



Neutral Citation Number: [2019] EWHC 193 (Ch)

Case No: CH-2018-000126

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS LIST (ChD)
ON APPEAL from the Orders of Master Clark dated 17 April and 26 April 2018

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 06/02/2019

IN THE ESTATE OF BALDEV SINGH KOHLI (deceased)
AND IN THE MATTER of the Inheritance (Provision for Family and Dependants) Act
1975

Before :

MR JUSTICE MANN

Between :

HARJEET KAUR KOHLI

(in her capacity as Executrix and beneficiary of the
Estate of Baldev Kohli deceased)

**Defendant/
Appellant**

- and -

MISS AMÉLIE PEARL LILY PROLES

(a minor by her mother and litigation friend, MELISSA
PROLES)

**Claimant/
Respondent**

Ms Teresa Rosen Peacocke (instructed by **Wright Hassall LLP**) for the **Appellant**
Ms Julia Beer (instructed by **Mundays LLP**) for the **Respondent** (by written submissions
only)

Hearing date: 30th January 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this
Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MANN

Mr Justice Mann :

1. This is an oral renewed application for permission to appeal from the order and judgment of Master Clark of 17th April 2018 in which she found that the deceased, Baldev Kohli, died domiciled in England and Wales and not in India, from where he came and where he died. Mrs Teresa Rosen Peacocke, for the appellant, raised large numbers of points of detail which she said went to show how the Master erred in her assessment, but basically sought to bring them under 3 or 4 principal heads, which I deal with below.

The structure and content of the judgment

2. The structure of the judgment under appeal was as follows. The Master started by setting out the legal principles involved in determining domicile, and in particular a domicile of choice (around which a large part of the case turned). There is no suggestion that she did not set out those principles correctly though she did not set out any principles governing the abandonment of a domicile of choice, which was another issue in the case. Having made remarks about the witnesses, including remarks about their credibility (and finding that the deceased's family witnesses were all witnesses as to whose credibility she expressed serious doubts) she then set out facts, essentially on a year by year basis so far as more recent years are concerned. She then embarked on a section in which she discussed and determined the questions relating to domicile of choice and concluded, at paragraph 138, as follows:

“138. Taking all of the above into account, I conclude that although the deceased maintain some connections with India, the inference to be drawn from his conduct and circumstances until his decision to fly there (which I consider below) is that his intention was to continue to live in England indefinitely i.e. permanently; and that by 2010 he had acquired England as his domicile of choice.”

3. She then went on to consider the question of abandonment, which arose because the deceased, having been diagnosed with cancer and having had treatment withdrawn, decided to go to India where he died weeks later. In that connection she set out various evidential factors and concluded that the contemporaneous evidence that the deceased intended to return to England was very strong. On this point she concluded:

“144. It may be that as his illness progressed, it became clear that he would be unable to [return to England]. It may be that at some stage it became clear to the deceased that he would die within a short period; and that at that stage she decided to remain in India. In my judgement, such decisions would not be an

abandonment of his English domicile of choice, for two reasons. The first is that such a decision would be one forced upon him by his illness and impending death: see *Udny* (cited at para 8 above). The second is that it would not be a decision as to where he was to live indefinitely, because, for all practical purposes, there was, sadly no life remaining to be lived by him.

145. Indeed, even if the deceased had travelled to India intending to die there, this would not, in my judgement, be an abandonment of his domicile of choice, for similar reasons. Where, for practical purposes, a person has no life left to live, then a decision to go to his/her country of origin to die, is not a decision to spend any significant part of one's life ("the end of one's days") in that country – it is a decision that the specific event of his/her death should be in that country."

She therefore concluded that, since there was no change of domicile since 2010, the deceased died domiciled in England.

4. I have set out those particular paragraphs because much of Mrs Peacocke's submissions turn on what the Master said in terms in those paragraphs.
5. The Master's judgment speaks for itself in terms of the facts referred to and found. It suffices for present purposes to say that this case concerns a gentleman whose domicile of origin was India. He moved to England in 2002 and carried on a number of business activities (a degree of property development, restaurant businesses and some pharmaceutical sales) in this country. His sons were educated here in terms of tertiary education. His wife remained in India in a matrimonial home, though in the years that followed she visited here and the deceased went to India. He did not apply for British citizenship, though the Master found in terms that he told Ms Proles, a woman with whom he had a relationship and a child, that he intended to do so. Based on the evidence that she heard, the Master said that he acquired a domicile of choice in this jurisdiction by 2010.
6. In 2014 he was diagnosed with mouth cancer. He had treatment for that until October 2015 when he was told his cancer had spread and he was removed from his treatment program. On 3 November 2015 the deceased flew to India where he died on 8 December 2015. The Master found in terms, as is reflected in the paragraphs set out above, that, at least at first, the deceased intended to return to England at some point, and she set out material which would support that proposition. Whether or not he was

turning a blind eye to the inevitable, that was her finding, and it is important for the domicile question.

7. Mrs Peacocke focused her application for permission to appeal under the following heads. I have to consider whether any of them have a real prospect of success within the meaning of the CPR.

(i) The Master failed to make a finding that the deceased ever had his sole or chief residence in the UK.

8. When setting out the relevant law the Master acknowledged that this was a relevant factor to be found if domicile was to be held to be changed – see para 7 of her judgment. The complaint is that she did not make a finding about that, coupled with evidential pointers which indicated that it could not have been made on the facts. In particular, Mrs Peacocke relied on the fact (which she averred, but as to which there is no finding) that the houses and flats lived in by the deceased were all apparently bought with a view to re-sale at a profit, with or without prior refurbishment. No properties were bought at all after 2011, and if the deceased did not have house or flat for the time being he stayed in short term rental properties or hotels. At the end of his life he was living in rented accommodation and the property business seemed to have been wound down.
9. I agree that the Master made no explicit finding in terms about the particular point relied on, but she clearly had it in mind. As I have observed, she referred to the point, with express reference to authority, in paragraph 7 of her judgment and she referred to the actual requirement for a “sole or chief residence” (and indeed she emboldened the words in the print of her judgment, which gives them emphasis). In her chronological account she narrated the various property purchases which took place, and she summarised the deceased’s “Homes”, with dates, in an Annex to her judgment. There is an indication that she had the permanence of a given dwelling in mind as a significant factor because at para 91 she said (in relation to a particular abortive purchase of a house in 2014/2015):

“I find that the deceased was at this stage seeking to buy a permanent home in England because he intended to remain here indefinitely.”

That suggests that she may have been aware of the shorter term nature of some of the previous ownerships (although one lasted for four years), and that will have been in her mind when she reached her overall conclusion.

10. Bearing those factors in mind, it seems to me that the Master's failure to advert to the short-term nature of some of the occupations does not mean that she did not have it in mind in reaching her overall conclusions. I would also add that what is important for the significant factor relied on by Mrs Peacocke ("sole or chief residence") is not necessarily the quality of living in any particular house at any particular moment, but the concept of making this country the "sole or chief residence". A series of temporary homes, occupied while they were redeveloped to be sold at a profit, is not inconsistent with an intention to make England and Wales a person's "sole or chief residence".

11. I therefore find that this proposed attack fails.

(ii) There was no proper finding as to where the deceased "wished to spend his last days"

12. This attack is based on the explanation of the requirement for a domicile of choice that the propositus should intend to continue to reside in a jurisdiction "for an unlimited time" – *Udny v Udny* (1869) LR Sc & Div 441. The concept was explained in *IRC v Bullock* [1976] 1 WLR 1178 at 1184H:

"In my judgement the true test is whether he intends to make his home in the new country until the end of his days unless and until something happens to him to make him change his mind."

13. The relevant findings of the Master in this respect appear under the heading in which she considered whether the deceased had abandoned England as his domicile of choice. She found that the contemporaneous evidence that the deceased intended to return to England was very strong (para 141), and she went on in the terms of paras 144 and 145 set out above.

14. Mrs Peacocke's first criticism of these paragraphs is that they fail to reflect the proper test in relation to abandonment. She submits that the concept of abandonment of a domicile of choice does not require the establishment of another particular domicile in the same way that a domicile of choice arises. All that is required is an abandonment, at which point the domicile of origin arises again automatically. The domicile of origin would arise by simply ceasing to reside in the domicile of choice and/or by ceasing to intend to reside there permanently or indefinitely. One does not have to form the same intention of permanent residence as had to be formed for a domicile of choice.

15. That may be right, but the Master's judgment betrays no flaws in this respect. She had already found (para 143) that he intended to return to England. She had also found that a particular flat taken in the name of one of his sons shortly after he flew to India had been taken on behalf of the deceased and so that he had a residence when he returned from India. In those circumstances, although the actual wording of the Master's judgement does not reflect what Mrs Peacocke says is the true state of the law, nonetheless she clearly found that he had not intended to cease to reside permanently in England; he had retained his residential connections there. In those circumstances he had not abandoned his domicile of choice. There is no flaw in the Master's judgment in this respect.
16. Next Mrs Peacocke criticised the Master's formulation in 144 and 145 that the deceased had no life left to live. I can see nothing wrong with the Master's formulation or her reasoning. Mrs Peacocke suggested that her findings in that respect were inconsistent with indications that he intended to return to England, and in particular that he intended to return for a medical appointment. There is no such inconsistency. It is plain from what the Master decided that in para 144 she was considering the situation where the deceased realised, after he had gone to India, that he had not got long to live. There is nothing inconsistent between that and his previous intention to return to England for the medical appointment. In para 145 she was reflecting on the fact that a man who realises that he has not got long to live might have other things on his mind than the sort of things which go to make up an intention to reside for domicile purposes. In those circumstances it may not be possible to attribute to him the relevant intentions to abandon the domicile of choice from the mere fact that he had gone somewhere else to live out his last days. That seems to me to be a perfectly sensible contrast to draw.

(iii) A failure to give any or any proper effect to the fact that the deceased would not have been allowed re-entry into England and Wales once he had left for India in 2015.

17. As the Master found, the deceased was in England pursuant to a 10 year visa which expired in 2014. Mrs Peacocke told me (though it is not to be found in the Master's judgment) that until 2014 the deceased was assiduous in making sure that he did not stay in England in any one year for a period longer than the visa permitted; that is why he returned to India from time to time. She relies on the fact that the visa expired in 2014 so that when he left the country in 2015 he must have known that he would not be allowed back in under that visa, and indeed he would not be allowed back in at all. That, Mrs Peacocke said, ought to be taken into account in assessing his intentions as to residence when he went to India in 2015. The Master's judgement does not reflect the point at all.
18. I accept that the point is not dealt with in the Master's judgement. It is not an irrelevant point. However, a first instance judgement on a trial cannot be successfully impeached by drawing attention to each and every point that might have been relevant but was not

dealt with in the judgement. The master made no findings about the deceased's understanding and intention in respect of his visa and rights of re-entry. She did, however, make a finding that he said he intended to return for his medical appointment. That is a finding which is inconsistent with the hypothesis that the deceased knew he would not be allowed to re-enter and therefore must have intended to abandon his English domicile. It is actually consistent with the opposite case. Furthermore, it is quite possible that the deceased was not thinking particularly straight about his visa when he left to go to India, in the face of his illness, even if he did not believe at the time that he was dying. The findings of the Master tend to suggest he was (understandably) in a state of some distress. I do not think that this omission by the Master is a significant flaw in the judgment.

(iv) Fixing 2010 as the date at which a domicile of choice had been established and failing to take into account subsequent events, and in particular the events late 2015, in considering the domicile of choice point.

19. These two criticisms are related. The Master made her findings about domicile of choice in para 138:

“138. Taking all of the above into account, I conclude that although the deceased maintain some connections with India, the inference to be drawn from his conduct and circumstances until his decision to fly there (which I consider below) is that his intention was to continue to live in England indefinitely i.e. permanently; and that by 2010 he had acquired England as his domicile of choice.”

20. I will deal first with the choice of 2010 as the date by which domicile was established. I agree that this formulation is a little curious. It is not clear why the Master fixed that particular time as being the date by which a domicile of choice had been established, when she had considered a wide range of evidence covering the five years following 2010. There is no particular significant event, or accumulation of events, which would point to 2010 as being the relevant date. I suspect that the Master fastened on that date because, according to her judgment, that date was chosen by counsel for the present respondent as being the date of establishment of a domicile of choice – see para 112. However, that just shifts the puzzle onto someone else – it is not clear why counsel for the respondent should have fastened on that year. That was only part way through the relevant period and leaves out much of the important evidence on the point.
21. Be that as it may, I consider that the point does not really matter in the context of the judgment as a whole. The Master did in fact receive evidence about later years and came to her conclusion in the light of that evidence. That was a perfectly proper thing to do – indeed, as will appear, Mrs Peacocke goes on to complain that the Master did

not do that in relation to the events of 2015. The preceding matters to which the Master referred were the extensive paragraphs in which she set out, in commendable detail, the deceased's life in this country and the particular areas relied on by the present respondent in support of an English domicile of choice (business activity and property developments, social and emotional connections, professional connections, the deceased's own stated intentions and "Other factors"). All those matters spanned the period from the deceased's arriving in this country to his leaving it again at the end of 2015. It is not clear what the rational justification for choosing 2010 is, but that does not matter, because it is a finding which could be justified on the evidence, and if it is too early the same finding can be made (and doubtless would have been made by the Master) if there had been debates about an appropriate date before the Master. She was basically saying that from 2010 and thereafter the deceased had established a domicile of choice. If 2010 is too early, the "thereafter" is still available, and it is plain enough what the Master was saying in this respect.

22. So far as the 2015 point is concerned I consider that Mrs Peacocke is technically right. She says that the events relating to the deceased's time in India in 2015 are relevant to the inquiry as to the domicile of choice, and that the Master did not plainly take them into account. However, those events do not do any damage to the conclusion reached by reference to evidence of the earlier period. If anything, they would support it. Accordingly, the arguable failure to feed these into the earlier inquiry is not a basis for permission to appeal.

(v) Other points

23. Mrs Peacocke raised a large number of other points about evidence that was or was not taken into account, a failure to apply acknowledged principles to the facts, and other respects in which the judgment was not in accordance with the detailed evidence which the Master heard. I have considered this material carefully, but consider that the points do not, either separately or taken all together, demonstrate any grounds for appeal. The trial of this matter took place over 4 days during which the Master heard a lot of evidence. The decisions that she reached were based on a large number of factors, and what the appellant in truth seeks to do is to re-run the factual case in appeal in terms of conclusions to be drawn from those factors. That is not a proper basis of an appeal. The Master came to a conclusion, and in the absence of arguable errors of principle, manifest errors on important facts, or disregarding significant parts of the evidence with a potential to affect the outcome, her decision should not be crawled over on an appeal in an attempt to reconstruct it.

Conclusion

24. For the reasons given above, I do not consider that any of the points raised by Mrs Peacocke in her forceful and detailed argument, are sufficient to give this appeal a real prospect of success, and I therefore refuse permission to appeal.