IN THE COURT OF APPEAL OF NEW ZEALAND

CA505/2014
[2015] NZCA 613

BETWEEN	THE COMMISSIONER OF INLAND REVENUE Appellant
AND	MICHAEL WILLIAM DIAMOND Respondent

Hearing:	15 October 2015
Court:	Randerson, Stevens and French JJ
Counsel:	M Deligiannis and D K Lemmon for Appellant J H Coleman for Respondent
Judgment:	18 December 2015 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order for costs.

REASONS OF THE COURT

(Given by Stevens J)

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Introduction

[1] The Commissioner of Inland Revenue (the Commissioner) is in dispute with Mr Diamond as to his tax liability for the financial years ending 31 March 2004 to 31 March 2007. The Commissioner claims Mr Diamond was for each of those years resident for tax purposes in New Zealand under s OE 1(1) of the Income Tax Acts of 1994 and then 2004.[1] That question turns on whether Mr Diamond had a permanent place of abode in New Zealand.[2]

[2] The Commissioner contends Mr Diamond had a permanent place of abode in New Zealand. In the Taxation Review Authority (TRA), Judge Sinclair agreed with the Commissioner.[3] Mr Diamond successfully appealed this determination to the High Court, where Clifford J rejected the Commissioner's approach to establishing whether a resident has a permanent place of abode.[4] He held that the phrase "to have a permanent place of abode" meant essentially "to have a home", and on the facts of this case, Mr Diamond had no home in New Zealand.[5]

[3] The Commissioner now appeals against the judgment of Clifford J. She says the correct meaning of s OE 1(1), as a matter of statutory interpretation and based on the common law, is that there need only be a place in which the taxpayer *can* abide, following which an assessment of the surrounding factual circumstances will determine whether that place is a permanent place of abode. There is no requirement

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1 The governing income tax legislation changed in the course of these years. The wording of the operative provisions in each statute, s OE 1, is identical.

2 In section OE 1, permanent place of abode is a dispositive element of tax residency. The deemed provisions do not apply to Mr Diamond, as he was not present in New Zealand for the requisite number of days. Therefore, he was tax resident only if he had a permanent place of abode in New Zealand at that time.

3 *Diamond v Commissioner of Inland Revenue* [2013] NZTRA 10 [TRA decision].

4 *Diamond v Commissioner of Inland Revenue* [2014] NZHC 1935 [High Court judgment].

5 At [56].

for this place to constitute the taxpayer's home, nor that he or she has actually lived there before.

[4] We first set out the background facts and briefly summarise the judgment in the High Court. Second, we outline the Commissioner's submissions. In order to assess the Commissioner's argument as to the correct statutory interpretation, we examine the legislative history of s OE 1. We then set out our view as to the correct meaning of s OE 1(1). In summary, we reject the interpretation contended for by the Commissioner and uphold Clifford J's findings on the facts. It follows that the appeal is dismissed.

Factual background

[5] The Commissioner contends the house in New Zealand that was Mr Diamond's permanent place of abode is a residential address at 24 Waikato Esplanade in Ngaruawhahia (the Waikato Esplanade property). Mr Diamond has never lived at that address. For that, and other reasons, Mr Diamond says that property was not, and as a matter of law could not have been, his permanent place of abode in New Zealand in the relevant tax years.

[6] Mr Diamond was born in New Zealand in 1960 and is a New Zealand citizen. He joined the army in 1978, serving both in New Zealand and overseas for over 25 years before retiring in June 2003. Following his retirement, he worked in Papua New Guinea as a security consultant and thereafter moved to, and worked in, Queensland. From October 2004 to 2012, he worked for a private security company in Iraq. His employment contract rolled over on an annual basis. He has more recently returned to Australia and is now working for an Australian company.

[7] Mr Diamond met his wife, Wendy and they married in 1981. The couple had four children together. They separated in 1994. Although they stopped living together as husband and wife, the couple did not formally dissolve their marriage or dispose of their relationship property until 2009. Throughout his time in Iraq, Ms Diamond had a debit card linked to Mr Diamond's American bank account, into which his income was paid. Mr Diamond contributed to their children's expenses by this means.

[8] In 1996, Ms Diamond purchased the Waikato Esplanade property. Mr Diamond agreed that the property could be purchased in their joint names to facilitate the raising of a mortgage for the property. Mr Diamond paid half of the mortgage in lieu of child support. In 1998, Ms Diamond wanted to purchase another property at 79 Waingaro Road. Again Mr Diamond agreed to allow his name to be included on the certificate of title to allow Ms Diamond to obtain a mortgage. Mr Diamond did not contribute to the mortgage payments on this property, which became the home for Ms Diamond and their four children. From 1998 onwards, the Waikato Esplanade property was rented to tenants on a periodic tenancy basis.

[9] In 2000, Mr and Ms Diamond formed a partnership to manage the rental properties. In 2005 this entity was incorporated as Wee Gem Ltd. Ms Diamond holds 99 shares in the company and Mr Diamond holds the remaining one share. It was set up as a Loss Attributing Qualifying Company. The company eventually held four properties: Waikato Esplanade, 79 Waingaro Road, another house at Tidd Drive and another property their eldest daughter previously owned, which was transferred to the company in 2008. To enable Ms Diamond to move to the Waingaro Road property, Mr Diamond bought out her half share in the Waikato Esplanade property. Mr Diamond held this outright for a number of years, as an asset of the partnership. It was subsequently transferred to the company, which held it for the benefit of Mr Diamond. Whilst Mr Diamond was in Iraq, Ms Diamond managed these rental properties through the company and covered outgoings in respect of the properties by drawing from his foreign bank account.

[10] In April 2005, Mr Diamond purchased two blocks of land in New Zealand. He also inherited some blocks of Māori land, but these have no relevance to the appeal. During the tax years in question, Mr Diamond returned to New Zealand every 5 to 6 months. He endeavoured to see his children when he returned, staying with Ms Diamond at her Waingaro Road home, before visiting other family members and friends. When returning to New Zealand, Mr Diamond listed Ms Diamond's address on his departure and arrivals cards; the same was listed for his Companies Office records.

[11] In 2006, Mr Diamond reformed a relationship with a woman with whom he had been previously associated in New Zealand. They met again overseas and subsequently had a child together. The relationship did not last, but Mr Diamond contributes financially to their child and visited her upon returning to New Zealand from time to time.

[12] In December 2006, Mr Diamond granted Ms Diamond enduring powers of attorney in relation to his property and for his personal care and welfare. Ms Diamond's evidence was that Mr Diamond had relatively little expertise in financial matters. She had encouraged him to purchase the blocks of land and had become, in effect, his financial advisor.

[13] In 2009, Mr Diamond and Ms Diamond formally dissolved their marriage. They signed a separation and relationship property agreement, and Mr Diamond executed a will naming Ms Diamond his sole executor and trustee. The company continued to own their properties, but the Waingaro Road property was transferred under the agreement to Ms Diamond and the bare blocks of land to Mr Diamond. Both agree Mr Diamond beneficially owns the Waikato Esplanade property.

[14] Mr Diamond left four cars in New Zealand. These have all since been disposed of or now belong to Ms Diamond or their children. Ms Diamond's evidence confirmed Mr Diamond and his children are now, in effect, estranged.

[15] When the evidence was heard in the TRA, Judge Sinclair found both Mr and Ms Diamond to be credible witnesses. Mr Diamond had deposed that his intention in 2003 was to leave New Zealand permanently and that he had no intention of returning.

High Court judgment

[16] Clifford J noted Judge Sinclair had approached the "permanent abode" question on the basis that two steps were involved in the analysis.[6] The Judge had accepted the Commissioner's submissions to the effect that the guiding authority was

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6 High Court judgment, above n 4, at [23].

Case Q55, requiring this two-step approach to the determination.[7] The first step was whether Mr Diamond had an available dwelling in New Zealand in the relevant tax years. Judge Sinclair decided that he had. Although the Waikato Esplanade property was rented out, Mr Diamond was the beneficial owner, controlling its disposition, and could have ceased the tenancy agreement with its occupants to make it available to himself to live in.[8]

[17] The second step involved assessing Mr Diamond's other connections with New Zealand. Judge Sinclair concluded:[9]

> While there are some factors supporting the disputant's position I consider looking at the circumstances overall, that the disputant continued to have a strong and enduring relationship with New Zealand in the relevant tax years. He continued to have an available dwelling to return to and maintained close family and financial ties to this country. Taking into account all the matters discussed above I am of the view that the disputant had a permanent place of abode in New Zealand in the tax years ending 31 March 2004, 31 March 2005, 31 March 2006 and 31 March 2007.

[18] The Commissioner supported the TRA decision in the High Court, submitting that Clifford J ought similarly to adopt the two-step approach set out in *Case Q55*.[10] Clifford J, in assessing the validity of this approach, considered the observations of Judge Barber in that case, relied upon by the Commissioner. Of particular relevance was the following:[11]

> I consider that "has a permanent place of abode" does not require that a dwelling be always vacant and available for the taxpayer to live in; but that there is a dwelling in New Zealand which will be available to the taxpayer as a home when, and if, that taxpayer needs it, and that the taxpayer intends to retain that connection on a durable basis, with that locality.

[19] Clifford J considered these observations were peculiar to the factual context of *Case Q55*.[12] The taxpayer had a permanent place of abode in New Zealand from which he was temporarily absent. Despite the fact his house was rented on a short term fixed tenancy, it remained the taxpayer's permanent place of abode. This was because the taxpayer had always intended to return to New Zealand and specifically

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7 *Case Q55* (1993) 15 NZTC 5,313 (TRA).
8 TRA decision, above n 3, at [24].
9 At [77].
10 High Court judgment, above n 4, at [33].
11 *Case Q55*, above n 7, at 5,320.
12 High Court judgment, above n 4, at [43]–[44].

intended to return to live in that particular house, as ascertained with reference to the facts. Of particular relevance was that the taxpayer had lived there prior to his temporary departure overseas on sabbatical leave and intended to, and in fact did, return there immediately after that period of leave expired.[13] As Clifford J concluded:

> [44] In my view, *Q55* is therefore properly authority for the proposition that a person's permanent place of abode in New Zealand will not cease to have that character merely because, whilst the person is outside New Zealand for a period greater than the statutory deeming period, that dwelling is rented out. The dwelling can maintain its character as the person's permanent place of abode, dependent on the particular fact circumstances, notwithstanding that fact.

[20] The Judge was satisfied *Case Q55* did not require, nor was it authority for, the two-step approach contended for by the Commissioner.[14] The correct interpretation of "a permanent place of abode" in s OE 1, having regard to both the individual words and the phrase as a whole, is rather "to have a home in New Zealand".[15] The Judge added that "the significance of an appropriate degree of permanence is emphasised by the meaning of the noun "abode" being itself that of an habitual residence, a house or home".[16]

[21] Applying that interpretation to the facts, Clifford J held:

> [57] Given that Mr Diamond had and has still not ever lived at 24 Waikato Esplanade, and for so long as he has owned that property himself has rented it out to others, including during the relevant tax years, 24 Waikato Esplanade is not, in the ordinary sense of the meaning of those words, a permanent place of abode Mr Diamond has in New Zealand. That is, for Mr Diamond, 24 Waikato Esplanade is not a dwelling, or a home, in New Zealand. On the basis of that interpretation I would also allow Mr Diamond's appeal.

[22] Finally, the Judge tested his conclusion as to the plain meaning of the statute against the legislative context and statutory purpose.[17] After referring to an expressed intention in the legislative materials to adopt the Australian test for permanent place of abode as articulated in *Federal Commissioner of Taxation v*

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13 High Court judgment, above n 4, at [43].
14 At [45].
15 At [55]–[56].
16 At [56].
17 At [58], referring to Interpretation Act 1999, s 5 and *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 76 at [22].

Applegate,[18] Clifford J concluded that to the extent the legislative choice of the phrase "a permanent place of abode in New Zealand" could be seen as altering the meaning of the phrase "a home in New Zealand", that alteration did not go far enough to support the approach taken by the Commissioner.[19]

[23] The Judge accordingly found the Waikato Esplanade property had never been Mr Diamond's home. It had never been lived in by him; beyond owning it, he had no connection to it. Moreover, the use Mr Diamond had made of the property had been consistently for investment purposes and that use had continued for nearly 20 years.[20] Whilst Mr Diamond had other ongoing personal connections with New Zealand, in the absence of the Waikato Esplanade property having any of the characteristics of a permanent place of abode, those connections could not alter that overall conclusion.[21]

The Commissioner's submissions

[24] On appeal, the parties identified the issue was which of two alternative approaches to the interpretation of "a permanent place of abode" in s OE 1 is correct:

- A taxpayer must have a home in New Zealand in which he or she usually abides on a permanent basis; or

- A taxpayer owns a dwelling in New Zealand, which was not his or her place of abode before leaving New Zealand, but in which he or she can abide on a permanent basis. That dwelling can then be assessed on the basis of the totality of the circumstances to ascertain its status as the permanent place of abode.

[25] Ms Deligiannis for the Commissioner submits Clifford J was wrong to adopt the first of these interpretations and to regard it as dispositive under s OE 1 and that because the taxpayer had not lived in the house it was therefore not his "abode".

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18 *Federal Commissioner of Taxation v Applegate* (1979) 27 ALR 114, (1979) 38 FLR 1. This expressed intention was identified in the *New Zealand Tax Planning Report* (1 October 1980) "Determination of Residence" at [¶2]; noted in High Court judgment, above n 4, at [66].

19 High Court judgment, above n 4, at [72].

20 At [74].

21 At [75].

Thus the underlying question is whether tax residency is to be determined by a test focussing on the nature of the residence as a home; or whether the section can accommodate the two-step process, under which availability of an abode is the first, followed by a second, requiring a judgment encompassing all of the facts and circumstances applicable to the particular taxpayer, indicating some salient connection to the property and/or New Zealand.

[26] Ms Deligiannis supports the latter interpretation on a number of bases. First, she says the plain meaning of s OE 1(1) supports the Commissioner's interpretation. Clifford J's conclusion as to the plain meaning of "a permanent place of abode" was incorrect because it rested on a definition of "abode" as a noun: "a habitual residence, a house or home". Ms Deligiannis submits if "abode" as a noun had been intended, the phrase would read "a permanent abode". Rather the phrase chosen is "place of abode", which connotes "a place where abiding has occurred or can occur". This distinction is important in the Commissioner's submission. A person who has an abode might be inferred to have actually lived in that dwelling. The concept of a person having "a place of abode" imports some distance between the person and the dwelling. This supports an interpretation of a person having somewhere they could live, but no requirement they had in fact lived there or continue to live there.

[27] Second, Ms Deligiannis submits the broader, two-step interpretation is supported by the legislative history of s OE 1. Parliament changed the phrasing of s OE 1 from its predecessor in 1974 to remove the word "home". Any interpretation defining "a permanent place of abode" as a home therefore cannot be consistent with that legislative amendment. This change followed the High Court judgment in *Geothermal Energy New Zealand Ltd v Commissioner of Inland Revenue*,[22] in which Beattie J discussed the concept of "home" and its meaning in relation to the residency test. Parliament sought to respond by removing the reference to "home" and replacing it with "a permanent place of abode", which was intended to be wider than its predecessor.[23]

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22 *Geothermal Energy New Zealand Ltd v Commissioner of Inland Revenue* [1979] 2 NZLR 324 (SC).

23 As is clear from the Parliamentary debates upon introducing the Bill and its second reading, referring to the 1980 Amendment Act, to which we refer in greater detail later.

[28] The Commissioner contends these amendments and their purpose are supplemented by further changes made at the behest of the Valabh Committee in 1988.[24] These were intended "to make it easier for a person to become a New Zealand resident and harder to cease to be one".[25] Importantly, in the Commissioner's submission, a proposal to replace "a permanent place of abode" with "permanent home" (to align these provisions with the terminology used in an OECD model treaty) was rejected following select committee consultation.[26]

[29] Third, Ms Deligiannis submits that the way in which the TRA has interpreted the phrase is consistent with the Commissioner's position.[27] Under the two-step process, where there is a dwelling in which the taxpayer could live on an enduring basis, the question is whether that dwelling is the person's permanent place of abode. Ascertaining the answer to this latter step requires consideration of the continuity and duration of their presence in New Zealand and the durability of their association with their alleged place of abode. The person's overall connections with that abode, and with New Zealand, are relevant to assessing whether they have a sufficiently durable association with their dwelling here, such that it can be considered their permanent place of abode.[28] While there is limited appellate authority on this issue, there are decisions under separate statutory frameworks with similar phrases, the interpretation of which supports this position.[29]

[30] Finally, Ms Deligiannis emphasises the parliamentary purpose behind the phrasing in s OE 1 is to protect the tax base against erosion, by enacting a broad definition of residence that does not equate to the notion of "home". Parliament intended to enlarge the notion of residence, to encompass persons who have a house

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24 Implemented in the Income Tax Amendment Act (No 2) 1988. This added "a strengthened personal presence test" and altered the bright line presence tests.

25 Consultative Committee on Full Imputation and International Tax Reform *International Tax Reform Full Imputation Part 2: Report of the Consultative Committee* (July 1988) [Valabh Committee Report] at [2.4.6]–[2.4.8].

26 Inland Revenue Department *Rewriting the Income Tax Act (Part O) – Exposure Draft* (June 2006) at 3; Income Tax Bill (91-2) (select committee report) at 5–6.

27 Relying on *Case Q55*, above n 7; *Case H97* (1986) 8 NZTC 664 (TRA); and *Case J98* (1987) 9 NZTC 1,555 (TRA).

28 This is the test as described by the Commissioner in Inland Revenue Department's Interpretation Statement: *Interpretation Statement IS 14/01: Tax Residence* (6 March 2014) at 7 and 24.

29 Such as the Accident Rehabilitation and Compensation Insurance (Ordinary Residence Definition) Regulations 1992, reg 3; and *R v Accident Rehabilitation & Compensation Insurance Corporation* HC New Plymouth AP45/97, 24 April 1997 at 5 per Fisher J.

available to them, but where that is not a "home" for the time-being and where the taxpayer may also have another permanent place of abode overseas.[30] Ms Deligiannis submits this would give effect to the policy of making it easier for a person to become a New Zealand tax resident and harder to cease to be one.

Legislative history

[31] We start by referring to s OE 1(1) as it appears in the Income Tax Acts of 1994 and 2004:

> **OE 1 Determination of residence of person other than company**
>
> (1) Notwithstanding any other provision of this section, a person, other than a company, is resident in New Zealand within the meaning of this Act if that person has a permanent place of abode in New Zealand, whether or not that person also has a permanent place of abode outside New Zealand.
>
> (2) Where a person other than a company is personally present in New Zealand for a period or periods exceeding in the aggregate 183 days in any period of 12 months, that person is deemed to be resident in New Zealand from the first day within that period of 12 months on which that person was personally present in New Zealand.
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> (3) Where a person other than a company is resident in New Zealand and is personally absent from New Zealand for a period or periods exceeding in aggregate 325 days in any period of 12 months, that person is deemed not to be resident in New Zealand from the first day within that period of 12 months on which that person was personally absent from New Zealand and, subject to this section, thereafter.
>
> (…)

[32] Until 1 October 1980, s 241(1) of the Income Tax Act 1976 (the 1976 Act) (the then equivalent of s OE 1) provided:

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

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[30] This is supported by the *Interpretation Statement IS 14/01*, above n 28, in which the IRD suggests the test was implemented to limit focus on the individual's connections with New Zealand, rather than testing the relative strength of that connection compared to other jurisdictions.

[33] This provision was addressed in *Geothermal Energy New Zealand Ltd v Commissioner of Inland Revenue*.[31] New Zealand employees of Geothermal Energy, who were located overseas for periods of more than 15 months, continued to own their homes in New Zealand. Beattie J made the following findings as to the interpretation of s 241(1):[32]

> (a) Section 241 of the Income Tax Act 1976 is exhaustive in its definition whether applied to a person or a company.
>
> (b) The essence of the "home" criterion as used in s 241(1) is the centre of gravity for the time being of the life of the person concerned. It will usually be where his wife and children reside. If he has no such family, or is separated, divorced or single, then the place where the normal course of his life occurs will apply — that is, the centre of his interests and affairs.
>
> (c) Though "home" needs some degree of permanency, it does not connote "permanent home" in the sense making it similar to the concept of "domicile". The distinction should also be drawn between the place that has become the centre of gravity and that which is merely used for some ephemeral or transient purpose.
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> (d) "Home" under s 241 should not be regarded as synonymous with the ownership of an interest in a house or property. It should in my opinion be construed qualitatively.

[34] In October 1980, Parliament repealed and replaced s 241 of the 1976 Act, in which the phrase "permanent place of abode" appeared for the first time:

> (1) For the purposes of this section, the term 'continuous period' means an unbroken period of days and includes a continuous period which commenced before the 1st day of April 1980.
>
> Provided that—
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> (a) Two or more such periods are to be treated as a continuous period if there are not more than 28 intervening days between such periods and those intervening days do not exceed in the aggregate 56 days in the income year.
>
> (b) Where 2 or more such periods are treated as a continuous period pursuant to paragraph (a) of this proviso, any intervening days between those periods are to be treated as part of that continuous period.

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31 *Geothermal Energy New Zealand Ltd*, above n 22.

32 At 346.

> (1A) Subject to this section, a person, other than a company, shall be deemed to be resident in New Zealand within the meaning of this Part of the Act if his permanent place of abode is in New Zealand.
>
> (1B) Where a person is personally present in New Zealand for a continuous period of not less than 365 days, he shall be deemed to be resident in New Zealand at all times during that continuous period:
>
> Provided that where, at the request of that person, the Commissioner determines that that person had a permanent place of abode outside New Zealand at all times during that continuous period, this subsection shall not apply to that person.
>
> (1C) Where a person is absent from New Zealand for a continuous period of not less than 365 days, he shall be deemed not to be resident in New Zealand at all times during that continuous period:
>
> Provided that where, at the request of that person, the Commissioner determines that that person had a permanent place of abode in New Zealand at all times during that period of absence, this subsection shall not apply to that person.

[35] The new provision introduced bright line tests (namely, the reference to continuous periods of 365 days in cls 1B and 1C) and the permanent place of abode test replaced the word "home". In the lead up to these amendments, in the course of parliamentary debates addressing these proposed amendments, the *Geothermal* decision was addressed directly. At the second reading of the Bill, the Deputy Minister of Finance made the following comments:[33]

> Clause 10 [amending s 241] reviews the definition of "resident" for individual taxpayers. The department's long-standing interpretation of the previous definition has been called into question in a recent High Court judgment [*Geothermal*]. The previous administration rule of 15 months' continuous presence in, or absence from, New Zealand has also been found to be deficient in certain respects. Under the new definition, an individual is deemed to be resident in New Zealand if his permanent place of abode is in New Zealand. …

[36] Also relevant to ascertaining the meaning of s OE 1 as amended is the 1980 Tax Planning Report (1980 Report), referred to earlier. That report suggests the legislature intended to adopt the Australian "permanent place of abode" test:[34]

> The former sec.241(1) provided that a person was deemed to be resident in New Zealand if his home was in New Zealand. This obviously did not take

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33 (13 August 1980) 432 NZPD 2622 at 2623.

34 *New Zealand Tax Planning Report*, above n 18, at [¶2] "Determination of Residence". That Australian test is articulated, as noted earlier, in *Federal Commissioner of Taxation v Applegate*, above n 18.

> the matter very far and left the question of the definition of "home" to be determined according to common law guidelines. The new section provides that a person is deemed to be resident if his "permanent place of abode" is in New Zealand or if he is personally present in New Zealand for a continuous period of 365 days (subject to breaks in that period as set out in the section).
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> The new section is far from being a code for the determination of residence. Firstly, it suffers from a structural defect present in its predecessor in that in certain situations people are (or may claim to be) "deemed" either to be resident or non-resident in New Zealand. …
>
> The other limitation on the effectiveness of the section as a code is, of course, the very reference to "permanent place of abode". This is a clear adoption of the decision in *F.C. of T. v Applegate* 79 ATC 4307 … which, although it may provide a more satisfactory touchstone than the notion of "home", falls short of providing a universal and easily applied test.

[37] A significant portion of the discussion on determination of residence in the 1980 Report focuses on the operation of the continuous period of presence in New Zealand and statutory deeming of residence according to those 365-day periods. The policy underlying the amendment was to alter the approach to periods of time spent in New Zealand in terms of its deeming effect on residence status. The 1980 Report also indicates there was an intention to align the definition of residence with the Australian permanent place of abode test.

[38] We refer also to the Valabh Committee Report in 1988, relied upon by the Commissioner.[35] The recommendations of that report resulted in the current section. This supplemented the "permanent place of abode" test with a "strengthened personal presence test", with a view to preventing avoidance of residence for tax purposes.[36] This does not bear on the interpretation of the phrase "permanent place of abode" for present purposes.[37]

[39] The 2007 Officials' Report to the Finance and Expenditure Committee (the 2007 Report) makes reference to this consideration by officials in 1980 of the proposal that the test of permanent place of abode be synonymous with the concept of "permanent home". The 2007 Report contains statements assessing submissions

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35 Valabh Committee Report, above n 25.

36 At [2.4.6].

37 The policy impetus sought to make it easier to become a tax resident and harder to cease to be a tax resident. To the extent that policy is relevant to the interpretation, it appears the Commissioner would seek to have the interpretation most conducive to easy acquisition of the status of tax resident prevail.

to the Finance and Expenditure Select Committee, expressing concern that "permanent home" is not the same as permanent place of abode and therefore a change in wording to that effect would change the existing law. The full statement in the 2007 Report is instructive:

> One of the tests of tax residence for individuals is whether a person has a "permanent place of abode" in New Zealand. This term is undefined in the Income Tax Act 2004, and was introduced in 1980 in response to a court decision, apparently to copy the phrase used in the Australian income tax legislation. *At that time, the policy files indicated that Inland Revenue considered that "permanent place of abode" was in essence a synonym for "permanent home".*
>
> Since that time, Inland Revenue has published significant commentary that seeks to explain how "permanent place of abode" is to be interpreted in practice, involving consideration of a range of factors and not merely the existence of permanent accommodation and that commentary is widely cited and relied upon.
>
> The Income Tax Bill adopted the wording of "permanent home" to replace "permanent place of abode", being a more modern expression of the term having the same meaning as a matter of semantics. Officials also felt that "permanent home" was more likely to indicate to readers that the test did not refer merely to accommodation. The leading case in New Zealand on applying the residence test – *Geothermal Energy NZ Ltd v Commissioner of Inland Revenue* in 1979 – interpreted the meaning of the term "home" (then used in legislation). The Judge gave an extensive summary of how the term should be applied that involves an approach broadly similar to that in the Inland Revenue commentary on the meaning of "permanent place of abode", which judicial summary is also commonly still cited as relevant.
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> However two submissions on the Bill (KPMG and the New Zealand Institute of Chartered Accountants) considered that changing the wording in this way would lead to the law no longer including various nuances concerning how the term "permanent place of abode" is applied in practice, that relate to a person's centre of economic interests. …
>
> (emphasis added)

[40] In the 2007 Report, officials seemed to be treating "permanent place of abode" as subsuming features of the concept of "home". Indeed, the preference for retention of the terms seems to have been to avoid regression to an approach overly fixated on mere residence, or mere possession of a "house", to the exclusion of wider factors in relation to the individual's connection to that home and wider

connections.[38] Officials favoured retention of the "various nuances" concerning how "permanent place of abode" is to be applied in practice.

[41] This review of the legislative history does not convincingly demonstrate any parliamentary intention to depart from the concept of a "home" in order to achieve a broader tax base. Rather, the adoption of the permanent place of abode test seems to have been intended to move away from the narrow focus established in *Geothermal*. It also supports a desire to retain the nuanced and contextual approach captured in the same phrase as used (albeit in a different statutory context) in Australian cases such as *Federal Commissioner of Taxation v Applegate.* This includes the "concept" of home in its broader sense, namely a dwelling being the subject of enduring and clear ties on the part of the taxpayer.

Our analysis

[42] We consider Clifford J was right to conclude Mr Diamond did not have a permanent place of abode in New Zealand for the four tax years ending 31 March 2004 to 31 March 2007 — and for the reasons the Judge gave. We do not regard the decision of Judge Barber in *Case Q55* as authority for the Commissioner's proposition that the mere availability of a dwelling is sufficient to ground an assessment of factual connections to the property, even if it has not been used by the taxpayer as a dwelling previously. A closer look at *Case Q55* is useful.

[43] The case concerned a university professor and his wife, who lived in Europe and England for 368 days (from 21 January 1990 to 25 January 1991) on a sabbatical leave of absence. While he and his wife did so, they leased their home in New Zealand for the entire period of their absence. He objected to his New Zealand tax-residence status for that period. The key to his objection was that, despite intending to return after the sabbatical period, and despite maintaining enduring connections to their locality and to New Zealand in that period, their dwelling was not available to them, because it was tenanted for the entire span of the sabbatical, such that they could not be said to have a permanent place of abode. The question

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[38] This approach being seemingly represented by the narrow approach adopted by Beattie J in *Geothermal Energy New Zealand Ltd*, above n 22, requiring home to be determined with reference to, for example, where an individual's family is "for the time being".

for Judge Barber was whether the unavailability of this dwelling was decisive of the existence of a "permanent place of abode".

[44] Judge Barber held it was not.[39] He considered the test to be an objective one. It is a question of fact whether there is a place in New Zealand the person could abide or dwell in on a permanent basis if he had wanted to do so during his time of absence.[40] Judge Barber identified a number of factors that were relevant to ascertaining whether the objector's permanent place of abode is in New Zealand.[41] These factors are intended to assess how a "durable" connection might be.

[45] It is true that Judge Barber, in several parts of his decision, refers to the concept of "availability" or potentiality of abiding at a place. For example, as to the latter the Judge said: "[permanent place of abode] does not refer to abiding or dwelling but to a taxpayer's potential to abide or dwell at a place".[42] Later he referred to the phrase as:[43]

> … not the same as having accommodation there at one's disposal on a permanent basis. In my view, it means having a place in which one can live or dwell whenever it is convenient for one to do so and which is a current focal point of one's living. Accordingly, in my view, it does not much matter that a house is not available for a taxpayer's use during the taxpayer's temporary period of absence from New Zealand. The fact is that it would have been available if the taxpayer had chosen to remain in New Zealand and was available upon his return to New Zealand.

[46] But these passages need to be seen in context, namely, that the professor and his wife had previously lived at the address, were temporarily absent from it and intended to return to live there when the leave ended. Any notion of availability of the dwelling was not intended to be the first inquiry of a two-step test.[44] Rather, we consider the Judge's analysis is grounded in the requirement of an enduring connection of the taxpayer to the property and his clear intention to return. The

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39 *Case Q55*, above n 7, at 5,318.
40 At 5,320.
41 At 5,318–19.
42 At 5,318.
43 At 5,320.
44 That is how the Commissioner has viewed it as illustrated in the *Interpretation Statement* of March 2014, above n 28, at 7, which features a checklist for "permanent place of abode". This separates out a first step of determining: "Is there a dwelling in NZ you could live in on an enduring rather than temporary basis?" The second question asks: "Is the dwelling your permanent place of abode?" This question requires consideration of whether the taxpayer has a durable connection in a locality taking into account a range of factors.

presence of these on the facts meant the mere unavailability for the time being of the property did not undermine its status as his permanent place of abode, particularly in the face of a clear intention to return to live in the property at a time it would be available. This is the limited extent of the authority of *Case Q55*. We do not consider it supports the Commissioner's approach. Nor do we consider that two-step approach is useful, in light of the statutory context.

Statutory interpretation

[47] Given we do not accept the approach advanced by the Commissioner, we now turn to review the statutory context and purpose to determine the correct interpretation of s OE 1.

[48] First, we consider the plain meaning of the words "permanent place of abode in New Zealand". The word "permanent" is important, to state the obvious, permanent is the opposite of temporary. Something is permanent when it is "continuing or designed to continue indefinitely without change.[45] Next, the word "abode" means "habitual residence, house or home or place in which the person stays, remains or dwells".[46] We consider this plain meaning, coupled with the statutory context we have reviewed above, demonstrates that the phrase means something more than mere availability of a place to stay and implies actual usage of the property by the taxpayer for residential purposes.

[49] A bright-line test in earlier statutes is retained in different forms in s OE 1(2) and (3).[47] Under these provisions a person may be deemed to be resident in New Zealand (or not as the case may be) by reference to defined periods of time within the tax year in question. The scheme of the section allows these provisions to be overridden by the application of subs (1) if it can be established that the taxpayer has a permanent place of abode in New Zealand, regardless of the taxpayer's presence or absence from New Zealand for particular periods of time.[48] We consider the

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45 Graeme D Kennedy and Tony Deverson *The New Zealand Oxford Dictionary* (Oxford University Press, Oxford, 2005) at 843.

46 At 3.

47 The relevant periods in any period of 12 months are respectively 183 days (subs (2)) and an aggregate of 325 days (in subs (3)).

48 The opening words of s OE 1(1) make it clear that subs (1) applies "notwithstanding any other provision of this section …".

structure supports the interpretation of permanent place of abode in New Zealand as a place where the taxpayer habitually resides from time to time even if the taxpayer spends periods of time overseas.

[50] Second, in interpreting these provisions we have considered the purpose of the section contended for by the Commissioner, namely, the protection of the tax base.[49] However, the extent to which this purpose is achieved turns essentially on the words used in the statute. This requires us to determine the meaning of permanent place of abode in order to ascertain whether a taxpayer is resident in New Zealand for tax purposes. The consequence of having tax residence in New Zealand is that all the taxpayer's worldwide income is taxable in New Zealand, subject to any applicable double taxation arrangements. Thus, there could be serious implications for the taxpayer. This suggests an interpretation beyond the ordinary and natural meaning of the term "permanent place of abode" ought not to be adopted unless plainly indicated by the statutory language or the context.[50]

[51] We have already referred in our review of the legislative history to the 1980 Report and to the 2007 Report by officials. In the former, reference was made to *Federal Commissioner of Taxation v Applegate.*[51] Like Clifford J we find the following observations of Fisher J in that case helpful as to the meaning of the phrase "permanent place of abode" in a similar statutory context. Fisher J said:[52]

> To my mind the proper construction to place upon the phrase "permanent place of abode" is that it is the taxpayer's fixed and habitual place of abode. It is his home, but not his permanent home. It connotes a more enduring relationship with a particular place of abode than that of a person who is ordinarily resident there or who has there his usual place of abode. Material factors for consideration will be the continuity or otherwise of the taxpayer's presence, the duration of his presence and the durability of his association with the particular place.

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49 Summarised at [30] above.

50 See for example *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106, [2013] 1 NZLR 453 at [23] confirming that, whereas the Court leans neither for nor against the taxpayer, it will require the provision is effectual to make the taxpayer amenable to the tax, with reference to the wording of the statute, taken in their "most natural sense".

51 *Federal Commissioner of Taxation v Applegate*, above n 18.

52 At 128.

[52] We do not consider it to be accidental that the authors of the 2007 Report noted the view of the Inland Revenue Department as being that "permanent place of abode" was in essence a synonym for "permanent home".

[53] With regard to our rejection of the two-stage test advocated by the Commissioner, and specifically the notion that mere availability is sufficient to ground an enquiry of connection, we have reviewed a number of decisions by the Taxation Review Authority.[53] Although each turns on their individual facts, some consistent principles emerge. The approach to tax residence, by applying the concept of permanent place of abode in each case, was similar. The Judges considered the factual circumstances before and after the absence from New Zealand. This was then assessed in combination with the expressed intention of the taxpayer to change, whether permanently or temporarily his/her residence along with a consideration of the taxpayer's stated intention and whether that was sustainable in light of the objective factual circumstances before the Authority. Significantly, in every case cited to us the taxpayer had previously lived in the house found to be his/her "permanent place of abode", or had subsequently returned to that house in New Zealand.[54]

[54] It follows we do not accept the submissions of the Commissioner as to the meaning of "permanent place of abode in New Zealand". Neither the plain meaning of s OE 1(1) nor the legislative history support the Commissioner's approach. Neither do we consider that the TRA decision in *Case Q55* does so. Rather, *Case Q55* provides support for the concept of an overall assessment having regard to a range of factors identified as applied to the relevant facts and circumstances of a particular case.

[55] We consider this conclusion is supported also by conceptual problems with the Commissioner's approach, when viewed against the plain statutory meaning. All counsel agree that "abode" at least connoted a house or dwelling. The key issue with

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53 *Case F138* (1984) 6 NZTC 60,237; *Case F139* (1984) 6 NZTC 60,245; *Case H97*, above n 27; *Case J41* (1987) 9 NZTC 1,240; *Case J98*, above n 27; and *Case U17* (1999) 19 NZTC 9,174.

54 In *Case U17*, above n 53, the taxpayer, as did Mr Diamond, retained business and other interests in New Zealand to support his family and as an alternative source of income. This was "readily explicable" and did not detract from the compelling factors pointing to his having changed his permanent place of abode. It was a question of the totality of circumstances in that case.

the Commissioner's preferred interpretation is that, once a dwelling that is merely available is identified, extraneous factors establishing a connection or remote ties to New Zealand can then be invoked to artificially assign to that dwelling the status of a permanent place of abode. We consider that approach to be in error: it blurs the lines between connection with and enduring residence in a particular *dwelling*, and general cultural, personal, financial and other connections to New Zealand more broadly. It is the former that is relevant to imposing tax residence pursuant to s OE 1. This is not made clear in by the Commissioner's approach which we consider gives rise to undesirable uncertainty.

[56] Any widening of connections establishing residence so as to protect the tax base against erosion is unsupportable when viewed in the light of the adoption of the word "abode" in the statute and the natural meaning of that term.

The correct interpretation of s OE 1

[57] Taking our conclusions as to the statutory wording and legislative purpose, together with our rejection of *Case Q55*, we now set out what we consider to be the appropriate interpretation of s OE 1. Whether an individual has a permanent place of abode is a question of fact. What is required is an overall assessment as to whether the taxpayer has a permanent place of abode in New Zealand. This will be highly contextual and will naturally turn on the circumstances of each case.

[58] Specifically, we do not consider the determination can be separated into discrete questions. Rather, the approach calls for an integrated factual assessment,[55] directed to determining the nature and quality of the use the taxpayer habitually makes of a particular place of abode. In this assessment, the mere availability to the taxpayer of a dwelling is not sufficient by itself. Nor as *Case Q55* demonstrates, will the mere unavailability of the dwelling necessarily result in loss of status as a resident taxpayer.

[59] The following (non-exhaustive) factors may inform the inquiry:

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[55] For a similar approach to the assessment and application of "resident and present" in a different context, see *Greenfield v The Chief Executive of the Ministry of Social Development* [2015] NZSC 139.

(a) The continuity or otherwise of the taxpayer's presence in New Zealand and in the dwelling;

(b) The duration of that presence;

(c) The durability of the taxpayer's association with the particular place;

(d) The closeness or otherwise of the taxpayer's connection with the dwelling — the situation before and after a period or periods of absence from New Zealand should be considered.

(e) The requirement for permanency is to distinguish merely transient or temporary places of abode. Permanency refers to the continuing availability of a place on an indefinite (but not necessarily everlasting) basis.

(f) The existence of another permanent place of abode outside New Zealand does not preclude a finding that the taxpayer has a permanent place of abode in New Zealand.

[60] In assessing a particular case the factual inquiry will be on the tax years in question. However, we consider evidence of the relevant circumstances both before and after those tax years may be taken into account to the extent they bear upon the question whether the taxpayer had a permanent place of abode in New Zealand in the tax years in question.

[61] Importantly the focus is on whether the taxpayer, not members of the taxpayer's family, have a permanent place of abode in New Zealand. Accordingly the fact that a taxpayer may provide a home for his family in circumstances where the taxpayer lives elsewhere would not necessarily be sufficient to establish that the taxpayer had a permanent place of abode in New Zealand.

Conclusion in this case

[62] We agree with Clifford J's conclusion on the facts for the reasons he gave. The Waikato Esplanade property has never been Mr Diamond's home and it was never intended by him to be his home. He has never lived in that property and has only ever used it as an investment. We do not accept that a place in which Mr Diamond has never lived can constitute a dwelling with which he has enduring and permanent ties.

[63] While it is true that Mr Diamond had other ongoing personal connections with New Zealand, the only address advanced by the Commissioner as a permanent place of abode for Mr Diamond was the Waikato Esplanade property. As noted above, we consider these connections must be focused on the alleged permanent place of abode to have significance for s OE 1. If that property does not carry any of the characteristics of a permanent place of abode, other connections would not alter that conclusion.

Result

[64] The appeal is dismissed.

Costs

[65] Neither party sought costs. We therefore make no order for costs.

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