[2011] UKUT 113 (TCC)
Appeal number: FTC/41/2010

Ordinary residence – whether this requires an intention to reside permanently or indefinitely – whether intention to stay for only 2½ years precludes finding of ordinary residence – role of appellate tribunal where First-tier Tribunal finds ordinary residence

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

Between :

DR ANDREAS HELMUT TUCZKA

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL:

THE HON MR JUSTICE ROTH
JUDGE THEODORE WALLACE

Sitting in public at London on 8 February 2011

K M Gordon and Ximena Montes Manzano (instructed by **Squire Sanders Hammonds** for the **Appellant**
Akash Nawbatt (instructed by **the General Counsel and Solicitor to HM Revenue and Customs,** for the **Respondents**

DECISION

Mr Justice Roth :

1. This is an appeal brought with permission granted by the First-tier Tribunal (Tax Chamber) ("FTT") against its decision released on 1 February 2010 ("the Decision") dismissing the appeal by Dr Tuczka against the determination by the Commissioners for Her Majesty's Revenue & Customs ("HMRC") that he was ordinarily resident in the United Kingdom for the three tax years 1998-99, 1999-2000 and 2000-01.

2. The facts are relatively simple and were not in dispute. We take them from the Decision:

(a) Dr Tuczka is an Austrian national who was born and grew up in Eisenstadt, Austria. After graduating from university in Vienna, he was employed from 1995 at Erste Bank in Vienna.

(b) Dr Tuczka is an investment banker and in 1997 he was offered employment by SBC Warburg ("Warburgs") in London where he commenced working on 1 July 1997. Soon after starting at Warburgs, he asked his girlfriend, Sylvia Schimmerl (who later became his wife), to join him in London once she had finished her studies.

(c) Between July 1997 and May 1998, Dr Tuczka rented accommodation in London. He moved in September 1997 from temporary housing to a flat in E14.

(d) On 20 February 1998, Dr Tuczka contracted to buy a property in Notting Hill, of which the purchase was completed in May 1998. At that time, Ms Schimmerl had graduated and she came to London to join him.

(e) In July 1998, Ms Schimmerl started a temporary accountancy training contract with PricewaterhouseCoopers ("PwC") in London.

(f) On 29 July 1998, Dr Tuczka notified HMRC on Form P86 of his presence in the UK, estimating that the duration of his stay would be 2½ years.

(g) On 9 November 1998, Dr Tuczka signed a new contract with Warburgs which stated:

> "Your employment is not for a fixed term or intended to be temporary."

The contract provided for a minimum of four weeks notice of termination.

(h) In December 1998, Ms Schimmerl entered into a fixed term training contract with PwC for a minimum of three years.

(i) On 10 May 2001, Dr Tuczka and Ms Schimmerl were married in Eisenstadt. They planned to return to live in Vienna and in August 2001 acquired a property there to serve as their matrimonial home.

(j) In May 2002, Dr Tuczka left Warburgs, intending to return to Vienna. However, while on gardening leave, he received and accepted an offer from ABN AMRO in London, under an arrangement which enabled him to spend part of his working week in Vienna.

(k) In August 2002, Ms Schimmerl took up a post with PwC in Austria and moved to the matrimonial home in Vienna.

3. As regards his tax returns, in January 1999, Dr Tuczka lodged a return for the tax year 1997-98 in which he self-assessed his status as neither resident nor ordinarily resident in the United Kingdom. In the tax returns that he lodged for the three subsequent tax years, which are the years relevant for this appeal, he assessed himself as resident but not ordinarily resident in the United Kingdom. In the return that he lodged for 2001-02, he self-assessed his status as both resident and ordinarily resident in the United Kingdom, on the basis of the guidance in IR 20.

4. For the purpose of this appeal, it is now accepted that Dr Tuczka was resident in the United Kingdom during the three years in question, in accordance with his self-assessment. The issue is whether the FTT was correct in concluding that he was also ordinarily resident here.

5. An appeal to the Upper Tribunal lies only on a point of law. Dr Tuczka submitted that the FTT erred in law, relying on both limbs of the test in *Edwards v Bairstow* [1956] AC 14 at 36: ie, that the reasoning of the decision contains something which on its face is bad law and which bears upon the determination; and that on the facts found, no persons "acting judicially and properly instructed as to the relevant law could have come to the determinations under appeal".

6. For Dr Tuczka it was submitted that for a person to be ordinarily resident in the UK, he must have the intention of staying here permanently or at least for an indefinite period. If he intends to remain only for a limited period, his stay would be temporary which, it was contended, precluded a finding of ordinary residence.

7. The meaning of ordinary residence does not have a statutory definition but received full consideration by the House of Lords in *Shah v Barnet LBC* [1983] 2 AC 309. That case did not involve the tax statutes but the obligation on local education authorities to pay student grants under the Education Acts. However, those statutes also incorporated a test of ordinary residence and the approach of the House of Lords was that these words are to be given their ordinary meaning, as determined in the field of tax law. It is common ground between the parties that the principles and reasoning of *Shah* accordingly apply in the present case.

8. The judgment in *Shah* is found in the speech of Lord Scarman, with which the other members of the House of Lords agreed. It is appropriate to quote extensively from Lord Scarman's speech. He said (at 340G-341G):

> "Ordinary residence is not a term of art in English law. But it embodies an idea of which Parliament has made increasing use in the statute law of the United Kingdom since the beginning of the 19th century. The words have been a feature of the Income Tax Acts since 1806. They were used in the English family law when it was decided to give a wife the right to petition for divorce notwithstanding the foreign domicile of her husband: Matrimonial Causes Act 1950, section 18 (1) (*b*). Ordinary or habitual residence has, in effect, now supplanted domicile as the test of jurisdiction in family law ….
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> The words "ordinary residence" were considered by this House in two tax cases reported in 1928. In each, the House saw itself as seeking the natural and ordinary meaning of the words. In *Levene v Inland Revenue Commissioners* [1928] A.C. 217, 225 Viscount Cave L.C. said:
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> > "I think that [ordinary residence] connotes residence in a place with some degree of continuity and apart from accidental or temporary absences."
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> In *Inland Revenue Commissioners v Lysaght* [1928] A.C. 234, 243 Viscount Sumner said:
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> > "I think the converse to 'ordinarily' is 'extraordinarily' and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not 'extraordinary.'"
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> In *Levene's* case Lord Warrington of Clyffe said, at p. 232:
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> > "I do not attempt to give any definition of the word 'resident.' In my opinion it has no technical or special meaning for the purposes of the Income Tax Act. 'Ordinarily resident' also seems to me to have no such technical or special meaning. In particular it is in my opinion impossible to restrict its connotation to its duration. A member of this House may well be said to be ordinarily resident in London during the

> Parliamentary session and in the country during the recess. If it has any definite meaning I should say it means according to the way in which a man's life is usually ordered." "

9. Lord Scarman proceeded to emphasise the distinction between ordinary residence and domicile. Hence the question of where is the person's "real home" is not the relevant test for ordinary residence. Moreover, commenting on the matrimonial case of *Stransky v Stransky* [1954] P 428, Lord Scarman said this (at 343E):

> "I do not read the judgment of Karminski J as importing into ordinary residence an intention to live in a place permanently or indefinitely… . But if he did hold that such an intention was necessary he would, in my view, have erred in law."

10. In an important passage, recalling the words of Viscount Cave in *Levene,* Lord Scarman stated (at 343G-H):

> "Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration."

After noting that there is an important exception when the person's presence in the country is unlawful, Lord Scarman continued (at 344B-F):

> "There are two, and no more than two, respects in which the mind of the "propositus" is important in determining ordinary residence. The residence must be voluntarily adopted. Enforced presence by reason of kidnapping or imprisonment, or a Robinson Crusoe existence on a desert island with no opportunity of escape, may be so overwhelming a factor as to negative the will to be where one is.
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> And there must be a degree of settled purpose. The purpose may be one; or there may be several. It may be specific or general. All that the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.
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> The legal advantage of adopting the natural and ordinary meaning, as accepted by the House of Lords in 1928 and recognised by Lord

> Denning M.R. in this case, is that it results in the proof of ordinary residence, which is ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind. Templeman L.J. emphasised in the Court of Appeal the need for a simple test for local education authorities to apply: and I agree with him. The ordinary and natural meaning of the words supplies one. For if there be proved a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences, ordinary residence is established provided only it is adopted voluntarily and for a settled purpose.
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> An attempt has been made in this case to suggest that education cannot be a settled purpose. I have no doubt it can be. A man's settled purpose will be different at different ages. Education in adolescence or early adulthood can be as settled a purpose as a profession or business in later years. There will seldom be any difficulty in determining whether residence is voluntary or for a settled purpose: nor will inquiry into such questions call for any deep examination of the mind of the "propositus."”

11. We consider that the reasoning of Lord Scarman is clear in expressly rejecting a contention that ordinary residence requires “an intention to live in a place permanently or indefinitely”. It was submitted that his observations are qualified by the subsequent House of Lords’ decision in *Nessa v Chief Adjudication Officer* [1999] 1 WLR 1937. There, the statutory words to be considered were “habitually resident”, in the context of social security legislation which established entitlement to income support. The claimant arrived in the United Kingdom on 22 August 1994 from Bangladesh. Claiming that she had a right of abode in the United Kingdom and that she intended to settle here, she claimed income support immediately after her arrival. The adjudication officer refused her claim, but on 6 December 1994 a social security appeal tribunal allowed her appeal.

12. One of the issues raised in argument was whether “ordinarily resident” and “habitually resident” have the same meaning. The only reasoned speech, with which the other members of the House of Lords agreed, was delivered by Lord Slynn of Hadley. Referring to *Shah*, he said that there is an overlap between the meaning of “ordinary” and “habitual” residence and noted that the one is sometimes defined in terms of the other. He then stated:

> “I am not satisfied, but it is unnecessary to decide, that they are always synonymous. Each may take a shade of meaning from the context and the object and purpose of the legislation. But there is a common core of meaning which makes it relevant to consider what has been said in cases dealing with both ordinary and habitual residence.”

After referring also to the dicta in the tax cases, Lord Slynn concluded that it was “plain that as a matter of ordinary language a person is not habitually resident in any

country unless he has taken up residence and lived there for a period." Lord Slynn continued (at 1942G-1943B):

> "It seems to me impossible to accept the argument at one time advanced that a person who has never been here before who says on landing, "I intend to settle in the United Kingdom" and who is fully believed is automatically a person who is habitually resident here. Nor is it enough to say I am going to live at X or with Y. He must show residence in fact for a period which shows that the residence has become "habitual" and, as I see it, will or is likely to continue to be habitual.
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> I do not consider that, when he spoke of residence for an appreciable period, Lord Brandon meant more than this. It is a question of fact to be decided on the date where the determination has to be made on the circumstances of each case whether and when that habitual residence had been established. Bringing possessions, doing everything necessary to establish residence before coming, having a right of abode, seeking to bring family, "durable ties" with the country of residence or intended residence, and many other factors have to be taken into account.
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> The requisite period is not a fixed period. It may be longer where there are doubts. It may be short (as the House accepted in *In re S (A Minor) (Custody: Habitual Residence)* [1998] A.C. 750, my speech at p. 763A , and *In re F (A Minore) (Child Abduction)* [1992] 1 F.L.R. 548, 555, where Butler-Sloss L.J. said: "A month can be ... an appreciable period of time")."

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

14. Accordingly, the point at issue in *Nessa* is not relevant for present purposes, since Dr Tuczka arrived in the United Kingdom more than nine months before the start of the first tax year with which this case is concerned. Nor can Dr Tuczka's submission derive any support from the reasoning of Somervell LJ in *Macrae v Macrae* [1949] P397, quoted by Lord Slynn in *Nessa*. There, Somervell LJ held that when a man

moves to a place which he intends to make his home for an indefinite period, then as from that date he is ordinarily resident in that place. But while *Macrae* accordingly held that this was a sufficient condition to establish ordinary residence, it does not mean that it is a necessary condition.

15. Furthermore, the position is made abundantly clear from the judgment of Nicholls J (as he then was) in *Reed (HM Inspector of Taxes) v Clark* [1986] Ch 1. The appellant, Mr Dave Clark, was a professional songwriter and musician who was a British subject and until the 1978-79 tax year had been resident and ordinarily resident in the United Kingdom. He left England on 3 April 1978 for Los Angeles and did not return to the United Kingdom until 2 May 1979. It was not in dispute that he absented himself from the United Kingdom for that period of 13 months for the purpose of avoiding tax. At the time he left and throughout his stay in North America, he always intended to return to the United Kingdom to reside here shortly after the end of the tax year. The issue in the appeal concerned the interpretation of section 49 of the Income and Corporation Taxes Act 1970 which provided that a British subject whose ordinary residence has been in the United Kingdom is chargeable to income tax if he has left the United Kingdom "for the purpose only of occasional residence abroad". However, Nicholls J held that in the section, "occasional residence is the converse of ordinary residence". Hence, in determining the question to be decided under section 49, the judge considered whether, for the year in question, Mr Clark was ordinarily resident abroad. Applying the test set out by Lord Scarman in *Shah*, Nicholls J stated (at 17F-18A):

> "On that basis it seems to me plain that a British resident's departure abroad for a period of a few weeks or months with the firm intention of returning at the end of the period to live here as before would be likely always to be for the purpose only of occasional residence. At the opposite end of the scale, it seems to me equally plain that the departure of such a resident abroad for a limited period of, say, three years would not necessarily be for the purpose only of "occasional residence" just because from the outset he had a firm intention of returning at the end of the period to live here as before: "not necessarily", because all the circumstances would have to be considered. *Inland Revenue Commissioners v Combe* (1932) 17 T.C. 405 is an example of this, where on the facts Captain Combe's business and residential headquarters were permanently in New York throughout the three years. For my part I think this latter conclusion is also true of residence abroad for just over one year in duration. The difference between these examples is one of degree, and there is an area in which different minds may reach different conclusions. In my view a year is a long enough period for a person's purpose of living where he does to be capable of having a sufficient degree of continuity for it to be properly described as settled. Hence, depending on all the circumstances, the foreign country could be the place where for that period he would be ordinarily and not just occasionally resident."

And further, the judge stated (at 18G):

> "But residence abroad for a carefully chosen limited period of work there (if that is what the facts established) is no less residence abroad for that period because the major reason for it was the avoidance of tax. *Likewise with ordinary residence.*" [our emphasis]

16. Accordingly, like the FTT, we hold that for an individual to be 'ordinarily resident' in a country does not require that he intends to stay there permanently or for an indefinite period.

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

18. Nor is it correct to suggest that a finding that Dr Tuczka was ordinarily resident in the United Kingdom in the tax year 1998-99 erodes a fundamental distinction between the concepts of residence and ordinary residence. The distinction is not as wide or as basic as the present appellant seeks to suggest. Hence, in *Levene,* Viscount Cave LC stated at (507):

> "The expression "ordinary residence" is found in the Income Tax Act of 1806 and occurs again and again in the later Income Tax Acts, where it is contrasted with the usual or occasional or temporary residence; and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences. So understood, the expression differs little in meaning from the word "residence" as used in the Acts; and I find it difficult to imagine a case in which a man while not resident here is yet ordinarily resident here."

That may explain why the researches of counsel found no reported tax case where residence was not in issue and the only question was whether the taxpayer was also ordinarily resident. Once it is found or accepted that the taxpayer is resident in the United Kingdom, the question whether he is also ordinarily resident here involves a factual evaluation to determine whether his residence has acquired a sufficient settled purpose to be part of the ordinary pattern of his life. As Lord Buckmaster observed in *Lysaght* (at 535):

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

19. That being the position, it is pertinent to look at the basis on which the FTT reached its conclusion that Dr Tuczka was ordinarily resident as well as resident in the United Kingdom.

20. In a very clear decision, the FTT set out the principles enunciated by Lord Scarman in *Shah* and stated its finding that the purpose of Dr Tuczka living in the United Kingdom had a sufficient degree of continuity to be described as settled. The FTT then posed the critical question, at what point did the purpose become settled? It answered that question in paras 73-74 of the Decision:

> "73. We consider that the purpose became settled during 1998-99. Dr Tuczka and Sylvia set up home in London in the spring of 1998, and their employment commitments kept them in London. In arriving at this conclusion, we take account of the potentially precarious nature of Dr Tuczka's employment; his contract contained a relatively short notice period of four weeks, and we are aware that sudden decisions without notice to terminate employment contracts in banking have always been a hazard for bank employees. However, Dr Tuczka's purpose was to continue his employment while it lasted. As Mr Nawbatt emphasised, the words "ordinarily resident" were stated by Lord Scarman in *Shah* at 343 to refer to "a person's abode in a particular country which he or she has adopted voluntarily as part of the regular order of his life *for the time being*, whether of short or long duration" (emphasis added).
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> 74. One factor in considering this question is Dr Tuczka's decision to purchase the Notting Hill flat. In our view this is not determinative of the question; it is an added factor demonstrating that his purpose in living in London for the time being was settled. Even without the purchase of the flat, we consider that the evidence shows Dr Tuczka to have become ordinarily resident during 1998-99. He chose to remain in London for a settled purpose, namely his employment, and adopted a pattern of living which in fact continued until 2002 (and, with certain changes, subsequently). We have accepted Mr Nawbatt's argument that there is no minimum period required in order to establish ordinary residence, and that this can in some circumstances be demonstrated after a comparatively short time has elapsed. Although Dr Tuczka had various intentions and expectations for the future, circumstances prevented these from being fulfilled and he continued with the existing pattern of living for the remainder of the three years under appeal. There was no change in the pattern over that period, so that (applying examination of immediately past events, as indicated in *Shah*) its commencement has to be taken back to the earliest fiscal year in which that pattern can be shown."

21. Accordingly, the FTT took into account various facts and circumstances in reaching its conclusion that Dr Tuczka's residence in the United Kingdom had achieved a sufficient degree of continuity to be described as settled during the tax year 1998-99. On that basis also, it found that he remained ordinarily resident for the subsequent tax years 1999-2000 and 2000-01. The FTT expressly did not state a view as to Dr Tuczka's status for previous and subsequent years: para 75.

22. In this appeal, Dr Tuczka sought to attack this reasoning as back-dating the factual position from later years to 1998-99. Particular criticism was directed at the last sentence of para 74. However, in our judgment, that is to misinterpret that sentence, which must be read in its context. The FTT was not seeking to base its conclusion regarding 1998-99 on facts which arose subsequently. It was simply stating, as is clearly the case, that an individual will be ordinarily resident in the United Kingdom in the first tax year in which the relevant circumstances exist upon which a finding of ordinary residence in his case will apply. It is the pattern of living which the FTT found Dr Tuczka had adopted by or during 1998-99 that is clearly the basis of its conclusion that he was ordinarily resident in the United Kingdom in that tax year.

23. Given our conclusion that the FTT applied the correct test for ordinary residence, the evaluation of the various facts to determine whether that test is satisfied is quintessentially a task for the FTT. As Viscount Sumner stated in *Lysaght* (at 527):

> "It is well settled that, when the Commissioners have thus ascertained the facts of the case and then have found the conclusion of fact which the facts prove, their decision is not open to review, provided (a) that they had before them evidence, from which such a conclusion can properly be drawn, and (b) that they did not direct themselves in law in any of the forms of legal error which amount to misdirection."

And much more recently, in *R (on the application of Davies & Anr) v HMRC* [2010] EWCA Civ 83, Moses LJ (with whose judgment Dyson LJ agreed) stated at [15]:

> "Many of the questions which must be asked to determine questions of residence, such as whether the purpose for which a person had adopted abode is "settled" or whether there is a sufficient degree of permanence and continuity lend themselves to no certain conclusion. They require value judgments, which may express a wide range of views, all of which are within the area of reasonable conclusion, even when they conflict."

24. Far from the conclusion of the FTT in the present case being one that no tribunal could properly have reached, it is a conclusion amply supported by the circumstances considered in the paragraphs we have quoted. Not only is there no basis on which to interfere with that conclusion, but we would, on the facts set out in the Decision, have reached the same view ourselves.

25. Finally, we should comment briefly on ground 6 of Dr Tuczka's grounds of appeal that is directed at para 77 of the Decision. The FTT there referred to the guidance in HMRC's IR 20 as it appeared that Dr Tuczka's advisers thought that his acquisition of the Notting Hill flat had an undue influence on HMRC's conclusions as to his status. The FTT rejected that suggestion, but then added:

> "Acquisition of a property would not necessarily prevent an individual from establishing that he or she was not ordinarily resident, provided

> that the property was sold within the period specified in IR 20; in other words, an individual could buy instead of renting, based on the same commercial approach as expressed by Dr Tuczka, and still not prejudice the ordinary residence status, as long as the property was held for a limited period."

This was criticised as applying a time-scale determined by non-statutory guidance which does not have any effect in law. However, this criticism is misconceived. It is abundantly clear from the beginning of para 77 of the Decision that this observation was *obiter*: the FTT there expressly states that it was not influenced by IR 20 in arriving at its decision. The reasoning in para 74, which we have quoted above, shows that the FTT would have reached its conclusion even without Dr Tuczka's purchase of the flat in Notting Hill. Its finding of a settled purpose was based upon his employment and the pattern of living which he adopted, arranging for his then girlfriend to join him in London where she took up an accountancy training position while he entered into a second, non-temporary contract with Warburgs and they set up a home together.

26. Accordingly, we dismiss this appeal.

MR JUSTICE ROTH
TRIBUNAL JUDGE

RELEASE DATE: 16 MARCH 2011