

CYGANIK V. AGULIAN: DETERMINING DOMICILE OF CHOICE

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Introduction

Domicile is a concept of private international law rather than a concept of tax law. However, it is used in determining the ability of the United Kingdom to charge certain individuals to tax. An individual who is not domiciled in any part of the United Kingdom but who is resident and ordinarily resident here enjoys significant tax advantages. It is, therefore, a matter of some importance to individuals to ensure that they retain or, as the case may be, establish their domicile in a territory outside the United Kingdom.

The Court of Appeal has recently discussed the question of domicile in the case of *Cyganik v. Agulian* [2006] EWCA Civ 129. The case concerned the acquisition of a domicile of choice by an individual with a Cypriot domicile of origin.

Domicile of Origin

A domicile of origin is acquired when an individual is born (*Henderson v. Henderson* [1967] P 77). Where the individual is legitimate, this is generally the father's domicile at the date of birth. Otherwise, the individual takes its mother's domicile. The domicile of origin continues until the individual acquires either a domicile of dependency or a domicile of choice. When the

individual acquires either a domicile of dependency or a domicile of choice, the new domicile continues until such time as it is abandoned. At that time, the domicile of origin revives (*Udny v. Udny* (1961) LR 1 SC and Div.441).

A domicile of origin is said to have a “adhesive” quality because, first, the burden is on whoever alleges that he has acquired a domicile of choice to prove it (*Winans v. IRC* [1904] AC 287 and *Re: Fuld No.3* [1968] P 675) and, second, the acquisition of a domicile is regarded as a serious matter which is not lightly to be inferred from slight indications or casual words (*Re: Fuld (No3)* at p.684, *Winans v. AG* at p.291, *Buswell v. IRC* [1974] STC 266).

Domicile of Choice

A domicile of choice is acquired where a person voluntarily fixes his sole or chief residence in a new territory and intends to remain there for the rest of his days, unless and until something occurs to make him change his mind. The intention to acquire a domicile of choice and to abandon the domicile of origin has to be “clearly and unequivocally proved” (*Moorhouse v. Lord* (1863) 10 HLC 272 at p.286). In *Moorhouse v. Lord* it was considered difficult to prove the acquisition of a domicile of choice in a territory where the individual concerned “must forever be a foreigner” (at p.287). This factor was relevant in the case of *F v. IRC* [2000] STC (SCD) 1, which concerned an Iranian individual who had lived in the United Kingdom for a considerable period but had never fully fitted into British society. The Iranian

individual was held not to have acquired an English domicile of choice.

Two requirements must be met before an individual may acquire a domicile of choice in a territory: there must, first, be residence in the territory; and, second, there must be an intention to reside in that territory permanently or indefinitely.

As to the first limb, residence is thought to mean physical presence. A long period of physical presence is not determinative. For instance, a period of residence of thirty-two years in the case of *Udny v. Udny* (1869) LR 1 Sc& Div 441, HL was not conclusive on the question of the acquisition of a domicile of choice. Further, the residence must be the individual's sole or chief residence in order to be taken into account (*Plummer v. IRC* [1987] STC 698; *The Duchess of Portland v IRC* [1982] STC 149).

In relation to the second limb, the individual's intention must be firm and settled (*Re: Clore (No.2)* [1984] STC 609). Where an individual intends to return to his country of origin on the occurrence of a likely contingency, the individual lacks the requisite intention to remain permanently or indefinitely in the territory in which he is residing. Likely contingencies are considered to include retirement, attainment of a specified age, inheritance of a title or the earlier death of a spouse. However, if an individual merely intends to return to his country of origin on the occurrence of an uncertain and unlikely contingency, e.g. winning the lottery, that is not

sufficient to prevent an individual having the requisite intention to remain in the territory in which he resides.

Statements made by a person as to his intention are useful evidence but by no means conclusive (*Wahl v. AG* (1930) 2417 LT 382, House of Lords).

The acquisition of a passport in a particular territory has been held not to be, of itself, conclusive evidence that the individual intends to reside in that territory permanently or indefinitely. The individual's reasons for acquiring the passport are important. For instance, in *Bheekhun v. Williams* [1992] 2 FLR 229, the evidence was that a Mauritian individual had come to the United Kingdom in 1960 and had chosen to retain a British passport when Mauritius became independent in 1968 because he regarded the United Kingdom as his home (at p.239). The trial judge and the Court of Appeal, therefore, held that such a person had acquired a UK domicile of choice. However, in *F v. IRC* [2000] STC (SCD) 1, an Iranian exile, although he had acquired a UK passport, was held not to have acquired a UK domicile of choice by virtue of that fact: his prime motivation for the acquisition of a UK passport was for ease of travel for the purposes of his business.

The question of whether a domicile of choice has been acquired is one of fact to be determined in the light of all the circumstances (*Re Fuld (No.3)* at p.684/685 per Scarman J).

***Cyganik v. Agulian* [2006] EWCA Civ 129**

The case concerned a preliminary question in respect of a claim under s.2 of the Inheritance (Provision of Family and Dependents) Act 1975. The issue was whether the deceased, who was born in Cyprus on 6 October 1939, had lost his Cypriot domicile of origin and acquired a domicile of choice in England, where he had lived and worked for a total of forty-three years. If he had acquired a domicile of choice in England, an English Court had jurisdiction to entertain the proceedings under the Inheritance (Provision of Family and Dependents) Act 1975.

The leading judgment was given by Mummery LJ. He relied principally on the judgment of Scarman J in *Re: Fuld (No. 3)* [1968] P 675 which set out the well-established principles (discussed above) applicable when determining whether an individual with a non-UK domicile of origin had acquired a domicile of choice in England. Mummery LJ then set out the salient facts. He compared the deceased's connecting factors with Cyprus and the deceased's connecting factors with the UK.

Connecting Factors With Cyprus

The deceased was born in 1939 into the Greek community in a village in Northern Cyprus (under Turkish control since 1974). The deceased's parents and grandparents were also born in Cyprus. Following the break-off, in unfortunate circumstances, of an arranged marriage with a girl from Limassol, the deceased fled to the United Kingdom. During the time that he lived in

London, which period lasted fourteen years, he wrote to his family in Cyprus regularly and sent them money and presents. In 1967, he returned to Cyprus for two or three months. Later in the year, he travelled overland to deliver a car there. He bought three pieces of land in Cyprus.

The deceased took his young daughter, Helena, to Cyprus with the intention that his parents would look after her. In 1972 the deceased returned to his home village intending to live there permanently with his parents and Helena. However, in 1974, Turkey invaded Cyprus and the deceased returned to the United Kingdom where his daughter and his sister-in-law joined him.

In March 1975, his daughter was sent back to Cyprus, again to be looked after by his parents. The deceased sent money to Cyprus regularly. He wished his daughter to learn the language in order that she would be prepared when the family returned to live in Cyprus. He enrolled his daughter in a Cypriot school. He also made regular trips to see his daughter and his parents in Cyprus. In 1980, when the deceased's mother died, his daughter came to live with him in England.

The deceased continued to make frequent trips to Cyprus and, in 1987, he wished to buy a hotel and to live in Cyprus. However, he did not carry out his wish because the prices were too high. In 1991, the deceased returned to Cyprus and lived there for seven or eight months. From 1996 onwards, the deceased told his bank manager in Cyprus of his intention to retire to Cyprus

and asked for his assistance in finding a property. He even went so far as to negotiate prices on some flats.

While living in England, the deceased continued to live the life of a Greek Cypriot: he spoke Greek and watched Cypriot television. He was very much in touch with Cyprus during his time in London. Although he held a British passport, his residence in London was marked by the fact that he regarded himself as Cypriot rather than British. He kept a Cypriot identity card which was, and was seen by him as being, significant for the purposes of exercising his Cypriot rights as a citizen of Cyprus.

Most of his friends were part of the Greek Cypriot community, and, after he met the Polish lady, Renata, who later became his fiancée, they included people from the Polish community. It was found as a fact that he had “a strong emotional attachment to the land of his birth, both the island of Cyprus as a whole and in particular to the area of his birth”. It was held that he retained “a very strong sense of Greek Cypriot identity”.

Connecting Factors With England

Mummery LJ observed that the deceased had come to England on a British passport at the age of eighteen in 1958 following the broken engagement. He lived with relatives in North London and worked as a mechanic when he first arrived. In 1968, his brother joined him in London for two months. At that time, he was living in a house and letting out rooms so that he could make money to go back to Cyprus.

In 1969 he began a relationship with the mother of his daughter.

In 1969/1970 he bought another property in Shepherd's Bush Road which he let out in bedsits. After his return from Cyprus following the Turkish invasion, he sought to convert the bedsits into a hotel. The deceased lived in the hotel and helped service it until his death. He bought several other properties in and around West London.

He started a relationship in 1977 with a Polish lady. That lasted about fifteen years. In 1992, he separated from the Polish lady.

In 1993, he met another Polish lady, Renata, who was later to become his fiancée. They lived together as man and wife for the rest of his life. In 1999 the deceased and Renata got engaged.

The deceased bought another property the upper floors of which were used as a hotel and the basement of which was refurbished, in 2002, as a flat. It was claimed by Renata that she and the deceased intended to get married in April 2003 and that the flat was intended to be their matrimonial home. The deceased died unexpectedly in February 2003.

The judge at first instance held that although the deceased had maintained his Cypriot domicile of origin until 1995, between 1995 and 1999 at some unspecified date he had acquired an English domicile of choice. His principal reason for saying this was that the deceased had

become engaged to Renata in England. He surmised from this that the deceased intended to live in England with Renata permanently or indefinitely.

Mummery LJ held that the judge had erred. If, as was agreed, the deceased had not acquired a domicile of choice in England between 1958 and 1995 because he did not intend to live in England permanently or indefinitely, it could not reasonably be inferred from what happened after 1995 that he had formed a different intention about his permanent home before he died.

Mummery LJ held that the judge had underestimated the enduring strength of the deceased's Cypriot domicile of origin.

Further, the emphasis of the judgment was wrong. The judge had observed that if the deceased had continued with a string of short-term girlfriends, "he might eventually have decided to sell up and go and live permanently in Cyprus."

Mummery LJ held that the question was not so much whether the deceased intended eventually to return permanently to live in Cyprus but whether it had been shown that by the date of his death he had formed the intention to live permanently in England. The crucial point was that the deceased retained his domicile of origin in Cyprus until it was proved that he intended to reside permanently or indefinitely in England.

Mummery LJ also disagreed with the emphasis that the judge had placed on the deceased's engagement to

Renata and on the judge's inference that his engagement necessarily meant that the deceased intended to live in England. Renata was Polish and her presence in the United Kingdom was precarious given that her continued presence here was illegal.

Mummery LJ held that there was no clear evidence that the deceased had ever intended to reside permanently or indefinitely in England. On that basis, the deceased had not acquired a domicile of choice in England

Mr. Justice Lewison and Lord Justice Longmore both agreed with Mummery LJ.

Longmore LJ noted, at paragraph 56, that Counsel for Renata had submitted that the deceased had acquired a domicile of choice on or after his engagement to Renata, placing reliance, inter alia, on *Forbes v. Forbes* (1954) Kay 341. In *Forbes v. Forbes*, General Forbes had acquired an English domicile by living with his wife and son in London after serving thirty-five years in India. However, his domicile in India was itself a domicile of choice (his domicile of origin being in Scotland). Longmore LJ observed that, "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."

This statement merits some consideration: is it a correct statement of law? It might be argued that the same factors must be proved in both situations. In order to show that a first domicile of choice has been acquired

or, in fact, a second domicile of choice has been acquired, it is necessary to show both residence and the intention to reside permanently or indefinitely in the alleged new domicile of choice. In the writer's view, therefore, this is an incorrect statement of the law.

Further, in the writer's view, it is not likely that a person will live in the first domicile of choice (which means that he must intend to live there permanently or indefinitely) and then immediately replace that domicile of choice with a second domicile of choice (because he has decided to live permanently and indefinitely there). It is much more likely, in the writer's view, that there will be a period of time between the individual abandoning his first domicile of choice and acquiring another domicile of choice. In the intervening period, the domicile of origin revives. A *Forbes v. Forbes* situation is, in the writer's view, quite rare in reality.

Example

An individual with an English domicile of origin lives and works and marries, say, in Singapore, and acquires a domicile of choice in Singapore. He then decides that he no longer wishes to live in Singapore but wishes to go to France when he retires. If this decision to leave Singapore when he retires occurs at the time when he is still living in Singapore, his English domicile of origin will revive. If he moves to France on retirement "to give it a go" and decides

to remain there permanently, then he will acquire a domicile of choice in France, having abandoned his domicile of choice in Singapore and, in fact, having superseded his domicile of origin in England.

Longmore LJ may, however, have made the statement in these terms as shorthand for the fact that if an individual has already broken the link with his domicile of origin by acquiring a domicile of choice elsewhere, the domicile of origin may perhaps have a less “adhesive” quality when that individual seeks to show that he has abandoned his first domicile of choice in favour of a second domicile of choice.

Apart from this observation by Longmore LJ, the case of *Cyganik v. Agulian* is a straightforward application of well-established principles: an individual who wishes to acquire a domicile of choice in a jurisdiction must reside there and must voluntarily fix his intention to reside there permanently or indefinitely. This is a question of fact. In *Cyganik v. Agulian*, the individual had maintained strong ties with Cyprus so that, despite his extended period of residence in England, he had not acquired an English domicile of choice.

Establishing Domicile in Practice

For an individual with a foreign domicile of origin, it is ideal to maintain close links with the home country. In other words, the individual in question should ideally do the following: make regular and extended trips to the

home country; retain bank accounts in the home country; make or retain investments in the home country; execute a will which is governed by the law of the home country; be involved in business interests in the home country; and include statements in the will to the effect that the individual wishes to be buried or cremated in the home country.

An individual with a UK domicile of origin who wishes to acquire a foreign domicile of choice must minimise his links with the United Kingdom while at the same time extending his links with the jurisdiction which is the proposed domicile of choice. He must, therefore, have extensive ties outside the United Kingdom. He must leave the United Kingdom with sufficient finality. He should, ideally, not keep a residence in the United Kingdom but, if he does retain a residential property in the UK, there must be sound reasons for doing so, e.g. keeping the property as an investment. The individual must not have an intention of returning to the United Kingdom on the occurrence of events that are likely to happen, e.g. retirement, the death of a spouse, attaining a particular age. It would be ideal if the individual tries to assimilate himself within the new territory, e.g. by joining social clubs and other social organisations, acquiring and then exercising a right to vote in local elections, becoming a naturalised citizen of the new territory or acquiring a right of permanent residence. The acquisition of a home there is also helpful.

If the individual moves away from the first territory of choice, he must keep a record of the reasons why he has chosen to move away from there.

Conclusion

Cyganik v Agulian is a useful case because it is a clear application of established principles which apply when determining domicile. One question that is raised by this decision is whether it is, in fact, easier to show a change of domicile of choice from one territory to another territory than it is to show the acquisition of the first domicile of choice. In the writer's view, this is not so.