:

- Scarborough Property Group (appointed 31/07/1991)
- SPC Group Ltd (appointed 04/11/1991)
- Scarborough Property Inv. Co. (appointed 01/12/1994)
- Sheffield United Plc (appointed 21/11/1998)
- Scarborough Property Company Ltd (appointed 30/10/2001)
- Scarborough Group Holdings Ltd (appointed 01/12/2005)



- Le Leman International (Yuhang) Ltd (Hong Kong) (appointed 08/12/2005)
- SIL Ltd (Hong Kong) (appointed 08/12/2005)
- Scarborough Group Ltd (appointed 02/03/2006)

Scarborough Group Ltd and Scarborough Group Holdings Ltd were formed as part of a group restructuring in February 2005 in which they became respectively the new parent company of the Scarborough Group and the immediate subsidiary of the new parent.

Following its acquisition of the entire share capital of Scarborough Group Ltd on 13 May 2007, Mr McCabe was appointed a director of Scarborough Group International Ltd on 12 September 2007.

Subsequent to his move to Brussels, Mr McCabe was appointed as a director of the following companies:

- Scarborough Realty (Europe) SPRL (Belgium) (appointed 05/04/06)
- Valad Commercial Management Ltd (Australia) (appointed 25/07/2007, resigned 30/11/2009)
- Valad Funds Management Ltd (Australia) (appointed 25/07/2007, resigned 30/11/2009)
- Mariners Blades Developments Pty Ltd (Australia) (appointed 05/03/2008)”

146. Mr McCabe remained a director of a significant number of companies, including the parent companies (which were at various times Scarborough Group Ltd and Scarborough Group International Ltd). He resigned as a director of SUFC in August 2005, but remained a director of SUplc. Mr McCabe was Chairman of SUplc (whereas Mr Robinson was chairman of SUFC).

147. The number of board meetings attended by Mr McCabe is summarised in the SoAF:

“39. According to the entries in Mr McCabe’s diaries, he attended Board Meetings as below:

- During the 2005/06 tax year, prior to travelling to Brussels on 4 April 2006, Mr McCabe attended 56 board meetings of which 52 were in the UK.
- During the 2006/07 tax year, Mr McCabe attended 42 board meetings of which 9 were in the UK.
- During the 2007/08 tax year, Mr McCabe attended a total of 56 board meetings of which 15 were in the UK.”

148. Mr McCabe attended board meetings of many of the key UK companies within the Scarborough Group, including those of Teesland, FairBriar, SUplc and SUFC. He also attended board meetings of Forsyth and Thorpe Park.

### ***Meetings***

149. Mr McCabe attended an extensive number of business meetings (including working lunches and/or dinners) during the Relevant Period. These covered the full range of the activities of different companies within the Scarborough Group:

- (1) Teesland – In addition to attending 12 board meetings, Mr McCabe regularly met with Ms Wilson. He met with Mr Burnley in relation to various UK projects, including in Brussels and Frankfurt.
- (2) Valad transaction - Mr McCabe flew to Australia on 16 September 2006 and had meetings with Mr Salwin of UBS who introduced him to Mr Day of Valad. This

introduction to Valad led into discussions and then negotiations which resulted in the sale of a major portion of Scarborough's business (including the European business and part of the UK business) to Valad in July 2007 for an enterprise value of AUD2 billion, a transaction which had been unexpected, and the consideration for which included shares and loan notes in Valad. The transaction is described at [45] to [48] of the SoAF, and Mr McCabe was appointed as an independent non-executive director of two companies in the Valad group. His duties included "to oversee management on behalf of Valad, to monitor Valad's business results and to set goals and formulate strategy", ie it was not UK or Europe specific:

45. On 9 July 2007 Mr McCabe sold his interests in Scarborough Property Holdings Ltd, Scamp Holdings Ltd (including its interest in Scarborough Continental Partners Ltd), Teesland PLC and Scarborough Development Group Ltd to Valad Property Group, a quoted Australian company. Those interests amounted by value to the greater part of his interest in the Scarborough Group. The consideration took the form of loan notes and equity in the acquiring entities.

46. Mr McCabe led the team which negotiated and concluded the transaction for the shareholders of the above companies. In that regard he visited Australia on a number of occasions including from 21 – 28 June 2007 and met with Valad officials during those visits.

47. Peter Hurley, a member of Valad's Australian management team, relocated to London to head the newly acquired European operations as Chief Executive. In addition, senior members of the Scarborough Group management team, including Stephen McBride and Didier Tandy, transferred with those businesses when they came under Valad ownership becoming, respectively Head of Valad Capital Services – Europe and Head of Property – Europe.

48. On 25 July 2007 Mr McCabe was appointed as a Non-Executive Director of Australian companies Valad Funds Management Ltd and Valad Commercial Management Ltd, with no special responsibilities, in order to provide "guidance and incisive input that will be generated from his four decades of international property experience", effective from 1 August 2007. He held 2.96% of the shares of Valad Property Group."

(3) SUFC – Mr McCabe attended 18 board meetings of SUplc and board meetings of SUFC. On occasions when Mr McCabe was watching a Sheffield United match he would generally meet briefly with Mr Rockett or Mr Robinson and the team manager beforehand. Mr McCabe participated in many of the key meetings in relation to the Tevez affair. The Tevez affair was undoubtedly extraordinary, and Mr McCabe's evidence was that these events meant he needed to spend more time in the UK than could have been anticipated. Whilst I find that he was heavily involved in the strategy meetings, and attended meetings with legal advisers, there was no noticeable increase in Mr McCabe's presence in the UK from May 2007 onwards (indeed this coincides with the months he spent the least amount of time in the UK).

(4) Non-UK football clubs – Mr McCabe met with various non-UK clubs, usually in their "home" jurisdiction:

(a) On 30 September 2006 Mr McCabe held a meeting for SUFC with Mr Farin of Royal White Star FC (a Belgian football club) in relation to non-EU football players, discussing an arrangement where the club would recruit and train players, with the possibility of them being transferred to SUFC (see [26] of the SoAF).

- (b) On 11 May 2007 Mr McCabe travelled from Brussels to Budapest to have a meeting about a potential joint venture in relation to the Hungarian club Ferencvaros.
- (5) Forsyth – Mr McCabe attended board meetings and met with Ms Gwillim-David. Some meetings were in the UK, others in Brussels.
- (6) FairBriar – Mr McCabe attended management meetings as well as nine board meetings, and he met with legal advisers in relation to the High Court case against the former director.
- (7) Thorpe Park – This was the development in Leeds, and Mr McCabe attended meetings in relation to this project with Mr Burnley and Mr Gilman in Paris, and had meetings in Brussels as well as in the UK.
- (8) Lumiere – This was another project in Leeds, and Mr McCabe attended meetings with Mr Burnley and KW Linfoot (the joint developer) whilst in La Manga, and the launch event in the UK the following month.
- (9) BoS – This was a key relationship for Mr McCabe, and he regularly met with Mrs Robertson. Most of those meetings were in the UK, but she did also visit him in Brussels.

150. With the exception of the first six months of the Relevant Period, Mr McCabe attended meetings on all of these matters both in the UK and in Brussels and elsewhere – the majority of the meetings with Valad were in Australia, and Teesland meetings took place throughout Europe (including the UK), but there was no discernible pattern. It was not the case that matters relating to the UK businesses were only discussed in meetings in the UK or outside of the UK.

***Roles undertaken by Scott and Simon***

151. Mr McCabe's evidence (and that of Scott and Simon) was that Scott and Simon were part of the management team to whom Mr McCabe handed over responsibility and which enabled him to focus his attention on the growth of the European business.

152. Scott had worked in the Scarborough Group for many years, initially in credit control and other roles, but then focused on property management and had moved to Forsyth, which provided serviced offices from various locations throughout the UK, in 2000. Scott's evidence was that, in the run-up to Mr McCabe's move to Belgium, Scott was taking on more responsibilities from his father:

- (1) He became managing director of Forsyth, which had previously been led by his father.
- (2) He took a more active role in relation to SUFC – he liaised with academy management, worked with budgets and contract management. He had regular meetings with the CEO and senior management, represented the club in negotiating headline commercial and sponsorship deals, attended matches, and represented the club at events.
- (3) His father would previously have been first port of call for any business issues. After the move, he and Simon instead worked with and learned from the experienced teams Mr McCabe had built up.

153. Simon had been working in the property investment and development sides of the business. Having spent four years in Edinburgh he returned to London, and was based at Carlos Place. Simon's evidence was that following Mr McCabe's move to Brussels:

- (1) Simon took on full responsibility for the UK investment portfolios, and more responsibility (along with senior colleagues) for the development division in the UK. He

also had responsibility for the teams within each division. This was previously managed by Mr McCabe.

(2) Simon also met with BoS on UK projects, working alongside Mr di Ciacca, and took over the relationships that Mr McCabe previously had, meeting with Mrs Robertson, Laura Milligan, Isobel Stevenson and others.

(3) Simon took on responsibility for certain matters in relation to SUFC, including the Tevez affair where he was responsible for managing the proceedings, including instructing legal advisers. He met with counsel and the various witnesses, and co-ordinated the preparation of financial submissions by Mr Capper. He discussed these matters regularly with Mr McCabe. He conducted interviews for the new team manager.

(4) Mr McCabe was no longer as readily available as the voice of experience. Simon relied on the team of experienced senior personnel, including Mr Burnley and Mr Tandy.

154. Addressing the evidence:

(1) There was a significant increase in the number of directorships held by Scott and Simon after 5 April 2006, increasing from 9 to 47 and from 13 to 116 respectively.

(2) There was no documentary evidence of additional executive responsibilities having been handed over to Scott and/or Simon ahead of Mr McCabe's relocation to Brussels. I recognise that this is no more than neutral in the context of a family-owned company.

(3) There were occasional strategy meetings between Mr McCabe and his sons (eg a meeting in Paris in April 2006).

(4) Scott had been appointed as director of Forsyth in 2001 and had been managing director of the company for a couple of years before the Relevant Period. Forsyth represents a small portion of the Scarborough Group's turnover, but it is an intensive business; Scott was visiting the various venues throughout the UK.

(5) Simon was in regular dialogue with the (non-family) senior management team. His father was not present at all of the meetings which Simon attended with them, and Simon increasingly took on the responsibility for the "meet and greet" of sponsors and visiting directors at Sheffield United games. Simon was closely involved in some aspects of the disputes arising out of the Tevez affair. Once Mr Tandy and Mr McBride transferred to Valad (in August 2007), Simon was one of the main contacts for construction projects in the UK (eg for Mr Burnley).

***Conclusions on responsibility for UK businesses***

155. On the basis of all of the evidence before me, I am not satisfied that Mr McCabe had handed over responsibility for running the UK businesses to others and was no longer performing that role himself.

156. Whilst Mr McCabe was no longer on the board of as many companies (and consequently did not attend as many board meetings), he remained on the board of the key companies within the Scarborough Group and remained involved in the decision-making and management of the various UK businesses. He led the negotiations for the sale to Valad, an enormously significant transaction for the group. He also led the crisis response to the Tevez affair, notwithstanding Simon's involvement in that matter. In addition, he was attending meetings on the full range of matters that comprised the business of the group – litigation with contractors, development of particular sites, inspecting potential properties, discussing finances, speaking to journalists, and meeting with bankers. That Mr McCabe was not "on the ground" at every site or at every development meeting is reflective of his seniority and the size of the Scarborough Group.

157. Whilst I accept that Mr McCabe had appointed a senior management team and Scott and/or Simon were in regular dialogue with them, which included meeting with them at times when their father was not present, the overwhelming impression from all of the evidence is that during the Relevant Period the management teams were reporting to Mr McCabe; they would travel to brief him, they were accountable to him and it was his strategy they were implementing. Mr McCabe was responsible for all of the businesses of the Scarborough Group, notwithstanding that he was also seeking to grow the European business.

## DISCUSSION

158. I address first the question of Mr McCabe's residence during the Relevant Period (including the alternative submissions as to Mr McCabe becoming non-UK resident by 5 April 2008) and then the operation of the DTC (again, taking account of the alternative submissions made).

### Residence

#### *Authorities*

159. I have already cited [40] to [50] of David Richards J's decision in the Upper Tribunal in *Glyn* under Relevant Law, and I follow the approach set out therein in reaching my decision, ie having made findings of fact on the evidence before me as regards all the relevant circumstances, I apply the factors identified in the authorities to determine, having regard to all relevant circumstances, whether or not Mr McCabe has in the Relevant Period been resident in the UK (per [41] of *Glyn*).

160. I note the general points made by David Richards J, namely that it is entirely possible for a person to have more than one country of residence; and also that the approach to whether a person resident in the UK has ceased to be so resident is in some respects different from the approach to whether a person previously resident in another country has become resident in the UK (per [42]). Whilst I have approached this discussion by reference to the principles as summarised by Lewison J in *HMRC v Grace* [2008] EWHC 2708 (Ch), and cited by David Richards J at [43] in *Glyn*, I bear in mind that these principles need to be considered and understood by reference to the facts of the relevant authorities; and that (per Lloyd LJ at [3] in *HMRC v Grace* [2009] EWCA Civ 1082) the circumstances, pattern and reasons for time being spent in the UK and elsewhere may be infinitely various and whilst decided cases illustrate a variety of examples, the result of one case cannot normally be used as a guide to how another should be decided, even if the two have some factors in common.

161. The relevant legal authorities were summarised as follows by David Richards J (and I repeat them here for convenience):

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

‘i) The word “reside” is a familiar English word which means “to dwell permanently or for a considerable time, to have one’s settled or usual abode, to live in or at a particular place”: *Levene v IRC* (1928) 13 TC 486 at 505, [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, 70 TC 478 at 510;

iii) In considering whether a person's presence in a particular place amounts to residence there, one must consider the amount of time that he spends in that place, the nature of his presence there and his connection with that place: *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] 3 All ER 7 at 13, [1970] 2 QB 463 at 477; *Goodwin v Curtis (Inspector of Taxes)* [1998] STC 475 at 481, 70 TC 478 at 510;

v) However, short but regular periods of physical presence may amount to residence, especially if they stem from performance of a continuous obligation (such as business obligations) and the sequence of visits excludes the elements of chance and of occasion: *Lysaght v IRC* (1928) 13 TC 511 at 529, [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) 13 TC 486 at 505, [1928] AC 217 at 223;

vii) "Ordinarily resident" refers to a person's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life, whether of short or long duration: *Shah v Barnet London BC* [1983] 1 All ER 226 at 235, [1983] 2 AC 309 at 343;

viii) Just as a person may be resident in two countries at the same time, he may be ordinarily resident in two countries at the same time: *Re Norris, ex p Reynolds* (1888) 5 Morr 111, 4 TLR 452; *Shah v Barnet London BC* [1983] 1 All ER 226 at 235, [1983] 2 AC 309 at 342;

ix) It is wrong to conduct a search for the place where a person has his permanent base or centre adopted for general purposes; or, in other words to look for his "real home": *Shah v Barnet London Borough Council* [1983] 1 All ER 226 at 236 and 239, [1983] 2 AC 309, 345 and 348;

x) There are only two respects in which a person's state of mind is relevant in determining ordinary residence. First, the residence must be voluntarily adopted; and second, there must be a degree of settled purpose: *Shah v Barnet London BC* [1983] 1 All ER 226 at 235, [1983] 2 AC 309 at 344;

xi) Although residence must be voluntarily adopted, a residence dictated by the exigencies of business will count as voluntary residence: *Lysaght v IRC* (1928) 13 TC 511 at 535, [1928] AC 234 at 248;

xii) The purpose, while settled, may be for a limited period; and the relevant purposes may include education, business or profession as well as a love of a place: *Shah v Barnet London BC* [1983] 1 All ER 226 at 235, [1983] 2 AC 309 at 344;

xiii) Where a person has had his sole residence in the United Kingdom he is unlikely to be held to have ceased to reside in the United Kingdom (or to have "left" the United Kingdom) unless there has been a definite break in his pattern of life: *IRC v Combe* (1932) 17 TC 405 at 411.'

[44] The propositions in sub-para (i)-(vi) and (xiii) are concerned with 'residence', while the remaining sub-paragraphs are concerned with whether a person is 'ordinarily resident'. This summary was cited with approval on

appeal: see *Revenue and Customs Comrs v Grace* [2009] EWCA Civ 1082, [2009] STC 2707 (at [6]).”

162. Furthermore, as David Richards J then set out at [75]:

“As Lloyd LJ said in *Grace* at [18],... the enquiry which the FTT had to undertake involved assessing the duration of Mr Glyn’s presence in the UK and the regularity and frequency of his visits, the nature of the visits and his connection with this country. The reasons for those visits are, in my judgment, relevant but what is irrelevant is whether they demonstrated any settled purpose.”

163. In considering whether a person’s presence in a particular place amounts to residence there, I must consider the amount of time that Mr McCabe spent in that place, the nature of his presence there and his connection with that place. This principle is derived from *IRC v Zorab* (1926) 11 TC 289. Related to this is the reminder (from *Goodwin v Curtis* [1998] STC 475) that physical presence does not necessarily amount to residence.

164. In *Zorab* the Commissioners had found that Mr Zorab was not resident in the UK and Rowlatt J concluded that he could not interfere with that decision. The case as stated was that Mr Zorab had been born in Calcutta, lived in India all his life (other than some time more than 30 years before the years in question where he came to the UK for his education), was unmarried and had never been a householder and generally lived in hotels. He left India in 1920, and his intention was that he would only return there for short visits. He spent several months in the UK each year – his first visit to the UK was for 11 months, but thereafter each visit was generally five to six months. He stayed at a hotel when he was in the UK, usually the same one. Mr Zorab did not have any business interests in the UK, but visited solely with the object of seeing friends here.

165. Rowlatt J set out at the beginning of his decision:

“Of course it is perfectly right to say that a man has not got to have a residence in the shape of a building to be resident in this country. That is quite clear. But I think that one has to consider not only the time that he is in this country but the nature of his visit and his connection with the country.”

166. Rowlatt J considered the authorities and then concluded:

“This gentleman seems to be a mere traveller. That is how the Commissioners have looked at it and I think they are entitled to look at it in that way without going wrong in law. He is a native of India, he has retired from his work there and he really travels in Europe. All that can be said about it is that in the course of his habitual travels he spends a considerable period every year in England. That is really all that can be said about it and I cannot see that the Commissioners were bound under those circumstances.”

167. *Zorab* is an “arriver” case and is an example of facts where there was significant physical presence in the UK for several months at a time, but other connections in the UK were confined to friendships.

168. This can be contrasted with *Lysaght v IRC* [1928] 13 TC 511, from which Lewison J derived the principle that 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.

169. In *Lysaght*, Mr Lysaght had been born in England to Irish parents and had lived in England until 1919, then partially retired. He sold his house and his family went to live in

Ireland. Mr Lysaght went to Australia in 1919 for business, and, on his return, he rented a furnished house in Somerset, and went backwards and forwards to Ireland until 1920, when he lived with his family in Ireland. After that time, he had no definite place of abode in England, but came every month to directors' meetings, where he would stay on business for about a week each time, staying either at hotels or at his brother's house. The total number of days spent in England for the three years ended April 1923 to April 1925 were 101, 94 and 84 days respectively.

170. The case stated at [4] included that:

“When in England the Appellant generally stays at the Spa Hotel, Bath, at which the meetings of the directors of the Company are held. Occasionally he has stayed at his brother's house at Chepstow. These visits to England are solely for business purposes, and the Appellant's wife never accompanies him on these visits. He owns a field of about three acres near Burnham, purchased many years ago, which he is anxious to sell. He has a few relatives and many friends in England. He has also relatives and friends abroad.”

171. The Special Commissioners had held that Mr Lysaght was resident and ordinarily resident in the UK. The House of Lords (Viscount Cave dissenting) held that he was resident and ordinarily resident in the UK in the years in question.

172. Rowlatt J, in upholding the decision of the Commissioners, stated:

“I think one must simply consider him as a gentleman who, one now knows, (whatever his past) has his residence in Ireland, and just comes over here. Secondly one must remember -and it is rather a hard thing to bear in mind, because it qualifies one's natural ideas in connection with the word "residence" - that one must not look for an establishment. As the Lord President pointed out, a tramp has a "residence" in this country. One must not look for an establishment. If a man chooses to live at hotels instead of in his own house, or even to stay with friends, it really does not affect the question of residence. What I really have to decide in this case, and what the Commissioners had to decide - and I have to see whether they were wrong-is whether or not he was a mere visitor.”

173. The speeches of the House of Lords supported this reasoning of Rowlatt J:

(1) Viscount Sumner said that property is not a conclusive test – whether Mr Lysaght resides in his own or in a hired house in Ireland cannot have much to do with it, nor is a person precluded from being resident because he puts up at hotels, and not always the same hotel, and never for long together. Keeping up an establishment abroad and none in the UK is not incompatible with being resident here if there is other sufficient evidence of it. He noted that it was the shortness of the aggregate time during which here was here that constituted the principal, though not the only, point in his favour; but the question of a longer or shorter time is one for the Commissioners; their decision cannot be interfered with.

(2) Lord Buckmaster, with whom Lord Atkinson agreed, said that a man might well be compelled to reside here against his will; the exigencies of business often forbid the choice of residence “and though a man may make his home elsewhere and stay in this country only because business compels him, yet none the less, if the periods for which and the conditions under which he stays are such that they may be regarded as constituting residence”, it is open to the Commissioners to find that in fact he does so reside.



(3) Lord Warrington said that the “most material fact” in favour of a finding of non-residence was that Mr Lysaght had a permanent family home in Ireland. His visits to the UK were for business purposes; they were frequent and regular. He concluded that he could not say there was no evidence on which the Commissioners could properly arrive at their conclusion, but was not sure that he should have taken the same view.

174. *Levene v IRC* (1928) 13 TC 486 was cited as authority for the principle that a person may simultaneously reside in more than one place, or in more than one country. In *Levene* the case stated included that Mr Levene spent time in the UK in hotels, and when he was not in the UK he was staying in Monaco and at various places in France. There was no hotel at which he stayed so long or to which he returned so frequently that it could be described as his home. He was married, and his wife almost always accompanied him. Mr Levene spent between four and five months in the UK in each of the relevant years.

175. The Special Commissioners found that he was resident and ordinarily resident in the UK, and that was unanimously upheld by the House of Lords.

176. Rowlatt J had reiterated that resident and residence were attributes of the person, not of a building. A person may be resident in the UK even though they are a wanderer here, staying in hotels and never staying two nights in the same place.

177. The House of Lords concluded that Mr Levene was resident in the UK in the years in question:

(1) Viscount Sumner said “What he actually did was to come back to England after an absence of about seven months, and he remained for nearly five. In the meantime he had not set up an establishment abroad but had lived in hotels...”.

(2) Lord Warrington described the pattern of Mr Levene’s movements, and noted that in no year of assessment did their stay in the UK extend to six calendar months, and that while abroad and in England they lived in hotels.

(3) Viscount Cave LC described the position of a wanderer as the most difficult case; noting that the question is then one of fact and degree.

178. In *Levene* Mr Levene was thus staying at hotels not only in the UK but also whilst overseas; he had no fixed establishment abroad. Mr Stone and Ms Shaw took me to additional authorities which considered the significance of having a home abroad.

179. In *Cooper v Cadwalader* [1904] 5 TC 101, Mr Cadwalader was an American citizen and had a lease for a total of six years over Millden Lodge and the exclusive right over grouse shooting at Millden, along with fishing rights. He spent two months each year at Millden during the shooting season. He employed a caterer during this time, and his guests were mostly from America. He retained his residence in New York during these periods he spent at Millden.

180. In the Court of Exchequer (Scotland), the Lord President concluded that Mr Cadwalader was assessable to tax in the UK – he had a lease in Scotland, occupied it personally for “a considerable portion of each year” and when he was in America the property was kept in readiness for his return. His occupation there was not casual or temporary, but was substantial.

181. In *Grace*, considered by David Richards J at [45] and [46] of *Glyn*, Lloyd LJ had said that Mr Grace’s ownership and use of a house in South Africa was not conclusive but was a relevant factor to be taken into account.

182. The principle that where a person has had his sole residence in the UK, he is unlikely to be held to have ceased to reside in the United Kingdom (or to have “left” the UK) unless there has been a definite break in his pattern of life is derived from *IRC v Combe* (1932) 17 TC 405.

183. In *R (Davies) v HMRC and R (Gaines-Cooper) v HMRC* [2011] UKSC 47, Lord Wilson addressed the phrase “a distinct break”, stating at [14] that this was not an inapt description of the degree of change in the pattern of an individual’s life which will be necessary. Lord Wilson considered the decision in *Combe*:

“19 In referring to a “distinct break” Nicholls J, as he acknowledged at p 14F, was adopting a phrase first used in this context in the decision of the Court of Session in *Inland Revenue Comrs v Combe* (1932) 17 TC 405. Until 1926 Captain Combe was resident and ordinarily resident in the UK. Then he went to New York to work as a broker for a firm on Wall Street. The objective was that he should become its European representative and, in furtherance of it, he returned to the UK, staying in hotels, for 52 days, 175 days and 181 days during each of the following three years. In upholding the conclusion that he was not liable to tax as a UK resident for those years the court proceeded straight to the statutory provision (which then remained in General Rule 3) and concluded that the captain had not left the UK for the purpose only of occasional residence abroad. It was implicit in its conclusion that he had left the UK in the sense of becoming non-resident in it. When, therefore, Lord Sands observed, at p 411, that “there was a distinct break” in what he described as the captain’s “residence” in the UK, it was with a view to explaining his conclusion that the captain’s residence abroad had been more than occasional....”

184. Lord Wilson further explained that this is a multifactorial enquiry, but that “severance of social and family ties” pitches the requirement at too high a level. At [20]:

“The distinct break relates to the pattern of the taxpayer’s life in the UK and no doubt it encompasses a substantial loosening of social and family ties; but the allowance, to which I will refer, of limited visits to the UK on the part of the taxpayer who has become non-resident, clearly foreshadows their continued existence in a loosened form.”

185. It is clear from the subsequent paragraph in Lord Wilson’s speech that this reference to an allowance of limited visits to the UK was to the 90-day allowance.

#### ***Application to the facts***

186. It is well-established that residence in the UK does not require the search for a residence in the form of a building in the UK. That Mr McCabe slept in hotels, or at the houses of friends or his son Simon, whilst in the UK does not therefore preclude his being UK resident.

187. Some of the older authorities involve starkly contrasting fact-patterns - *Zorab* involved significant time being spent in the UK, but Mr Zorab’s visits were to spend time with friends (rather than family or on business); whereas in *Lysaght* the visits were for business purposes only, and involved regular visits of one week each month, amounting to three months each year in circumstances where Mr Lysaght had an established family home abroad.

188. Here, I find it helpful to remind myself of the principles that a person may reside in more than one country; and where a person has had his sole residence in the UK, he is unlikely to have ceased to reside in the UK unless there has been a definite break in his pattern of life (as that principle was then explained further by Lord Wilson by reference to there being a substantial loosening of ties).

189. In this context I note first the facts I have found as regards Mr McCabe’s life before 4 April 2006 – these include the amount of time spent in the UK each year, his family and social relationships in the UK, but also the development of the business of the Scarborough Group, and the changes which had occurred prior to the Relevant Period (including as a result of Teesland’s acquisition of iOG in 2004).

190. Addressing whether there was a substantial loosening of Mr McCabe's ties to the UK, I consider first his physical presence in the UK.

*Physical presence*

191. Mr McCabe's whereabouts are set out above. Whilst counsel both made submissions as to which metric I should prefer, I conclude that I do not need to decide to rely on only one set of data. The dictionary definition of residence (and its reference to an abode or where a person lives) does bring into focus where a person sleeps; but there are other references to assessing physical presence which are not so confined and refer only to the amount of time spent in the UK. I consider that there is no reason why such an amount of time should not include all time in the UK, albeit that this is coupled with a need to consider and assess the quality of the time (particularly given the principle that physical presence may not be sufficient) and that where a person sleeps is one part of this.

192. As to Mr McCabe's presence in the UK during the Relevant Period:

(1) Mr McCabe spent a limited number of nights in the UK – 33 in the first year, 43 in the second. This fact alone does not give an accurate picture of the amount of time he spent in the UK, as he was present in the UK for 79 days or part days in the first year and 95 in the second.

(2) He made 98 visits to the UK throughout the Relevant Period, 53 of which did not involve an overnight stay.

193. For completeness, I would add that I do not find what was referred to as the "whole days" approach particularly helpful – at 18 days and 13 days for the first and second years respectively, these numbers give a misleading (rather than incomplete) view of Mr McCabe's presence given the number and frequency of his visits, as by definition they take no account of day trips or trips where he stayed just one night, and even where he was in the UK for a period of almost three full days (being weekdays or across a weekend), only count one of those days.

194. When considering these statistics, I remind myself that in the first six months Mr McCabe had made just one visit to the UK, such that the nights in the UK, and the vast majority of days or part days, arose in the second six months of 2006-07. After the first six months, Mr McCabe was thus making lots of short, regular trips to the UK. These visits to the UK were not evenly spread out - the pattern was not consistent during the remaining 18 months. There was, however rarely a period of more than five days where Mr McCabe was not making a visit to the UK, unless he was either in Spain in that time or making a long-distance trip to, eg, Australia, Brazil, Canada, or the US.

195. I recognise that the level of physical presence in the UK is less than that spent in Belgium, Spain and indeed Australia. The brevity of the trips to the UK also means that they do not have the feel of being settled; the pattern is disrupted and short; but the frequency of the visits and the ability to make lots of visits of a short duration was aided by the proximity of Brussels to London, and the ease with which Mr McCabe could fly from Brussels using the private plan or travel by Eurostar.

196. Ms Shaw submitted that the very brevity of these visits meant that they lacked the quality of presence which I should be looking for when determining residence. The difficulty is that this pre-supposes that quality of presence should be equated with length of presence. Mr McCabe's trips to the UK were busy and productive. Where Mr McCabe was away from the UK for longer periods of time (with the exception of the first six months), this was generally not because he was in Brussels – instead, the picture which emerges is that he was in Australia (which explains the gap from leaving the UK on 13 November 2006 and not making another trip until 2 December 2006), and/or he was at La Manga, or in the Far East.

197. Ms Shaw submitted that several of the visits to the UK during the Relevant Period were for matters of chance and occasion, eg Mrs McCabe's illness, her birthday party, attending the High Court as a witness, and that he had no fixed habit of being in the UK for such matters. I do not accept that this was made out on the facts for two (separate) reasons, each of which would be sufficient on its own – with the exception of the two occasions on which Mrs McCabe was ill, Mr McCabe planned his time very efficiently and his visits to the UK encompassed more than one reason or activity (eg he attended business meetings prior to attending Mrs McCabe's birthday party); and given the amount of time that Mr McCabe spent in the UK in prior years, I find that, on the balance of probabilities, he did have the fixed habit of being in the UK for, eg, birthdays and funerals of family and close friends.

#### *Connections to the UK*

198. Whilst Ms Shaw submitted that the reasons for Mr McCabe's visits were not ties to the UK, the reality is that Mr McCabe did return to the UK, and his activities in the UK covered a variety of reasons reflecting various types of connections to the UK:

- (1) Whilst Mr and Mrs McCabe spent most of their time together outside of the UK (primarily at La Manga, but also on short holidays and longer business trips, and when Mrs McCabe visited Brussels), Mr McCabe did return to the UK and spend time with his wife in the UK, in Scarborough (particularly over Christmas, and where he was a welcome visitor at Deepdale), in Sheffield watching football and attending key social events (such as the Player of the Year dinner) and in London.
- (2) He saw both Scott and Simon in the UK, both as family members and in business meetings. They spent most of their time together at La Manga, but it had been the pattern before the Relevant Period that La Manga was a place where the family spent social time together, since Scott and Simon no longer lived at Deepdale.
- (3) I accept that Mr McCabe's relationships with long-standing friends changed following 4 April 2006. He was, quite simply, able to see some less frequently, and lost touch with others.
- (4) However, Mr McCabe was still able to attend a large number of Sheffield United matches, both home and away, and as well as offering enjoyment (or disappointment) of the games themselves, they also provided opportunities to meet with friends or family, and to have brief catch-ups with the manager and Mr Rockett.
- (5) Looking at the business:
  - (a) Mr McCabe was owner of the Scarborough Group, and this UK incorporated and UK resident company represented his main asset.
  - (b) Mr McCabe was director of the holding companies and some of the other companies within the group, and he was Chairman of SUPlc. Whilst the number of directorships reduced, he retained significant influence both as owner and director.
  - (c) Whilst Mr McCabe's evidence included that all of the Scarborough Group's activities had some form of international element, and Ms Shaw submitted that the majority of Mr McCabe's work engagements were related to non-UK activities, the practical reality was that Mr McCabe conducted a wide range of activities in the UK. He did hold discussions and briefings in relation to the sale of a large part of the business to an Australian counterparty, but the target business was both UK and non-UK. However, it is readily apparent that he also attended meetings in the UK with key UK contacts (eg Mrs Robertson and Ms MacCagnan), he attended board meetings of UK companies in the UK, had meetings in the UK in relation to UK-

specific matters, including the Tevez affair, developments in Leeds, the re-generation of Sheffield, legal disputes in relation to old projects, and met with international business partners (eg Dr Quek) in the UK.

(d) I have found that I was not satisfied that Mr McCabe had handed over responsibility for running the UK businesses; but in any event, the extent of his involvement, and the number of trips he made to the UK for business meetings and their breadth of subject-matters, illustrates a key part of his connection to the UK throughout the Relevant Period.

#### *Non-UK activities*

199. The authorities do illustrate that an individual can have a full life, including a home, overseas and still be resident in the UK - this can be seen in *Lysaght* and in *Cadwalader* – but it is clearly a relevant factor that I need to take into account.

200. As regards Mr McCabe’s time in Belgium:

(1) Mr McCabe retained accommodation throughout in Brussels – Whilst HMRC did not accept that this was Mr McCabe’s “home” for the purposes of the common law test of residence (as opposed to it being a “permanent home” for the purposes of the DTC), I accept that the accommodation Mr McCabe chose met his needs, and he moved when he was not satisfied (which can be seen from both the move from the Marriott to the Meridien apartments and then his decision to sell Ave Louise). Mrs McCabe visited him and stayed there with him, as did friends (eg Ian Cameron).

(2) He had a permanent office in Brussels, at which not only did he do his own work (whether of reading briefings, research, or strategizing) but also held meetings - with Mr Vangoidsenhoven and others based outside of the UK, and also with colleagues and contacts who travelled from the UK to meet with him (including Mr Tandy and Mr Burnley).

(3) Friends and family from the UK visited Mr McCabe in Brussels; and he attended some social events locally and he had local gym membership.

(4) Mr McCabe spent regular time in Brussels (whether that be measured by reference to nights or using a part-days methodology). This was not just time at weekends, or in the evenings – Mr McCabe spent 134 part weekdays in Brussels in the first year, and 96 in the second (compared to 44 and 63 respectively in the UK).

201. During the Relevant Period, and without confining matters to time spent in Brussels in particular but rather assessing activities outside the UK:

(1) Mr McCabe pursued various non-UK projects – with football clubs (including Royal White Star FC, Anderlecht FC and Ferencvaros FC), a retail JV with Cortefiel in Madrid, a building scheme in Malaga, serviced apartments in Paris, developments in Shanghai and Shenzhen, and looking at the recovery of distressed assets in the US.

(2) Mr McCabe travelled extensively on business – trips to Australia were necessarily longer, but there were short trips (sometimes just for one night) to, eg, Amsterdam, Germany, and Hungary.

(3) [31] and [32] of the SoAF record the number of engagements in Mr McCabe’s diary during the period, and the significant majority of these were outside the UK. Whilst there are some individuals whom Mr McCabe met on the majority of occasions in the UK (eg Ms MacCagnan and Dr Quek), there are others where the reverse was true, eg Mr Salwin.

(4) [39] of the SoAF records the board meetings attended by Mr McCabe, and 74 out of 98 were outside of the UK.

*Relevance of tax*

202. HMRC had accepted that a person can be non-UK resident even if that residence has been adopted for tax avoidance reasons. However, Mr Stone submitted that this should colour the approach taken to the facts; and that Mr McCabe did not need to be in Brussels at all:

- (1) Mr McCabe was working with people in the UK.
- (2) There were fewer face-to-face meetings in Brussels compared to those on days he was in London.
- (3) The meetings that were held whilst Mr McCabe was physically present in Brussels had nothing to do with Belgium (with the exception of a few inspections of potential properties in the first few months, particularly in July and October 2006) - these meetings could have been held anywhere in Europe.
- (4) Even in Brussels some of his meetings related to UK businesses (eg Thorpe Park and SUplc/SUFC board meetings).
- (5) When Valad bought SCP and the UK businesses, Mr Hurley relocated to London, showing that Valad did not consider it necessary to run this business from Brussels.

203. As to these submissions:

- (1) I agree that Mr McCabe's diary was fuller (with more pre-planned business and family or social engagements) on days that he was in London compared to days he was in Brussels. I also accept Mr McCabe's evidence that this does not mean he was not busy working whilst in Brussels.
- (2) Mr Stone's submissions included that Mr McCabe could have run the business from, eg, London, Amsterdam (where Teesland/iOG had a physical presence) or Paris (which was a hub for long-haul flights unlike Brussels). I do not consider that the possibility of any of these alternative options is relevant to the assessment of whether or not Mr McCabe remained resident in the UK. Instead, I focus on the actions he did and did not take.
- (3) I conclude that the tax advice Mr McCabe obtained from Mazars and Mr Way was the main reason for some of his actions taken, including:
  - (a) his decision not to return to the UK for six months after 4 April 2006 (advice which could not override his desire to be at Bramall Lane for the "historic" final match of the season);
  - (b) the act of returning keys to Deepdale to Mrs McCabe and sleeping at hotels or at Mr Cameron's house when he was in Scarborough overnight (an action which was described by Simon as "bizarre");
  - (c) the entry into the agreement between SRE and Mr McCabe appointing him as managing director of SRE on 22 January 2007, effective from 4 April 2006 - there was no evidence that his activities changed after the effective date, or as to other reasons for the entry into this agreement at this time;
  - (d) the entry into the various consultancy agreements between SRE and UK companies within the Scarborough Group, which were in relatively standard forms and had not all been tailored to reflect the reality of Mr McCabe's services (notably in relation to the contract between SRE and SUplc); and

(e) he returned to Brussels to sleep (with meetings in London on the days either side), ie seeking to minimise the number of nights spent in the UK. This could be seen on several occasions, eg 19 October 2006, 1 November 2006, 22 February 2007; and involved flying back to London very early the following morning.

### ***Concluding discussion***

204. Assessing the totality of the evidence, I have concluded that Mr McCabe remained UK resident after 4 April 2006. Whilst my assessment of the facts makes it clear that there was a change in the pattern of Mr McCabe's life after that date, in the context of an individual who had been resident in the UK since birth, this was not such as to constitute a sufficient loosening of his ties with the UK.

205. The most significant factors against this conclusion are:

- (1) the amount of time Mr McCabe was physically present in the UK during the Relevant Period (referring here to actual time spent, and looking at this in the context of the number of nights and the brevity of individual visits); and
- (2) the extent of his overseas activities - I accept that Mr McCabe did establish himself in Brussels during this time, maintaining a home and office there; and the importance of time spent at La Manga for family and social relationships.

206. I do not disregard the reduction of time spent in Scarborough with both Mrs McCabe and long-standing friends; but I do not regard this as significant a fact as those identified in the preceding paragraph.

207. However, in the context of Mr McCabe having been resident in the UK before the Relevant Period, all of these are outweighed by:

- (1) The totality of his ongoing business relationships with and within the UK – his attendance at meetings and board meetings of key UK companies, including Teesland plc and SUplc, his involvement in UK projects, his maintaining of key business contacts in the UK, eg Mrs Robertson and Dr Quek.
- (2) The ongoing importance of “headline” roles in respect of the business of the Scarborough Group, eg remaining Chairman of SUplc and a key public face of the football club, being seen to lead the response to the Tevez affair, and also his involvement in regeneration projects which were important to his connection to Sheffield.
- (3) Mr McCabe continued to spend time with his family – with the whole family across the Christmas periods, birthdays, catching up with his sons, spending time with Mrs McCabe and/or his sons at football matches. These occasions were fewer than in previous years, but not an insignificant amount of time.
- (4) The frequency of his attendance at Sheffield United matches – again, it is clear from the SoAF that he attended fewer matches, but he did attend both home and away matches, met with directors of their opponent, and some were social occasions with, eg, Mr Cameron.
- (5) Whilst Mr McCabe's visits to the UK were generally fairly short, and usually involved no more than two nights in the UK (other than at Christmas and for Scott's wedding), they were frequent and, having regard to his activities in the UK (both business, family and social), productive. His physical presence was by no means a stop-gap measure – it was time he used efficiently and well to do activities in the UK that were important and of value to him. That is an important quality of his presence in the UK.

(6) Even before the Relevant Period, Mr McCabe travelled regularly on business, and was accustomed to spending significant amounts of family and social time at La Manga. This was particularly important as regards his non-working time spent with Scott and Simon.

208. I have therefore concluded that Mr McCabe remained resident in the UK after 4 April 2006. This conclusion is based on my assessment of all of the evidence before me; and I conclude that he was resident in the UK throughout the Relevant Period, ie I also reject the alternative submissions of Ms Shaw that Mr McCabe had ceased to be UK resident at some point in the Relevant Period and in any event by 5 April 2008.

209. Ms Shaw drew attention to other dates and events which she submitted demonstrated that a substantial loosening, or further loosening, of ties with the UK had occurred, and which individually or cumulatively amount to a distinct break, including:

(1) 4 October 2006 - by this point, Mr McCabe had been physically absent from the UK for six months, apart from the visit on 30 April, had firmly established himself in Brussels and already started to develop the European business.

(2) 31 January 2007 - by this point, Mr McCabe was in discussions with Valad about the disposal of part of the UK business of the Scarborough Group and its European business. He had also further established himself in Brussels by purchasing and moving into the apartment on Ave Louise.

(3) 1 August 2007 - by this date, Mr McCabe had sold his interests in Scarborough Property Holdings Limited, Scamp Holdings Limited (which included its interest in SCP), Teesland plc and Scarborough Development Group to Valad. Those interests amounted by value to the greater part of his interest in the Scarborough Group, and on 25 July 2007 he was appointed as a non-executive director of Valad Commercial Management Limited and Valad Funds Management Limited, two Australian companies (with effect from 1 August 2007).

(4) 30 September 2007 – the financial statements for SCP and Teesland plc for the periods ended on this date show the significance of the European business.

(5) 3 April 2008 – Mr McCabe gifted the remainder of his ordinary shares in Scarborough Group to his sons in equal shares. This gift resulted in him divesting himself of the remainder of his financial interest in the Scarborough Group.

210. I do not accept these submissions – I do not consider that any of these points, either individually or taken together with the remainder of the facts as found, are sufficient to demonstrate a sufficient loosening of ties:

(1) It is clear from the authorities that an absence from the UK of several months is not itself sufficient. The difficulty which Ms Shaw faces on the facts, and which I have concluded is not surmounted, is that during the six months from 4 April to 4 October 2006 (and leaving aside the return to the UK on 30 April 2006, which does not and should not dictate the conclusion), Mr McCabe retained some of his connections to the UK throughout whilst not physically present in the UK (eg attending board meetings of several of the UK companies, both in Brussels and Paris), and was continuing to hold meetings in relation to UK developments (eg Lumiere in Leeds). After six months, Mr McCabe returned to the UK and the pattern of his life continued, albeit with him spending time in Brussels as well as the UK, Spain and elsewhere. Mr McCabe's physical absence from the UK was a consequence of the tax advice which he had received, and was treated by him as a hurdle to overcome. He did remain absent for the time advised, but when



viewed in the context of all the surrounding facts which I have relied on above, but I am not satisfied that Mr McCabe had made a sufficient loosening of ties by this date.

(2) I had accepted that Mr McCabe had found for himself suitable accommodation in Brussels, ie have not counted the use of serviced apartments in Brussels as a factor against non-UK residence. Similarly, I do not consider that the purchase of Ave Louise changes matters.

(3) The transaction with Valad had a clear impact on Mr McCabe's non-UK travel during the Relevant Period, it being the explanation for the visits to Australia. However, the fact of that transaction, and its effects on the shape of the Scarborough Group, did not otherwise have a material effect on the factors which I consider support the conclusion that he remained UK resident. Mr McCabe did, in consequence of this transaction, acquire assets which were investments in a non-UK group and additional directorships in non-UK companies; but this does not detract from the strength and extent of his UK connections. The fact of the transaction with Valad did not result in an overall reduction in Mr McCabe's physical presence in the UK.

(4) I had accepted (and HMRC had not challenged) Mr McCabe's efforts to grow the European business, the results of which are shown in the financial statements.

(5) The gift of shares in the Scarborough Group to Scott and Simon was a substantial transaction, and had a material impact on Mr McCabe's wealth. However, bearing in mind that the burden of proof is on Mr McCabe, I do not have sufficient evidence to accept that there was a distinct break or sufficient loosening of ties at this point. There was minimal evidence of Mr McCabe's presence, actions and relationships after this date (largely confined to nights in the UK and visits in the UK as recorded in his tax returns).

211. I have concluded that Mr McCabe remained UK resident.

## **DTC**

212. The application of the DTC is relevant on the facts as I have concluded that Mr McCabe was resident in the UK in the Relevant Period (it being an agreed fact that he was resident in Belgium during this period). Article 4 defines residence, and sets out how to determine the residence status where an individual is resident in both the UK and Belgium.

213. As affirmed by the Supreme Court in *Fowler v HMRC* [2020] UKSC 22 at [16]-[19], I should be guided in my interpretation of the DTC by the Vienna Convention on the Law of Treaties, OECD commentaries on the OECD Model Tax Convention, on which the DTC is based, and relevant case law.

214. Mr Stone submitted that as the purpose of the DTC is to eliminate double taxation and prevent the avoidance of taxation, I must adopt a purposive approach to the interpretation reflecting both of these purposes (in accordance with *Bayfine UK v HMRC* [2012] 1 WLR 1630). The OECD Commentary on Article 1 set out an example (at [56] of the Commentary, which was newly inserted in that published in 2017 (the "2017 Commentary")) of improper use of the DTC where an individual who has his permanent home and all his economic interests, including a substantial shareholding in a company in that state, who, essentially to sell the shares and escape taxation on the capital gain, transfers his permanent home to the other state where such gains are subject to little or no tax. The Commentary then exhorts at [61] that it should not be lightly assumed that a taxpayer is entering into the type of abusive transactions referred to above. Mr Stone submitted that Mr McCabe had artificially arranged his affairs specifically to avoid the application of CGT to the disposal of shares to his sons; and in the Relevant Period the UK did not have a GAAR that might be triggered by abusive arrangements.

215. Ms Shaw submitted that there was no abuse of the DTC. As a matter of UK law, s10A TCGA 1992 sets out that tax avoidance is the realisation of chargeable gains by temporary non-residents, ie those who are resident overseas for less than five years. So going abroad for more than five years is not tax avoidance, even if that was the reason for the move (which was not accepted).

216. I consider that I should be cautious about concluding that the transactions or arrangements entered into by Mr McCabe are abusive for this purpose. The authorities set out what it means to be UK or non-UK resident for the purposes of UK law, and where a person actually arranges their life in the knowledge of those rules and in accordance with those rules, I would not consider that of itself to be an abuse of either UK law or the provisions of the DTC. However, when applying the provisions of the DTC (in this case Article 4) to the facts as I have found them, I do consider the purposes of the DTC when assessing the weight to be given to the facts as found.

217. Article 4(2) sets out the tie-breaker clause. It was accepted that Mr McCabe is a British national, and therefore if the tie-breaker has not been resolved at an earlier stage of the waterfall he would be deemed to be a resident of the UK by virtue of Article 4(2)(c). Both parties submitted that his residence can and should be determined at those earlier stages (whilst disagreeing as to the outcome).

218. I am mindful that the approach of the tie-breaker is to specify the preference which is to be given to particular aspects of residence at the different stages of the waterfall.

#### ***Permanent home***

219. The first part of Article 4(2)(a) provides that an individual shall be deemed to be a resident of the state in which he has a permanent home available to him.

220. HMRC accepted that Mr McCabe had a permanent home available to him in Brussels, noting that renting a furnished room would be sufficient for this purpose. The tie-breaker would thus be resolved in favour of residence in Belgium if he did not have a permanent home available to him in the UK.

221. Ms Shaw submitted that Mr McCabe did not have a permanent home available to him in the UK. Deepdale was owned by Mrs McCabe, a separate legal person; Mr McCabe had removed his personal belongings from Deepdale, handed back the keys and moved out, thus giving up his occupational rights to the house; by his actions he ensured Deepdale was not available to him, and he did not stay there; it is not relevant that he could have stayed there if asked, or that it may have been more convenient to stay there than in a hotel.

222. Mr Stone submitted that the DTC uses plain English words - the change of ownership of the house in 2004 had made no difference to whether it was a permanent home available to him at that time. Mr McCabe did use the house whenever he was in Scarborough. Mr McCabe had stayed in hotels, not because Deepdale was not available to him but because the tax advice was that he must not sleep at Deepdale.

223. The 1977 edition of the OECD Commentary (ie that which had been published at the time the DTC was negotiated) (the “1977 Commentary”) sets out the following:

“11. The Article gives preference to the Contracting State in which the individual has a permanent home available to him. This criterion will frequently be sufficient to solve the conflict, e.g. where the individual has a permanent home in one Contracting State and has only made a stay of some length in the other Contracting State.

12. 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 that 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.

13. As regards the concept of home, it should be observed that any form of home may be taken into account (house of 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.).”

224. The 1977 Commentary thus emphasises that the DTC gives preference to the place where the individual “owns or possesses a home”, which must be permanent, ie “the individual must have arranged and retained it for his permanent use”, and “the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally...”.

225. The 2017 Commentary retained this language, but added an example to [13]:

“For instance, a house owned by an individual cannot be considered to be available to that individual during a period when the house has been rented out and effectively handed over to an unrelated party so that the individual no longer has the possession of the house and the possibility to stay there.”

226. Ms Shaw’s submitted that I should not rely on the 2017 Commentary as the amendments were made after the Relevant Period; and that in any event the changes did not assist HMRC on the facts.

227. In *Fowler v HMRC* [2020] UKSC 22 the Supreme Court set out the following at [18]:

“The OECD Commentaries are updated from time to time, so that they may (and do in the present case) post-date a particular double taxation treaty. Nonetheless they are to be given such persuasive force as aids to interpretation as the cogency of their reasoning deserves...”

228. I consider that this principle is capable of applying equally to the amendments or updates made to the OECD commentary after the Relevant Period. I do, however, note that in the context of the meaning of a permanent home the only difference is the addition of an example which illustrates what was meant by the principle already set out in the 1977 Commentary.

229. On the basis of the facts as I have found them, I have concluded that Mr McCabe did have a permanent home available to him in the UK, namely Deepdale:

(1) I recognise that Deepdale was owned solely by Mrs McCabe throughout the Relevant Period and Mr McCabe did not have any legal ownership interest in the house. However, that had been the case since June 2004 and Mr McCabe had continued to live there from then until 4 April 2006.

(2) Mr McCabe was a welcome visitor at Deepdale whenever he was in Scarborough. Deepdale was available to him to use, and he did use it throughout the Relevant Period.

(3) Mrs McCabe would have given him permission to stay overnight whenever he wanted, and for as long as he wanted. The only reason he did not do so was that he had been advised not to for tax purposes.

(4) Given the purposes of the DTC, I do not consider that I should place any weight on the artificial step of handing over his set of keys to Mrs McCabe when considering whether the house was available to Mr McCabe.

230. The example added to the 2017 Commentary of a house being rented out and handed over to a third party such that the individual no longer has possession of the house and no possibility of staying there reinforces this conclusion.

231. Mr McCabe thus had a permanent home available to him in both the UK and Belgium.

### *Centre of Vital Interests*

232. The second part of Article 4(2)(a) provides that if an individual has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests, or “COVI”).

233. The 1977 Commentary provides:

“15. If the individual has a permanent home in both Contracting States, it is necessary to look at the facts in order to ascertain with which of the two States his personal and economic relations are closer. Thus, regard will be had to his family and social relations, his occupations, his political, cultural or other activities, his place of business, the place from which he administers his property, etc. The circumstances must be examined as a whole, but it is nevertheless obvious that considerations based on the personal acts of the individual must receive special attention. If a person who has a home in one State sets up a second in the other State while retaining the first, the fact that he retains the first in the environment where he has always lived, where he has worked, and where he has his family and possessions, can, together with other elements, go to demonstrate that he has retained his centre of vital interests in the first State.”

234. This commentary (which was unchanged in the 2017 Commentary) is helpful in expanding upon what is meant by “personal and economic relations” for this purpose.

235. Ms Shaw submitted that Mr McCabe’s family and social connections were closer in Belgium (but this was marginal) – Ms Shaw drew attention to the nights spent with Mrs McCabe in Brussels, visits from Scott and Simon (but accepting he also saw them in the UK), his long-standing friends were in the UK, but they hardly saw each other in the UK whereas they did visit him in Brussels. Instead, Brussels was the centre of Mr McCabe’s social life as he spent more time there. His work activities were closer to Belgium; it was where he had his own office, administered his affairs, and travelled to and from on his overseas business trips.

236. Mr Stone submitted that in assessing this limb of the waterfall I should not be counting factors in each state, but instead should be considering the depths of the roots, eg long-standing friendships. Mr McCabe’s business empire, and his lifelong passion for Sheffield United (which had expanded to include his interest in the re-generation projects), were firmly rooted in the UK.

237. The determination of the state with which Mr McCabe’s personal and economic relations are closer requires a comparison between relevant aspects of his relations and life in the UK and Belgium during the Relevant Period. “Personal and economic relations” are explained broadly in the commentary, but nevertheless I do not take account of conclusions in relation to Mr McCabe’s permanent home or habitual abode when assessing his COVI as these are separate stages of the waterfall. There are two additional preliminary points to make – the importance of time spent as a family in La Manga is irrelevant, as is a comparison between relations in the Relevant Period and Mr McCabe’s interests and relations before the start of that period.

238. Mr McCabe's relevant personal and economic relations in Belgium include:

- (1) Mr McCabe's establishment of an office there, from which he worked on his own, attended meetings in person and by video conference;
- (2) His only employment income until August 2007 was from SRE, a Belgian company, and even in August 2007 it was supplemented not by employment income from UK companies but from an Australian company (and thus I take not account for the purposes of assessing his COVI).
- (3) He explored potential business property opportunities in Belgium, albeit decided not to pursue them as they did not make good business sense, concluding that the market was too stagnant;
- (4) Mr McCabe bought the apartment at Ave Louise in 2007;
- (5) Mr McCabe attended social events in Brussels, long-standing friends visited him there (Mr Cameron socially, Mr Burnley for a combination of business/social), and he started to develop new friendships during this time (including with Mr Vangoidsenhoven); and
- (6) Mr McCabe spent some time with Mrs McCabe, Scott and Simon in Brussels when they visited him there.

239. However, assessing all of Mr McCabe's relations, I place greater weight on his personal and economic relations in the UK and conclude that his COVI was in the UK and he is deemed by Article 4(2)(a) to be a resident of the UK in consequence. The matters on which I rely for this purpose are:

- (1) Mr McCabe spent time in the UK with family and with long-standing friends – in Scarborough at Christmas and at other times during the year, in Sheffield watching football and attending social events including the Player of the Year dinner, at away matches elsewhere in the UK (including Manchester and Liverpool) and in London (including at Mrs McCabe's birthday party which Simon had organised);
- (2) He attended a significant number of Sheffield United matches in the UK, which were important to him as a fan as well as a means of spending time with friends and family.
- (3) Mr McCabe was the controlling shareholder of the Scarborough Group, and was a director of the holding companies and key subsidiaries within the group.
- (4) Mr McCabe conducted a substantial amount of business for the various parts of the Scarborough Group in the UK – this included board meetings and relationship meetings, his involvement in UK projects including in Leeds and re-generation projects in Sheffield.
- (5) Whilst Mr McCabe's employment income was from SRE, all of SRE's income was from UK companies within the Scarborough Group.

240. This conclusion is sufficient to dismiss the appeal. However, I address the remainder of the tie-breaker as I heard submissions from both parties.

### ***Habitual abode***

241. If the State in which Mr McCabe has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be resident of the State in which he has a habitual abode (Article 4(2)(b)). The sub-clause dealing with no permanent home is not applicable on the facts of this appeal in any event.

242. The 1977 Commentary sets out the following:

“17. In the first situation, the case where the individual has a permanent home available to him in both States, the fact of having an habitual abode in one State rather than in the other appears therefore as the circumstance which, in case of doubt as to where the individual has his centre of vital interests, tips the balance towards the State where he stays more frequently. For this purpose regard must be had to stays made by the individual not only at the permanent home in the State in question but also at any other place in the same State.”

243. The 2017 Commentary also includes this paragraph, but has an additional explanation, which includes two illustrations to which counsel referred:

“19. The application of the criterion provided for in subparagraph b) requires a determination of whether the individual lived habitually, in the sense of being customarily or usually present, in one of the two States but not in the other during a given period; the test will not be satisfied by simply determining in which of the two Contracting States the individual has spent more days during that period. The phrase “séjourne de façon habituelle”, which is used in the French version of subparagraph b), provides a useful insight as to the meaning of “habitual abode”, a notion that refers to the frequency, duration and regularity of stays that are part of the settled routine of an individual’s life and are therefore more than transient. As recognised in subparagraph c), it is possible for an individual to have an habitual abode in the two States, which would be the case if the individual was customarily or usually present in each State during the relevant period, regardless of the fact that he spent more days in one State than in the other. Assume, for instance, that over a period of five years, an individual owns a house in both States A and B but the facts do not allow the determination of the State in which the individual’s centre of vital interests is situated. The individual works in State A where he habitually lives but returns to State B two days a month and once a year for a three-week holiday. In that case, the individual will have an habitual abode in State A but not in State B. Assume, however, that over the same period of five years, the individual works short periods of time in State A, where he returns 15 times a year for stays of two weeks each time, but is present in State B the rest of the time (assume also that the facts of the case do not allow the determination of the State in which the individual’s centre of vital interests is situated). In that case, the individual will have an habitual abode in both State A and State B.”

244. Ms Shaw submitted that the description of the habitual abode as “[tipping] the balance towards the State where he stays more frequently” makes it clear that the test is looking at where an individual stays, ie nights, albeit that the precise location within the state is immaterial. A comparison of the nights spent and the duration of visits in each of the UK and Belgium makes it clear that Mr McCabe’s habitual abode was in Belgium. He had no customary presence in the UK; and the circumstances are similar to the first example in [19] of the 2017 Commentary.

245. Mr Stone submitted that whether Mr McCabe had a habitual abode in the UK or Belgium is not simply comparative between the two states, as is clear from the fact that Article 4(2)(c) addresses the situation where an individual has a habitual abode in both states. He submitted that the second example in [19] of the 2017 Commentary was more apt.

246. I conclude that Mr McCabe had a habitual abode in Belgium, and did not have such an abode in the UK. By way of explanation of my reasons for this conclusion:

- (1) I do not accept Mr Stone’s submission that the test is not comparative; it is plainly comparative, albeit that it is clear from the final limb of the tie-breaker and the 2017

Commentary, and illustrated by the decision in *Hankinson v HMRC* [2009] UKFTT 384 (TC), that an individual can have a habitual abode in both states.

(2) I agree with Ms Shaw that the references to where an individual “stays” makes it clear that for this limb of the tie-breaker I should not only be looking for physical presence in a state but also placing weight on where Mr McCabe spent his nights. This is emphasised by [19] of the 2017 Commentary, with its explanation that the notion of a habitual abode refers to the frequency, duration and regularity of stays that are part of the settled routine of an individual’s life and are therefore more than transient.

(3) I have made findings as to Mr McCabe’s whereabouts during the Relevant Period, and described his travel pattern throughout this time. I have no hesitation in concluding that he had a habitual abode in Belgium – Mr McCabe spent 129 nights in Brussels in 2006-07 and 98 the following year; of the 85 occasions he was in Brussels, only two did not involve an overnight stay; the pattern of his travel is such that it was Brussels to where he was returning after his many overseas visits. His presence there was more than transient; he was customarily or usually present there.

(4) This is not the case for the UK. When reaching this conclusion, I take account of all of the facts in relation to Mr McCabe’s physical presence in the UK (including the number of visits to the UK and days or part days in the UK) but pay particular regard to the limited number of nights spent in the UK (33 in 2006-07 and 43 the following year), and that the visits to the UK were generally for just one or two nights. The visits were frequent, but short and irregular. On balance, I conclude that he was not customarily present in the UK and did not have a habitual abode in the UK.

247. The consequence of this is that if I had not already determined residence in favour of the UK by applying the COVI test, I would have instead reached the contrary conclusion at this stage of the waterfall.

248. Finally, I note that if I had concluded that Mr McCabe had a habitual abode in both States or in neither of them, he would be deemed to be a resident of the UK by reason of his nationality (Article 4(2)(c)).

#### **DISPENSATION**

249. I have concluded that Mr McCabe remained resident in the UK in 2006-07 and 2007-08; and that he is deemed to be resident in the UK throughout this period under Article 4 of the DTC.

250. Mr McCabe’s appeal is dismissed in principle.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

251. 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.

**JEANETTE ZAMAN  
TRIBUNAL JUDGE**

**Release date: 30<sup>TH</sup> SEPTEMBER 2022**





**APPENDIX 1**  
**STATEMENT OF AGREED FACTS**

1. Mr McCabe was born in Sheffield on 25 April 1948. He married Sandra McCabe on 14 August 1971. They have two sons – Scott (born in 1975) and Simon (born in 1977) – who live in the UK. As at 4 April 2006 they had one grandchild, Scott’s son Charles, who was born on 19 September 2004. Scott’s daughter Sophia was born on 11 January 2008.
2. Mr McCabe attended school at Duchess Road, Sheffield, then Hunters Bar Primary School and finally the Rowlinson Technical Modern School, Sheffield.
3. After leaving school at 16, Mr McCabe worked on a building site for a local contractor whilst attending night schools and training to become a Quantity Surveyor. He thereafter joined Ackroyd and Abbott who were bought by Bovis, a major national and international property developer, in the late 1960s, and joined Teesland Development Company Ltd (“Teesland”) in the early 1970s where he first worked on projects in continental Europe and in Saudi Arabia.
4. Mr McCabe subsequently established County Properties Ltd (“County”) in the mid-1970s which was the beginning of the longstanding relationship with the Bank of Scotland. County combined with Assam Trading Holdings Ltd in 1979 with the resulting entity focusing on international real estate.
5. In 1980 Mr McCabe established what would become Scarborough Property Group Plc (which together with members of its group from time to time is referred to hereafter as “the Scarborough Group”) to acquire real estate and carry out real estate services for third parties. The Scarborough Group’s business initially focussed on the UK before undertaking its first project in mainland Europe through a joint venture (United Scarborough Estates Limited) to develop property in Belgium at Amerika House, Antwerp. That property was sold in 2002. Mr McCabe first acquired an interest in Sheffield United Football Club (“SUFC”) in 1997 when he acquired an interest in approximately 1.4% of the shares in its parent company.
6. The Scarborough Group also acquired Teesland, which was subsequently listed on the London Stock Exchange in 2002 with the Scarborough Group retaining a significant interest. Teesland thereafter acquired iOGroup (“iOG”) – a property fund management company with offices in the Czech Republic, Denmark, France, Finland, Germany, Hungary, the Netherlands and Sweden.
7. The Scarborough Group and the Bank of Scotland established the joint ventures of Scarborough Continental Partners Ltd (“SCP”) and Sc€uro Ltd (“Sc€uro”) in late 2005 to acquire real estate assets in continental Europe. The Bank provided funds of over €700 million to SCP which acquired real estate in the Nordic countries, France, Germany, The Netherlands and elsewhere in mainland Europe. The principal activity of SCP was European commercial property investment.
8. In February and March 2006, Mr McCabe visited Belgium on five days prior to travelling to Brussels on 4 April 2006:
  - on 16 and 17 February 2006 with Mrs McCabe when he viewed potential temporary living accommodation at The Golden Tulip Residence Parnasse and Marriott Executive Apartments;
  - on 22 February 2006 when he viewed potential office accommodation including that at Bastion Tower where he established an office; and
  - on 1 and 2 March 2006 when he stayed overnight at the Marriott Apartments where he lived for over three months from 4 April 2006.

9. On 8 March 2006 a firm of Belgian lawyers, CMS DeBacker, began work to set up a Belgian company, Scarborough Realty (Europe) SPRL (“SRE”) for Mr McCabe. The Company’s Constitution was signed by Mr and Mrs McCabe at a meeting in Brussels on 5 April 2006 and registered with the authorities on 7 April 2006.
10. Mr McCabe was resident and ordinarily resident in the UK from birth until the 2005/06 tax year. Whether he remained resident and/or ordinarily resident thereafter is to be determined by the Tribunal.
11. On 29 March 2006 various items of luggage were transported from Scarborough to Mr McCabe’s rented accommodation at the Marriott Executive Apartments, Brussels.
12. On 4 April 2006 Mr and Mrs McCabe travelled on the 14:13 (UK time) Eurostar to Brussels, arriving at 17:37 (Belgian time).
13. For the period 4 April 2006 until 21 July 2006, Mr McCabe stayed in a rented apartment at the Marriot Executive Apartments, Brussels which he had viewed on 17 February 2006. The accommodation was leased for a three month period with an option to renew for a further three months. It comprised two en-suite double bedrooms and living/dining room with kitchen area.
14. On 5 April 2006 Mr McCabe attended the municipal office in Brussels to start the registration process as a resident of Belgium. He obtained a Certificate of Experience on 4 May 2006 from the UK Department of Education & Skills confirming his eligibility to work for SRE in Belgium. On 9 May 2006 Mr McCabe received his purple temporary residence card and on 6 November 2006 he received his blue ID card confirming his residence in Belgium for a period of 5 years. On 11 September 2006 Mr McCabe received confirmation of his registration for Belgian Social Security contributions effective from 7 April 2006.
15. An article in “Property Week” on 7 April 2006 reported Mr McCabe’s relocation to Belgium to create a European Headquarters in Brussels from which he would be responsible for managing the expansion of international business, particularly in Western and Central Europe and overseeing Teesland’s European expansion.
16. On 7 April 2006 Mr and Mrs McCabe travelled to Spain where they stayed until 16 April. Thereafter, Mr McCabe visited Germany and France where he participated in business meetings before returning to Brussels on 26 April 2006.
17. Mr McCabe travelled to Brussels on 4 April 2006. He made the following arrangements:
  - a) He engaged the services of Serge Gielbartowicz, a Brussels resident, of FECAM SPRL, Clos de la petite Suisse, 1 – B-1140 Evere, as a driver. FECAM SPRL, which provided the services of Mr Gielbartowicz and the car he drove, was initially engaged from 4 April 2006 through the Marriot Executive Apartments for Mr McCabe and then directly by Mr McCabe from 1 May 2006. The monthly invoices for Mr Gielbartowicz’s services averaged over €5,000.
  - b) He registered with Dr Zeiger, a local medical practitioner, of 26 Bd Maria Groeninckx de May, 1070 Brussels on 27 July 2006.
  - c) He registered with Dr Woitchik, a local dentist, of Avenue George Bergmann 113, 1050 Brussels on 27 July 2006.
  - d) He ceased to use and/or closed, as noted, the following UK bank and credit card accounts:
    - Barclays account 8934 – closed 3 April 2006,
    - Bank of Scotland account 5807 (joint) – account transferred into sole name of spouse 6 April 2006,
    - Barclays account 9973 – closed 14 July 2006,
    - American Express account 3742 895464 – closed 13 November 2006,

- Barclaycard account 4423 5000 (joint) – ceased to use 18 May 2006; spouse ceased to use December 2006; closed 1 March 2007,
  - American Express account 3742 001017 – ceased to use May 2006; closed March 2007,
  - Barclays account 4767 – closed 4 March 2008,
  - Halifax PEP, share dealing account – no contributions made after 5 April 2006; closed 28 March 2008.
- e) He did not close the following UK account:
- Halifax Cash ISA – no contributions made in the relevant years.
- f) He opened the following accounts in Brussels:
- ING Euro Current account 310-1755565-48 – opened 8 May 2006,
  - ING Euro Green savings account 375-4431914-63 – opened 8 May 2006,
  - ING Credit card ref B/03-04916768-8 – opened 25 May 2006.
- g) He terminated his Vodafone contract on 1 October 2006 and set up a Belgian phone from the Phone House on 22 June 2006.

18. Mr McCabe received the following medical treatment outside of the UK during the period 4 April 2006 to 5 April 2008:

- May to June 2006: Orthopaedic Surgeon Dr Louis Kinnen Chirec (Parc Leopold), Rue Froissart 38, 1040 Brussels for an injury to his elbow;
- 9 June 2006: dental treatment at Clinica Dentaria, Fietz & Fietz, Portugal;
- 13-15 June 2007: Emergency GP, Sydney Gateway Quayside Medical Centre, Circular Quay, Australia.

There is no reference in Mr McCabe’s diary to him receiving any medical or dental treatment in the UK during the period in question.

19. In May 2006, Mr and Mrs McCabe viewed a residential property at 1150 Woluwe St Pierre, Brussels and began the purchase process. However, on 30 August 2006 his lawyer advised him of significant problems with the title which would delay the purchase. On 16 October 2006 Mr McCabe offered to purchase a residential property, Ave Louise 541, Ixelles, Brussels, and on 27 October 2006 entered into an agreement to purchase the property within 4 months for €1.4 million. The property comprised 2 bedrooms, a sitting/dining room and kitchen. He moved there on 3 November 2006 following a down payment of €225,000 and completed the purchase on 19 February 2007. In May 2008 he sold that property and acquired another residential property of similar size at Franklin Roosevelt, Brussels at a cost of €900,000 which he occupied as a residence from that time. Mr McCabe sold the property in February 2014.

20. From 22 July 2006 until 9 November 2006 Mr McCabe stayed in an apartment at Le Meridien, Brussels which was available for the exclusive use of Mr McCabe throughout the period at a rate of €2,411 per week and was paid for by SRE as part of his taxable remuneration from the company.

21. The Belgian tax authorities have certified that Mr McCabe filed Belgian tax returns as a resident with effect from 5 April 2006 and paid Belgian tax in excess of €2 million as follows:-

Year to:-	National Tax (€)	Local Tax (€)	Total (€)
31 December 2006	74,521.48	6,334.32	80,855.80
31 December 2007	207,953.60	14,556.76	222,510.36
31 December 2008	572,852.12	40,099.65	612,951.77
31 December 2009	217,230.39	15,202.75	232,433.14

31 December 2010	173,685.08	8,101.75	181,786.83
31 December 2011	364,458.60	7,674.71	372,133.31
31 December 2012	229,433.03	7,622.93	237,055.96
31 December 2013	211,258.79	7,568.53	218,827.32
TOTAL	2,051,393.09	107,161.40	2,158,554.49

22. Mr McCabe registered with the Belgian Social Security authority on 7 April 2006 and made contributions with effect from that date in respect of periods which include the two years ended 5 April 2008. He has been in receipt of a Social Security pension from the Belgian State since 2015.

23. Mr McCabe was appointed Gérant (managing director) of SRE at the Extraordinary General Meeting attended by Mr McCabe and his wife, Sandra McCabe, held upon incorporation of the company on 5 April 2006 with his duties commencing on the same date. In addition, a contract of employment, which states that it was effective from 4 April 2006 was signed by Mr McCabe on 22 January 2007.

24. The financial statements of SRE, Brussels, show that the company obtained turnover from Belgian and worldwide operations, and incurred payroll costs, as follows:

Period	Turnover (€)	Payroll (€)
5 April 2006 to 28 February 2007	671,640	417,711
Year ended 28 February 2008	1,279,762	425,281

Mr McCabe was assessed to tax in Belgium in respect of the following amounts of Belgian Remuneration as Manager (“Belgische Bezoldigingen als bedrijfsleider”):

Period	(€)
5 April 2006 to 31 December 2006	167,400
Year ended 31 December 2007	442,861
Year ended 31 December 2008	421,780

No other employments were reported on Mr McCabe’s Belgium or UK tax returns until 1 August 2007 when he became a non-executive director of Valad Property Group.

25. In July 2006 a Belgian national, Patrick Vangoidsenhoven, was seconded by Bank of Scotland to assist Mr McCabe with his work on the European joint venture based at Bastion Tower, Brussels, where Mr McCabe’s office was located. Mr Vangoidsenhoven was appointed as a full time executive of SRE in Brussels from 1 February 2011.

26. In September 2006 Mr McCabe made contact with Michel Farin, President of Brussels football club Royal White Star Woluwe and met with him on a number of occasions. This facilitated a cooperation agreement between the Belgian club and SUFC.

27. Mr McCabe was a member of the Bath & Racquets Club in London and the associated George Club before he moved to Brussels. On 20 March 2006, Mr McCabe notified both clubs of his new address in Brussels and requested the Bath & Racquets Club to change his membership to that of an overseas resident. In June 2010 both clubs confirmed that Mr McCabe’s membership ceased in March 2006.

28. According to the entries in Mr McCabe’s diaries:

- During the 2004/05 tax year, Mr McCabe spent 254 midnights in the UK and 111 midnights outside the UK.
- During the 2005/06 tax year, prior to travelling to Brussels on 4 April 2006, Mr McCabe spent 276 midnights in the UK and 89 midnights outside the UK (3 of which were in Belgium).

During the 2006/07 tax year, Mr McCabe spent 129 midnights in Belgium, 55 midnights in Spain and 37 midnights in Australia. He spent 33 midnights in the UK. According to entries in Mr McCabe's diaries and supported by invoices from the various hotels and a witness statement 28 of these were spent in 5 different hotels, 4 were spent at the home of a friend and 1 at the home of his son Simon in London.

During the 2007/08 tax year, Mr McCabe spent 98 midnights in Belgium, 66 midnights in Spain and 44 midnights in Australia. He spent 43 midnights in the UK. According to entries in Mr McCabe's diaries and supported by invoices from the various hotels 42 of these were spent in 10 different hotels and 1 was spent at the home of a friend.

29. On 30 April 2006 Mr McCabe travelled from Brussels to the UK. He arrived in the UK at 10:30 en route to Hong Kong, departing that evening at 21:15. While in the UK he watched SUFC play Crystal Palace in the final game of the season in which they secured promotion to the Premiership.

30. Mr McCabe did not visit the UK again until 5 October 2006.

31. Mr McCabe visited the UK on 46 occasions between 6 April 2006 and 5 April 2007. These visits resulted in Mr McCabe being present in the UK for some part of the day on 79 days and a further 4 occasions in transit where he did not leave the airport. During 2006/07 Mr McCabe was present in Belgium for some part of the day on 175 days. There were 223 entries in his diary relating to visits to the UK out of a total of 834 entries during the year to 5 April 2007.

32. In the 2007/08 tax year, Mr McCabe visited the UK on 53 occasions. These visits resulted in Mr McCabe being present in the UK for some part of the day on 94 days and a further 5 occasions in transit where he did not leave the airport. During 2007/08 Mr McCabe was present in Belgium for some part of the day on 135 days. There were 229 entries in his diary relating to visits to the UK out of a total of 816 entries during the year to 5 April 2008. These entries included business meetings, contact with business acquaintances, audio and video conferences and attending SUFC matches, amongst other matters.

33. Mr and Mrs McCabe purchased a property at 13 Deepdale Avenue, Scarborough in 1990. On 11 June 2004 Mr McCabe transferred ownership of his share of the property to Sandra McCabe. A council tax Bill for 2006/07 was issued to Mrs McCabe by Scarborough Borough Council on 6 April 2006 in respect of the property.

34. Mr McCabe was not listed as a resident at 13 Deepdale Avenue on the Voter Registration Form issued to the property in the summer of 2006. The only registered voter at the address at this time was Mrs Sandra McCabe.

35. Mrs McCabe continued to live at 13 Deepdale Avenue. There has been no change to the marital status of Mr and Mrs McCabe.

36. Mr McCabe was appointed as director of Sheffield United Football Club (company number 00061564) on 7 December 1995 and resigned on 5 August 2005.

37. Mr McCabe acquired control of Sheffield United Plc (company number 00396956; delisted and renamed Sheffield United Ltd from 20 January 2014) (“SUL”) via the acquisition of a controlling shareholding in SUL by the Scarborough Group and this remained the case until 3 April 2008 when he disposed of the majority of his shares in the Scarborough Group. He has been a director of SUL since 21 November 1998 and chairman of SUL since January 2002. The financial statements of SUL continue to identify Mr McCabe as the ultimate controlling party of SUL.

38. According to entries in Mr McCabe’s diaries, during the 2005/06 tax year, prior to travelling to Brussels on 4 April 2006, Mr McCabe attended 45 SUFC football fixtures. In 2006/07 Mr McCabe attended 16 SUFC fixtures and in 2007/08 24 SUFC fixtures.

39. According to the entries in Mr McCabe’s diaries, he attended Board Meetings as below:

- During the 2005/06 tax year, prior to travelling to Brussels on 4 April 2006, Mr McCabe attended 56 board meetings of which 52 were in the UK.
- During the 2006/07 tax year, Mr McCabe attended 42 board meetings of which 9 were in the UK.
- During the 2007/08 tax year, Mr McCabe attended a total of 56 board meetings of which 15 were in the UK.

40. Between January 2006 and 4 April 2006, Mr McCabe reduced his UK directorships from 184 to 35, and was appointed to 4 other UK directorships during this time resulting in 39 UK directorships on 4 April 2006.

41. From 5 April 2006 to 5 April 2007 Mr McCabe resigned a further 14 UK directorships, leaving 25 as at the latter date.

42. Mr McCabe held the following directorships throughout the two tax years ended 5 April 2008:

- Scarborough Property Group (appointed 31/07/1991)
- SPC Group Ltd (appointed 04/11/1991)
- Scarborough Property Inv. Co. (appointed 01/12/1994)
- Sheffield United Plc (appointed 21/11/1998)
- Scarborough Property Company Ltd (appointed 30/10/2001)
- Scarborough Group Holdings Ltd (appointed 01/12/2005)
- Le Leman International (Yuhang) Ltd (Hong Kong) (appointed 08/12/2005)
- SIL Ltd (Hong Kong) (appointed 08/12/2005)
- Scarborough Group Ltd (appointed 02/03/2006)

Scarborough Group Ltd and Scarborough Group Holdings Ltd were formed as part of a group restructuring in February 2005 in which they became respectively the new parent company of the Scarborough Group and the immediate subsidiary of the new parent.

Following its acquisition of the entire share capital of Scarborough Group Ltd on 13 May 2007, Mr McCabe was appointed a director of Scarborough Group International Ltd on 12 September 2007.

Subsequent to his move to Brussels, Mr McCabe was appointed as a director of the following companies:

- Scarborough Realty (Europe) SPRL (Belgium) (appointed 05/04/06)

- Valad Commercial Management Ltd (Australia) (appointed 25/07/2007, resigned 30/11/2009)
- Valad Funds Management Ltd (Australia) (appointed 25/07/2007, resigned 30/11/2009)
- Mariners Blades Developments Pty Ltd (Australia) (appointed 05/03/2008)

43. A consultancy agreement between SPC Group Plc and Scarborough Realty (Europe) SPRL dated 31 May 2006 was agreed under which Mr McCabe provided services to SPC Group Plc “in respect of (but not limited to) European and other non-UK property markets including undertaking research on behalf of the Company into the nature and state of those markets, the identification of potential acquisition and development opportunities within those markets and, with the approval of the Board, developing such opportunities on behalf of the Company, and establishing relationships with European property specialists and advisers on the Company’s behalf, and providing such other services as may from time to time be agreed by the Company and SRE.”

44. The above consultancy agreement was amended on 11 September 2008, with effect stated to be from 1 March 2008, to increase the fee of Scarborough Realty (Europe) SPRL to reflect the increased level of service provided in respect of the property interests of SCP Group Ltd. For the year ended 28 February 2009 the fee was to be allocated to the activities in:

- The Far East €325,000
- Hungary €50,000
- India €25,000
- Australia €25,000
- Canada €25,000
- Europe (HBOS/Valad joint venture) €25,000.

45. On 9 July 2007 Mr McCabe sold his interests in Scarborough Property Holdings Ltd, Scamp Holdings Ltd (including its interest in Scarborough Continental Partners Ltd), Teesland PLC and Scarborough Development Group Ltd to Valad Property Group, a quoted Australian company. Those interests amounted by value to the greater part of his interest in the Scarborough Group. The consideration took the form of loan notes and equity in the acquiring entities.

46. Mr McCabe led the team which negotiated and concluded the transaction for the shareholders of the above companies. In that regard he visited Australia on a number of occasions including from 21 – 28 June 2007 and met with Valad officials during those visits.

47. Peter Hurley, a member of Valad’s Australian management team, relocated to London to head the newly acquired European operations as Chief Executive. In addition, senior members of the Scarborough Group management team, including Stephen McBride and Didier Tandy, transferred with those businesses when they came under Valad ownership becoming, respectively Head of Valad Capital Services – Europe and Head of Property – Europe.

48. On 25 July 2007 Mr McCabe was appointed as a Non-Executive Director of Australian companies Valad Funds Management Ltd and Valad Commercial Management Ltd, with no special responsibilities, in order to provide “guidance and incisive input that will be generated from his four decades of international property experience”, effective from 1 August 2007. He held 2.96% of the shares of Valad Property Group.

49. In the summer of 2007, following SUFC’s relegation from the Premier League, SUFC instigated a series of proceedings in connection with the conduct of West Ham United Football

Club. The matter was eventually resolved when West Ham United Football Club agreed on 4 March 2009 at a meeting held in Brussels to pay compensation to SUFC.

50. On 3 April 2008 Mr McCabe transferred his ordinary shares in Scarborough Group International Ltd (then known as Scarborough Group Holdings Ltd), the parent company of the Scarborough Group, to his sons for no consideration.

51. Mr McCabe became 65 years old on 25 April 2013. He sold his home in Brussels on 21 February 2014.

52. Mr McCabe filed form P85 informing HMRC of his departure from the UK on 4 April 2006. This form was signed by Mr McCabe on 15 May 2006 and sent to HMRC by the agent on 13 June 2007. He filed his UK tax returns for the years 2006/07 to 2012/13 inclusive on the basis that he was not resident nor ordinarily resident in the UK. Mr McCabe filed his UK tax return for the year ended 5 April 2014 on the basis that he became resident in the UK under UK law on 3 May 2013, and remained resident in Belgium under Belgian law until 20 February 2014. He made a declaration that he was treaty resident in Belgium until 20 February 2014 in accordance with the treaty with Belgium. HMRC did not open an enquiry into that return.

53. Sandra McCabe filed her tax returns during the period in question on the basis that she was resident and ordinarily resident in the UK. No enquiries have been opened into her tax returns.

54. On 6 June 2016, following the issue by HMRC of closure notices in respect of the two UK tax years ended 5 April 2008, Mr McCabe having considered that the actions of HMRC would result for him in taxation not in accordance with the provisions of the UK/Belgium Double Tax Convention (the Treaty), exercised his right under Article 25 to present his case to the Competent Authority of the Contracting State of which he regarded himself as having been a resident in the years in question, namely Belgium.

55. By way of update during the course of the procedure, the Belgian Tax Authority (BTA) advised Mr McCabe's representatives by email on 3 March 2017 that the UK Competent Authority (UK-CA) did "not oppose any of the Belgian arguments which [the BTA] used to support [their] position that Mr. McCabe..." had a permanent home, had vital interests and was normally resident in Belgium. The BTA also noted that "Conversely, the UK-CA cites a number of important facts and elements, on the basis of which [HMRC] decide that Mr. McCabe in that same period, also had a permanent home at his disposal in the UK as well as close personal and economic relations and was normally resident there. Hence, [HMRC] decide that applying the so-called tiebreaker rule set out in article 4, paragraph 2 of the DBV-BE-UK, Mr. McCabe must be considered to be a resident of the State of which he is a citizen".

56. On 6 October 2017 the BTA informed Mr McCabe's representatives that the competent authorities of Belgium and the United Kingdom had reached an agreement that for the purposes of Article 4 of the Treaty Mr McCabe was considered to be a resident of the United Kingdom for the above period. This letter provided no details on how the agreement was reached. Mr McCabe declined to accept the agreement which also required the withdrawal of ongoing litigation on the matter in both jurisdictions.

57. Mr McCabe has requested both the BTA and HMRC to provide a copy of the correspondence between them which resulted in the above decision but both authorities have declined to do so. Mr McCabe continues to seek access to this documentation and is pursuing legal action in both jurisdictions.

58. The legal characterisation or consequences arising from the matters referred to in this Statement of Agreed Facts, together with any inferences to be drawn from these matters is a matter solely for the Tribunal to determine. Accordingly, the parties recognise that the Tribunal



will need to evaluate the witness evidence to be heard during the appeal, and consider for itself the documentary evidence before the FTT.