Neutral Citation: [2023] UKFTT 617 (TC)

Case Number: TC08858

FIRST-TIER TRIBUNAL
TAX CHAMBER

Heard on a hybrid basis in London

Appeal reference: TC/2020/00052

INCOME TAX AND CAPITAL GAINS TAX – Appellant's domicile of origin – whether domicile of choice in Massachusetts – whether domicile of choice established when a person had a "home" in a place and an intention to end his days in that place – no – Barlow Clowes v Henwood considered in the context of earlier case law on domicile – HMRC reliance on extended time limits in TMA s 36 read together with the Requirement to Correct provisions – whether Appellant was careless – yes – whether carelessness caused the loss of tax – held, HMRC had not met the burden of proving causation – appeal allowed in relation to two earliest years but refused for the later three years

Heard on 18 to 21 April 2023
Judgment date: 5 July 2023

Before

TRIBUNAL JUDGE ANNE REDSTON
MS JANE SHILLAKER

Between

IAN CHARLES STRACHAN

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Samuel Brodsky of Counsel, instructed by Addleshaw Goddard LLP

For the Respondents: Mr Christopher Stone and Ms Georgia Hicks, both of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION AND SUMMARY

1. Mr Strachan completed his self-assessment ("SA") tax returns for the tax years 2011-12 to 2015-16 ("the relevant years"), on the basis that he was domiciled in Massachusetts. HMRC disagreed, and issued discovery assessments for the first four of those years, and a closure notice and amendment for the fifth year (together "the assessments"); these totalled £420,407.29.

2. The issues in the case were:

   (1) whether Mr Strachan had a domicile of origin in England and Wales[1] or in Scotland;

   (2) whether from 1987 to 2006 he had a domicile of choice in Connecticut;

   (3) whether from 2006 (and in particular for the relevant years) he had a domicile of choice in Massachusetts; and

   (4) if the answer to the last question was no, whether Mr Strachan had been "careless" when he completed his 2011-12 and 2012-13 SA tax returns, and if so, whether the carelessness had brought about the loss of tax, so as to allow HMRC to issue discovery assessments for those two years.

3. We decided that Mr Strachan had an English domicile of origin, and had never had a domicile of choice in Connecticut. The main issue in dispute was the third; it essentially turned on the meaning of the term "chief residence" in the extensive case law on domicile.

4. In reliance on *Barlow Clowes International Limited v Henwood* [2008] EWCA Civ 577 ("*Barlow Clowes*"), Mr Brodsky submitted on behalf of Mr Strachan that:

   (1) A domicile of choice was established in a jurisdiction when:

      (a) a person had a "home" in that place, such that he was not a mere traveller or casual visitor; and

      (b) he also had the intention to end his days there; as a result of that intention the home was his "chief residence".

   (2) Since it was clear on the facts that Mr Strachan had a home in Massachusetts and intended to end his days there, he had a domicile of choice in Massachusetts in the relevant years.

5. There was no dispute that the first of those submissions was correct: to establish a domicile of choice a person has to be more than a mere traveller or casual visitor. However, we agreed with HMRC's Counsel, Mr Stone and Ms Hicks, that (1)(b) was not correct. Instead, to establish a person's "chief residence", *all* relevant factors have to be considered: it was not enough simply to have a home in another place, and intend to end your days there.

6. We decided that Mr Strachan had not established that his chief residence was in Massachusetts during the relevant years, and he thus did not have a domicile of choice in that place. We refused his appeal against the assessments for 2013-14 through to 2015-16.

7. One of those assessments had been issued within the "ordinary" four year time limit at Taxes Management Act 1970 ("TMA), s 34, and the other two under the extended time limits

[1] England and Wales is a separate single jurisdiction for domicile purposes. For brevity, and because Mr Strachan's connections were only with England (and not Wales), in this decision we have referred to a "domicile in England" or to an "English domicile".

provided by the "Requirement to Correct" ("RTC") provisions in Finance Act ("FA") No 2, Sch 18. There was no dispute about the validity of those assessments.

8. However, HMRC only had the power to issue discovery assessments for 2011-12 and 2012-13 (under TMA s 36 read together with the RTC provisions) if the loss of tax resulting from his incorrect SA returns had been "brought about carelessly" by Mr Strachan or by a person acting on his behalf.

9. Mr Strachan had not taken any professional advice on his domicile status since 1987. We decided he had been "careless", because he had assumed he was domiciled in Massachusetts when the reasonable taxpayer in his position would have refreshed the advice he had taken over 25 years previously, given the very significant changes to his position during that time.

10. We went on to consider whether Mr Strachan's carelessness had caused the loss of tax. Mr Brodsky relied on the fact that Mr Strachan had obtained advice from Michael Flesch KC in 2018, which had confirmed Mr Strachan's Massachusetts domicile. Mr Brodsky said that had Mr Strachan taken advice before filing his 2011-12 and 2012-13 returns, that advice would "in all likelihood" have confirmed his a Massachusetts domicile of choice. It followed, said Mr Brodsky, that carelessness did not cause the loss of tax; the loss would have been the same even had he taken advice at the time. We disagreed. Had Mr Strachan sought advice, it could not be assumed that he would have consulted Mr Flesch, or someone who took the same view. Mr Strachan was thus unable to prove that the loss of tax would have been the same had he taken advice However, HMRC were similarly unable to prove that the loss would have been avoided had Mr Strachan taken advice.

11. The issue therefore turned on the burden of proof. Mr Stone submitted that once Mr Strachan had been found to be careless, the burden shifted, and it was for Mr Strachan to prove that his carelessness had not caused the loss of tax.

12. However, based on the case law, we found that the burden rested on HMRC throughout. HMRC had to prove, not only that Mr Strachan had been careless, but that the carelessness had brought about the loss of tax, and they were unable to do so.

13. We therefore allowed Mr Strachan's appeal against the assessments for 2011-12 and 2012-13. The total amount payable is therefore reduced from £420,407.29 to £321,333.14.

THE EVIDENCE

14. The evidence consisted of documents and witness evidence; we also had a Statement of Facts and a Note on the Facts prepared by Mr Stone and Ms Hicks.

The documents

15. The Tribunal was provided with a document bundle of 2,945 pages, which included:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) formal documents including birth and marriage certificates, wills and passports;

(3) schedules of Mr Strachan's income;

(4) print-outs from the diaries of Mr and Mrs Strachan, and other travel related documents;

(5) banking, credit card and pension related documents;

(6) documents relating to Mr Strachan's properties in London, Connecticut, Massachusetts and Sotogrande Spain; and

(7) various documents about Mr and Mrs Strachan's charitable activities and donations, and about their involvement in various leisure activities.

The witness evidence

16. There were three witnesses, Mrs Strachan, Mr Kniesel, a family friend of Mr and Mrs Strachan, and Mr Henrietta, the HMRC Officer who had carried out the enquiry into Mr Strachan's domicile status and issued the assessments. Mr Strachan did not give witness evidence because of his health condition, see §279., but he had previously written detailed letters to HMRC and we have taken that evidence into account, subject to our observations at §24..

Mrs Strachan

17. Mrs Margaret Strachan (known as Peggy) provided two witness statements, of which the second related only to events from May 2021. She gave evidence-in-chief led by Mr Brodsky, was cross-examined by Mr Stone, answered questions from the Tribunal and was re-examined by Mr Brodsky. Her oral evidence was given by video from Massachusetts over two afternoons.

18. Mrs Strachan began her first witness statement by explaining why her husband was not able to give evidence, and then said "hence I am doing so in his place". It is rare for one person to be able to stand in the shoes of another and give exactly the same evidence. It is certainly not possible in a case such as this, where the decisions taken by Mr Strachan at various points in his life were significant issues in the appeal. We therefore did not accept that Mrs Strachan's evidence was identical to that which Mr Strachan would have given. Nevertheless, it is of course true that because Mr Strachan was unable to participate in the appeal, Mrs Strachan's evidence took on a particular importance.

19. Mrs Strachan is a highly intelligent woman with a background in finance; her working life included running a captive finance company. She gave detailed responses to the questions asked and was not evasive in any way. However, we agreed with Mr Stone that the *dicta* of Leggat J (as he then was) in *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm) ("*Gestmin*") were relevant. He said:

> "[15] An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> [16] While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are…
>
> [17] Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved…External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).
>
> [18] Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with

> our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.
>
> [19] The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty…to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces…
>
> [20] Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been 'refreshed' by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.
>
> [21] …
>
> [22] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

20. We agreed with Mr Stone that Mrs Strachan was aware of the "targets she is aiming for", in other words, she knew how the questions she was being asked were relevant to the parties' positions and to the issues in dispute, see [20] of *Gestmin*. This was clear not only from the focus and wording of her first witness statement, in which she said on six occasions (spread over 63 paragraphs) that Massachusetts was Mr Strachan's "permanent home", but also from the answers she gave in cross-examination.

21. We also agreed with Mr Stone that when tested against "known or probable facts" some parts of Mrs Strachan's evidence had been affected by unconscious bias of the type described by Leggatt J. A particular example (see §196.ff) was her evidence that Mr Strachan had decided at the time of their engagement in May 1987 that he would retire to Mrs Strachan's Connecticut property and that it would be their "permanent home". In May 1987, the couple were not even married; Mr Strachan had no connections with Connecticut; he did not own any property there and had only visited his fiancé's house for weekends and over Easter, and he was about to move to London for work (see §188.). As Mr Stone said, Mrs Strachan's evidence on this matter was "coloured by her awareness of the legal test for the acquisition of a domicile of choice". We additionally agree with Mr Stone that this clear example of unconscious bias is relevant when we consider the accuracy of, and weight to be given to, Mrs Strachan's evidence regarding Mr Strachan' intentions after he moved to London.

22. We also take into account the case law on the weight to be given to declarations of intention in the context of domicile. The House of Lords authoritatively stated in *Ross v Ross* [1930] A.C.1 at 6–7:

> "Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the persons to whom, the purposes for which, and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expressions."

23. Taking all the above into account, we have tested Mrs Strachan's statements as to her husband's intentions against the other evidence, in order to make findings of fact as to whether he had the intention in the relevant years sufficient to support his claims that he had a domicile of choice in Connecticut and/or Massachusetts.

Mr Strachan

24. Although Mr Strachan did not give evidence, during the course of the enquiry he provided detailed information to HMRC about the relevant factual background, beginning with a letter from his tax adviser, Mrs Diane Schofield, dated 3 July 2017. This said "in his own words" that he and Mrs Strachan "intend to retire" to Massachusetts, where he considered himself to be domiciled. The letter went on to say that although Mr Strachan was living and working in England "it is still my absolute intention to return permanently to Massachusetts at the end of my working life, which is likely to be within the next five years". Similar statements were included in subsequent correspondence. As Mr Stone pointed out, they were all made in the context of HMRC's enquiries into Mr Strachan's SA tax returns. There was no earlier documentary evidence directly recording his intentions.

25. The observations we made above as to unconscious bias and the evidential status of declarations of intent also apply to Mr Strachan's evidence. We have also taken into account that Mr Strachan could not be cross-examined on any of the statements he had made. For all those reasons, we have tested his statements of intent against the other evidence in order to make findings of fact as to whether in the relevant years he had domiciles of choice in Connecticut and/or Massachusetts.

Mr Kniesel

26. Mr Kniesel is a close friend of Mr and Mrs Strachan. He provided a witness statement, gave oral evidence by video from the USA; was cross-examined by Mr Stone; answered a question from the Tribunal and was re-examined by Mr Brodsky. We found him to be an honest and straightforward witness, but he was aware that the Strachans were relying on his evidence to support their declarations of intent. His witness statement (like Mrs Strachan's)

says that the Massachusetts house was to be the Strachans "permanent home" where they "would end their days", and he repeats that statement three times.

27. As with Mr and Mrs Strachan, in assessing Mr Kneisel's evidence we take into account that (a) there is a high probability that it has been affected by unconscious bias and (b) it is to be accorded careful scrutiny in accordance with the *dicta* in *Ross v Ross.*

Mr Henrietta

28. Mr Henrietta provided a witness statement, was cross-examined by Mr Brodsky and re-examined by Mr Stone. He was an honest witness, although a significant part of his witness statement and his oral evidence set out his view of the law as it applied to Mr Strachan, and we have disregarded that material. He also gave cogent oral evidence confirming the existence of the Domicile Ruling, as explained at §201..

The Statement of Facts

29. We were also provided with a document headed "Statement of Facts not disputed". Mr Stone made a submission to the effect that although HMRC were not disputing the points set out in that document, it was not a "Statement of Agreed Facts". We found the distinction between a "Statement of Facts not disputed" and a "Statement of Agreed Facts" difficult to grasp, and having confirmed with Mr Stone that HMRC were not seeking to challenge any of the information contained within that document, we have taken it to set out points which both parties agreed to be factually correct. In consequence, we have therefore not found it necessary to cross-check every one of those points to underlying documentary or other evidence.

30. However, in the course of our review of the Bundle, we did identify a small number of differences between the Statement of Facts and the underlying evidence; where that was the case, we made our findings in reliance on the evidence. In particular:

(1) Mr Strachan and Mrs Strachan both said he had registered with GP in Massachusetts in 1988 (see §264.), but the Statement of Facts gives the date as 2006.

(2) The dates on which various legal documents were signed, as shown on the face of those documents, differs from those in the Statement of Facts, which says they were all signed in August 2016, see §269.ff.

(3) We identified two more days when Mr Strachan was in Massachusetts compared to the list provided in the Statement of Facts, see §249..

HMRC's "Note on the Facts"

31. At the beginning of the final day of the hearing, Mr Stone and Ms Hicks provided a "Note on the Facts". This combined facts from the Statement of Facts with (a) other evidence given by the witnesses and (b) that contained within the Bundle. Mr Brodsky reviewed this Note over an extended lunch adjournment, and then highlighted some points of disagreement.

32. We have found parts of the Note to be a helpful chronological summary, and have at times borrowed from its wording when setting out some of our own findings, but it has not displaced our own independent assessment of the evidence. We have also taken into account any explicit disagreements expressed by Mr Brodsky, as well as the limited time he had to review and comment on the Note.

DOMICILE: THE LEGAL PRINCIPLES

33. We first set out the case law on domicile which preceded *Barlow Clowes*, followed by our discussion of that case in the light of the parties' submissions. We end this section by considering a Court of Appeal judgment which followed *Barlow Clowes*.

RESIDENCE

34. There was no dispute that, in order to be domiciled in a place, a person has to be "resident" there. It was also agreed that the following text from the current 16th edition of *Dicey, Morris and Collins on the Conflict of Laws* ("*Dicey*")[2] accurately set out the legal position:

> "[the term] 'residence' means very little more than physical presence. But it does mean something more: thus a person is not resident in a country in which he or she is present 'casually or as a traveller.'[and] 'Residence in a country for the purposes of the law of domicile is physical presence in that country as an inhabitant of it.' A person's state of mind may be relevant to the issue whether he or she is present in a country as a traveller or as an inhabitant; but, subject to this point, residence may be established without any mental element."

35. The first of the two citations in that extract is from *Manning v Manning* (1871) L.R. 2 P. & D. 223, 226; the second from *IRC v Duchess of Portland* [1982] 2 WLR ("*Portland*") at p 318. There was no dispute that a person seeking to show that he is domiciled in a jurisdiction must first show that he is not there "casually or as a traveller". The issue we had to decide was what more was required.

LEADING CASE LAW UP TO *BARLOW CLOWES*

36. Because a key point of dispute between the parties was the meaning and effect of the leading case law, we decided it was important to cite the relevant passages, rather than rely on secondary sources (such as case law summaries in other FTT decisions, or in legal texts). We have summarised the relevant principles derived from that case law at §80.ff.

37. Most of the judgments cited below were included in the Bundle; the others were included by reference, being included as authorities either in later decisions, or in *Dicey*.

Jopp

38. In *Jopp v Wood* (1865) 4 De G.J. & Sm. 616, 621 ("*Jopp*"), Turner LJ said that:

> "The mere fact of a man residing in a place different from that in which he has been before domiciled, even although his residence there may be long and continuous, does not of necessity shew that he has elected that place as his permanent and abiding home. He may have taken up and continued his residence there for some special purpose, or he may have elected to make the place his temporary home. But domicil, although in some of the cases spoken of as 'home', imports an abiding and permanent home, and not a mere temporary one."

Whicker

39. In *Whicker v Hume* (1858) 7 H.L.Cas. 124, 160 ("*Whicker*"), Lord Cranworth said, in a case which contains numerous citations from the classics:

> "By domicile we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it."

[2] Unless the context otherwise requires, references in this judgment to *"Dicey"* are to Chapter 6 of the 16th edition of that work, which was provided as part of the Authorities Bundle for the hearing.

Lord

40. In *Lord v. Colvin* (1859) 4 Drew. 366, 376 ("*Lord*"), Kindersley V-C. said:

> "I would venture to suggest that the definition of an acquired domicile might stand thus: that place is properly the domicile of a person in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected or the happening of which is uncertain) shall occur to induce him to adopt some other permanent home."

41. When that case reached the House of Lords under the name of *Moorhouse v. Lord* (1863) 10 H.L.Cas. 272 ("*Moorhouse*"), Lord Chelmsford, at pp. 285–286. criticised this passage in the Vice-Chancellor's judgment, saying it was:

> "…liable to exception, in omitting one important element, namely, a fixed intention of abandoning one domicile and permanently adopting another. The present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this even a present intention of making it a permanent home. It is rather a present intention of making a temporary home, though for a period indefinite and contingent. And even if such residence should continue for years, the same intention to terminate it being continually present to the mind, there is no moment of time at which it can be predicated that there has been the deliberate choice of a permanent home."

Bell

42. *Bell v Kennedy* (1868) ("*Bell*") was decided by the House of Lords following an appeal from the Court of Session. Lord Cairns, the Lord Chancellor, initially expressed the issue as follows:

> "Whether the appellant, before the 28th September 1838, the day of the death of his wife, had determined to make, and had made Scotland his home, with the intention of establishing himself and family there, and ending his days in that country."

43. At the end of his judgment, he restated this as follows:

> "The question, as it seems to me, is not whether he had made up his mind to take up his residence elsewhere than in Scotland, but the question is, had he, prior to September 1838, finally made up his mind or formed a fixed intention to settle in Scotland?"

44. In the same case, Lord Westbury said it was impossible to say from the evidence that Mr Bell "had a fixed and settled purpose to make Scotland his future place of residence, to set up his tabernacle there, to make it his future home" and that "unless you are able to shew that with perfect clearness and satisfaction to yourselves, it follows that the domicile of origin continues".

45. In his concurring judgment, Lord Colonsay assessed Mr Bell's evidence, saying that those involved in domicile disputes "have a natural, though, it may be, an unconscious, tendency to give to their bygone feelings a tone and colour suggested by their present inclinations".

Udny

46. *Udny v Udny* (1869) LR1 Sc & Div 441 ("*Udny*") was also a House of Lords judgment following an appeal from the Court of Session: it concerned the domicile of the respondent's father, who had been born in Scotland. Lord Westbury said (at page 457) that:

> "it is a settled principle that no man shall be without a domicil, and to secure this result the law attributes to every individual as soon as he is born the domicil of his father, if the child is legitimate…this has been called the domicil of origin, and is involuntary. Other domicils…are domicils of choice. For as soon as an individual is *sui juris,* it is competent to him to elect and assume another domicil, the continuance of which depends on his will and act. When another domicil is put on, the domicil of origin is for that purpose relinquished and remains in abeyance during the continuance of the domicil of choice…It revives and exists whenever there is no other domicil."

47. He continued at p 458:

> "Domicil of choice is a conclusion or inference which the Law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that the residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or *animus manendi,* can be inferred the fact of domicil is established."

48. The Lord Chancellor, Lord Hatherley, said at p 449:

> "A change of that domicil can only be effected *animo et facto* – that is to say, by the choice of another domicil, evidenced by residence within the territorial limits to which the jurisdiction of the new domicil extends. He, by making the change, does an act which is more nearly designated by the word 'settling' than by any one word in our language. Thus we speak of a colonist settling in Canada or Australia, or of a Scotsman settling in England, and the word is frequently used as expressive of the act of change of domicil in the various judgments pronounced by our Courts."

49. In the same case, Lord Chelmsford distinguished nationality and domicile, saying that the two were "distinct". Lord Westbury expanded that point, saying that by changing nationality a person acquired citizenship of a particular country, and this brought with it certain rights and obligations, but that citizenship was distinct from domicile.

Re Grove

50. In *Re Grove* (1888) 40 Ch D 216, Cotton LJ gave the leading judgment, with which Lopes LJ agreed. At page 242 Cotton LJ said:

> "Before I go further into the facts of the case, I will just read one passage which expresses what is sufficient to acquire a domicile of choice, and to give up the domicile of origin. Lord Westbury in *Udny v Udny*...says: 'Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief resident in a particular place, with an intention of continuing to reside there for an unlimited time.

> This is a description of the circumstances which create or constitute a domicile, and not a definition of the term…'"

51. Lopes LJ added (at p 242) by reference to the general law of evidence:

> "in order to determine a person's intention at a given time, you may regard not only conduct and acts before and at that time, but also conduct and acts after the time, assigning to such conduct and acts their relative and proper weight and cogency."

Winans

52. In *Winans v Attorney General* [1904] AC 287 ("*Winans*"), the issue was whether Mr Winans, who had been born in the USA, was domiciled in England at the time of his death. The House of Lords reversed the decision of the Court of Appeal. In their judgments, their Lordships cited both *Bell* and *Udny* as authorities. The Earl of Halsbury said at p 288:

> "Now the law is plain, that where a domicil of origin is proved it lies upon the person who asserts a change of domicil to establish it, and it is necessary to prove that the person who is alleged to have changed his domicil had a fixed and determined purpose to make the place of his new domicil his permanent home. Although many varieties of expression have been used, I believe the idea of domicil may be quite adequately expressed by the phrase - Was the place intended to be the permanent home?"

53. Lord Linlay said at p 299:

> "I take it to be clearly settled that no person who is *sui juris* can change his domicil without a physical change of place, coupled with an intention to adopt the place to which he goes as his home or fixed abode or permanent residence, whichever expression may be preferred. If a change of residence is proved, the intention necessary to establish a change of domicil is an intention to adopt the second residence as home, or, in other words, an intention to remain without any intention of further change except possibly for some temporary purpose."

Ross

54. In *Ross v Ross* HL [1930] AC 1 ("*Ross*"), Lord Buckmaster held that the appellant had failed to prove he had a domicile of choice; the other Law Lords agreed. He said at pp 6-7:

> "Declarations as to intention are rightly regarded in determining the question of a change of domicil, but they must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made and they must further be fortified and carried into effect by conduct and action consistent with the declared expression."

Re Fuld

55. In *Re Fuld* [1968] P 675 Scarman J (as he then was) said at p 682:

> "A classic description of the concept [of domicile] is to be found in Lord Westbury's speech in *Udny v. Udny*. Two features of his description are of particular importance in the present case. First, that the domicile of origin prevails in the absence of a domicile of choice, ie, if a domicile of choice has never been acquired or, if once acquired, has been abandoned. Secondly, that a domicile of choice is acquired when a man fixes voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time."

56. He added at p 684:

> "(1) The domicile of origin adheres unless displaced by satisfactory evidence of the acquisition and continuance of a domicile of choice;
>
> (2) a domicile of choice is acquired only if it is affirmatively shown that the propositus is resident in a territory subject to a distinctive legal system with the intention, formed independently of external pressures, of residing there indefinitely. If a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency, eg, the end of his job, the intention required by law is lacking; but, if he has in mind only a vague possibility, such as making a fortune (a modern example might be winning a football pool), or some sentiment about dying in the land of his fathers, such a state of mind is consistent with the intention required by law. But no clear line can be drawn; the ultimate decision in each case is one of fact – of the weight to be attached to the various factors and future contingencies in the contemplation of the propositus, their importance to him, and the probability, in his assessment, of the contingencies he has in contemplation being transformed into actualities.
>
> (3) It follows that, though a man has left the territory of his domicile of origin with the intention of never returning, though he be resident in a new territory, yet if his mind be not made up or evidence be lacking or unsatisfactory as to what is his state of mind, his domicile of origin adheres."

57. At p 686 he said:

> "The weight to be attached to evidence, the inferences to be drawn, the facts justifying the exclusion of doubt and the expression of satisfaction, will vary according to the nature of the case. Two things are clear – first, that unless the judicial conscience is satisfied by evidence of change, the domicile of origin persists: and secondly, that the acquisition of a domicile of choice is a serious matter not to be lightly inferred from slight indications or casual words."

58. He then set out the facts, which included this passage at p 692:

> "In 1955, acting under advice, Peter Fuld asserted to the United Kingdom Tax authorities that he was domiciled in Germany. In a letter to the Inspector of Taxes, written on his behalf on November 30, 1955, it was said: 'For the future Mr. Fuld intends primarily to reside with his mother permanently in Germany…'"

59. Scarman J commented on this letter as follows:

> "Such a declaration as that which I have quoted to the United Kingdom tax authorities is far from conclusive. On the contrary, it must be treated with great caution since it was made to advance a claim for tax relief. A wealthy man cannot, by his interested declarations, alter the facts of his life. Yet if he be, as Peter Fuld was, an honest man, honestly advised, it would be taking too cynical a view to disregard such a declaration altogether."

Bullock

60. In *IRC v Bullock* [1976] 1WLR 1178 ("*Bullock*") the Court of Appeal considered whether Mr Bullock had lost his Canadian domicile of origin and acquired a domicile of choice in England. Buckley LJ gave the only judgment, with which Roskill and Goff LJJ both agreed. He said at p 1183:

> "The effect upon a man of a change of domicile is to make the law of his new domicile his personal law in place of the law of his previous domicile. The intention which has to be sought, however, is not a conscious intention to achieve this result. I think it would be unusual for anyone who changed

> his domicile to have done so consciously or primarily for the purpose of subjecting himself to the legal system of his new country. The intention which must be sought is an intention on the part of the person concerned to make the new country his permanent home."

61. He cited with approval the principles in *Jopp, Whicker* and *Hume* which we have set out above, followed by the passages from the judgments of the Vice-Chancellor and Lord Chelmsford in *Lord* and *Moorhouse.* He then said at p 1184:

> "In defence of Kindersley V.-C. it seems to me only fair to remark that, since no man can have more than one domicile at one time, the act of acquiring a new domicile must necessarily involve the abandonment of the previous domicile. That this was present to the mind of the vice-chancellor is clear from later passages in his judgment in *Lord v. Colvin*, for example at p. 422, where he referred to a man intending to abandon an acquired domicile and to resume his domicile of origin or to his abandoning his domicile of origin to acquire a domicile of choice. In truth the insistence of Lord Chelmsford upon the importance of finding a fixed intention of abandoning one domicile and permanently adopting another is but a method of emphasising the importance of finding that the person in question intends to make his new country his permanent home. The abandonment of the previous home is implicit in the adoption of the new home, if the latter is intended to be exclusive and permanent. A man may have homes in more than one country at one time. In such a case, for the purpose of determining his domicile, a further inquiry may have to be made to decide which, if any, should be regarded as his principal home. We are not concerned, however, with any considerations of that sort."

62. He then considered the passage from *Re Fuld* cited at §55. above, that "a domicile of choice is acquired when a man fixes voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time". He accepted that statement, noted that it derived from Lord Westbury's speech in *Udny* (see §47. above), but said that the expression "unlimited time" required "some further definition", adding:

> "In my judgment, 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 make him change his mind."

63. This was, he said, reflected in *Winans,* where Lord McNaughton had held, by reference to Lord Cairn's *dictum* in *Bell,* that "the question was whether the person whose domicile was in question had 'determined' to make, and had in fact made, the alleged domicile of choice 'his home with the intention of establishing himself and his family there and ending his days in that country'."

64. He also said:

> "Domicile is distinct from citizenship. The fact that the taxpayer chose to retain his Canadian citizenship and not to acquire United Kingdom citizenship would not be inconsistent with his having acquired a domicile in the United Kingdom, but his adherence to his Canadian citizenship is, in my opinion, one of the circumstances properly to be taken into consideration in deciding whether he acquired a United Kingdom domicile."

Portland

65. The issue in *IRC v Duchess of Portland* [1982] 2 WLR ("*Portland*") concerned the domicile of the Duchess. She had a Canadian domicile of origin, but acquired an English domicile of dependency on marriage. In 1973, the law on domiciles of dependency changed,

and the Duchess argued that this caused the revival of her domicile of origin. In the course of considering that issue, Nourse J (as he then was) said at p 371:

> "There can no longer be any doubt as to the test appropriate to the abandonment of a domicile of choice. The leading case on the subject is *Udny v. Udny*...Residence in a country for the purposes of the law of domicile is physical presence in that country as an inhabitant of it. If the necessary intention is also there, an existing domicile of choice can sometimes be abandoned and another domicile acquired or revived by a residence of short duration in a second country. But that state of affairs is inherently improbable in a case where the domiciliary divides his physical presence between two countries at a time. In that kind of case it is necessary to look at all the facts in order to decide which of the two countries is the one he inhabits."

Plummer

66. The following background facts of *Plummer v IRC* [1988] 1 WLR 292 ("*Plummer*") are set out in the headnote:

> "The taxpayer was born in London in 1965 of English parents. In 1980 her mother and younger sister moved permanently to Guernsey and her father, who worked in London, went there at weekends and for holidays. The taxpayer was at that time at a day school in London. In 1981 she went to boarding school in Somerset and in 1984 to London University. Whenever possible she went to her family in Guernsey for weekends and holiday periods. During the fiscal year 1983–84 she spent 106 days in Guernsey and the following year 83 days there."

67. It was accepted that Ms Plummer had formed a strong attachment to Guernsey and intended to "settle" there when her education and any further training was completed. Hoffman J (as he then was) considered Nourse J's reference in *Portland* to being an "inhabitant" of a country, and said:

> "while I find the contrast between an inhabitant and a person casually present useful to describe the minimum quality of residence which must be taken up in a new country before a domicile there can be acquired, the concept of being an inhabitant seems to me less illuminating in cases of dual or multiple residence such as the present."

68. He went on to say that "clearer guidance" was to be found in the passage from *Udny* referred to in *Bullock,* that to have a domicile of choice, a person must have voluntarily fixed "his sole or chief residence" in that place. He then said at p 295:

> "I infer from this sentence…that a person who retains a residence in his domicile of origin can acquire a domicile of choice in a new country only if the residence established in that country is his chief residence.**"**

69. Ms Plummer's counsel submitted that:

> "a person whose presence in a new country is sufficient to amount to residence may, notwithstanding that his chief residence remains in his domicile of origin, acquire a domicile of choice by evincing an intention to continue to reside permanently in the new country."

70. Hoffman J rejected that submission as inconsistent with Lord Westbury's speech in *Udny*; he said this had "always been treated as an authoritative statement of the circumstances in which a domicile of choice may be acquired". He went on to hold that the Special Commissioners had been entitled to find that Ms Plummer was not domiciled in Guernsey, because her "chief residence" remained in England. He then said at p 296:

> "I go further and say that in my judgment it was the right conclusion. If the taxpayer had in 1980 broken altogether with England and settled in Guernsey like her mother and sister and then, even after a relatively short interval, returned to England for study, the quality of her presence here might have been such as to prevent a revival of her domicile of origin. But the fact is that she has not yet settled in Guernsey, and the reasons why she has been unable to do so are in my view irrelevant. When there is no competing place of continuing residence, settlement may be established by presence for a very short time; even for a single day. But as Nourse J. pointed out in *Inland Revenue Commissioners v. Duchess of Portland* [1982] Ch. 314, 319, an inference of settlement from a short stay is difficult to draw when the person in question divides his physical presence between two countries at a time. To treat the house in Guernsey as her chief residence simply because it is the sole residence of her mother and sister would in my view be attributing to her a kind of quasi-dependent domicile for which there is no legal justification. And the fact that the taxpayer may intend to settle in Guernsey after her education and training are completed and then to remain permanently is not sufficient to give her a proleptic domicile of choice."

Morgan

71. The issue in *Morgan v Cilento* [2004] EWHC 188 (Ch) ("*Morgan*") was whether a Mr Shaffer had retained a domicile of choice in Australia despite having come back to England (his domicile of origin) shortly before his death. Lewison J (as he then was) concluded at [15]:

> "it must be shown that (1) the propositus has ceased to reside in the territory in which he had a domicile of choice and that (2) the propositus has no intention to return to reside there (as opposed to an intention not to return). The absence of intention must be unequivocal, so that a person is in two minds does not have the necessary absence of intention. In addition, the abandonment of a domicile of choice is not to be lightly inferred."

Cyganik

72. In *Cyganik v Agulian* [2006] EWCA Civ 129 ("*Cyganik*") the Court of Appeal considered whether a testator, Andreas, had acquired a domicile of choice in England or whether he had retained his domicile of origin in Cyprus. Mummery LJ gave the leading judgment, with which Lewison and Longmore LJJ both agreed.

73. Under the heading "the legal principles and the proof", Mummery LJ set out the passage from *Re Fuld* cited at §55. above, saying that it identified two "important features" of the law of domicile, one of which was that "a domicile of choice is acquired when a man fixes voluntarily his sole or chief residence in a particular place". He then expressly approved the passage from *Re Fuld* which we set out at §56..

74. Longmore LJ began his concurring judgment at [53] by saying:

> "I agree with the judgment of Mummery LJ. In particular I agree that Scarman J in *Re Fuld (No 3)* [1968] P 675 684E-686D correctly set out the principles by which English law determines whether a domicile of origin has been replaced by a domicile of choice. These principles cannot be revisited by this court stemming as they do from *Udny v Udny* (1869) LR 1 Sc&Div 441, *Winans v Attorney-General* [1904] AC 287, [1904-7] All ER Rep 410 and *IRC v Bullock* [1976] 1 WLR 1178. All the cases state that a domicile of origin can only be replaced by clear cogent and compelling evidence that the relevant person intended to settle permanently and indefinitely in the alleged domicile of choice."

Gaines-Cooper

75. The background to *Gaines-Cooper v HMRC* [2007] EWHC 2617 (Ch) ("*Gaines-Cooper*") was that Mr Gaines-Cooper had appealed HMRC's assessments on the basis that he had a domicile of choice in the Seychelles. He lost at the Special Commissioners and appealed to the High Court. The hearing before Lewison J took place in October 2007; he gave judgment in November 2007, some six months before the publication of *Barlow Clowes*[3].

76. At [32], Lewison J encapsulated the issue he had to decide by saying "the question whether a person's residence in a particular territory is his chief residence is, as it seems to me, a question of the character of his residence in that territory". He also referred at [34] to *Bullock* where, as cited above, Buckley LJ had said:

> "A man may have homes in more than one country at one time. In such a case, for the purpose of determining his domicile, a further inquiry may have to be made to decide which, if any, should be regarded as his principal home."

77. Lewison J then said at [35] that "since this postulates two *homes*, it is clear that the Lord Justice was considering more than just physical presence in two or more territories". At [37] he referred to *Portland,* saying that Nourse J "did not distinguish between (a) looking at 'all the facts' to decide whether a person was resident in a jurisdiction and (b) the question of the necessary intention on the other. At [38] he said that the quality of a person's residence can only be evaluated "by an examination of the conduct of the propositus over a more prolonged period". At [39] he referred to Hoffman J's *dictum* in *Plummer* that "a person who retains a residence in his domicile of origin can acquire a domicile of choice in a new country only if the residence established in that country is his chief residence", and he then continued:

> "The formulation of the applicable test in *Udny* requires both a chief residence and also an intention to continue to reside indefinitely. Thus the question whether a person's residence is his chief residence is part of the first limb of the test rather than the second. The test is predicated on the fact that a person has a residence in each of the competing territories. Plainly, therefore, residence alone is not enough to satisfy the first limb of the test where a person has two or more residences. If a person has two or more residences in different territories, which is his chief one?"

78. He also said at [43]:

> "one cannot determine a person's chief residence merely by taking a snapshot at a particular moment in time. It seems probable, as a matter of common sense, that the further one gets from the point at which a domicile of choice is alleged to have been acquired, the less cogent will be any inference that one can draw from conduct. But that is a question of evaluating the evidence, rather than saying that it is irrelevant."

79. He continued at [44] by stating the Special Commissioners had therefore "made no legal error in looking at evidence outside 'the critical period' in order to help them decide which was Mr Gaines-Cooper's chief residence in 1976".

Summary of the relevant principles

80. Before considering *Barlow Clowes,* we summarise the key principles which emerge from the above judgments.

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[3] Mr Gaines-Cooper subsequently lost separate judicial review proceedings relating to the HMRC guidance in booklet IR20.

Establishing a domicile of choice

81. The courts repeatedly endorsed Lord Westbury's *dictum* in *Udny* that a domicile of choice is only established if a person both*:*

(1) voluntarily fixes his "sole or chief residence" in a particular place, and

(2) does so with "an intention of continuing to reside there for an unlimited time".

82. The only change to that *dictum* was made in *Bullock,* when Buckley LJ said that the expression "unlimited time" required some further definition, so as to allow for the fact that a person's intention to reside indefinitely in a place could change if circumstances were to alter.

83. It is worth remembering that the *dictum* relates to establishing a domicile of choice, not a domicile of origin. A person is not required to show that he has the intention of continuing to reside for an unlimited time in his domicile of origin, in order for that domicile to be retained.

Settling

84. Lord Hatherley's use of the word "settling" is another way of expressing the requirement that a person must live in a place as his sole or chief residence so as to establish a domicile of choice: he said that a person who changes his domicile:

> "does an act which is more nearly designated by the word 'settling' than by any one word in our language. Thus we speak of a colonist settling in Canada or Australia, or of a Scotsman settling in England."

85. In *Plummer,* the taxpayer had never "settled" in Guernsey, because she continued to live and study in England, where she had her "chief residence", and this was fatal to her domicile claim. We reject Mr Brodsky's submission that Ms Plummer lost her appeal because, unlike her mother and her sister, she did not own her own home in Guernsey. Instead, she lost because she had not "broken altogether with England" which remained her chief residence; her future intention to "settle" in Guernsey was insufficient.

The permanent home

86. The place where the person has his sole or chief residence is his permanent home, the place where he has "settled". For example:

(1) In *Jopp,* Turner LJ held that the person was required to show that he had "his abiding and permanent home" in the jurisdiction.

(2) In *Whicker,* Lord Cranworth said that "by domicile we mean home, the permanent home".

(3) In *Moorhouse*, Lord Chelmsford held that "the present intention of making a place a person's permanent home can exist only where he has no other idea than to continue there, without looking forward to any event, certain or uncertain, which might induce him to change his residence".

(4) In *Winans,* the Earl of Salisbury said that "the person who is alleged to have changed his domicil had a fixed and determined purpose to make the place of his new domicil his permanent home. Although many varieties of expression have been used, I believe the idea of domicil may be quite adequately expressed by the phrase - Was the place intended to be the permanent home?".

87. It is thus not possible to have two "permanent homes" at the same time. As Buckley LJ said in *Bullock,* "a man may have homes in more than one country at one time. In such a case,

for the purpose of determining his domicile, a further inquiry may have to be made to decide which, if any, should be regarded as his principal home".

All the factors

88. It is also clear from the case law that a multi-factorial assessment is required to decide whether a person has a domicile of choice in a jurisdiction. This was expressly stated by Scarman J in *Re Fuld,* when he said "the ultimate decision in each case is one of fact – of the weight to be attached to the various factors and future contingencies in the contemplation of the propositus, their importance to him, and the probability, in his assessment, of the contingencies he has in contemplation being transformed into actualities". That passage was expressly approved by Mummery LJ in *Cyganik.*

89. In *Udny*, Lord Westbury described a domicile of choice as "an inference of law": in other words, the purpose of carrying out the multi-factorial assessment is to see whether or not that inference can be drawn from the facts. In *Re Fuld,* Scarman J made a similar point when he said that the domicile of origin persists "unless the judicial conscience is satisfied by evidence of change".

90. The need to carry out a multi-factorial assessment does not disappear where a person has two homes: in *Portland,* Nourse J said that where the person "divides his physical presence between two countries at a time…it is necessary to look at all the facts in order to decide which of the two countries is the one he inhabits". Although in *Plummer*, Hoffman J criticised the use of the term "inhabits", he went on to say that when a person has two homes, it is for him to establish by evidence which is his "chief residence". Lewison J made the same point in *Gaines-Cooper*, holding that if a person has two or more residences in different territories, the court must decide "which is his chief one", and that the answer is "a question of the character of his residence in that territory", which in turn was established "by an examination of the conduct of the propositus over a more prolonged period", which is "a question of evaluating the evidence".

Expressed intentions

91. It follows from the above that a person does not prove he has a domicile of choice by making a statement to that effect. Moreover, as Lord Colonsay said in *Bell,* those involved in domicile disputes "have a natural, though, it may be, an unconscious, tendency to give to their bygone feelings a tone and colour suggested by their present inclinations", while in *Ross,* Lord Buckmaster said that declarations of intention "must be examined by considering the person to whom, the purposes for which, and the circumstances in which they are made" and in addition "must further be fortified and carried into effect by conduct and action consistent with the declared expression". Similarly, in *Re Fuld,* Scarman J said that domicile declarations made to the tax authorities "must be treated with great caution", noting that "a wealthy man cannot, by his interested declarations, alter the facts of his life", although it would be "too cynical" to disregard such a declaration altogether. In *Bullock,* Buckley LJ said that domicile of choice is established, not by the person saying he had intended to change his domicile, but instead by an intention to make the other jurisdiction "his permanent home".

BARLOW CLOWES

92. We next consider *Barlow Clowes*. The background[4] is that Barlow Clowes International Ltd collapsed in 1988 owing significant sums to investors. Mr Henwood was the director of Eurotrust International Ltd, an Isle of Man company which had administered payments relating to Barlow Clowes.

[4] See the separate case of *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37

93. Barlow Clowes' liquidators sought to recover over £9m from Mr Henwood, but bankruptcy proceedings could only be brought against him under the Insolvency Act 1985 if he was domiciled in England. He applied for a declaration that the court had no jurisdiction, as he had lost his English domicile of origin and had a domicile of choice in Mauritius.

High Court and Court of Appeal

94. At the High Court, Evans-Lombe J found in favour of Mr Henwood. He held that:

(1) Mr Henwood's English domicile of origin had been replaced by a domicile of choice in the Isle of Man.

(2) In 1988 Mr Henwood and his wife acquired a substantial property in France. Barlow Clowes collapsed the same year.

(3) In 1992, the Henwoods left the Isle of Man, and Mr Henwood's English domicile of origin revived. In the same year, he leased a property in Mauritius.

(4) In 1992-2006 Mr Henwood lived for around three months each year in Mauritius, but spent longer in France.

95. Evans-Lombe J decided that Mr Henwood had moved to Mauritius with the intention of permanently residing there, and had a new domicile of choice in that country. The liquidators appealed. Geoffrey Vos QC represented the liquidators and Mr White QC represented Mr Henwood.

96. On 23 May 2008, the Court of Appeal overturned the High Court decision. Arden LJ gave the leading judgment; Moore-Bick LJ and Waller LJ issued concurring judgments. One of the key issues in the appeal before us was the meaning and effect of the Court of Appeal decision.

The parties' submissions in a nutshell

97. Mr Brodsky submitted that a person has a domicile of choice if he (a) had a home in a jurisdiction, and (b) intends to end his days there: as the result of that intention, the home is his "chief residence".

98. In making that submission, Mr Brodsky relied on Arden LJ's judgment at [103], where she said (his emphasis) that "the test of chief residence involved a consideration of factors throwing light on the subject's intention", and her statement at [104] that in deciding where a person was domiciled:

> "The court has to look at the quality of the residence in order to decide in which country the subject has an intention to reside permanently. Provided that task is carried out, the chief residence in the sense that term is used in this context has in fact been identified."

99. Mr Brodsky also said that the Tribunal was bound to follow *Barlow Clowes,* and was not bound by the *dictum* about "chief residence" in *Udny,* as that was a Scottish case. The passage to which he was referring was Lord Westbury's statement that (emphasis added):

> "Domicile of choice is a conclusion or inference which the Law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time."

100. Mr Stone disagreed. He submitted that it was clear from *Udny* and the case law which followed that a person who was "resident" in a jurisdiction only had a domicile of choice there if two tests were satisfied:

(1) he had a home in that jurisdiction which was his "sole or chief residence"; and

(2) his intention was permanently to reside there as his sole or chief residence.

101. He said that where a person had two homes, the first step was therefore to establish which was the "chief residence" by carrying out a multi-factorial assessment. It was only if that first step was satisfied, that a person's intention became relevant.

The status of *Udny*

102. We begin with Mr Brodsky's submission that the Tribunal is not bound by *Udny*. He is correct that judgments of the House of Lords (and now the Supreme Court) which decide an appeal from the Court of Session are not binding in England[5].

103. However, where such a judgment has been repeatedly followed and endorsed by English courts and tribunals, it is accepted as authoritative: for example *Donoghue v Stevenson* [1932] AC 562 was also decided by the House of Lords following an appeal from the Court of Session.

104. In considering whether *Udny* was similarly to be treated as authoritative, we took into account the following:

(1) In *Grove,* Cotton LJ, giving the leading judgment in the Court of Appeal, relied on Lord Westbury's judgment in *Udny*, including his reference to "sole or chief residence" describing it as a statement "which expresses what is sufficient to acquire a domicile of choice, and to give up the domicile of origin".

(2) In *Winans,* the House of Lords cited *Udny* as an authority.

(3) In *Re Fuld,* Scarman J said Lord Westbury's speech was "a classic description" of the concept of domicile, and went on to highlight two elements as being particularly relevant to that case, one of which was the *dictum* containing the reference to "chief residence".

(4) In *Bullock*, the Court of Appeal endorsed the same *dictum,* with Buckley LJ saying only that "the expression 'unlimited time' requires some further definition".

(5) In *Portland,* Nourse J stated that *Udny* was "the leading case" on the test appropriate to abandoning a domicile of choice.

(6) In *Plummer,* Hoffman J said that Lord Westbury's statement had "always been treated as an authoritative statement of the circumstances in which a domicile of choice may be acquired".

(7) In *Cyganik,* Mummery LJ stated that the *dictum* constituted one of two "important features" of the law of domicile. Longmore LJ said that in *Re Fuld* Scarman J had "correctly set out the principles by which English law determines whether a domicile of origin has been replaced by a domicile of choice", and went on to say that "these principles cannot be revisited by this court stemming as they do from *Udny v Udny*…, *Winans v Attorney-General*…and *IRC v Bullock*…"

105. We thus have no hesitation in finding that *Udny* is binding on this Tribunal.

Arden LJ and *Udny*

106. Arden LJ herself also relied on and followed *Udny.* She began her judgment by setting out ten "principles of law" taken from the 2006 edition of *Dicey*, and then amplified Rules (vi) and (vii). Rule (vi) read:

[5] For the current legal position, see the Constitutional Reform Act 2005, s 41(2); the Explanatory Notes confirm that the position is unchanged by that Act.

> "Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise."

107. In her amplification of that Rule, Arden LJ said at [10] that "the intention of residence must be fixed and must be for the indefinite future. It is not enough for instance that at any given point in time its length has not been determined". She followed this at [11]-[13] by a summary of *Udny,* which she described as "the leading case".

108. That summary includes the passage from Lord Hatherley's judgment which describes a change of domicile as "an act which is more nearly designated by the word 'settling' than by any one word in our language" (see §48.). She also set out the key *dictum* from Lord Westbury's judgment, which Mr Brodsky had said was not binding on this Tribunal.

109. Arden LJ thus explicitly followed *Udny*, citing both Lord Westbury's *dictum* and Lord Hatherley's reference to "settling", as encapsulating what is required for a change of domicile. At no point did she say that *Udny* was not binding on her; indicate that she considered it was wrongly decided, or that she was further developing the law as there set out. By way of contrast, we note Buckley LJ's express statement in *Plummer* that he was providing a "further explanation" of the phrase "unlimited time".

Bell

110. Mr Brodsky's submission was that a person has a domicile of choice if he has a home in a jurisdiction and an intention that he will "end his days" there. That phrase comes from Lord Cairns judgment in *Bell*, where he says that the question is whether the person:

> "had determined to make, and had made, Scotland his home, with the intention of establishing himself and his family there, and ending his days in that country?'

111. Arden LJ cited this passage at [14], and emphasised the phrase "ending his days in that country". She then said that "this test by its reference to ending one's days usefully emphasises the need for the subject to have a fixed purpose that he will live in the country of his domicile of choice".

112. She therefore did not set out a free-standing test by which domicile status is established depending on whether a person intends to "end their days" in a jurisdiction. The passage from *Bell* begins by stating the person "had made" Scotland "his home". There was no suggestion in *Bell* that a person could have two "homes" and there is no suggestion in any of the subsequent case law that *Bell* was inconsistent with *Udny*. Moreover, Arden LJ does not say that there is any divergence.

All the facts

113. Mr Brodsky's approach would mean that there would no longer be any need to decide whether a person has a domicile of choice by considering all the facts. However, that new approach runs contrary to Arden LJ's judgment read as a whole and also to the concurring judgments, which we consider at §131.ff.

114. In *Barlow Clowes* at [8], Arden LJ referred to Rule (vi) of *Dicey*, which read:

> "Any circumstance that is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice."

115. In her amplification of that Rule, Arden LJ confirmed at [17] that "a finding as to domicile requires a careful evaluation of all the facts", and she emphasised at [19] that a

person's declarations of intention should not be relied on "unless corroborated by action consistent with the declaration".

116. Applying those principles to Mr Henman's case, she concluded at [65] that Evans-Lombe J had "failed to take into account various important matters", and that as a result, "this court must make its own evaluation of the facts". That evaluation is at [116]-[128] of her judgment. It begins with the statement that "the main issue…is whether [Mr Henwood] had the requisite intention to reside permanently or indefinitely in Mauritius", and she then considered a number of relevant facts, including the time spent in the French property, before saying at [121]:

> "In December 2005 he was only 57 years old and had an active business life. He is unlikely in reality to have been thinking of where he would wish to spend his last days. There was no evidence of ill health. But another test that can be applied is to ask where, if anywhere, he had settled. I say 'if anywhere' because Mr Henwood travelled frequently…"

117. After setting out more factual matters, she said at [126]:

> "So the question is whether Mr Henwood has established on a balance of probabilities that he has a domicile of choice in Mauritius. He has had a residence there for many years. But it is the quality of his residence that matters and thus he has in effect to show that he preferred Mauritius to any other place in the world. He said that was so, but then of course these were self-serving statements…"

118. She concluded at [127] that Mr Henwood had "failed to establish on a balance of probabilities that his domicile of choice was Mauritius".

119. Thus, Arden LJ did not decide Mr Henwood's domicile status simply by asking whether he had a home in Mauritius and whether he had expressed a genuine intention of ending his days there. She accepted he had a home in Mauritius, but the issue of whether he was domiciled in that jurisdiction depended on considering all the facts to establish "where he had settled", and that what mattered was "the quality of that residence" taking into account all the facts.

120. We add that Arden LJ's reference here and elsewhere in her judgment to the need to establish "the quality of the residence" in order to decide questions of domicile, are essentially the same as Lewison J's statement in *Gaines-Cooper* that where a person has two or more residences in different territories, the answer to the question as to which of two homes constitutes the person's "chief residence" is "a question of the character of his residence in that territory". Lewison J held (rightly in our view) that whether a person had his chief residence in a jurisdiction could only be established "by an examination of the conduct of the propositus over a more prolonged period". In other words, a detailed fact finding exercise is required: it is not enough for a person to show that he intends to end his days in a particular jurisdiction.

The key passages

121. The passages of Arden LJ's judgment which form the heart of the dispute between the parties in Mr Strachan's case are at [103]-[104]; we have called these "the key passages".

122. They come within a subsidiary section of the judgment in which Arden LJ considered Mr Vos's submission that Evans-Lombe J had "erred in failing to make a finding as to which of Mr Henwood's homes was his chief residence", see [51]. The key passages thus do not form part of her reasoning as to whether to allow or refuse the liquidator's appeal: her conclusion on that issue is at [65] and her evaluation of the facts at [118]-[128].

123. Arden LJ began her discussion of Mr Vos's submission by saying that he had relied on the passage from *Udny* we have already set out at §99.. She next cited Buckley LJ's *dictum* in *Bullock* that where a person has homes in more than one country "a further inquiry may have to be made to decide which, if any, should be regarded as his principal home". She then said: "Determining which is the chief or principal residence involves considering the quality of the subject's residence."

124. This was followed by the citation from *Portland* set out at §65., which ends by saying that where the person "divides his physical presence between two countries at a time…it is necessary to look at all the facts in order to decide which of the two countries is the one he inhabits". Finally, she considered *Plummer,* noting that Hoffman J had criticised the reference to "inhabitant" used in that case, and had instead relied on the concept of "chief residence" from *Udny.*

125. Pausing there, at no point in this discussion did Arden LJ indicate that she was disagreeing with the law as stated in *Udny, Bullock, Portland* or *Plummer.*

126. The key passages form the next part of her judgment:

> "[103] This decision [ie *Plummer*] is criticised by Dicey, Morris and Collins in *The Conflict of Laws*, which seems to suggest that the decision overlooked the point that questions as to the quality of residence are primarily relevant to the question whether the person had the requisite intention of permanent or indefinite residence (see pp 133–134). For my part, I do not consider that this criticism is correct since it is clear that Hoffmann J recognised that the test of chief residence involved a consideration of factors throwing light on the subject's intention. He thus went on to reject the submission of counsel for the taxpayer that all the commissioners had done was to count the number of nights the taxpayer had spent in the UK rather than consider the quality of her residence. Hoffmann J rejected that argument, not on the grounds that it was misconceived in law but on the grounds that the commissioners had indeed considered the quality of residence in Guernsey.
>
> [104] Inevitably, any test of chief residence is circular. It cannot simply be a reference to the main home in terms of size or amenities. Nor can it be a reference to the home in which the subject spends the most time. The court has to look at the quality of the residence in order to decide in which country the subject has an intention to reside permanently. Provided that task is carried out, the chief residence in the sense that term is used in this context has in fact been identified.
>
> [105] In fact, the judge [Evans-Lombe J] in effect directed himself that he needed to ascertain the chief residence. Thus, at para [J27], he stated that if he was satisfied that France was more of a home than Mauritius, Mr Henwood would fail to establish a domicile of choice in Mauritius. The judge was using the term 'home' in the sense of a permanent home. This appears from para [J51], where he says:
>
> > 'In my view it is highly unlikely that any married couple would deliberately abandon the idea that they had a home where they were based or to which they would not wish ultimately to return.'
>
> [106] In *Whicker v Hume* (1858) 10 HLC 124, at 160, Lord Cranworth said:
>
> > 'By domicile we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it.'

> [107] Accordingly, it was permissible for the judge to use the concept of home in this context."

127. Mr Brodsky said that it was clear from the key passages that a person's "chief residence" is the home where he intends to end his days, and that as long as the person genuinely has that intention in relation to a home in a particular jurisdiction, that is all that is required to establish a domicile of choice.

128. We begin by noting that in the key passages, Arden LJ equated "permanent home" and "chief residence", as we have done in our analysis at §86.ff. This can be seen from [105] , where she said that:

> (1) Evans-Lombe J had correctly considered whether Mauritius was Mr Henwood's "permanent home";
>
> (2) he had done so by asking whether "France was more of a home than Mauritius"; and
>
> (3) this was the same as asking whether Mauritius was Mr Henwood's chief residence.

129. Our reading of the key passages, read in the context of the rest of the judgment, is that Arden LJ is saying no more than that a person's domicile has to be decided by looking at all relevant factors, and it is that exercise which provides the answer to the domicile question. In other words, a multi-factorial analysis will show which of two homes is the person's permanent home/chief residence. If that analysis shows that a person has established a permanent home/chief residence in a jurisdiction other than his domicile of origin, it necessarily follows that he intends to stay there "unless and until something happens to make him change his mind", see *Bullock.*

130. Arden LJ was therefore not saying that a domicile of choice is established simply by a person (a) having a home in a jurisdiction other than his domicile of origin, and (b) genuinely intending to spend his final days in that home. That reverses the logic and meaning of the key passages. The outcome of the multi-factorial test leads to the finding about intention, not the other way about.

The concurring judgments

131. Mr Brodsky supported his submissions about the key passages by reference to the concurring judgments given by Moore-Bick and Waller LJJ.

Moore-Bick LJ

132. Moore-Bick LJ began by saying (Mr Brodsky's emphasis):

> "I am grateful to Arden LJ for her description of the circumstances giving rise to this appeal and her exposition of the law relating to the acquisition and loss of domicile with which I agree and <u>which I gratefully adopt</u>.."

133. Mr Brodsky submitted that Moore-Bick LJ had therefore adopted Arden LJ's new formulation of the domicile test as stated in the key passages. However, we have already found that (a) the key passages are not part of the *ratio* of her judgment, and (b) they do not change the previously understood legal position.

134. In addition, Moore-Bick LJ explained his own conclusion by evaluating all relevant facts (see [132]-[140]), and then said at [141] that:

> "where a person maintains homes in more than one country the question must be decided by reference to the quality of residence in each of those

> countries, since it is only by considering the quality of residence that one can decide which is his real home."

135. In considering the "quality of the residence" in Mauritius, at [143] Moore-Bick LJ compared "the way in which Mr Henwood used the villa [in Mauritius] with the way in which he made use of the French property during that period", saying that on the facts, Mr Henwood "treated that property [in France] as his principal home rather than the villa", and therefore "the nature of his residence at the villa was not consistent with its being his real home". Thus, Moore-Bick LJ did not simply ask whether Mr Henwood had the intention of ending his days in Mauritius; instead he assessed the facts and decided that it was not his principal home, and he had thus not established a domicile of choice in that jurisdiction.

Waller LJ

136. Waller LJ said at [147] that he agreed the appeal should be allowed "for the reasons given by Arden LJ and by Moore-Bick LJ". He then summarised the position, saying that "the evidence simply did not establish that Mr Henwood had ever finally made a choice as between France and Mauritius as to which, if either, was to be his permanent home", and added that when Mr Henwood left the Isle of Man, he lost that domicile of choice and his English domicile of origin revived. He continued:

> "The question then is whether the evidence ever established that Mr Henwood thereafter acquired a domicile of choice anywhere and in particular whether he could establish Mauritius as opposed to France. The evidence did not establish the requisite intention."

137. Waller LJ, like the other two judges, did not come to his conclusion by considering whether Mr Henwood genuinely intended to spend his final days in his Mauritian home. Instead, his assessment of all relevant factors led him to conclude that Mauritius was not Mr Henwood's "permanent home", and that *as a result*, he had not established the requisite intention. .

Conclusion

138. Our reading of *Barlow Clowes* is that the Court of Appeal confirmed that in deciding whether a person has a domicile of choice, that person's chief residence/permanent home must be established following a multi-factorial test, and this in turn forms the foundation for a finding about intention, not the other way about.

KELLY

139. In *Kelly v Pyres* [2018] EWCA Civ 1386 ("*Kelly*"), the Court of Appeal considered, in the context of divorce proceedings, whether Mrs Kelly was domiciled in England. King LJ gave the only judgment with which Newey LJ and McDonald J both agreed. She cited from Arden LJ's judgment in *Barlow Clowes,* noting her amplification of *Dicey's* Rules (vi) and (vii).

140. In relation to Rule (vi), King LJ referenced Arden LJ's citations of *Udny* and *Bell* and in particular the statement that a person must have:

> "a singular and distinctive relationship with the country of supposed domicile of choice. That means it must be his ultimate home or, as it has been put, the place where he would wish to spend his last days."

141. She then said at [69]:

> "the reference to 'singular and distinctive' and 'ending his days in that country' must be considered in the context of the requirement for there to be a fixed intention to reside in a country for the indefinite future. In my judgment, temporary residence of eleven months, but with an expressed

> intention to retire to this country in several decades time is not enough without more cogent evidence with which to loosen the strong ties with a domicile of origin and to create a replacement domicile of choice."

142. She next considered *Dicey's* Rule (vii), which stated that all facts which throw light on the subject's intention must be considered, and then said at [74]:

> "It follows that on the facts of a case that a judge may well find that a person working abroad has nevertheless acquired a domicile of choice in England, but such a conclusion will only be reached after careful consideration of all the facts. In such a case, one would expect that England would truly be 'home', and that, all the evidence would point to that person as regarding him or herself as 'living in England but working abroad'."

143. King LJ continued by referring to Longmore LJ's statement in *Cyganik* (see §74.) that a domicile of origin can only be replaced by "clear cogent and compelling evidence that the relevant person intended to settle permanently and indefinitely in the alleged domicile of choice", and she held that that this evidence was not present in Mrs Kelly's case.

144. We find that *Kelly* supports our reading of *Barlow Clowes.* In other words, a court or tribunal deciding whether a person has a domicile of choice in a jurisdiction must:

(1) first consider "all the evidence" as to whether he has chief residence/permanent home in that jurisdiction;

(2) the evidence for a chief residence/permanent home must be "clear cogent and compelling"; and

(3) if that is the case, the person will also have "intended to settle permanently and indefinitely" in the jurisdiction where he has his chief residence/permanent home, unless and until something happens to make him change his mind, see *Bullock.*

DICEY

145. We add that it was part of Mr Strachan's case that his view of domicile was supported by *Dicey.* That submission had two legs. The first (in the grounds of appeal) was that in accordance with Rule (vi) of *Dicey*[6]: "Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise". For the reasons set out above, we disagree with Mr Brodsky's reading of that Rule, and with his submissions about the related discussion in *Barlow Clowes.*

146. The second (in Mr Brodsky's skeleton argument) was a passage from within the text at paragraph 6-039[7] of the 2022 edition (his emphasis):

> "It has been suggested [by Hoffmann J. in *Plummer*] that the distinction between an inhabitant and a person casually present is of limited value in cases of dual or multiple residence, as a person who retains a residence in the domicile of origin can acquire a domicile of choice in a new country only if the residence established in that country was a ''*chief* residence''[An expression used by Lord Westbury in *Udny*. The determination of a chief residence' will include an assessment of the quality of the residence: *Plummer* at p 295; *Barlow Clowes* at [103]].
>
> It is, however, submitted that questions as to the quality of residence are primarily relevant in considering whether the propositus has the *animus manendi*, the intention of permanent or indefinite residence [*Morgan*]."

[6] This Rule was number (vi) at the time *Barlow Clowes* was decided, see §106.*;* it is described in the Grounds of Appeal as "Rule 10" and has become Rule 12 in the 2022 edition.

[7] We have added the footnotes into the main text; these are shown by square brackets. We removed the full case law references as they are already contained within this decision. We also split the passage into two paragraphs.

147. We noted that the underlined final sentence, on which reliance was placed by Mr Brodsky, refers to *Morgan* rather than to *Barlow Clowes*. However, as is clear from our summary (see §71.), *Morgan* did not concern the "quality of residence" issue (the phrase is not mentioned), but rather what is required for a domicile of choice to be retained. We were therefore unable to understand the basis for the inclusion of this sentence in *Dicey*.

OUR CONCLUSION ON THIS ISSUE

148. As is clear from the foregoing, we reject Mr Brodsky's submission that a person is domiciled in a jurisdiction if he has a home in that place, and intends to end his days there. We instead agree with Mr Stone that, where a person has two homes, a domicile of choice can only be established in a jurisdiction if the person has his "chief" or "principal" home in that jurisdiction and whether or not that is the position requires consideration of all the facts.

THE STANDARD AND BURDEN OF PROOF

149. We next set out the case law on the standard and burden of proof.

The standard of proof

150. Part of Arden LJ's judgment in *Barlow Clowes* considered the standard of proof in domicile proceedings. However, some months after that case was published, the House of Lords issued *Re B* [2008] UKHL 35, in which Lord Hoffman said at [13]:

> "I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."

151. Lady Hale said at [70]:

> "Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts."

152. Lords Scott, Rodger and Walker agreed. There is therefore now no doubt that the standard of proof in these proceedings is the balance of probabilities.

The burden of proof

153. It is clear from the domicile authorities set out earlier in this judgment that the burden of proving that a person has changed his domicile rests on that person: see for example the citation from *Winans* at §52..

154. There was however some disagreement as to whether the burden was heavier where the person asserts that a domicile of choice had replaced his domicile of origin, rather than where one domicile of choice had been replaced by another.

155. In *Winans,* Lord Macnaghten held at p 290 that the character of domicile of origin "is more enduring, its hold stronger, and less easily shaken off" than domicile of choice. In *Cyganik,* Longmore LJ said "it is easier to show a change from one domicile of choice to another domicile of choice than it is to show a change to a domicile of choice from a domicile of origin",

156. Arden LJ revisited this issue in *Barlow Clowes,* disagreeing with Longmore LJ, and saying:

> "[91] …In an increasingly cosmopolitan world, where migration is not confined to higher socio-economic groups and travel and communication is much easier, it is likely that many people will be as attached to a domicile of choice they have acquired as to a domicile of origin which they enjoyed originally. The law should reflect that fact.

> [92] Secondly, it is said that as a practical matter it is easier to establish that the domicile of origin has been retained because it is associated with a person's native character and thus presumably in most cases it can be inferred that he would have wanted that domicile…
>
> [93] But that second rationale does not apply universally. The following examples spring to mind. There can be cases where the subject never had the national character of his domicile of origin or has specifically disclaimed his intention to reside in his domicile of origin or where that domicile is not relevantly distinctive…
>
> [94] It seems to me that as a general proposition the acquisition of any new domicile should in general always be treated as a serious allegation because of its serious consequences. None of the authorities cited to us preclude that approach, and such an approach ensures logical consistency between two situations where the policy interest to be protected is…the same. However, what evidence is required in a particular case will depend on the application of common sense to the particular circumstances."

157. However, in the subsequent Court of Appeal case of *Kelly,* King LJ held at [23] that domicile of origin was "more tenacious" than a domicile of choice, and did not dissent from the principle set out in *Dicey* that:

> "it is more difficult to prove that a person has abandoned his domicile of origin than to prove that he has abandoned a domicile of choice."

The view of the parties and our approach

158. Mr Brodsky invited the Tribunal to adopt the approach set out by Arden LJ; Mr Stone emphasised King LJ's reiteration of the long-standing view that a domicile of origin is "more tenacious".

159. We decided that given the facts of Mr Strachan's case, we did not need to resolve the dispute about the relative "heaviness" of the burden of proof. It is clearly right, as Arden LJ said, that the acquisition of any new domicile should "always be treated as a serious allegation because of its serious consequences", and we have taken that approach.

160. However, for completeness we confirm that we would have come to the same conclusion on Issue 3, whether or not Mr Strachan had a Scottish domicile of origin, and whether or not he had a Connecticut domicile of choice, so the relative heaviness of the burden of proof would have made no difference.

ISSUE 1: DOMICILE OF ORIGIN

161. Mr Brodsky submitted that Mr Strachan's domicile of origin was Scotland, while Mr Stone's position was that it was England. We first make some additional findings as to the law, followed by findings of fact on this issue; the parties submissions and our view.

THE LAW

162. The following propositions were not in dispute:

(1) A person's domicile of origin is, in the context of a legitimate child born during the lifetime of his father, the country in which his father was domiciled at the time of his birth, see *Dicey* at 6-026, citing *Peal v Peal* (1930) 46 T.L.R. 645 and *Grant v Grant* 1931 S.C. 238.

(2) Until a child reaches an age at which he may acquire his own domicile of choice, his domicile is that of the person on whom he is legally dependent, and it follows any change in that person's domicile, see *Re In Patten's Goods*(1860) 24 JP 150.

THE FACTS

163. Mr Strachan's father, Charles Henry Strachan ("Charles Strachan"), was born in Scotland in 1906. His parents were also born in Scotland, and they lived out their lives solely in that country

164. In 1927, at the age of 21, Charles Strachan qualified as a doctor in Aberdeen, and moved to England to become a general surgeon at Batley Hospital, West Yorkshire. He did not have or retain any property in Scotland. In the mid-1930s he became a GP and general surgeon at a practice in Oldham, Greater Manchester.

165. Mr Strachan's mother was Margaret Craig. Mr Strachan's own marriage certificate describes her as having been born in "UK", whereas the same document says his father was born in Scotland. From that distinction we have inferred his mother was born in England. However, Mr Strachan described her to HMRC in July 2018 as "Scottish"**,** and we make the further inference that she was of Scottish descent.

166. Mr Strachan's parents married in 1939; they had three children who were all born in the family home in Oldham: Jennifer in 1940; Mr Strachan on 7 April 1943; and Neil in 1945. Charles Strachan sent Mr Strachan to school at Fettes College in Edinburgh, and he cheered for Scotland (rather than England) when the two nations competed in rugby. He chose two Scots to be Mr Strachan's godparents; one of whom was his sister who had remained in Scotland.

167. Charles Strachan worked in Oldham until 1974, when he retired to Wilmslow, Cheshire. He continued to live in Wilmslow working as a locum doctor, until 1991 when he passed away. His probate certificate records that he was domiciled in England and Wales at the date of his death. He left an English Will which was written in July 1985, amended by two codicils in 1986 and 1990.

SUBMISSIONS AND DISCUSSION

168. It was common ground that Charles Strachan had a domicile of origin in Scotland, but that at some point before his death had acquired a domicile of choice in England. If he had acquired that domicile before 1964, when Mr Strachan reached the age of majority, Mr Strachan has an English domicile of origin; if he acquired it subsequently, Mr Strachan has a Scottish domicile of origin.

169. Mr Stone said that by 1964, when Mr Strachan achieved his majority, Charles Strachan:

(1) had been living in England for 37 years, and had married and had three children here;

(2) had worked consistently in England for the same length of time, practicing as a GP in Oldham for around thirty years; and

(3) owned no land or property in Scotland.

170. Mr Stone added that when Charles Strachan retired in 1974 he did not return to Scotland, but moved to Wilmslow. Although this was ten years after Mr Strachan achieved his majority, it provides further support for an earlier change of domicile: in *Groves*, Lopes LJ had said that "in order to determine a person's intention at a given time, you may regard not only conduct and acts before and at that time, but also conduct and acts after the time, assigning to such conduct and acts their relative and proper weight and cogency", see §51. above.

171. In Mr Stone's submission, there was "clear and cogent evidence" that before 1964, Charles Strachan had decided voluntarily to fix his sole residence in England and intended to

reside there for an unlimited time, and was thus domiciled in England at least by the date Mr Strachan achieved his majority (if not sooner).

172. Mr Brodsky made limited submissions, saying that it was for HMRC to show that Charles Strachan had a domicile of choice in England by 1964 and that they had "little evidence" to do so. He emphasised Charles Strachan's continuing links with Scotland, as shown by his support for that team in rugby matches, and the fact that he sent Mr Strachan to school in Edinburgh.

173. We agree with Mr Stone for the reasons he gave that Charles Strachan had an English domicile at least by the time Mr Strachan achieved his majority. On the facts, England was his "permanent and abiding home" and the place where he had "settled". Cheering for Scotland in rugby matches, and sending a child to school in Scotland, are minor factors compared to the significant points relied on by Mr Stone.

DOMICILE OF ORIGIN: CONCLUSION

174. For the reasons set out above, we decide that Mr Strachan had an English domicile of origin.

ISSUE 2: DOMICILE OF CHOICE IN CONNECTICUT

175. The next issue was whether between 1987 and 2006 Mr Strachan had a domicile of choice in Connecticut.

FINDINGS OF FACT

176. The findings of fact set out below are particularly relevant to this issue, but some are also relevant to Issues 3 and 4.

Mr Strachan's early life and studies

177. Having been born in Oldham, Mr Strachan attended primary school in England, before going to Fettes in Scotland at age 13. At the end of his secondary schooling, he spent a gap year in the Grand Cayman Island. On his return to England he studied at Christ's College, Cambridge.

178. After the end of his second year, he applied and received a Green Card; the application was sponsored by a landscape architect he had met during his gap year. Over the summer he worked in New York State for three months, followed by a US road trip, before returning to Cambridge for his final undergraduate year; he achieved a double first in History.

179. Mr Strachan then obtained a place on a Masters course at Princeton, and arrived there by ship. He was told by an immigration official that he could only enter the country if he also registered for conscription. He did so, and was classified as 1A, which meant he could be sent to Vietnam unless he was granted a deferral. However, as students were not drafted, and Mr Strachan obtained a deferral for the next two years (1965-1967) while he studied at Princeton.

First marriage, work and purchase of London property

180. Upon graduation in 1967 Mr Strachan married his first wife, Diane Shafer, the daughter of the then governor of Pennsylvania; he also joined the Ford Foundation, which sent him to Malaysia for two years. He was still classified as 1A during that period, but his role for the Ford Foundation gave him an exemption for a year, and the following year he obtained a medical exemption because of illness contracted in Malaysia. In 1969 he returned to the US and spent a year studying for a PhD at Harvard; he lived in a rented property.

181. In February 1970 his daughter Shona was born and he joined Exxon Corporation ("Exxon"). He initially worked in New York, but in 1972 moved to Texas, in 1973 to Japan

and in 1974 to Thailand, where he stayed for three years. Throughout this time he lived in rented accommodation.

182. Meanwhile, in 1971 Mr Strachan had become a US citizen. By signing the "certificate of naturalization" he confirmed he "intends to reside permanently in the United States". He subsequently obtained a US passport.

183. In 1977 Mr Strachan returned to Texas, where he continued to work for Exxon; he purchased a house in Houston where he lived until 1979. In that year he was assigned by Exxon first to Japan, where he stayed until 1982, and then to Hong Kong, where he lived until October 1983. During these periods overseas, the house in Houston was let to tenants.

184. In 1983, Mr Strachan was left money by his aunt; he used this to buy a property in Redcliffe Square, London, which he let to tenants. The Tribunal had no evidence as to the reason(s) why he had purchased a property in England, and we were unable to make a finding.

185. In 1984 Mr Strachan returned from Hong Kong to New York; he sold the property in Houston and purchased an apartment in Manhattan jointly with his first wife. However, the frequent changes of location had put pressure on his marriage**,** and in 1985 the couple separated, with Mr Strachan remaining in the New York flat. In 1986 he left Exxon and joined Johnson & Higgins, a New York insurance broker. The couple's divorce was finalised in 1987.

Mrs Strachan, Kielwasser Road and London job offer

186. Meanwhile, in 1986 Mr Strachan had met Margaret Auchincloss, the future Mrs Strachan[8], in New York, where she was living with her two children from her previous marriage, Jonathan (born in 1971) who was at boarding school, and Charlotte (born in 1974). Mrs Strachan was working for the First Boston Corporation ("First Boston").

187. On 24 December 1986, before the couple had begun a relationship, Mrs Strachan had purchased a property in Kielwasser Road, Washington, Connecticut ("Kielwasser Road"), with the purpose of using it as a weekend get away: she described Kielwasser Road in her witness statement as "a weekend house". Kielwasser Road was about two hours drive from New York, so not within commuting distance. No close family member lived in the area where the property was situated, but a schoolfriend lived in a nearby town, and Mrs Strachan was also friends with a German woman she had previously met when living in Paris.

188. In March 1987 Mr and Mrs Strachan began a relationship, and spent Easter and two subsequent weekends at Kielwasser Road; after each visit they returned to their separate apartments in New York. In May 1987, Mr Strachan proposed to Mrs Strachan. By then, he had already been offered and was about to accept a new job with Rio Tinto Zinc ("RTZ") based in London. He informed Mrs Strachan about this new job "in the next breath" after proposing to her, and told her "he really wanted to take up the offer".

189. Mrs Strachan's evidence was as follows:

> "The understanding between Ian and myself, very specifically, was that we would move to the UK to take advantage of a great job opportunity and for an adventure. Both Ian and I have a sense of adventure, and we had both lived in many different places in the world prior to meeting each other. We viewed this move very simply as a further adventure and a temporary one."

[8] For ease of reference we refer to her as Mrs Strachan throughout this decision, including in relation to the period before the marriage.

190. We accept that Mr Strachan expected the RTZ position to be "temporary"; that was consistent with the pattern of his career up to that point, which had consisted of a series of different roles in various locations.

191. Soon afterwards, Mr Strachan resigned from Johnson & Higgins, and in July he sold his flat in New York and moved into Mrs Strachan's flat. They spent two July weekends in Kielwasser Road as well as 1-8 August; they then left for a three week holiday travelling around Asia. Although Mr Strachan subsequently told HMRC that that "moved in with" Mrs Strachan at Kielwasser Road in June 1987, this was contradicted by Mrs Strachan's oral evidence at the hearing, and also by a detailed schedule of dates setting out when Mr Strachan had visited that property. We find as a fact that Mr Strachan did not "move in with" Mrs Strachan at Kielwasser Road at any point.

192. In September 1987, Mr Strachan moved to London. He made no further visits to Kielwasser Road that year.

How Mr Strachan viewed Kielwasser Road

193. Mrs Strachan's oral evidence was that because of the move to London, Kielwasser Road "took on a whole new meaning" as their "anchor"; she said their thoughts about the property "gelled" over summer 1987 before Mr Strachan left for London, and that they "realised it would be [their] home in the US" and would "retire there", adding that from Kielwasser Road they could "get to New York to visit friends" as well as go to the opera and theatre, and that "New York was where [they] were focused".

194. When challenged in cross-examination, Mrs Strachan said they "could see keeping [Kielwasser Road] for ever" and that although at Mr Strachan's then age of 44 he "did not think actively about ending his days", he thought it "could be a permanent home". She was however unable to respond when asked whether Mr Strachan thought it "would" be a permanent home.

195. In her witness statement, deposed in September 2021, Mrs Strachan said that Kielwasser Road was "our American home until we jointly bought the house in Manchester Massachusetts in May 2006", and that Kielwasser Road "would not be ideal for our retirement" because:

> "It was located in the countryside in a somewhat isolated area, two hours from the nearest large airport and far from a good hospital. Further, there was not much to do there for our children and grandchildren when they visited."

196. Mr Stone invited us to find that it was not credible that Mr Strachan had decided in the summer of 1987 that Kielwasser Road would be his "permanent home". We agree. We find as a fact that Mr Strachan had not decided, in the summer of 1987 before he left for London, that Kielwasser Road (or Connecticut) would be the place to which he would retire, or his "permanent home", for the following reasons:

(1) Mr Strachan had only been going out with Mrs Strachan since March 1987;

(2) he had already decided to move to London when he proposed to her in May 1987;

(3) the couple were not even married in the summer of 1987;

(4) he had spent only two weekends and Easter at Kielwasser Road;

(5) he had never lived in Connecticut;

(6) he had no connections or ties to Connecticut;

(7) Kielwasser Road was owned by Mrs Strachan;

(8) it was a weekend home;

(9) it was not possible to commute from there to New York where they were currently or most recently working and where they were "focused";

(10) Kielwasser Road could therefore never become the place where they lived during the week and from which they went to jobs in New York City to work; and

(11) it was not suitable as a retirement home because it was two hours from the nearest large airport and far from a good hospital.

197. We also agree with Mr Stone that Mrs Strachan's evidence on this point had been "coloured by her awareness of the legal test for the acquisition of a domicile of choice". This can be seen from:

(1) the points set out above;

(2) her statement that in the summer of 1987, they had agreed they would "retire" to Kielwasser Road, even though Mr Strachan was, as she later acknowledged in cross-examination, only 44 years old at that point, and

(3) by her reiteration of the phrase "permanent home", a term used repeatedly in the case law and in the later discussions with HMRC.

London

198. In September 1987, Mr Strachan moved to London to take up the role of Chief Financial Officer of RTZ; he became a member of the main board and a director of a number of North American subsidiaries. Soon after his arrival he moved into the property he had previously purchased in Redcliffe Square. On 28 November 1987, Mr and Mrs Strachan were married in New York. Mr Strachan gave Redcliffe Square (and not Kielwasser Road) as his address on the marriage certificate.

199. RTZ introduced Mr Strachan to Mr Clive Tulloch, a partner with Coopers & Lybrand ("C&L"), an accountancy firm which subsequently merged with Price Waterhouse to become PwC. Mr and Mrs Strachan met with Mr Tulloch, who subsequently exchanged correspondence with HMRC and asked for a domicile ruling.

200. We make the following reasonable inferences and find as facts that:

(1) Mr and Mrs Strachan knew from these discussions that a non-domiciled person was able to shelter certain income and gains from UK tax.

(2) Mr and Mrs Strachan provided the factual basis for Mr Tulloch's communications with HMRC (as that is the only way in which he could have known enough about Mr Strachan's position to ask for a domicile ruling). We further find that those facts included the following:

(a) Mr Strachan had not lived in England since 1964, some 25 years earlier, so had spent almost all his adult life outside the jurisdiction.

(b) He had become a US citizen, married there, and had a child.

(c) Mrs Strachan had a property in Connecticut in which Mr Strachan had spent time (we make no finding as to whether he disclosed that he had made only occasional weekend visits over a very short period).

(d) His daughter and Mrs Strachan's children all lived in the US.

(e) Although he had accepted a role in London, he saw this as his next career opportunity following a sequence of other roles.

201. Later that year Mr Strachan obtained a domicile ruling from HMRC ("the Domicile Ruling"), which stated that he had a domicile of choice in Connecticut**.** Neither party provided the Tribunal with a copy of the Domicile Ruling or with the background correspondence: Mr Strachan told HMRC on 31 July 2018 that he and Mrs Strachan had not retained a copy and neither had PwC. At the hearing, Mr Henrietta said he had been told by HMRC colleagues that a ruling had been given, but had not seen that ruling.

202. In January 1988, Mrs Strachan was transferred to London by her employer, First Boston; Kielwasser Road was left empty; in the whole of that year, Mr and Mrs Strachan visited the property only for five days at Easter. In 1989 Mr and Ms Strachan spent 4 days in May and 2 weeks in August at Kielwasser Road.

203. Mrs Strachan worked for First Boston for about a year, and then moved to Sotheby's to head up its captive finance company. She began letting Kielwasser Road soon afterwards, initially to friends she had met at Sotheby's. The tenants moved their own personal possessions into the property, and Mrs Strachan stored hers in in an "out of the way" closet, leaving the property furnished but containing "nothing of value". The relatively informal basis of the tenancy allowed Mr and Mrs Strachan to return to Kielwasser Road for two or three weeks in August during 1990 through to 1995. In 1991 they additionally visited for five days at Easter and for four days in October; in 1992 they were there for five days in November and in 1995 for three days in June. In 1995 or 1996, Mrs Strachan began letting Kielwasser Road via an agent to cover its costs. The tenancy agreement required the tenants to allow the owner to access the property in August each year, and Mr and Mrs Strachan subsequently only visited the property during that month.

204. Consistently with that pattern of usage, Mr Strachan told HMRC in December 2017 **(**at the beginning of the enquiry into his tax affairs) that Kielwasser Road "had been our holiday home". It remained in Mrs Strachan's ownership until she sold it in December 2006. Throughout this time, Mr Strachan continued to live in Bloomfield Terrace, and to work in London.

SUBMISSIONS AND DISCUSSION

205. Mr Brodsky asked the Tribunal to confirm that Mr Strachan had a domicile of choice in Connecticut, but he made no detailed submissions. Mr Stone said that Mr Strachan plainly did not have that domicile, either in 1987 or subsequently, given that Kielwasser Road was not owned by him; he had never lived in it other than for occasional weekends over a very short period before he left for London, and he had subsequently visited only for a few weeks each summer, with very few additional visits. As a result, said Mr Stone, Kielwasser Road was not Mr Strachan's permanent home or chief residence, and he did not regard it as such.

206. We agree with Mr Stone. Mr Strachan had plainly not fixed his "sole or chief residence" in Connecticut by the time he left for London in September 1987. His only connection with that state was Kielwasser Road, a property owned by his girlfriend and then his fiancé: he had no friends, work, or other ties in Connecticut. He made a few short visits to Kielwasser Road between March and September 1997. By May 1997, when he proposed to Mrs Strachan, he had already decided to move to London. When he sold his flat in New York. he moved into Mrs Strachan's apartment in that city, not to Kielwasser Road. We have already found as a fact that he did not at that time regard Kielwasser Road as the place to which he would retire, or as his "permanent home".

207. In the period between arriving in London and the sale of Kielwasser Road in 2006, Mr Strachan visited the property during August each year, and on a very small number of other occasions. He himself described it as "a holiday home".

208. We held at §148., having considered the case law, that where a person has more than one home, a domicile of choice can only be established if he has his "chief" or "principal" home in a jurisdiction. Mr Strachan did not have his chief or principal home in Kielwasser Road at any point. He had never "settled" there.

209. Even if our conclusions as to the law were to be wrong, and Mr Brodsky were to be correct that a person has a domicile of choice in a jurisdiction if he (a) has a home in that place, and (b) intends to end his days there, the answer would be the same. Mr Strachan never intended to "end his days" in Connecticut.

CONCLUSION ON ISSUE 2

210. For the reasons set out above, we find that Mr Strachan never had a domicile of choice in Connecticut.

ISSUE 3: WHETHER DOMICILE OF CHOICE IN MASSACHUSETTS

211. This was the main issue in dispute. We first make findings of fact, followed by the parties' submissions and our view.

FINDINGS OF FACT

212. The focus of these findings are on Issue 3, but as noted at §176., our findings on Issue 2 are also relevant.

Bloomfield Terrace and the children

213. In December 1987, Mr and Mrs Strachan purchased a property in Bloomfield Terrace, London ("Bloomfield Terrace"). Mr Strachan subsequently sold Redcliffe Square, and Mrs Strachan sold her New York apartment.

214. The couple moved into Bloomfield Terrace in May 1988; before they did so, that property was refurbished. The work included creating a study, upgrading the master bathroom, modernising the heating system, and repainting the entire house, inside and out. It also included converting rooms on the second and third floor to create bedrooms for Mr Strachan's daughter Shona and for Mrs Strachan's children Jonathan and Charlotte. Mr Strachan said in November 2018 that "as we were a newly combined family, we wanted them to know they each had their own bedroom".

215. At that time, Shona was beginning her university course in the US and Jonathan was at secondary school there; he remained at the same school when his mother moved to London, and he then went to university in the US. Both children stayed in Bloomfield Terrace when visiting their parents.

216. In the summer of 1988 Charlotte was 13. She moved into Bloomfield Terrace and attended the American School in London for the remainder of her secondary school education, so for around four years. From 1992 to 1995 she went to college in the US, returning to Bloomfield Terrace in 1995 whilst working in London, and she stayed until 1998. She thus lived with Mr and Mrs Strachan for seven of their first ten years in London.

217. In 2010-2011, the Strachans carried out a substantial renovation of Bloomfield Terrace. Mr Strachan described it as stripping the building back to its bare walls and rebuilding it "completely anew". The work included replacing the drains, repointing the exterior, insulating the building, reinforcing the floors, installing double glazing and sound-proofing, fitting a new kitchen, reconfiguring the heating and hot water systems to include an air-source heat pump, replacing the plumbing and electrical systems and repainting the entire house, inside and out**.** The Strachans also repurposed Shona's room as a second study and turned one of the top floor bedrooms into an exercise area. The total cost was £878,674,

around $1.4m. Mrs Strachan accepted in cross-examination that at the time they carried out these extensive renovations, they knew they "were going to spend several years in London".

218. When he was required to include their address on formal documents, Mr Strachan consistently stated that it was Bloomfield Terrace and/or in London: for example:

(1) In Mr and Mrs Strachan's joint 2011 IRS return, they gave Bloomfield Terrace as their "home address".

(2) Mr Strachan signed a Living Will in August 2012 in which he stated he was "residing at Bloomfield Terrace (also maintaining a residence at Manchester-by-the-Sea, MA 01944, USA)".

(3) In the same month, Mr Strachan signed a power of attorney in favour of Mrs Strachan, in which he described himself as "a local resident of London, England (also maintaining a residence in Manchester-by-the-Sea, Essex County, Massachusetts, USA)".

(4) Mr Strachan's will, signed in August 2016, began by saying in similar terms that he was "of London, United Kingdom also maintaining a residence in Manchester-by-the-Sea, Essex County. Massachusetts").

Mr Strachan's work from 1971 to 2015

219. Mr Strachan continued to work full-time for RTZ until January 1996, when he took up a role with BTR plc. After that company merged with Siebe plc in 1999 to become Invensys plc, Mr Strachan retired from full time employment, although he continued to have a part-time role with that company for some nine months.

220. Mrs Strachan's evidence, which was not challenged, was that after the merger, Mr Strachan began getting calls from head-hunters, and had serious discuss with two companies in the US and one in Canada. However, he was also offered part-time roles with "more important" English companies because he was "well-known" in London, and those roles were "more suited to him". Mr Strachan turned down the North American opportunities.

221. Also in 2000, the Strachans purchased their property in Sotogrande, see further §239. below. In cross-examination, Mrs Strachan accepted that this purchase was "only consistent with continuing to live in London", and she also accepted that they would not have spent over £200k on their Spanish property if Mr Strachan was planning to spend only a year or two in London.

222. In 1999, just before the Invensys merger, Mr Strachan had already accepted a part-time commitment as a director of Transocean Ltd. In the period after he left BTR, he took on a number of other part-time positions, serving on the boards of Instinet Group Inc, Balli plc, Reuters Group plc, Harsco Corporation, Johnson Matthey plc, Xstrata plc, Caithness Petroleum plc and Rolls Royce plc. Some but not all of those roles were concurrent. Harsco's headquarters were in Pennsylvania and Instinet's in New York, but by 2005 none of Mr Strachan's directorships were with US companies. By 2015, his only remaining role was as CEO of Transocean, a position from which he retired in May of that year.

223. It was common ground that (a) although from 2000 Mr Strachan no longer had a single full-time job, he had moved to a "portfolio career" made up of "important" directorships "with major companies and (b) these involved "a busy work schedule". The significance of his roles is illustrated by the fact that in November 2003, Mr Strachan was ranked at number 31 in The Power 100 List (of most powerful FTSE Directors) published by the Times Newspaper; in 2005, he was number 19, and in 2006 he had further risen to number 11.

224. Mr and Mrs Strachan continued to live in Bloomfield Terrace during those years; Mrs Strachan accepted that "London has been our base since 1987". Mr Strachan told HMRC in July 2017 that:

> "given the global nature of the companies with which I became involved, it made perfect sense to continue to live in London, a world financial centre in a convenient geographic location and time zone."

Mr Strachan's roles: 2016 to 2020

225. As set out above, all Mr Strachan's paid work had come to an end by 2015, when he was 72 years old. Mr Stone suggested to Mrs Strachan in cross-examination that this was an "obvious break point", and asked why they did not return to the US. Mrs Strachan said they had stayed living in London because Mr Strachan was "still full of energy" and had no hobbies other than golf, which he didn't want to play more than twice a week. She then said (the following is taken from HMRC's Note on the Facts, but we agree that it is an accurate – albeit not entirely *verbatim* – record of Mrs Strachan's evidence):

> "he saw this as an opportunity to give something back to the community at large: Learn, Earn, and Return. The question was what and where and how. He was adrift, wasn't sure what to do. He talked to all friends in America and in London and the position at Ashoka arose, actually through the husband of one of my golfing friends. He explained to Ian what it was all about: you act as a sponsor for social entrepreneurs, start-ups doing something good for society, they are matched with people who have experience, like my husband, given what he knew about strategy, corporate governance, international and corporate business. Ashoka has a network in America but he didn't know the US business scene. He knew the British and international business scene well. He made a big contribution from 2016 – it was the perfect thing for him to do. That's why we stayed."

226. Mr Stone then asked "he had been working in London for 29 odd years; given his desire to give back to the community, that was where he could be most effective?" to which Mrs Strachan said "yes". This reflected what Mr Strachan himself had said in July 2017:

> "since much of my recent business experience has been in the UK, I can offer the most value to this organisation by remaining here for the time being."

227. In July 2018 he made a similar point, saying that his "wide circle of friends and contacts in London made this the obvious place to look" for a new position.

228. The role with Ashoka was unpaid; it required a minimum commitment of three years, and an annual contribution of £8,000. Mr Strachan made that commitment and the contributions. At the end of the three year period, when Mr Strachan was 75, he made a further three year commitment, which would have taken him to summer 2022. In the same communication to HMRC dated July 2018, he said that at age 75, he was:

> "in sound mind and body and well able to make a contribution (albeit unpaid) at Ashoka, beyond what might be considered a normal retirement age…the idea of a complete retirement at this point is, for me, premature."

229. As part of his involvement with Ashoka, on 5 December 2016 he joined the board of BTB Education Ltd, and on 12 December 2016 became chairman of Vi-Ability Educational Programme; both companies were also based in London. In 2017, Mr Strachan told HMRC he expected "to be actively involved as well as financially committed to Ashoka for the next several years".

230. Meanwhile, in 2018 Mr Strachan had also taken on a new remunerated directorship with GWI UK Acquisition Company Ltd. This was a British subsidiary of a US company, but Mr Strachan's duties were carried out within the UK. Mrs Strachan agreed in cross-examination that taking on this role was only consistent with Mr Strachan's intention to remain based in London for another few years. He resigned in January 2020.

Mrs Strachan's work

231. As noted at §203., Mrs Strachan had been transferred to London by First Boston and then worked for Sotheby's. When that role came to an end in December 1994, she joined the board of trustees of a charity called "Action on Addiction": she described this as a "half-time" or even "two-thirds-time" unpaid role, with which she was "very, very involved" until she stepped down in 2006 when that charity merged with another.

Social and cultural activities in England

232. Mr and Mrs Strachan's social and leisure activities focused on the high arts, together with golf and bridge. HMRC carried out an analysis of Mr Strachan's diary for January to April 2013 ("the sample period") to identify the nature and extent of those activities. It was not suggested on behalf of Mr Strachan that the sample period was not representative, and we find that it was.

Culture

233. Mr and Mrs Strachan were afficionados of the opera, ballet, classical music and theatre. They were "friends" of the Royal Opera House and went regularly to the opera at Garsington and to performances of the Royal Ballet and the Royal College of Music. In the sample period, they visited the theatre, ballet and opera at least 10 times. They made regular donations to Garsington, ranging from £150 in 2006 to £1,175 in each of 2010 and 2011. They gave £1,000 to the Royal Ballet School in 2013 and £1,400 to the English National Ballet the following year.

Golf

234. After retiring from full-time work, Mrs Strachan developed a passion for golf and was a member of the Royal Mid Surrey Golf Club, which gave her "so much pleasure over the years" and through which she made "so many friends".

235. Mr Strachan was, at various times, a member of the New Zealand Golf Club, Denham Golf Club and Wisley Golf Club, before joining the Royal Mid Surrey Golf Club (Mrs Strachan's club) in 2018. In the sample period Mr Strachan played golf in the UK 13 times; he also participated in a golfing trip organised with a group of British friends he had made when working in Hong Kong.

Boodles

236. In 2001, Mr Strachan became a member of Boodles, a dining club in St James, Piccadilly. He served on the admissions committee for three years, and played golf with club members. He became an overseas member in 2021, the day he notified the club that his address was no longer Bloomfield Terrace but was instead in Massachusetts**.**

Bridge

237. Mrs Strachan was a keen bridge player, and encouraged Mr Strachan to play. In the sample period Mr Strachan attended weekly lessons in Fulham, and in October and November 2014 took further instruction.

Conclusion

238. Mr Stone submitted that it was clear from the above that "the Strachans led an active and full social and sporting life in London". We agree. They regularly attended world-

famous cultural venues to enjoy opera, ballet and music, they were active supporters of the related organisations, they were keen golfers, and they had a rich network of friends and contacts with whom they shared those activities. Mrs Strachan additionally played bridge on a regular and frequent basis.

Property in Spain

239. In June 2000, Mr and Mrs Strachan bought shares in Deportiva, Sotogrande SA, and in December 2000 purchased an apartment in Sotogrande. Mr Strachan explained this in his letter to HMRC in November 2018:

> "When I retired from full time work in 1999, with the prospect of more flexibility in my working schedule, we put our minds to finding a place where we could spend long weekends away from London. On the advice of European friends, we chose to look in Sotogrande, a development in southern Spain very near Gibraltar. We acquired our apartment there for £219,000 on 12 December 2000…[it] has 3 small bedrooms and two baths, a very tiny kitchen and only one common room: a living room with dining area.
>
> In Sotogrande we found not only wonderful light, warmth and very good golf, we also immersed ourselves in Spanish culture and made Spanish friends. My wife immediately set about learning Spanish and we joined two golf clubs. In the early years, we regularly visited Sotogrande 6-7 times a year for an average of 30 days per year."

240. Mr and Mrs Strachan were members of the Sotogrande and Valderrama Golf clubs until 2018, when Mrs Strachan resigned from the latter. At the end of that year, Mr Strachan told HMRC that they had been spending less time in Spain, but it was nevertheless accepted that since it had been purchased, Mr and Mrs Strachan had spent on average just under 30 days a year there.

The Massachusetts Property

241. Mrs Strachan's family have a long-standing historic connection with Manchester-by-the-sea ("Manchester") in Massachusetts. Her great-great-grandparents purchased land there in the mid 1880s so they could spend their summers by the sea. The extended Auchinloss family traditionally got together in Massachusetts for Thanksgiving and Christmas, and for some time in the summer, either in Mrs Strachan's grandmother's house or in another house nearby owned by a close relative.

242. From 1987 to 2006, Mr Strachan spent an average of six days a year in Massachusetts, staying with Mrs Strachan's grandmother. As at September 2021, eleven of Mrs Strachan's relatives owned a home in Manchester; five of those properties being main homes, and six holiday homes.

243. In May 2006, Mr and Mrs Strachan purchased a property in Masconomo Street, Manchester ("Masconomo Street") for almost $3m, which was within a five minute walk of the houses owned by Mrs Strachan's relatives. Once the purchase was completed, Mrs Strachan put Kielwasser Road on the market; the sale was completed in December 2006.

244. Mrs Strachan's evidence was that she remembered from a meeting with Mr Tulloch of C&L in 1987 that they had been advised to ensure that Kielwasser Road was only sold after a new US property had been acquired, to prevent Mr Strachan reverting to his domicile of origin. Mr Strachan similarly told HMRC on 31 July 2018 that Kielwasser Road had not been sold until after the purchase of Masconomo Street, thus "ensuring, so [he] believed, a seamless transition from one domicile to another".

Improvements to Masconomo Street

245. In 2010-11, Mr and Mrs Strachan spent over $1m renovating and improving Masconomo Street. The number of bedrooms was increased from four to seven, and the number of bathrooms from four to six; the roof was raised; air conditioning and insulation installed; heating and hot water systems upgraded and one of two staircases rebuilt. Mr Strachan described the resulting property as "a wonderful family house easily accommodating all 12 members of our nuclear family, but also a very welcoming house in which to entertain our friends, which we frequently do, and a very cosy one when we are there alone".

246. In 2015, Mr and Mrs Strachan purchased an adjoining parcel of land from a neighbour for $454,000 which gave them access to the waterfront, including a small private beach shared with only two neighbours. Mr and Mrs Strachan spent a further $120,000 "renovating this coastal wetland…and…build[ing] a boardwalk to the beach".

247. On 8 November 2018, Mr Strachan told HMRC that their "goal has been to create a very special family home…which will pass to our children, and we hope, will stay in our family for generations". Mrs Strachan's evidence was that in total, including the purchase price, Mr and Mrs Strachan had spent $4.7m on Masconomo Street, which was more than its market value. That evidence was not challenged and we accept it.

Time spent in Massachusetts

248. Mr and Mrs Strachan provided detailed diary information on which Mrs Strachan was cross-examined. On the last day of the hearing, based on that evidence, HMRC produced a schedule of dates when Mr Strachan was in Massachusetts ("the Schedule").

249. For some of those years, the dates on that Schedule are the same as those in the Statement of Facts. For others, the Schedule has fewer days. We reviewed the detailed reasons given for the reductions in days and accept them. In carrying out that review exercise we identified two further days in October 2015 when Mr Strachan was present in Massachusetts, which appeared to us to have been overlooked on the Schedule, and we have included those days in our findings below.

250. We find that between 2006 and March 2017, Mr Strachan spent the following time in Massachusetts; almost all of this was in Masconomo Street:

(1) Christmas and New Year, each year.

(2) All of August, and sometimes a day or two at the end of July, each year.

(3) In most years, the first week or so of September.

(4) In all years from 2007, an average of around three weeks between the end of May and the end of June.

251. In his own schedule provided to HMRC, Mr Strachan invariably described the summer visits as "holiday" and those in December/January as "Christmas holiday" or simply "Christmas". Mr Kniesel's oral evidence was similarly that the Strachans "took up residence in the summers and at Christmas".

252. Mr Strachan was there on a very few other dates, namely:

(1) 7-9 March 2008, to "meet with neighbours";

(2) 20-22 March 2011 to "oversee house renovations";

(3) 14-16 October 2014 to "oversee wetlands"; and

(4) 23-24 and 29-31 October 2015, to "oversee works" and "check on landscaping"

253. In oral evidence, Mrs Strachan said they were unable to go at other times because Mr Strachan was "very busy in London".

254. Taking into account all the above, on average Mr Strachan spent around 10 weeks a year in Massachusetts. In September 2017, Mr Strachan described Masconomo Street to HMRC as "our family holiday home".

255. Mr Stone submitted that Masconomo Street was "used for holidays on a regular and rigid timeframe". Mr Brodsky objected to that wording, but we agree with Mr Stone and find as a fact that Masconomo Street was used only as a holiday home. Mr Strachan regularly visited Masconomo Street for Christmas/New Year and for summer holidays. All other visits, barring the three days in March 2008, were to oversee work being carried out there. Our finding is also consistent with Mr Strachan's own description as to his use of the property.

Work in Massachusetts?

256. Mr Strachan told HMRC on 26 July 2017, in relation to his portfolio of directorships, that he could "only effectively have carried out [his] responsibilities living in London rather than in a fairly remote location such as Manchester-by-the-Sea". In relation to his role with Ashoka, he said it was "unlikely" he could have "found something in Manchester that would have been such a good fit between the needs of the NGO and my particular skills".

Activities in Massachusetts

257. When Mr and Mrs Strachan were in Masconomo Street, they engaged in the following activities:

(1) golf: in 2008, both Mr and Mrs Strachan joined the Essex County Club as full members;

(2) cycling, gardening and reading (Mr Strachan particularly enjoyed history books);

(3) boating, using a motor boat purchased by Mrs Strachan in 2009; and

(4) spending time with family members**.** In particular, they hosted their extended family at Christmas.

258. Those activities are entirely consistent with our finding that Masconomo Street was used as a holiday home.

Valuables

259. Masconomo Street was not let out when the Strachans were in London, and was thus unoccupied for most of the year. It was fully furnished, including with family portraits, and contained various items of sentimental value such as photographs and mementoes. However, the insurance information included in the Bundle shows that it contained "fine art and collectibles" totalling around $59k, of which $19k related to a single oil painting of Mr and Mrs Strachan, with two other modern paintings taken together also being valued at $19k. Rugs and tapestries made up almost all the balance of £21k.

260. In contrast, the insurance documentation relating to Bloomfield Terrace showed that it contained paintings valued over £637k and carpets valued at over £40k, as well as other valuables**.** When the Strachans left Bloomfield Terrace they sold some items by auction, and moved over £500k of paintings and other items to Massachusetts.

Donations

261. As noted at §177., Mr Strachan went to school at Fettes and to university at Christ's College, Cambridge. He retained significant ties with both institutions, played golf at Denham with the "Old Fettesians" giving the Founder's Day speech at Fettes in 2008 and

staying with the headmaster**,** and he made large donations to the school, including pledging £25,000 in two instalments in 2010 and 2011 for a new classroom block**.** He also made generous gifts to Christ's College, including £2,500 in 2010, £1,000 in 2011 and £2,000 in each of 2013, 2014 and 2015. The only bequests in his will were to Fettes and Christ's College.

262. In the period from 1 January 2012 to 31 October 2018, his total donations to UK charities were £89,317 (the great majority of these were English rather than Scottish); in the same period, he donated $57,289 to US charities, some of which were located in Massachusetts.

Medical cover

263. Until they left London, Mr and Mrs Strachan were registered with an NHS GP; Mr Strachan was additionally registered as a patient of a private GP practice. Until December 2021, they also paid for private medical insurance, which cost them around £10,000pa in 2018-19 (the only year for which we have evidence). Mr and Mrs Strachan also had travel cover as part of the household insurance for Bloomfield Terrace: Mrs Strachan's oral evidence was that "if we got ill abroad, they would pay our expenses or pay to fly us home".

264. Mrs Strachan has been registered with a GP practice in Manchester since 1977. Mr Strachan told HMRC in November 2018 that Mr Strachan had been registered since 1988, and Mrs Strachan confirmed this in her witness statement.

265. Since 2009, when Mr Strachan reached 66, he has also paid into Medicare. He told HMRC, and Mrs Strachan confirmed, that a person who delays contributing to Medicare after age 65 pays higher contributions later in life. It follows that Mr Strachan's contributions are slightly higher as the result of the one year delay to the start date. Mrs Strachan began contributing when she was 65. Their total contributions up to October 2018 were around $70,000.

266. For many years Mr and Mrs Strachan also had what Mrs Strachan called "catastrophic care" cover, generally known in the UK as "critical illness" insurance. This was to cover the medical costs if they had a serious medical emergency such as a stroke or heart attack when they were in the US. Once they were within Medicare, they stopped paying for this cover.

Family members

267. Around 2007, Mr Strachan's daughter Shona moved to New Mexico, and in 2012 she moved again to Pennsylvania, where she was still living in 2021. Mrs Strachan's daughter Charlotte has lived in New York since 2009 and her son Jonathan in Colorado since 1995. Mr Strachan told HMRC in November 2018 that he had:

> "become very close to my wife's sisters, brother and her in-laws, as well as many of her cousins, whereas in England I have only my two siblings who I rarely see, and two nieces whom I don't know well."

Legal and similar documents

268. Mr and Mrs Strachan kept their birth and marriage certificates, and other personal papers they often needed, in the safe at Bloomfield Terrace.

269. Neither Mr nor Mrs Strachan have ever made a will under English law**.** Mr Strachan made a will in New York after he and Mrs Strachan agreed to marry in 1987, but no copy of that will was in the Bundle. Mr Strachan subsequently signed the following documents, all of which have always been retained in Massachusetts by his lawyer:

(1) in August 2012, a Health Care Proxy "according to…the General Laws of Massachusetts", which gave Mrs Strachan authority to make health care decisions on his behalf should he become incapable of doing so;

(2) in the same month, a "living will" relating to end of life care, signed in the presence of his Massachusetts lawyer;

(3) in August 2016, a new will under Massachusetts law, of which only the first and last pages were included in the Bundle;

(4) in September 2018, a "Uniform Durable Power of Attorney" appointing Mrs Strachan as his attorney; this was "executed as authorised by Massachusetts law"; and

(5) in August 2021, a new will, also under Massachusetts law; all pages were included in the Bundle.

270. In all the wills executed by Mrs Strachan since 2006, she left her share in Masconomo Street to Mr Strachan. Mr Strachan's 2021 will similarly provided that Mrs Strachan will inherit Mr Strachan's share. The clause continues by saying that if Mrs Strachan were to decide to sell Masconomo Street, then "without imposing any legal obligation" she is asked to offer it to her children, Charlotte and Jonathan, at a price to be decided at her discretion, and if they accept the offer, to sell them Masconomo Street. Mr Strachan's will also states that if Mrs Strachan does not survive him, Masconomo Street is bequeathed to Charlotte and Jonathan. We make the reasonable inference that Mrs Strachan's will, of which no copy was provided to us, made similar provisions, so that both parties' intention was that Masconomo Street should pass to Mrs Strachan's children in due course.

Investments and pensions

271. Most of Mr and Mrs Strachan's investments are managed in the US by investment managers located there. In 2018 (the only year for which we had evidence), their joint holdings were valued at $15m. These include US "Investment Retirement Accounts" into which they consistently invested the maximum permitted by the US Tax Code; Mr Strachan also held shares worth £767k in three English listed companies of which he had been a director: the shareholdings originated from that time.

272. Mr Strachan has a UK state pension and a US state pension, both based on contributions made when he was working in those countries. He also has pensions from Exxon and from two other London employments. In the context of his overall wealth, his pensions are insignificant.

Mr Strachan's tax returns

273. Mr Strachan's SA returns were initially prepared by C&L, and then by PwC following the merger. In 2008, Mr Strachan became a client of Mrs Schofield, who was previously a PwC partner.

274. In all the relevant years (and, we understand, for all years before that) Mr Strachan filed his SA returns on the basis that he was not domiciled in England. His earnings from Transocean, Instinet, Harsco and Xstrata were excluded from his SA returns in reliance on his non-domicile status and on the basis that all the duties were carried out overseas. In addition, some interest and dividend income was excluded, on the basis that it arose overseas and was not remitted to the UK. For all the relevant years, he paid the remittance basis charge.

275. For the tax year 2016-17 (ie, the year following the relevant years), Mr Strachan did not claim the remittance basis, and instead paid tax on his worldwide income on an arising basis.

The HMRC enquiry and assessments

276. Mr Strachan filed his 2015-16 SA return on 11 July 2016. On 7 June 2017, Mr Hawthorne, an HMRC Officer, opened an enquiry into that return under TMA s 9A. On 3 July 2017, Mrs Schofield replied, attaching a personal statement from Mr Strachan. Correspondence continued, and on 27 February 2018, Mrs Schofield provided details of the income which would have been charged to UK tax were Mr Strachan to be domiciled in England.

277. On 9 July 2019, based on those figures, HMRC issued the assessments; these were for the amounts set out below:

Year	**Type of decision**	**Amount charged**
2011-12	Assessment	£52,320.99
2012-13	Assessment	£46,753.16
2013-14	Assessment	£67,275.43
2014-15	Assessment	£26,702.38
2015-16	Closure notice	£227,355.33
		£420,407.29

278. On 26 July 2019, Addleshaw Goddard appealed the assessments on behalf of Mr Strachan; on 27 September 2019, the firm asked for a statutory review; after an extension of time was agreed, the HMRC Review Officer, Mr Agg, upheld the assessments on 25 November 2019. Mr Strachan's appeal was notified to the Tribunal on 5 December 2019.

Mr Strachan's illness and leaving London

279. On 3 July 2020, Mr Strachan was diagnosed with Alzheimer's disease by his neurologist in London. As a result, he resigned from Ashoka before the end of his second three year term. In May 2021**,** Bloomfield Terrace was put on the market. Mrs Strachan accepted in cross-examination that "the trigger" for instigating the sale was Mr Strachan's health**.**

280. In July 2021, Mr and Mrs Strachan began to rent a specialist apartment in Lexington, Massachusetts; this is on a campus which also has assisted living facilities for when they are needed. The sale of Bloomfield Terrace was completed on 13 December 2021, for around £5.5m

281. Mr and Mrs Strachan left London on December 18, 2021 and Mr Strachan moved into the apartment in Lexington in March 2022. Masconomo Street has been retained and Mr and Mrs Strachan spend part of each week there, and the rest of the time in Lexington.

Expressions of intention

282. We next make findings of fact about Mr Strachan's expressed intentions. We consider the weight to be given to these at §293.ff.

Mr Strachan's expressed intentions

283. Mr Strachan made the following statements during the HMRC enquiry:

(1) In July 2017 he said that when he and Mrs Strachan moved to London to take up the RTZ job, they considered this to be "a temporary relocation" and had "agreed" with each other that they would "return to the United States at the end of [his] working life".

(2) In the same letter, Mr Strachan explained that "since much of my recent business experience has been in the UK, I can offer the most value to this organisation [Ashoka] by remaining here for the time being", but continued "it is still my absolute intention to return permanently to Massachusetts at the end of my working life, which is likely to be within the next five years".

(3) In September 2017, he told HMRC that he and Mrs Strachan "intend to make [Masconomo Street] our permanent, principal home at the end of my working life".

(4) In December 2017, he said:

> "I first made my decision to reside permanently and indefinitely in Massachusetts in the autumn of 1999. By that time, since becoming engaged to my current wife 12 years before, I had visited that state already 19 times for personal reasons…The following events caused me to choose Massachusetts as my permanent home: at the end of 1998 I had resigned my position as CEO of BTR…by the Autumn of 1999 I had decided not to look for a full time position…"

(5) He continued by saying that at Christmas 1999 he and Mrs Strachan had spent a day with an estate agent looking at properties in Massachusetts, but "did not see anything that suited us" and they had later contemplated purchasing Mrs Strachan's grandmother's house, but rejected that option as the house needed "a total renovation and was in any event much too large".

(6) On 31 July 2018, Mr Strachan told HMRC that his and Mrs Strachan's intention was "to sell our London house and move back to Manchester in the summer of 2022".

(7) On 8 November 2018, he told HMRC that they could have rented a similar property in Massachusetts for their visits there, and this would have cost around $50k, about half the cost of owning and operating Masconomo Street; in addition, they were bearing the opportunity cost of tying up so much capital in that property. He concluded by saying: "it is difficult to imagine any reason to spend this extra money, or to incur the usual headaches of home ownership, other than our desire to own the home to which we will retire".

(8) In the same letter, in a passage to which reference has already been made at §267., Mr Strachan said that during his life:

> "every decision made and every action taken, from the age of 22 and continuing through to the present day point to an unwavering intention to end my days in the United States, and, since 2006, specifically in Manchester by the Sea…I will end my days in that house. Why? Because my daughter, step-children and all my grandchildren live in the United States. Because I have become very close to my wife's sisters, brother and her in-laws, as well as many of her cousins, whereas in England I have only my two siblings who I rarely see, and two nieces whom I don't know well. And finally, because I gave my heart to America when I was 22 years old."

Mrs Strachan's evidence

284. Mrs Strachan signed her first witness statement on 24 September 2021, after Mr Strachan's diagnosis, but before they sold Bloomfield Terrace and moved to Massachusetts. Ms Strachan said six times over 63 paragraphs that Massachusetts was Mr Strachan's

"permanent home". Some of those statements are included in the evidence we have set out below; the others are essentially repetitions:

(1) By May 1987, the month they were engaged, Mrs Strachan "knew that he considered himself more American than British and that he intended to end his days in the United States" and "from as long as I have known Ian, he has always made his intention to see out his life in the States very clear. If you had asked 'in which state?' it would without any doubt whatsoever have been Massachusetts from 2006".

(2) From the time of the move to London, "it was always our intention to return to the USA at some point in the future, whether to take up a different employment opportunity or, if not that, then to retire and end our days near our children in the United States. Ian's work has meant that we have stayed based in London for many more years than we had anticipated in 1987, but that has never affected our intention to return home to the United States, and specifically - since 2006 - to Manchester Massachusetts, for our later years".

(3) "From 2006, the intention has always been that Massachusetts would be our permanent home, where we would end our days, and that intention remains as strong as ever" and "From the moment we saw this house [Masconomo Street], we agreed that this was where we would make our permanent home and where we would end our days".

(4) Masconomo Street was suitable for retirement as it is "located a mere 50 minutes from both a major airport and from Boston, a leading medical hub".

(5) Given her family connections with Manchester "it would have been unthinkable for me to even contemplate ending my days far from my family. Ian has become a fully integrated member of my extended family and, since our marriage, has happily agreed that we would end our days in the midst of this large and welcoming clan".

(6) Under her will, she had left Mr Strachan her share in Masconomo Street because "it is his specific intention to end his days in this house, even if I were to predecease him".

(7) Even if one of them predeceased the other "that would not affect where either of us would choose to live out our days" because "we are both Americans first and foremost and America is where our family is".

285. Mrs Strachan also said, in relation to her understanding of the position at the time of their engagement in 1987:

> "…if I had had any sense that Ian viewed his potential move to London as 'going home' or as a permanent resettlement I would not have married him. Since my separation from my first husband in 1977, when he and I moved to cities that were nearly 3,000 miles apart, I had been the one point of unbroken stability for my two children whose lives had been severely disrupted by their parents' separation. It would have been completely unthinkable for me to disrupt those lives again by essentially abandoning them to move to another country."

286. She added that Masconomo Street is worth less than the money they have invested in it, and they would not have done this had they not been planning to end their days there.

287. Her oral evidence was that Mr Strachan "always intended to end his days" in the US, and that it only takes "a small leap" to find that "he settled on Massachusetts in 2006 or at least 2010", and that in doing so "he was playing out the plan he had for his entire life".

288. However, in cross-examination, she gave the following responses:

(1) When asked about their investment in the Spanish property (ownership of which was only consistent with them remaining in London) and about Mr Strachan's roles in London, she said they had agreed that "for as long as he was making a contribution to British business we would stay in Britain".

(2) When asked about Mr Strachan's statement to HMRC in 2017 that "we intend to make [Masconomo Street] our permanent, principal home at the end of my working life", Mrs Strachan agreed that the property had only become their "principal home" in 2021 after they had left London following his diagnosis, but reiterated that Masconomo Street had been his "permanent home" since 2006.

(3) When asked why they had not taken the opportunity to move back to Massachusetts in 2016, when all Mr Strachan's remunerated roles had come to an end and he was already 72, Mrs Strachan said[9]:

> "The initial three-year commitment [to Ashoka] would cover him to 2019 – we knew that would keep us in London until he was at least 76. When that ended in 2019, he decided to extend that period: he loved what he was doing.
>
> I am not sure why you feel it so important that we move from the UK when my husband was vigorous, active, eager to make a contribution. If we had moved to Massachusetts at that time [in 2016], he would have had nothing to do except play golf in summer and read history books in the winter. I don't know the rush to take a human being out of the country; he was still able to make a contribution to this country, thank you very much. I am not sure why you are trying to push my husband out of the country when he is still making a contribution, and go somewhere where he cannot."

Mr Kniesel's evidence

289. Mr Kniesel worked in London from 1986 until 1992, and he and his wife became friends with the Strachans soon after their arrival in 1987. Mr and Mrs Kniesel also have a house in Manchester; since 1995 they have lived in that house for around four months of the year. Mr Kniesel has therefore been a neighbour of Mr and Mrs Strachan since 2006, when they bought Masconomo Street.

290. Mr Kniesel told the Tribunal that he knows Mrs Strachan "very well"; he described her as "intelligent and very strong willed". He said that given her family history and her connections to Manchester, "there was never any real room for doubt as to where her and Ian would end up and certainly no doubt once they bought the house in Manchester together in 2006", because of:

(1) the family history;

(2) what they said to the Kniesels over the years; and

(3) what he described as "Peggy's nature". We understand this to refer to Mrs Strachan being "strong-willed".

291. In his witness statement, Mr Kniesel said he was "absolutely certain" both Mr and Mrs Strachan had told him that "Manchester was to be their permanent home", and that his "best recollection" was that:

> "we had some of those conversations around 2006 when they were buying the Manchester home and those conversations became more explicit and

[9] The text is taken from HMRC's Note on the Facts, but we agree that it is an accurate - albeit not entirely verbatim - record of what Mrs Strachan said.

> frequent around the time that Peggy and Ian did a lot of work on the Manchester property, two or three years later."

292. He said that the amount of time, effort and money they had spent on Masconomo Street was "only consistent with seeing that property as a permanent home and ending their days there". Under cross-examination, he agreed that he had no knowledge of the renovations carried out on Bloomfield Terrace, and did not know that those improvements had cost more than the amount spent on Masconomo Street. He also agreed that he was not aware that Mr Strachan's commitment to Ashoka or that this required residence in the UK.

Finding of fact about intention

293. Mr Strachan therefore repeatedly told HMRC that he planned to end his days in Massachusetts, and both Mrs Strachan and Mr Kniesel provided supporting evidence to the same effect.

294. However, the case law says that that the person's own declarations:

(1) "must be treated with great caution" (Scarman J in *Re Fuld*);

(2) should not be relied on "unless corroborated by action consistent with the declaration" (Arden LJ in *Barlow Clowes*); and

(3) "must further be fortified and carried into effect by conduct and action consistent with the declared expression" (Lord Buckmaster in *Ross*); albeit that

(4) it would be "too cynical" to disregard them altogether (Scarman J in *Re Fuld*).

295. We find that the following facts are consistent Mr Strachan having an intention to "end his days" in Massachusetts rather than in England:

(1) he did not make an English will, or finalise any other end-of-life related documents under English law; and

(2) his investments were all managed in Massachusetts (other than three shareholdings which related to his English directorships).

296. The following facts are consistent with Mr Strachan having an intention to end his days in the US rather than in England, and that as his only home in the US was in Massachusetts, we make the reasonable inference that these facts too are consistent with Mr Strachan having an intention to end his days in that jurisdiction:

(1) Mr Strachan had chosen to be a US citizen; by signing the "certificate of naturalization" he confirmed he "intends to reside permanently in the United States". ;

(2) Mrs Strachan wanted them to end their days in the US and she is "strong willed"; and

(3) his daughter and step children live in the US; he has a good relationship with Mrs Strachan's family, many of whom live in or regularly visit Massachusetts, and he is not particularly close to his siblings and nieces who live in England.

297. The following facts are neutral:

(1) Mr Strachan has a comfortable home in Massachusetts (although that fact is also consistent with him continuing to use the home only for holidays).

(2) Mr and Mrs Strachan paid into Medicare (although that is also consistent with the need to cover the risk of a medical emergency when on holiday in Massachusetts).

(3) Mr and Mrs Strachan spent a lot of money on Masconomo Street, more than its current market value (although that fact is also consistent with their unchallenged

intention to leave that property to Mrs Strachan's children, located as it is on land historically connected to her families' origins. As Mr Strachan said, they hoped it would "stay in our family for generations". It thus has a special character).

298. However, we also find that Mr Strachan did not intend to retire, but instead to continue making a "contribution" by working in London, whether on a paid or unpaid basis; he only intended to "end his days" in Massachusetts if he was no longer able to make a continuing contribution in London. We come to that finding because:

(1) In 2000, when Mr Strachan was 57, he could have retired to Masconomo Street after his last full time role came to an end following the merger of BTR and Siebe, but:

(a) he rejected offers from US companies because he could not obtain the same work opportunities there: better quality London-based opportunities were available because he was "well-known" in the UK, and the roles he was offered were "more suited to him" than anything available in North America;

(b) he plainly intended to continue living in London, because in that same year the Strachans spent over £200k on a property in Spain; that purchase only made sense because they could reach Sotogrande easily from London. It was, as Mr Strachan explained to HMRC, a place where they could spend "long weekends away from London"; and

(c) Mrs Strachan was heavily involved in her work for Action on Addiction, which did not end for another six years.

(2) In 2015, Mr Strachan was 72 and his part-time remunerated roles had come to an end. He again could have retired to Masconomo Street. But he did not do so, and plainly did not want to do so. Mrs Strachan described him as "still full of energy" but as "adrift" until he found Ashoka, where he could make "a big contribution". He could not carry out a similar role in Massachusetts because he "didn't know the US business scene", while his "wide circle of friends and contacts in London made this the obvious place to look" for a new position and it was "unlikely" that he could have "found something in Manchester that would have been such a good fit between the needs of the NGO and [his] particular skills".

(3) In 2019, when Mr Strachan was 75, and his initial three year commitment with Ashoka had come to an end, he once again could have retired to Masconomo Street. However, he said this idea was "premature" given that he was "sound mind and body" and still "well able to make a contribution" to Ashoka, and could "offer the most value" to that organisation by remaining in London. Mrs Strachan said they stayed because "he loved what he was doing" and was "vigorous, active, eager to make a contribution" and did not want to retire to Masconomo Street where (in her words) he "would have had nothing to do except play golf in summer and read history books in the winter".

299. Mr Brodsky invited us to find that Mr Strachan would have retired to Masconomo Street in 2022 at the end of his second two year term with Ashoka. We disagree. Such a finding would be inconsistent with those in the previous two paragraphs. On the basis of Mr Strachan's actions (see the case law citations at §294.) we find on the balance of probabilities that had Mr Strachan remained "sound in mind and body" and still "able to make a contribution" he would have stayed in London after 2022.

300. We further find that Mr Strachan intended only to leave London and "end his days" in Massachusetts if or when he was unable to continue with his life in London, in particular, if or when was unable to use his skills and experience there in paid or unpaid roles. That conclusion is consistent with Mrs Strachan's evidence that they had agreed that "for as long

as he was making a contribution to British business [they] would stay in Britain", and his statement that he and Mrs Strachan had "agreed" they would "return to the United States at the end of [his] working life".

301. Mr Strachan was already 75 when he made his second three year commitment to Ashoka, it was thus entirely possible that he would continue to live in London until he passed away as the result of a sudden traumatic event such as a heart attack or stroke, and would thus never "end his days" in Massachusetts. However, Mr Strachan's diagnosis meant he was no longer able to live the life he loved in London, and he moved to Massachusetts, where he is likely to "end his days" in Lexington, given the facilities for assisted living, rather than in Masconomo Street.

302. In *Re Grove,* Lopes LJ said (in a passage later adopted by Lewison J in *Gaines-Cooper*):

> "in order to determine a person's intention at a given time, you may regard not only conduct and acts before and at that time, but also conduct and acts after the time, assigning to such conduct and acts their relative and proper weight and cogency."

303. We have given the facts that Mr Strachan has now left London and will end his days in Massachusetts, their "proper weight and cogency" relative to the other facts we have found. Mr Strachan only moved in 2020, as the result of an illness which was not present or envisaged during the relevant years, which ended four years previously.

304. Our findings at §298. to §300. are also consistent with the following earlier findings:

(1) Mr and Mrs Strachan valued their highly enjoyable social life in London, a location which was rich in world-class cultural events such as opera, ballet, music and theatre; these would be unavailable were they to live in Masconomo Street (unless they visited New York or another metropolis).

(2) Mr Strachan had a close network of friends including those at Boodles and those with whom he played golf.

(3) He retained close connections with his school and university, visiting and making generous donations.

(4) Mr and Mrs Strachan supported English charities to a greater extent than those in Massachusetts, indicating their level of involvement in the life of the country.

(5) Mr Strachan was well known and had a reputation in England, but not in the US, where he "didn't know the US business scene".

(6) Mr and Mrs Strachan visited their holiday home in Spain 6-7 times a year for an average of 30 days per year; this was easily accomplished from London and was "only consistent with continuing to live [there]",

(7) Mr and Mrs Strachan invested over $1.4m in Bloomfield Terrace in 2010, when Mr Strachan was already 67; as Mrs Strachan accepted, that level of expenditure showed that they were planning on a shared future in that property. It was also around 40% more than they had spent on Masconomo Street.

305. For completeness, we do not accept any of the following as being correct:

(1) Mr Strachan's statement that he had decided in 1999 to reside permanently and indefinitely in Massachusetts. That statement is inconsistent with his other evidence that he formed the intention in 2006 when Masconomo Street was purchased, and with his claimed domicile of choice in Connecticut.

(2) Mrs Strachan's statement that she was bequeathing her share of Masconomo Street to Mr Strachan because he intended to end his days there. Mr and Mrs Strachan left their share to each other, as is normal with married couples who own a home as tenants in common, with the expressed wish that the survivor pass the property to Mrs Strachan's children on the second death. It is clear from other parts of the evidence that their joint intention was that the property remain within Mrs Strachan's family. It was thus irrelevant whether or not Mr Strachan would end his days there.

Overall finding on intention

306. As set out above, we find as facts that Mr Strachan intended to stay in London for as long as he was sound in mind and body, able to enjoy his life there and make a contribution based on his skills and experience. If, but only if, he became unable to live that life, he intended to end his days in Massachusetts.

THE CHIEF RESIDENCE

307. As is clear from the section on the legal principles (see §33.ff), we did not accept Mr Brodsky's submission that if a person intended to end his days in one of two jurisdictions in which he had homes, that place was his "chief residence". We instead agreed with Mr Stone that where a person has two homes, a domicile of choice can only be established in a jurisdiction if the person has his "chief" or "principal" home in that jurisdiction, and that this requires the following approach:

(1) carefully evaluate all the facts (Nourse J in *Portland*; Arden LJ in *Barlow Clowes*; King LJ in *Kelly*);

(2) recognise that a finding that a jurisdiction is a domicile of choice requires "clear cogent and compelling evidence (Longmore LJ in *Cyganik,* reaffirmed by King LJ in *Kelly*); and

(3) assess "the quality" or "the character of his residence" in each jurisdiction on the basis of the factual findings (Arden LJ in *Barlow Clowes* and Lewison J in *Gaines-Cooper*).

308. For the following reasons, we agree with Mr Stone that in all the relevant years, Mr Strachan did not have his chief residence/principal home in Massachusetts:

(1) Mr Strachan spent the greater part of each year in London, and only some ten weeks a year in Massachusetts.

(2) Although he visited Masconomo Street regularly, this was only for holidays or (rarely) to supervise improvements.

(3) Mr Strachan's work, which was of vital importance to him, and without which he was "adrift", could only be carried out from London: he told HMRC in July 2017 that he could "only effectively have carried out [his] responsibilities living in London rather than in a fairly remote location such as Manchester-by-the-Sea", and that "given the global nature of the companies with which I became involved, it made perfect sense to continue to live in London, a world financial centre in a convenient geographic location and time zone".

(4) This remained the case when Mr Strachan moved to an unpaid but still demanding role with Ashoka in 2016: he told HMRC that London was "the obvious place to look" for a new position; it was "unlikely" that he could have "found something in Manchester that would have been such a good fit between the needs of the NGO and my particular skills"; and he could "offer the most value" to that organisation by remaining in London".

(5) Mr and Mrs Strachan refurbished Bloomfield Terrace before they moved in, creating a study, modernising the heating system, and repainting the entire house, inside and out, and providing a bedroom for each child of their "newly combined family"; they invested a further $1.4m in improving the property in 2010, which involved stripping the building back to its bare walls and rebuilding it "completely anew". This was around 40% more than they spent on refurbishing Masconomo Street.

(6) Mr Strachan gave Bloomfield Terrace as his home address on official documents, including his IRS return, his wills, his power of attorney and his living will.

(7) London was the centre of their active social, cultural and sporting life. Although they played golf in Massachusetts and had friends there, it was in London that they were able to visit the Royal Ballet, the Royal Opera House, and similar venues to enjoy the world-class performances which were important to them and which they regularly attended. Mrs Strachan said that in Masconomo Street Mr Strachan had "nothing to do except play golf in summer and read history books in the winter".

(8) In the period from 1 January 2012 to 31 October 2018, his total donations to UK (mostly English) charities were £89,317. In the same period, he donated $57,289 to US charities, only some of which were located in Massachusetts.

(9) Mr and Mrs Strachan kept their most valuable possessions in Bloomfield Terrace, with the paintings alone valued at over £637k, compared to a total valuation for collectibles in Masconomo Street of $59k.

(10) They kept their birth and marriage certificates, and other personal papers they often needed, in the safe at Bloomfield Terrace.

(11) Mrs Strachan accepted in cross-examination that during the relevant years, their "principal home" was in London.

(12) Mr Brodsky also accepted in his skeleton argument that "Mr Strachan was primarily based in London at that time and it was his 'main home'", or in other words, "his primary base, where he spent the most time".

(13) We also took into account Mr Strachan's intentions. Mr Strachan intended to stay in London for as long as he was sound in mind and body, so as to be able to enjoy his life there and make a contribution based on his skills and experience. He would only leave London and move to Massachusetts if that position changed. This only happened more than four years after the end of the relevant years, when Mr and Mrs Strachan sold Bloomfield Terrace and left England; they now live only in Massachusetts.

309. In our judgment, the evidence overwhelmingly leads to the conclusion that during the relevant years, Mr Strachan did not have his chief residence or principal home in Massachusetts. He thus retained his English domicile of origin and did not have a domicile of choice.

THE POSITION SUBSEQUENTLY

310. There was some discussion between the parties about the position following the relevant years, and in particular whether Mr Strachan was domiciled in Massachusetts from December 2021, when he left London.

311. We decline to make a finding on that issue. It was not before us to decide; our jurisdiction is to uphold or set aside HMRC's decisions on the assessments. In addition, a finding about actions taken by Mr Strachan after his diagnosis may require evidence on capacity, and there was no such evidence before us.

CONCLUSION ON ISSUE 3

312. For the reasons set out above, we find that Mr Strachan did not have a domicile of choice in Massachusetts in the relevant years. We thus dismiss his appeal against the assessments for 2013-14 through to 2015-16. However, in relation to the two earlier assessments, we have to consider whether they were made within the statutory time limits: that is Issue 4.

ISSUE 4: THE TIME LIMITS

313. We first set out the facts relevant to this issue, some of which repeat findings made earlier in this judgment which are included here for ease of reference. In addition, we have relied on findings made in relation to Issues 1-3 which we have not thought necessary to repeat.

314. The facts are followed by the legislation, the parties' submissions on carelessness, causation, and the burden of proof, together with our view on each.

THE FACTS

315. In the autumn of 1987, just after Mr Strachan had arrived in London, he and Mrs Strachan met with Mr Tulloch, a partner with C&L. We made related findings at §200..

316. Following an exchange of correspondence with HMRC, Mr Tulloch obtained the Domicile Ruling, which said that Mr Strachan had a domicile of choice in Connecticut**.** The Tribunal was not provided with a copy of that Ruling or with the background correspondence by either party. On December 18 2017, Mrs Schofield told Mr Henrietta that:

> "Mr Strachan no longer has copies of the Coopers and Lybrand submission to HMRC or HMRC's answer, but these might be in your files. He did ask Coopers and Lybrand (now PwC) to search their archives but their search has proved fruitless…"

317. We inferred from Mrs Schofield's letter that she also did not have a copy of the Domicile Ruling. At the hearing, Mr Henrietta said he had been told by HMRC colleagues that a ruling had been given, but had not seen a copy.

318. Mr Strachan's SA returns were initially prepared by C&L and subsequently by PwC. In May 2006, Mr and Mrs Strachan purchased Masconomo Street; after the purchase Mrs Strachan put Kielwasser Road on the market, and it was sold in December 2006. Mr Strachan told HMRC on 31 July 2018 that Kielwasser Road was not sold until the winter of 2007 "ensuring, so I believed, a seamless transition from one domicile to another". Mrs Strachan said she remembered from a meeting with Mr Tulloch in 1987 that they had been advised to ensure that Kielwasser Road was only sold after a new US property had been acquired, to prevent Mr Strachan reverting to his domicile of origin.

319. Neither Mr nor Mrs Strachan said they had checked the Domicile Ruling or the related correspondence when they carried out those transactions, and we infer from the language of their evidence (Mrs Strachan "remembered" and Mr Strachan "believed") that they instead relied on their recollection. They also did not ask PwC for advice: Mr Strachan said only that the firm was aware of the purchase and sale transactions, and he "assumed" they would have told him if "those transactions raised domicile issues"**.**

320. In 2008, because PwC had become "too expensive", Mr Strachan transferred responsibility for preparing and submitting his SA returns to Mrs Schofield, who had previously been a PwC partner. Mrs Strachan confirmed under cross-examination that they had not asked her for advice on domicile when she took over the work, and that they had instructed her to complete the return on the basis that Mr Strachan was domiciled in

Massachusetts. Each year, Mrs Strachan provided the information to Mrs Schofield and she completed Mr Strachan's SA return**.**

321. For all the relevant years, his return was filed on the basis that he was not domiciled in England and he paid the remittance basis charge. His earnings from Transocean, Instinet, Harsco and Xstrata were excluded on the basis that (a) he was non-domiciled and (b) all the duties were carried out overseas**.** Some interest and dividend income was also excluded on the basis that it arose overseas and was not remitted to the UK.

322. On 27 February 2018, Mr Strachan confirmed to Mr Henrietta that he had not sought any professional advice on his domicile since his meeting with Mr Tulloch in 1987. Mrs Strachan said they had both "assumed" that because HMRC had agreed Mr Strachan was non-domiciled in England in 1987, he was also not domiciled here in 2006. She was asked during cross-examination whether they understood this technical area of tax law, and she replied "probably not".

323. At some point before 27 February 2018, Addleshaw Goddard instructed Michael Flesch KC on behalf of Mr Strachan. Mr Flesch wrote a letter to HMRC setting out his opinion, although this was not included in the Bundle. On 26 July 2018 a conference took place in Chambers with Mr and Mrs Strachan, Mr Alasdair Simpson of Addleshaw Goddard, Mr Henrietta and two other HMRC officers. During the conference, Mr Flesch said that in his opinion, Mr Strachan was domiciled in Massachusetts. He referred in particular to *Barlow Clowes* at [103]-[104], the first two of the "key passages" relied on by Mr Brodsky in this appeal, see §126.. He also referred to one of the two passages from the 2006 edition of *Dicey* which was amplified by Arden LJ in *Barlow Clowes,* see §106. and our discussion at §145.ff.

THE LEGISLATION

324. We next set out the legislation relevant to discovery assessments, time limits and carelessness.

The discovery provisions

325. The assessments for 2011-12 through to 2014-15 were made under TMA s 29. So far as relevant to this case, that section provides:

> "(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment
>
> > (a) that an amount of income tax or capital gains tax ought to have been assessed but has not been assessed…
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax
>
> (2) …
>
> (3) Where the taxpayer has made and delivered a return under section 8… of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above
>
> > (a) in respect of the year of assessment mentioned in that subsection; and
> >
> > (b) in the same capacity as that in which he made and delivered the return,
>
> unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly…by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8…of this Act in respect of the relevant year of assessment; …

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above…."

326. HMRC's Statement of Case highlighted both the first and the second condition, and from this we understand their position to be that both are satisfied; the first because the returns were completed carelessly by Mr Strachan or on his behalf, and the second because the returns did not include any explanation as to the reasons why he had filed his returns on the basis that he was non-domiciled. We return to the issue of carelessness below.

The time limit provisions

327. For the discovery assessments to be valid, they had to be issued within the relevant time limits. TMA s 34 is headed "Ordinary time limit of four years", and subsection 1 provides:

"Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates."

328. HMRC issued the assessments on 9 July 2019, so only that for 2015-16 was made within that four year time limit.

329. FA No 2, Sch 18 is headed "Requirement to correct certain offshore tax non-compliance". Para 9(2) of that Schedule provides:

"The tax non-compliance involves an offshore matter' if the potential loss of revenue is charged on or by reference to

(a) income arising from a source in a territory outside the UK,

(b) assets situated or held in a territory outside the UK,

(c) activities carried on wholly or mainly in a territory outside the UK, or

(d) anything having effect as if it were income, assets or activities of a kind described above."

330. It was common ground that if Mr Strachan were domiciled in the UK, para 9(2) would be engaged. Para 26 then provides:

"(1) This paragraph applies where

(a) at the end of the tax year 2016-17 a person has relevant offshore tax non-compliance to correct, and

(b) the last day on which it would (disregarding this paragraph) be lawful for HMRC to assess the person to any offshore tax falls within the period beginning with 6 April 2017 and ending with 4 April 2021.

(2) The period in which it is lawful for HMRC to assess the person to the offshore tax is extended by virtue of this paragraph to end with 5 April 2021.

> (3) In this paragraph 'offshore tax', in relation to any relevant offshore tax non-compliance, means tax corresponding to the offshore PLR in respect of the non-compliance."

331. In other words, if the time limit would otherwise fall in the period 6 April 2017 to 5 April 2021, it is extended to 5 April 2021 if the assessment involves an offshore matter.

332. The ordinary four year time limits for the tax years 2013-14 and 2014-15 would be 5 April 2018 and 5 April 2019. Both dates are within the period 6 April 2017 to 5 April 2021, and the time limit for both years was therefore extended to 5 April 2021. The parties were in agreement as to the meaning of the RTC legislation and its application to those two years.

333. However, the assessments for 2011-12 and 2012-13 were in dispute. The four year time limits for those years were 5 April 2016 and 5 April 2017, so neither was within the period 6 April 2017 to 5 April 2021 set out in the RTC legislation. HMRC could therefore only make a valid discovery assessment in relation to those two years if the six year time limit in TMA s 36 applied, instead of the ordinary four year time limit.

334. TMA s 36 includes the following provisions:

> "(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates, (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).
>
> (1A) …
>
> (1B) In subsections (1) and (1A), references to a loss brought about by the person who is the subject of the assessment include a loss brought about by another person acting on behalf of that person."

335. If TMA s 36(1) applied, the time limit for assessing 2011-12 would be 5 April 2018, and the time limit for assessing 2012-13 would be 5 April 2019. Both dates would then fall within the period 6 April 2017 to 5 April 2021 set out in the RTC provisions, and the deadline for assessing both years would also be 5 April 2021.

336. In Mr Strachan's case, the assessments for 2011-12 and 2012-13 were issued on 9 July 2019, well before that extended 5 April 2021 deadline. The issue was therefore whether TMA s 36 applied.

WHETHER CARELESS

337. The first question was thus whether the loss of tax had been brought about "carelessly" by Mr Strachan.

338. TMA s 118(5) provides that:

> "For the purposes of this Act a loss of tax or a situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation."

339. In *Atherton v HMRC* [2019] UKUT 41 (TCC) ("*Atherton*"), the UT (Fancourt J and Judge Thomas Scott) said at [37]:

> "The reasonable care which should be taken by a taxpayer is assessed by reference to a prudent and reasonable taxpayer in the position of the taxpayer in question."

340. It was common ground that HMRC had the burden of proving that Mr Strachan had acted carelessly. Mr Stone submitted that the prudent and reasonable taxpayer in Mr Strachan's position would have taken advice on his domicile position and not simply

assumed, on the basis of a ruling obtained in 1987 in relation to Connecticut, that over 25 years later he was domiciled in Massachusetts, a different US state. He submitted that Mr Strachan had failed to act as the prudent and reasonable taxpayer in his position would have done, and so had been careless.

341. Mr Brodsky responded by saying that Mr Strachan had relied on the advice he had been given by C&L in 1987 and on the Domicile Ruling, and the reasonable taxpayer in his position would not have considered it necessary to obtain any further advice, but would have continued to file his SA returns on the basis that he remained non-domiciled.

342. We began by establishing the characteristics of "the reasonable person in the position of Mr Strachan". In our view, that person would have the following characteristics:

(1) He would be intelligent: Mr Strachan obtained a double first from Cambridge University.

(2) He would be financially aware: Mr Strachan worked in the City, including as RTZ's Chief Financial Officer.

(3) He would not have been a tax expert, and would not have understand all the technicalities of domicile law: Mrs Strachan said that this was "probably" the case for both her and Mr Strachan, see §323..

(4) However, he would nevertheless have understood that in 1987, HMRC had ruled that he was domiciled in Connecticut (and not in the USA): that this was Mr Strachan's understanding can be seen from his letters to HMRC.

(5) He would have known that a domicile claim involved sheltering money from UK tax: Mr Strachan knew this from his discussions with Mr Tulloch.

(6) In particular, the reasonable person with the intelligence and financial awareness of Mr Strachan, who had participated in the discussions which preceded the granting of the Domicile Ruling and so was fully aware of the facts on which it was based (see §200.(2)), would have safely retained a copy of the Domicile Ruling, and checked it regularly, to see whether any changes to the factual position might have impacted on its validity and had he been unsure of the position, would have asked his tax advisers to review the position and if necessary to take further specialist advice.

(7) If, for whatever reason, neither he nor his advisers had retained a copy of the Domicile Ruling, he would not have relied on his recollection but would have similarly asked his tax advisers to review the position and if necessary obtain further specialist advice.

(8) Even without a copy of the Domicile Ruling, the reasonable person in Mr Strachan's position would have known that following the sale of Kielwasser Road in 2006, he had no possible "home" in Connecticut. He would also have known that other key facts (see §200.) had changed over time, and in particular that he had continued to live and work in London for more than 25 years, together with his wife (and for seven years, his step-daughter).

343. We therefore agree with Mr Stone that the reasonable person in Mr Strachan's position would not have assumed he continued to be non-domiciled, but instead would have refreshed the advice he had received over a quarter of a century earlier.

344. HMRC have therefore met their burden of proving that Mr Strachan was careless. The issue in dispute related only to 2011-12 and 2012-13, but it follows from the findings above that Mr Strachan was also careless in relation to the later relevant years.

345. Mr Stone additionally submitted that Mr Strachan's advisers had also been careless, and in particular that Mrs Schofield, Mr Strachan's adviser during the relevant years, should have provided or obtained advice on his domicile position when she took over those responsibilities from PwC in 2008. However, given our findings in relation to Mr Strachan, we did not need to consider this additional submission.

THE QUESTION OF CAUSATION

346. The parties also disagreed on whether it was enough for HMRC to prove that Mr Strachan had been careless, or must also prove that the carelessness caused the loss of tax.

Mr Stone's submissions on *Atherton*

347. Mr Stone relied on *Atherton*. The appellant in that case had claimed an employment loss by including it in box 3 of his SA return; this was headed "Relief now for 2008–09 trading, or certain capital, losses". The appellant explained in the white space of his return that he had used box 3 because there was no equivalent box for employment losses. He also entered the loss in Box 20; as a result of that entry, the loss was taken into account when calculating his liability for the year, reducing it to nil.

348. HMRC issued a discovery assessment, and one of the issues considered by the UT was whether TMA s 36 applied so to extend the time limits on the basis of carelessness. At [60] the UT cited TMA s 118(5), and then said at [61] that "the relevant question" was (their emphasis):

> "…whether the taxpayer and those acting on his behalf took reasonable care to avoid creating the insufficiency in the assessment."

349. They continued at [62]:

> "When the question is asked in that way, the answer becomes clear. The duty of the taxpayer is to take reasonable care to avoid bringing about an insufficiency and if he does not do so then the insufficiency is brought about carelessly. Mr Atherton could readily have avoided the insufficiency by not using box 20 in the way that he did. Although he wished to use box 20 in that way, to try to 'force' a year 2 loss into his assessment for year 1, he was under a duty to take reasonable steps to avoid the consequences of doing so. Despite his objective, he was bound not to use box 20 in that way. He could reasonably have avoided the insufficiency by confining himself to a standalone claim for relief using box 3."

350. The UT then said at [63] that the position might have been different, if a taxpayer had been:

> "advised by an adviser who was not someone 'acting on his behalf' to make use of box 20 in the way that Mr Atherton did, and if reliance on the advice given was reasonable in the circumstances, the taxpayer may well then not have been in breach of his duty to take reasonable care to avoid bringing about an insufficiency."

351. However, that hypothetical scenario did not apply to Mr Atherton, as he had been given advice by persons "acting on his behalf", who were also "under a duty to take reasonable care to avoid the insufficiency", see TMA s 36(IB).

352. Mr Stone submitted that:

(1) Mr Strachan similarly had not taken reasonable care to avoid the loss of tax which had resulted from his incorrect domicile claim. The entries on his returns caused the loss of tax, and he had been careless in completing those returns because he had not sought any professional advice on his domicile status since 1987.

(2) In *Atherton* the UT had said only that *had* professional advice been given, it *might* have changed the position. The UT did not speculate, let alone take into account, the advice that a reasonably competent adviser might have given, had advice been taken.

(3) The Tribunal should similarly not consider what would have happened if, hypothetically, Mr Strachan had refreshed his professional advice before he filed his returns.

Mr Brodsky's submissions on *Bella Figura Ltd*

353. Mr Brodsky relied on *Bella Figura Ltd v HMRC* [2020] UKUT 0120 (TCC)) ("*BFL*"). BFL was a pension scheme which had made a loan to a company called Falken Ltd (the "Falken 1 loan"). HMRC decided the Falken 1 loan was an "unauthorised employer payment" and a "scheme chargeable payment", and assessed BFL to a scheme sanction charge, an unauthorised payments charge and an unauthorised payments surcharge. BFL's case was that Mr Wightman, its managing director, had received advice from PPCL, a firm of pension administrators, that the loan was not an "unauthorised employer payment" or a "scheme chargeable payment".

354. The FTT held that PPCL had not given Mr Wightman that advice, saying at [88]:

> "I find that Mr Wightman has not discharged the burden of showing, as he must since it is his reasonable belief that is in question, that he actually did receive advice that the Falken 1 loan was not a scheme chargeable payment from PPCL…I find that if he had applied such a critical mind to the situation, he would have challenged the validity of the loan and sought clarification from PPCL, but he did not (or at least has not discharged the burden of showing that he did)."

355. The FTT went on to conclude that the loss of tax was therefore brought about carelessly and as a result the six year time limit in TMA s 36 applied. However, the UT disagreed, holding at [61(2)]:

> "[The FTT] did not take into account the fact that s36 of TMA is concerned with the question of whether a failure to take reasonable care causes a loss of tax. The FTT identified the failure to obtain advice as a careless omission. However, it did not go on to consider what would have happened if BFL had asked PPCL if the Falken 1 loan qualified. That was a relevant consideration because, if PPCL would have replied that it believed the documentation it had drafted would be effective, that might well have demonstrated that BFL's carelessness did not cause the loss of tax."

356. After considering another issue, the UT went on to allow the appeal, in part because, as explained at [85(4)]:

> "In our judgment, given the FTT's finding as to the background to PPCL's appointment, it is reasonable to infer that, if PPCL had been asked whether the documentation they were producing would produce the desired result, they would have given that confirmation."

357. Mr Brodsky submitted that:

(1) *BFL* shows that a loss of tax is not "brought about carelessly" as required by TMA s 36 if the outcome would be the same had the taxpayer acted reasonably, and taken advice;

(2) Mr Strachan obtained new advice from Mr Flesch in 2018, and Mr Flesch opined that Mr Strachan had a domicile of choice in Massachusetts;

(3) had Mr Strachan obtained advice before filing his 2011-12 and 2012-13 SA returns, that advice "would in all likelihood have been that he was perfectly entitled to fill out his return as he did";

(4) had he received that advice at that time, he would have continued to file on the basis that he was not domiciled in England; and

(5) thus any loss of tax was not "brought about" by his carelessness in not obtaining advice. Instead, the loss would have been exactly the same even had he not been careless, and had taken advice.

Discussion

358. TMA s 36 applies where the loss of tax has been "brought about" by carelessness. In *BFL* the UT said at [61(2)] that "s 36 of TMA is concerned with the question of whether a failure to take reasonable care causes a loss of tax". We therefore agree with Mr Brodsky that the section requires us to ascertain whether the loss of tax would have been avoided had the person not been careless.

359. The answer to that question is often obvious. We considered two simple hypothetical examples:

(1) Ms Alpha was an employee who claimed a deduction for travel costs between her home and a permanent workplace without taking advice. However, any reasonably competent tax professional would have advised her that those travel costs were not deductible, but were instead "ordinary commuting", see ITEPA s 338(3)(a). Ms Alpha's carelessness in not taking advice therefore caused the loss of tax.

(2) In March 2003, Mr Beta claimed capital losses on share option scheme shares without taking advice. However, at that time the reasonably competent tax adviser would have told Mr Beta he could claim the losses, in reliance on the January 2003 HMRC press release following *Mansworth v Jelley* [2002] EWCA Civ 1829. However, that HMRC's guidance was incorrect. Had Mr Beta taken advice before he filed his return, he would not have avoided the loss of tax and his carelessness did not cause the loss.

360. The issue of Mr Strachan's domicile is not so straightforward. In 2018, Mr Flesch gave an opinion which relied on at least some of the same "key passages" in *Barlow Clowes* as formed the basis of Mr Brodsky's submissions in this appeal. However, as HMRC pointed out, Mr Flesch's view was not necessarily shared by other practitioners specialising in this area of law: in particular, a different view had been taken by James Kessler KC in *Taxation of Non-residents and foreign* domiciliaries: he states at Chapter 4.11.1 that:

> "A person resides in more than one country, it is considered that they acquire a domicile of choice in country A if and only if:
>
> (1) country A is their chief residence; and
>
> (2) their intention is permanently to reside in country A as their chief residence."

361. We have come to the same conclusion as Mr Kessler. Although we accept that Mr Flesch's opinion supported Mr Strachan's domicile claim, it is therefore not the case that all reasonably competent advisers would have taken the same view as to Mr Strachan's domicile. We thus do not accept Mr Brodsky's submission that, had Mr Strachan taken advice before he filed his SA returns, that advice "would in all likelihood have been that he was perfectly entitled to fill out his return as he did". The advice would have depended on the view taken by the particular practitioner.

362. Mr Brodsky relied on *BFL,* but Mr Strachan's position is different from the facts of that case. In *BFL,* the UT took into account the advice Mr Wightman would have received from PPCL, had he asked. In other words, the question was narrowly confined to the advice which would have been given at the relevant time by the specific firm with which BFL was already working. Mr Strachan is not in the same position: Mr Flesch was not instructed at the time Mr Strachan filed the tax returns in question: his opinion was instead given in 2018, over five years later.

363. In summary, we therefore do not know whether Mr Strachan's view as to his domicile status would have been confirmed had he taken advice before filing his 2011-12 and 2012-13 SA returns. It would have depended on who was instructed to provide an opinion. The position is thus not the same as that of taxpayers such as Ms Alpha and Mr Beta, where any reasonably competent adviser would have given the same advice.

THE BURDEN OF PROOF

364. It follows from the above that Mr Brodsky has not shown that if Mr Strachan had taken advice, that advice would have supported his domicile claim. However, HMRC have also not proved the opposite: Mr Stone accepted that a reasonably competent adviser might have agreed with Mr Flesch, or with Mr Kessler.

365. However, Mr Stone submitted that this did not matter, because HMRC were not required to prove what would have happened, had Mr Strachan taken advice. In reliance on *Atherton,* he said that once HMRC had met their burden of proving that Mr Strachan had been careless, the burden shifted, and it was for Mr Strachan to prove that his carelessness had not caused the loss of tax, and that unless he could do so, the extended time limits apply.

366. Mr Brodsky disagreed, saying that the burden remained on HMRC throughout, so that unless they could show that a reasonably competent adviser would have told Mr Strachan he was wrong, the extended time limit in TMA s 36 does not apply.

The case law

367. Mr Brodsky relied on *BFL,* where the UT had said at [62] that "the burden is on HMRC to show that BFL was careless for the purposes of s 36 of TMA" and had also rejected HMRC's submission that BFL had provided insufficient evidence to show what advice PPCL would have given, had they been asked, see [64]. Mr Stone accepted that *BFL* was "against him" but submitted that it had been decided without the benefit of *Atherton*, and was therefore arguably *per incuriam*. We accept that there is a tension between those two judgments.

368. However, we also considered two earlier cases. Although neither counsel referred to these authorities, they are well known. In *HMRC v Household Estate Agents* [2007] EWHC 1684 (Ch), Henderson J (as he then was) considered the similar discovery provisions in FA 1988, Sch 18 para 43, at a time when "fraud or wilful default" had not yet been replaced by the current concepts of carelessness and deliberate behaviour, and said:

> "With regard to para 43, placing the burden upon HMRC would accord with the long-established general rule, before self-assessment, that the Revenue had to establish fraud or wilful default in order to make an assessment outside the normal six year time limit: see for example *Hudson v Humbles (Inspector of Taxes)* (1965) 42 TC 380 at 384 and *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635 at 639, 60 TC 359 at 386 per Dillon LJ."

369. In *Burgess & Brimheath v HMRC* [2015] UKUT 578 (TCC) at [38] the UT (Judges Berner and Scott) confirmed that the same approach applied in relation to the amended TMA

provisions introduced as the result of self-assessment, and they also held that HMRC had the burden of proving that the conditions necessary to make a valid out-of-time assessment had been met. Onne of those conditions is that the person has been "careless" or acted "deliberately", but the other is that the carelessness causes the loss of tax.

370. Having considered that case law, which is entirely consistent with *BFL,* we agree with Mr Brodsky that that HMRC have the burden throughout; it does not shift to the appellant to show that the carelessness did not cause the loss of tax.

371. HMRC have not met that part of their burden, because they have not been able to show that had Mr Strachan taken advice, the loss of tax would have been avoided: in other words, that the loss of had been "brought about" by his carelessness.

CONCLUSION ON CARELESSNESS

372. For the reasons set out above, we find that:

(1) HMRC have met the burden of showing that Mr Strachan acted carelessly in not seeking advice before he submitted his 2011-12 and 2012-13 tax returns; but

(2) they also have the burden of proving that the loss of tax was "brought about" by the carelessness, and they have not met that burden..

373. As a result, we allow Mr Strachan's appeal against the assessments for 2011-12 and 2012-13.

OVERALL CONCLUSION AND APPEAL RIGHTS

374. For the reasons set out in this decision, Mr Strachan's appeal is refused in relation to 2013-14 through to 2015-16, because he was domiciled in England during those years.

375. His appeal is allowed for 2011-12 and 2012-13. Although Mr Strachan was also English domiciled in those years, and although he was careless in completing those SA returns, HMRC have not met their burden of proving that his carelessness caused the loss of tax.

376. The total amount payable as a consequence of the assessments is therefore reduced from £420,407.29 to £321,333.14.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

377. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE REDSTON
TRIBUNAL JUDGE

Release Date: 05th JULY 2023