Neutral Citation Number: [2025] EWCA Civ 1022

Case No: CA-2024-002730

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
FAMILY DIVISION
MR JUSTICE WILLIAMS
1665-4069-5184-4953

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 August 2025

Before:

LORD JUSTICE LEWISON
LORD JUSTICE MOYLAN
and
LORD JUSTICE POPPLEWELL

- -

Between:

MANISHA RAMANA	**Appellant**
- and -	
CHRISTNAN KIST-RAMANA	**Respondent**

- -
- -

Greg Williams and Sam Watts (instructed by **Dawson Cornwell LLP**) for the **Appellant**
The **Respondent** appeared in person

Hearing date: 30 April 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 1 August 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Moylan:

1. This is an appeal against the decision of Williams J (the judge) on 25 October 2024 by which he dismissed an application for divorce for want of jurisdiction. He decided that the courts of England and Wales did not have jurisdiction because the wife was not domiciled here on the date of her application on 11 October 2022, this being the only jurisdictional ground on which she relied.

2. The wife appeals from that decision. She appeared in person at the hearing below but was represented on this appeal by Mr Williams and Mr Watts. The husband appeared in person, as he did below.

3. In summary, the judge phrased the issue he had to determine as being:

> "In this case the wife's birth in Mauritius where her mother and father lived at the time would fix her domicile of origin in Mauritius. The issue in this case involves consideration of whether the wife acquired a domicile of choice in England at some point between her arrival in 2000 and her departure in 2019 and if so whether that revived upon her return in October 2022 or whether she acquired a domicile of choice in England for the first time between her arrival on 7 October 2022 and the issue of the petition on 11 October 2022."

The judge found that the wife had acquired a domicile of choice in England and Wales "by some point prior to 2016". He also found that this had not revived by 11 October 2022.

4. The wife appeals, contending that the judge failed to address the intermediate issue of whether the wife had lost her domicile of choice in England prior to 11 October 2022. Mr Williams submitted that, if the judge had applied the right legal test to this issue, he would have decided that the wife had not lost her domicile of choice.

5. It is relevant to note that, as well as contesting jurisdiction, the husband had applied for a stay of the proceedings here under Schedule 1, paragraph 9, the Domicile and Matrimonial Proceedings Act 1973 ("DMPA 1973"). The husband had commenced divorce proceedings in Mauritius on 18 November 2022 and contended that that jurisdiction was more appropriate for the determination of the divorce proceedings. The judge did not determine that application.

6. At the end of the hearing, the parties were informed that the appeal would be allowed and the matter remitted for rehearing. I set out below my reasons for agreeing with that decision. At the rehearing, the court will need to determine whether the wife had lost her domicile of choice in England prior to 11 October 2022. As explained below, the burden of proving this is on the husband and it will require consideration of all the evidence including of what happened *after* the family left England in 2019. The court will also need to determine the husband's application for a stay.

Factual Background

7. As set out in the judgment below:

> "The parties to the marriage are cousins by birth and both their families are Mauritian. The husband was born in England [in 1972] but returned to Mauritius as a baby before being brought back to England by his mother when he was about four and he grew up here. The mother was born [in 1979] and grew up in Mauritius. She came to England on a student Visa [in 2000] and the parties met and married on 25 October 2003."

The parties' two children were born in England and the family continued to live here until September 2019.

8. The husband has British and Mauritian nationality. The wife is a Mauritian national. She was granted indefinite leave to remain in the UK in November 2005 and obtained British citizenship in March 2018. The wife's domicile of origin is Mauritius.

9. The family left England in September 2019 and moved to Mauritius. There was a dispute between the parties as to what their plans were at this time, which I deal with further below. The family were still living in Mauritius when the Covid pandemic started which meant that they could not leave Mauritius.

10. The marriage broke down and the parties separated in November 2020. They all remained living in Mauritius until 8 October 2022 when the wife travelled to England with the children. She commenced divorce proceedings here on 11 October 2022. The husband commenced proceedings here under the 1980 Hague Child Abduction Convention on 15 November 2022 and also divorce proceedings in Mauritius on 18 November 2022. The husband's proceedings under the 1980 Convention were ultimately dismissed in May 2023. The divorce proceedings in Mauritius are continuing.

11. As referred to above, the wife's case was that she was domiciled in England and Wales on 11 October 2022. In her Statement dated 7 June 2024 she said:

> "I consider England to be my domicile of choice, having lived here all of my adult life, save a short period of time between September 2019 and October 2022. I consider that I acquired a new domicile of choice, being England and Wales, by the combination of residence and my intention of indefinite residence, in the early 2000s."

In respect of the move to Mauritius in September 2019 she said:

> "Christnan has contended that I was not domiciled in England and Wales on the date of my application, I anticipate his position being that my domicile changed from England and Wales to Mauritius. I do not consider that my place of domicile ever changed from England and Wales. When Christnan, the children and I moved to Mauritius in September 2019, the plan was to move to Singapore for a period of time. We were stuck in Mauritius for financial reasons and later the invasion of Ukraine by Russia prevented us moving. I do not consider that, as a family, we ever settled in Mauritius, or had

> any fixed plans to remain in Mauritius. We moved there, for a limited period of time, for a particular purpose. The basis of our residence there was not indefinite in its future contemplation."

In summary, the wife's case was that the family had left England because of their financial circumstances. They planned to stay in Mauritius for a limited period of time to save some money before then moving to Singapore where the prospects for developing the husband's business were considered to be significantly better. The reason for going to Singapore was again to accumulate sufficient savings to enable them in due course to return to live in England.

12. The husband's case, as set out in his Position Statement dated 29 April 2024, was that there was "never any intention that [we] would return to live in England when we left in 2019" and that, if the wife had acquired a domicile of choice in the UK, "it was lost when she returned to live in Mauritius". In his Statement dated 20 August 2024, the husband said that, when the wife returned to Mauritius in 2019, she intended "to settle permanently in Mauritius". He also repeated that, when they left England in September 2019, it "was never intended that either of us would move back to the United Kingdom permanently".

13. However, in an earlier Statement dated 21 June 2024, the husband had said that "we moved to Mauritius in September 2019, with initial plans to relocate to Singapore". Further, in his divorce petition in Mauritius the husband had said that: "In or about September 2019, the parties elected travel to Mauritius to spend time with the family pending a decision whether to relocate elsewhere and/or stay in Mauritius". It is also relevant that he had emailed the older child's school before the start of the new school year in September 2019 explaining that the child would be taken out of school because the family had organised a move to Singapore "sooner than anticipated" and wanted the older child to begin at school there before the start of term. The husband subsequently accepted the judge's description of this email as "spin", given that it did not reflect the true picture because the family were not moving directly to Singapore and was designed, presumably, to avoid incurring school fees.

The judgment below

14. The judge summarised the parties' cases and their evidence. He then addressed the law. Under the heading of domicile, he quoted from *Agulian v Cyganik* [2006] EWCA Civ 129 ("*Agulian*") and *Barlow Clowes International Ltd v Henwood* [2008] EWCA Civ 577, [2008] BPIR 778 ("*Barlow Clowes*") and referred briefly to *Mark v Mark* [2006] 1 AC 98 ("*Mark*"). The judge set out that the "requisite components" to establish a domicile of choice are: "(i) residence in another country; combined with (ii) a settled intention to make his home permanently or indefinitely in that country".

15. He then summarised the position as follows:

> "[28] So, it is well settled law that a person has a domicile of origin which remains with them throughout life and which, save in exceptional circumstances, cannot be extinguished. It can be put in abeyance by the adoption of a domicile of choice but will revive as and when the domicile of choice comes to an

> end. The onus of proving the acquisition of a domicile of choice lies on the party asserting the change and must be proved by cogent evidence to a high standard. I do not consider that this means anything other than that it must be proved on the balance of probabilities but in determining whether the balance is established that it is more likely than not, the court is acknowledging that a person's domicile of origin as a matter of legal status carries with it a significant weight which requires the court to apply a degree of rigour to the evidence and what can properly be inferred from it to generate the weight which on balance of probabilities displaces the domicile of origin in favour of the domicile of choice. Domicile of origin and its replacement by a domicile of choice are significant legal issues of status rather than simple matters of fact."

16. The judge then, as referred to above, set out the "issue" he had to determine:

> "[29] In this case the wife's birth in Mauritius where her mother and father lived at the time would fix her domicile of origin in Mauritius. The issue in this case involves consideration of whether the wife acquired a domicile of choice in England at some point between her arrival in 2000 and her departure in 2019 and if so whether that revived upon her return in October 2022 or whether she acquired a domicile of choice in England for the first time between her arrival on 7 October 2022 and the issue of the petition on 11 October 2022."

It can be seen that the judge only expressly referred to: (i) the acquisition by the wife of a domicile of choice prior to 2019 and its revival in October 2022 or, alternatively, (ii) the acquisition of a domicile of choice by her in October 2022. In particular, he did not refer to the need to consider the question of whether, if the wife had acquired a domicile of choice by 2019, she had lost it by 11 October 2022.

17. Under the heading of "Evaluation", the judge set out his analysis and conclusions. The judge again summarised what he had to determine:

> "[34] The first issue for determination is whether the wife has established that she was domiciled in England and Wales as of 11 October 2022. *It is for the wife to establish that she was so domiciled on the balance of probabilities* but bearing in mind the jurisprudence which confirms that the establishment of this legal fact requires appropriately weighty evidence. In many cases, possibly most cases, the issue will be whether an individual has established a domicile of choice which displaces their domicile of origin. In this case whilst that is the position there is also a wider perspective in that the wife's case is that her domicile of origin was displaced at some point after 2000 in favour of a domicile of choice in England which was established as she made her home here together with the husband and their children. *The wife's case at times appeared*

> *to be that this domicile of choice had endured throughout her absence from England between 2019 and 2022* but was also put on the basis that if that domicile of choice had been lost after her departure in 2019 then it had been acquired again between her return to England on 7 October 2022 and the issuing of the divorce petition on 11 October 2022." (emphasis added)

18. The judge understandably remarked, at [35], that his task was "more opaque" than it might have been if the parties had been represented. However, the judge's focus can be seen again from his reference to the need to evaluate "the wife's intentions between 7-11 October 2022" and to the evidence being "thin", "[b]oth in respect of the acquisition of a domicile of choice between 2000 and 2019 and its re-acquisition in 2022", notwithstanding that he had recorded in [34] in the words I have emphasised, that her case was also that she had not lost her domicile of choice between 2019 and 2022. Further, when referring to the acquisition of a domicile of choice requiring both residence in England and a "settled intention of permanent or indefinite residence in England" he repeated, without limitation, that "*the burden of proof lies on the wife to establish [these] issues*" (emphasis added).

19. I have emphasised the above words because, while the wife had the burden of establishing that the court had jurisdiction in respect of the divorce proceedings, which depended on whether she was domiciled in England and Wales on 11 October 2022, the burden in respect of the issue of domicile was not solely hers. As explained further below, it was for the wife to establish that she had lost her domicile of origin and had acquired a domicile of choice in England and Wales prior to 2019 (i.e. when the family left England). If she did, the husband then had the burden of proof of establishing that she had lost this domicile of choice prior to 11 October 2022.

20. The judge decided that the wife had acquired a domicile of choice in England. In summary, this was because:

> "[38] Over a period of between 13 and 16 years the family made their home in England and took steps which were consistent with them having a settled intention to remain here permanently or indefinitely. That would support the wife's case that in this period of time it was her intention to remain permanently or indefinitely in England and the weight of the evidence would support her having acquired a domicile of choice by some point prior to 2016."

21. The parties did not agree about when they had started to consider leaving England. The judge's conclusion was:

> "[40] It matters not perhaps when the ultimate decision was taken to leave England but it is clear that the family came to that conclusion. The wife's evidence and that of the husband establishes that they agreed that life in England could not be sustained on the income the husband's business was generating whilst they were based in England. It is clear that they agreed that they should leave England with a view to moving to the Far East where it seemed that the prospects for generating a far

> more successful business existed and which might generate sufficient money to enable the family to return to England with sufficient wealth to then re-establish a home and lifestyle in England to which they aspired."

Pausing there, this finding was consistent with the wife's case as to what lay behind the proposed move to Singapore. The judge also found that "both agreed that when in Mauritius (or possibly prior of going to Mauritius) the wife had said that they should have a sum of £140-160k in the bank before she would contemplate physically relocating to Singapore because that would provide sufficient security to ensure they could be accommodated, and the children educated privately whilst the husband pursued his business".

22. The judge next set out his conclusion as to the effect of the family leaving England in September 2019:

> "[43] The date on which the family decided to leave England with a view to making a life in due course in Singapore and in the meantime in Mauritius at the latest is September 2019 although possibly significantly earlier. *The inescapable conclusion of this decision is that the wife's intention to make England her permanent or indefinite home at that point came to an end.* The *aspiration to return to England* in due course if they made their fortunes in Singapore whilst they resided elsewhere is not sufficient to maintain a domicile of choice which requires physical residence and intention to permanently or indefinitely reside in that country. *At the point of departure from England* on an indefinite or permanent basis the wife's residence there came to an end as did her intention to live there permanently or indefinitely. Whilst absence from a country for a temporary period would not undermine physical residence or the intention to live there permanently or indefinitely the departure of the wife together with the husband and their children was plainly not a temporary departure. Unless the family's finances prospered to such a degree that life in England was viable and unless the family agreed to return that marked the end of the family's life in England. *Everything thereafter in terms of the future was uncertain*. The wife herself said they had contemplated perhaps returning to England if the finances allowed when [the elder child] was in late secondary school or for university. Most of the family furniture and electrical goods were sold and the remaining personal items including children's clothes were placed in storage; where they remain to this day at a cost of about £80 per month. […]
>
> [44] That being so the wife's domicile of choice in England ended and her domicile of origin in Mauritius which had been

> in abeyance during her domicile in England, revived. As it happens her Mauritian domicile of origin also coincided with where she was resident - there is no question in this case of an alternative domicile of choice having been acquired." (emphasis added)

23. It can be seen that, although not identified as an issue earlier in his judgment, the judge did in fact decide that "the wife's domicile of choice in England ended". However, it can also be seen that the judge did not include within his analysis at this point evidence of what happened after September 2019. His determination, that the "inescapable conclusion" of the decision to leave England in September 2019, was not based on an analysis of all the evidence, but was confined to matters up to the "point of departure from England". The judge's conclusion that "the wife's intention to make England her permanent or indefinite home at that point came to an end", was based on the nature of the parties' plans when they left England. He considered that the "aspiration to return to England in due course if they made their fortunes in Singapore … is not sufficient to maintain a domicile of choice"; it was "not a temporary departure"; and "[e]verything thereafter in terms of the future was uncertain".

24. The judge then considered what had happened after the family arrived in Mauritius. In the course of this, he said:

> "[46] … The wife's case was that the family never settled in Mauritius and never had any fixed plans to remain there which would appear to be consistent with their original intentions but how that changed over the course of time is less clear. Given the wife had revived her domicile of origin in Mauritius her intentions would not be relevant to that domicile although might inform what her intentions were upon leaving Mauritius."

I refer to this because it again makes clear that the judge did not consider evidence as to what had occurred after September 2019 was relevant to the question of whether the wife had lost the domicile of choice she had acquired in England prior to 2016.

25. It is also relevant that, when the judge was considering "the reacquisition of a domicile of choice" in England by the wife, he again said that "the burden of proving residence and intention to live indefinitely or permanently in England still lies on the wife in this case". It is also right to note that, when considering whether the wife had reacquired a domicile of choice in England and Wales, the judge made a passing reference to "[w]here a domicile of choice is abandoned".

26. After detailed consideration, the judge decided that the wife had failed to establish that she had reacquired a domicile of choice in England by 11 October 2022.

Submissions

27. The parties' respective submissions to this court were, in brief summary, as follows.

28. Mr Williams phrased the "central plank" of the wife's appeal as being that the judge had asked the wrong questions. The judge's summary of the issues he had to determine (see paragraph 16 above) omitted a critical step, namely whether the wife had lost her domicile of choice in England. This omission meant that the judge had not properly addressed this issue.

29. He also submitted that such analysis as there was of this issue in the judgment was flawed both legally and factually. The judge had failed to conduct the required "global evaluation". Looking at the history after September 2019, Mr Williams submitted that the judge had failed to include a material factor in his analysis, namely that the wife had returned to live in England in October 2022 and had remained living here with the children thereafter. This provided, he submitted, strong support for her case that she had not lost the relevant intention when she left England in September 2019 or at any time thereafter. He also relied on the fact that the family's departure from England was, on the wife's case and as the judge accepted, not intended to be permanent and on the fact that, as again was accepted by the judge, the parties did not intend to make their permanent home in Mauritius or Singapore. There was, he submitted, a clear intention to return.

30. Mr Williams submitted that, on any reasonable analysis of the evidence, if the judge had asked the right question, he would have concluded that the wife had not lost her domicile of choice in England. The wife had not lost the necessary intention.

31. The husband, in clear and concise submissions, argued that the judge properly applied the relevant legal principles and reached a decision which was open to him on the evidence. He submitted that the judge had correctly found that the wife had lost her domicile of choice in England when the family left for Mauritius in 2019. The judge had been entitled to reject the wife's "claims that she never intended to leave England permanently". The family had left England with no planned return date; they had sold all their substantial assets in England and had maintained no professional or personal ties with England; and they had lived in Mauritius for three years.

32. The husband submitted that the wife's appeal was, "at its heart", a factual disagreement with the judge's conclusions dressed up as raising legal issues. He repeated that the judge had addressed the issue of abandonment properly and thoroughly. The judge had applied the correct legal test, had asked the right question and did not make any error of law. He also submitted that the wife bore the burden of proving that her domicile of choice in England persisted and that she had failed to do so. Her domicile of origin, therefore, revived when she was in Mauritius.

The Legal Framework

Jurisdiction

33. The grounds on which the courts of England and Wales have "jurisdiction to entertain proceedings for divorce" are set out in s. 5(2) of the DMPA 1973. As referred to above, the only ground relied on by the wife is that set out in sub-paragraph (g), namely that "on the date of the application … either of the parties to the marriage is domiciled in England and Wales". The relevant date, therefore, at which the court had to determine the wife's domicile was 11 October 2022.

Domicile

34. I propose to deal with this issue at some length. First, because this issue will have to be determined at the rehearing and it is possible that the parties will, again, be acting in person. In addition, domicile is an issue which arises not infrequently in the context of applications for parental orders under section 54 of the Human Fertilisation and Embryology Act 2008 which, typically, are one-sided.

35. The general principles applicable to the issue of domicile are clear and are summarised in *Dicey, Morris and Collins on The Conflict of Laws* (16th edition, 2022) ("*Dicey*"). These include:

> "Rule 7 – No person can be without a domicile", at [6R-010];
>
> "Rule 8 – No person can at the same time and for the same purpose have more than one domicile", at [6R-013];
>
> "Rule 9 – An existing domicile is presumed to continue until it is proved that a new domicile has been acquired", at [6R-017];
>
> "Rule 11 – (1) Every person receives at birth a domicile of origin", at [6R-025]);
>
> "Rule 12 - Every independent person can acquire a domicile of choice by the combination of residence and intention of permanent or indefinite residence, but not otherwise", at [6R-037];
>
> "Rule 13 – Any circumstance which is evidence of a person's residence, or of his or her intention to reside permanently or indefinitely in a country, must be considered in determining whether he or she has acquired a domicile of choice in that country", at [6R-049].

I deal with the issue of loss of a domicile of choice below.

36. Although Rule 9 is phrased as a presumption in favour of the continuance of existing domicile, this is, at [6-018], "not a legal rule" and its significance is that it means that "the burden of proving a change of domicile lies on those who assert it". This means that, when this issue is raised, the court expressly has to decide whether the domicile of choice has been lost. Further, the effect of the application of this approach in this case is that the wife had the burden of establishing that she had acquired a domicile of choice in England before September 2019 and, if she succeeded in doing so (as she did), the husband had the burden of proving that she had lost it prior to 11 October 2022. Whether the wife had lost her domicile of choice was, therefore, an issue which the judge was expressly required to address. In addition, the judge was wrong when he referred only to the wife as having the burden of proof.

37. In respect of the standard of proof of change in domicile, *Dicey* at [6-019], summarises the position as follows:

> "The courts have offered different formulations of the standard of proof required to rebut the presumption. It is clear that the standard is that adopted in civil proceedings, proof on a balance of probabilities, not that adopted in criminal proceedings, proof beyond reasonable doubt. Although Sir Jocelyn Simon P. said that "the standard of proof goes beyond a mere balance of probabilities" the prevailing view is that of Scarman J. that "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." *Cogent and clear evidence is needed to show that the balance of probabilities has been tipped, and this is true whether the issue is the acquisition or loss of a domicile of choice*." (emphasis added)

The passage quoted from Scarman J (as he then was) came from *In the Estate of Fuld, Decd. (No 3)* [1968] P 675 ("*Fuld*") at p.686 D which I consider further below.

38. In *Barlow Clowes*, Arden LJ, as she then was, addressed the question, at [89], of "whether there is any difference in the strength of the case which Mr Henwood must show if he acquired a domicile of choice in Mauritius without his domicile of origin reviving and the strength of the case which he must show if his domicile of origin revived. It would be odd to have two different approaches within the same case". Her answer, at [94], was that there should be no difference:

> "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 (as demonstrated above) the same. However, what evidence is required in a particular case will depend on the application of common sense to the particular circumstances."

Moore-Bick LJ agreed with this, at [141]:

> "I agree with Arden LJ that the weight of evidence required to displace the domicile of origin where that has revived merely by operation of law is no greater than that which is required to displace an existing domicile of choice."

39. As referred to above, Rule 12, the acquisition of a domicile of choice requires "a combination of residence and intention of permanent or indefinite residence". As referred to below, a domicile of choice is lost when these two elements are "given up". They are, therefore, the obverse of each other. Residence requires no elaboration. It is the latter element, intention, which requires further consideration. This is addressed in *Dicey* at [6-043]:

> "A person who determines to spend the rest of their life in a country clearly has the necessary intention even though he or she does not consider that determination to be irrevocable. It is, however, rare for the *animus manendi* to exist in this positive form: more frequently a person simply resides in a country without any intention of leaving it, and such a state of mind may suffice for the acquisition of a domicile of choice. The fact that a person contemplates that he or she might move is not decisive: thus a person who intends to reside in a country indefinitely may be domiciled there although he or she envisages the possibility of returning one day to their native country. *If they have in mind the possibility of such a return should a particular contingency occur, the possibility will be ignored if the contingency is vague and indefinite, for example making a fortune or suffering some ill-defined deterioration in health; but if it is a clearly foreseen and reasonably anticipated contingency, for example the termination of employment, or the offer of an attractive post in the country of origin, succession to entailed property, a change in the relative levels of taxation as between two countries, or the death of one's spouse, it may prevent the acquisition of a domicile of choice*. If a person intends to reside in a country for a fixed period only, they lack the *animus manendi*, however long that period may be. The same is true where a person intends to reside in a country for an indefinite time but clearly intends to leave the country at some time." (emphasis added)

It can be seen from this passage that, when determining whether a person has the requisite intention, at one end of the spectrum is a "vague or indefinite" occurrence and at the other end is a "clearly foreseen and reasonably anticipated" one.

40. I deal with this question further below but I would first repeat, as referred to by Mr Williams in his oral submissions, the note of caution sounded by Scarman J at the beginning of his judgment in *Fuld*, at p.682 F:

> "This branch of the law is adorned by a great number of cases, not all of which is it easy to harmonise. The difficulty arises not from a lack of clarity in judicial thought but from the nature of the subject. Domicile cases require for their decision a detailed analysis and assessment of facts arising within that most *subjective* of all fields of legal inquiry - *a man's mind*." (emphasis added)

He then added, at p.682 G/p.683 A, that: "[n]aturally enough in so subjective a field different judicial minds concerned with different factual situations have chosen different language to describe the law". It would, therefore, be unwise to suggest that the cases establish, or indeed to seek to craft, a clear rule or a prescribed approach when dealing with the issue of contingencies in the context of determining whether a person has the required intention.

41. Rule 13 addresses the scope of relevant evidence. The effect is that, when determining a person's domicile at a particular date, the court must look at the totality of the evidence: see, for example, *Dicey*, at [6-055] and *Re Grove* (1888) 40 Ch D 216 in which Lopes LJ said, at p.242: "I have always understood the law to be, that in order to determine a person's intention at a given time, you may regard not only conduct and acts before and at the time, but also conduct and acts after the time, assigning to such conduct and acts their relative and proper weight and cogency".

42. A further example of this is *Agulian*, in which Mummery LJ said, when overturning the trial judge's decision, first, at [46(1)], and then, at [51]:

> "46 (1) First, the question under the 1975 Act is whether Andreas was domiciled in England and Wales *at the date of his death*. Although it is helpful to trace Andreas's life events chronologically and to halt on the journey from time to time to take stock, this question cannot be decided in stages. Positioned at the date of death in February 2003 the court must look back at the whole of the deceased's life, at what he had done with his life, at what life had done to him and at what were his inferred intentions in order to decide whether he had acquired a domicile of choice in England by the date of his death. Soren Kierkegaard's aphorism that "Life must be lived forwards, but can only be understood backwards" resonates in the biographical data of domicile disputes.";
>
> "51 Thirdly, and connected to the first two points, *the division of Andreas's life in England into periods of time led the deputy judge to divorce the post-1995 events, from which he drew an inference of an intention to make a permanent home in England, from the pre-1995 events from which he correctly declined to make that inference*. He should have considered, as at the date of Andreas's death, the whole of Andreas's life in retrospect in order to see whether an inference could be made that he intended to make his home permanently or indefinitely in England. By concentrating on the years at the end of Andreas's life the deputy judge limited his perspective on Andreas's life and did not take into account all the materials relevant to an inference about Andreas's intentions. Had he taken into account all the connecting factors with Cyprus and England over the whole of Andreas's lifetime, he would have found that the evidence was not sufficiently "cogent and convincing" to establish such a serious matter as a change of domicile. He would have concluded that the cumulative effect of the preponderance of the factors did not point "clearly and unequivocally" to an intention to make his permanent home in England, but rather reinforced the enduring character of his Cypriot domicile of origin."

I draw attention, in particular, to Mummery LJ's reference to the judge having wrongly divided the deceased's life "into periods of time" rather than considering the whole of his life.

43. This is relevant in the present case because, when determining that "the wife's domicile of choice in England ended" (paragraph 44) when the family left England in 2019, it is clear that the judge did not take into account evidence of any subsequent matters. This was a material error and one which might well have had a bearing on the judge's decision because it meant that the judge excluded from his consideration the fact that the wife returned to live here in 2022 and has remained living here apparently with the intention of doing so indefinitely.

44. I would just note that the potential relevance of *any* circumstance, as identified in Rule 13, has to be applied in accordance with the normal rules applicable to decision making and the content of judgments. As was said in *Ray v Sekhri* [2014] 2 FLR 1168 by McFarlane LJ, as he then was, at [38]:

> "It is not a requirement that the trial judge should slavishly list each and every such factor. He has a responsibility to look at the contours of the case and highlight the prominent elements that, in his view, fall for consideration and which may be determinative of the outcome."

45. The loss of a domicile of choice is addressed in *Dicey* in Rule 15, at [6R-077]:

> "(1) A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently or indefinitely, and not otherwise.
>
> (2) When a domicile of choice is abandoned, either
>
> (i) a new domicile of choice is acquired; or
>
> (ii) the domicile of origin revives."

The commentary provides as follow, at [6-078]:

> "*A domicile of choice is lost when both the residence and the intention which must exist for its acquisition are given up*. It is not lost merely by giving up the residence nor merely by giving up the intention. *It is not necessary to prove a positive intention not to return: it is sufficient to prove merely the absence of an intention to continue to reside*. The intention is not considered to have been given up merely because the propositus is dissatisfied with the country of the domicile of choice. In order to show that the intention has been given up, it may be desirable to prove the formation of an intention to reside in another country, but such proof is not essential as a matter of law." (emphasis added)

As referred to above, this is the obverse of the acquisition of a domicile of choice so that what has to be established is the *loss* of the intention to reside in a country permanently or indefinitely.

46. I now turn to some of the authorities which have addressed the court's approach when considering whether a domicile of choice has been acquired or lost in particular when

the person's intention is connected to or involves a contingency.

47. I start with *Fuld*. The testator in that case had a domicile of origin in Germany and the issue was whether he had lost it. When considering the nature of the required intention, Scarman J said, starting at p.684 F/p.685 A:

> "a domicile of choice is acquired only if it be affirmatively shown that the propositus is resident within 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, e.g., 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*." (emphasis added)

I would note four elements. The first connects with what Scarman J said, as quoted above, namely that the court is engaged in a *subjective* inquiry as to the person's "state of mind". Secondly, that a contingency can be relevant for the purposes of determining whether the person has the required intention but it is only *one* factor in that assessment. Thirdly, other relevant factors can include the importance of the contingency to the person and "his assessment" of its probability. Fourthly, there is "no clear line" and the "ultimate decision" will depend on the weight the court gives to the "various factors and future contingencies".

48. The next case is *In re Flynn Decd (No. 1)* [1968] 1 WLR 103 ("*Flynn*"). The case concerned the well-known actor, Errol Flynn. The issue was where he was domiciled at the date of his death. His domicile of origin was Australia or Tasmania where he was born in 1909. Megarry J (as he then was) decided that, by 1942, he had acquired a domicile of choice in California. The issue, therefore, as set out in the Headnote, was "whether F.'s domicile at the time of his death was California or New York State or Jamaica as his domicile of choice; or whether he had abandoned a domicile of choice so that his domicile of origin revived".

49. The first question Megarry J addressed was whether Errol Flynn had lost his domicile of choice in California. This raised an issue as to the applicable test which he set out, at p.133 A/D:

> "There is no dispute that this domicile could be lost either by abandonment or by the acquisition of a new domicile of choice; but a curious point has arisen as to the intention required for abandonment. Given the necessary factum of a physical departure from the country of domicile, is it necessary to

> demonstrate that the departure was animo non revertendi, or does it suffice if it was sine animo revertendi? In other words, *is it necessary to establish a positive intention not to return to reside in the country, or will it suffice if there is a merely negative absence of any intention to continue residing there*?" (emphasis added)

50. Megarry J decided, after considering a number of authorities including *Udny v Udny* (1869) LR 1 Sc & Div 441, HL (Sc) and *Fuld*, that the correct approach was as it now appears in Rule 15(1). It was *not* necessary to establish a positive intention not to return but only the absence of an intention to continue residing there. This was because the loss of a domicile of choice is the obverse of its acquisition, as had been explained by Lord Hatherley LC in *Udny v Udny*, at p.450:

> "It seems reasonable to say that if the choice of a new abode and actual settlement there constitute a change of the original domicile, then the exact converse of such a procedure, viz., the intention to abandon the new domicile, and an actual abandonment of it, ought to be equally effective to destroy the new domicile. That which may be acquired may surely be abandoned, and though a man cannot, for civil reasons, be left without a domicile, no such difficulty arises if it be simply held that the original domicile revives."

Similarly, Lord Westbury said, at p.458: "Domicile of choice, as it is gained *animo et facto*, so it may be put an end to in the same manner". In Megarry J's words, at p.115 C: "Acquisition and abandonment are correlatives". He then went on to explain:

> "*When animus and factum are each no more, domicile perishes also*; for there is nothing to sustain it. If a man has already departed from the country, his domicile of choice there will continue so long as he has the necessary animus. When he no longer has this, in my judgment his domicile of choice is at an end, for it has been abandoned; and this is so even if his intention of returning has merely withered away and he has not formed any positive intention never to return to live in the country. In short, the death of the old intention suffices, without the birth of any new intention. In this way abandonment dovetails in with acquisition. It follows that in my view the true rule is correctly stated in Dicey and Morris on The Conflict of Laws, 8th ed. (1967), rule 10(1)." (emphasis added)

The wording of the then Rule 10(1) was the same as the current Rule 15(1).

51. Megarry J's decision, that it was not necessary to establish a positive intention not to return but only the absence of an intention to continue residing, was followed by Sir Jocelyn Simon P (as he then was) in *Qureshi v Qureshi* [1972] Fam 173 ("*Qureshi*"). He noted, at p.191 D, that although Megarry J 's comments were probably obiter, they "seem to me to be valid and valuable tools of analysis". This included that, at p.191 C/D:

> "Thirdly, given the necessary fact of a physical departure from the country of domicile of choice, for its abandonment the animus that must be shown is not necessarily non revertendi; *it is sufficient that the residence in the new country is sine animo revertendi*." (emphasis added)

52. The next case is *Inland Revenue Commissioners v Bullock* [1976] 1 WLR 1178 ("*IRC v Bullock*"). This considered the nature of the intention required for the purposes of acquiring a domicile of choice. The taxpayer's domicile of origin was Canada. The issue was whether he had acquired a domicile of choice in England by 1971, by which date he had been living here for nearly 40 years. The taxpayer contended that he intended to return to Canada in the event of his wife predeceasing him but not until then because his wife did not want to move to live there. Buckley LJ set out his reasons for deciding that the taxpayer had not lost his domicile of origin, at p.1185 H-p.1186 G:

> "The judge disregarded as remote the theoretical possibility that the taxpayer may somehow persuade his wife to live in Canada or that she may change her mind and reconcile herself to life in Canada. I think he was justified in so doing upon the findings made by the commissioners. I am consequently prepared to accept that in the present case the matrimonial home will continue to be in England as long as both the parties to the marriage survive. It is clear, however, from the findings of the commissioners that the taxpayer never abandoned his intention of returning to live in Canada in the event of his surviving his wife. The taxpayer's wife is some three or four years younger than he is and her health is good. The taxpayer said in his evidence before the commissioners that he would put the possibility of her predeceasing him at no higher than a possibility and considered it an even chance which of them might die first. We must, in my opinion, proceed upon the footing *that the possibility of the taxpayer surviving his wife is not unreal* and that he is at least almost as likely to survive her as she is to survive him.
>
> No doubt, if a man who has made his home in a country other than his domicile of origin has expressed an intention to return to his domicile of origin or to remove to some third country upon *an event or condition of an indefinite kind*; for example. "if I make a fortune" or "when I've had enough of it" *it might be hard, if not impossible, to conclude that he retained any real intention of so returning or removing*. Such a man, in the graphic language of James L.J. in *Doucet v. Geoghegan* (1878) 9 Ch.D. 441, 457, is like a man who expects to reach the horizon; he finds it at last no nearer than it was at the beginning of his journey. In *Aikman v. Aikman* (1861) 4 L.T. 374, 376, Lord Campbell L.C. said that a mere intention to return to a man's native country on a doubtful contingency would not

> prevent residence in a foreign country putting an end to his domicile of origin.
>
> In the present case it seems to me impossible not to hold that the taxpayer has always maintained a firm intention to return to Canada in the event of his surviving his wife. Whether that event will or will not occur is of course doubtful. That is the characteristic of a contingency. But there is no doubt about the nature of the contingency, nor will there eventually be any doubt whether the contingency has or has not occurred. There is *nothing embryonic, vague or uncertain about the taxpayer's intention* in this respect. Suppose a man to establish his home in a foreign country with the intention of returning to his country of origin when or if he survives the age of 60; or with the intention of returning to his country of origin when he retires; or of doing so if and when he inherits a particular family title. I apprehend that in neither the first nor the second case could it be contended that he had adopted a permanent home in the foreign country, *notwithstanding that the event upon which he proposed to return to his country of origin was one which might never occur*. His intention would have been limited to making a temporary home there. The occurrence of the contingency of the man inheriting a family title might well be more uncertain than his surviving the age of 60 or living to retirement; but, *if there were a real likelihood of the contingency occurring*, I can see no reason why that man should more readily be treated as having an intention of making a permanent home in the foreign country than the other two examples.…
>
> The contingency of the taxpayer surviving his wife seems to me *no more remote or unreal than this. Anderson v. Laneuville* (1854) 9 Moo. P.C.C. 325 must be read in the context of the facts of that case, and Dr. Lushington's statement, at p. 334, that it could never be said that residing in a country until the death of an individual is a residence merely for a temporary purpose, cannot in my opinion be taken as an enunciation of a rule of universal application. *The question can perhaps be formulated in this way where the contingency is not itself of a doubtful or indefinite character: is there a sufficiently substantial possibility of the contingency happening to justify regarding the intention to return as a real determination to do so upon the contingency occurring rather than a vague hope or aspiration?*" (emphasis added)

53. I have emphasised certain passages because, in line with *Re Fuld*, it seems to me that Buckley LJ was analysing the nature of the intention to determine whether it was a "real intention". He used a number of different formulations: "not unreal"; "an event or condition of an indefinite kind"; "embryonic, vague or uncertain"; an event "which might never occur"; and "a real likelihood of the contingency occurring" before

formulating the question as being: "where the contingency is not itself of a doubtful or indefinite character: is there a sufficiently substantial possibility of the contingency happening to justify regarding the intention to return as a real determination … rather than a vague hope or aspiration?".

54. In *Agulian*, Mummery LJ, at [6], quoted with approval what Scarman J had said in *Fuld*, at p.684 F/p.685 D, as quoted above.

55. In *Mark*, the principal issue in the case was whether a person could become domiciled in a country in which their presence was unlawful. The House of Lords decided that they could. In the course of her speech (with which the rest of the Judicial Committee agreed), Lady Hale pointed out that having a precarious immigration status did not prevent a person from acquiring a domicile of choice in England:

> "[39] An adult can acquire a domicile of choice by the combination and coincidence of residence in a country and an intention to make his home in that country permanently or indefinitely: see the joint report of the Law Commission and the Scottish Law Commission, The Law of Domicile (1987) (Law Com No 168, Scot Law Com No 107), para 2.6. *There is a long line of cases showing that an alien may acquire a domicile of choice in this country even though he might be required to leave at any time by executive action with no right of appeal*: see *Boldrini v Boldrini and Martini* [1932] P 9, CA; *May v May and Lehmann* [1943] 2 All ER 146; *Cruh v Cruh* [1945] 2 All ER 545; *Zanelli v Zanelli* (1948) 64 TLR 556; *Szechter (orse Karsov) v Szechter* [1971] P 286. Indeed, as already seen, aliens were always in that precarious position, and could otherwise never have established a domicile of choice here. In *May v May and Lehmann* the principle was applied to a German Jew who had been given only limited leave to land here in 1939. In *Cruh v Cruh*, Denning J applied the principle to a man of Austrian or German origin who had been recommended for deportation following a conviction for conspiracy and whom the Home Secretary intended to deport as soon as it became practicable to do so. Until the recommendation was actually effected, the domicile of choice remained. Once that happens, however, the domicile is lost." (emphasis added)

56. Lady Hale next considered, from [40], the position if the person's presence in the country was "unlawful". In that case, at the date of the petition, at [22], the wife was "an overstayer and her continued presence here was an offence under sections 24(1)(b) and 24A of the Immigration Act 1971". Lady Hale considered a number of authorities, both domestic and international, as well as *Dicey*. In the course of this review, she said, at [47]:

> "*One can also form an intention to remain in a place despite considerable uncertainty as to whether this will be possible*. *English law requires only that the intention be bona fide*, in the sense of being genuine and not pretended for some other

> purpose, such as getting a divorce to which one would not be entitled by the law of the true domicile." (emphasis added)

She concluded that the fact that a person's presence or residence was unlawful did not, as a matter of principle, prevent them from becoming domiciled here:

> "[49] Hence, my Lords, it seems to me that there is no reason in principle why a person whose presence here is unlawful cannot acquire a domicile of choice in this country. Although her presence here is a criminal offence, it is by no means clear that she will be required to leave if the position is discovered. Her position is in reality precarious in the same way that the aliens' presence was precarious in the *Boldrini* [1932] P 9 line of authority. In fact, it was always much less likely that this wife would ever be removed from this country than it was that the propositus in *Cruh* [1945] 2 All ER 545 would be removed.
>
> [50] *This is not to say that the legality of a person's presence here is completely irrelevant. As in the precarious residence cases, it may well be relevant to whether or not she had formed the required animus manendi.* But this is a question of fact and not, as it was held to be in *Smith* 1962 (3) SA 930, a question of law. Nor is it, as at times the Court of Appeal appeared to be saying, a matter of discretion or, as it is put in *Rayden & Jackson on Divorce and Family Matters*, 17th ed (1997), para 2.16, of the court being "hostile" to the assertion of a domicile of choice by an illegal entrant or resident. Either a person has acquired a domicile of choice in this country or she has not. If she has done so, she is not to be denied it because the court considers her case unmeritorious or tainted with moral or legal turpitude. If she has not done so, she is not to be granted it because the court considers her virtuous. It is a matter of fact whether she had the required intention at the relevant time." (emphasis added)

57. It is significant that no investigation appears to have been undertaken in that case as to the likelihood of the wife being required to leave the UK and that the "considerable uncertainty" as to whether the wife would be able to stay did not undermine the existence of the required intention. It seems to me again that this shows that, first, while a contingency or uncertainty can be a relevant factor when the court is determining whether a person had the required intention, many factors can feed into the determination and, secondly, that even "considerable uncertainty" as to whether it can be fulfilled may not prevent the required intention being present.

58. In the same vein is *Szechter (orse Karsov) v Szechter* [1971] P. 286 ("*Szechter*"), a case which also concerned domicile for the purposes of divorce proceedings which had been commenced in August 1969. The husband and wife, who both had a Polish domicile of origin, had arrived in England at the end of 1968 and only had limited permission to live in the UK, initially until December 1969 and then extended until December 1970. Sir Jocelyn Simon P determined, at p.294 F/G, that the parties "had acquired and never lost a domicile of choice in England by residing here with the

intention of making this country their permanent home". It was "*immaterial* that their intentions were liable to be frustrated by the decision of the Secretary of State for the Home Department as to permission for their continued residence here" (emphasis added). In stating this, he followed *Boldrini v Boldrini and Martini* [1932] P 9 ("*Boldrini*") in which Lord Hanworth MR had said, at p.15, that the fact that the petitioner was "an alien subject to the Aliens Order, 1920, under which he had to report any movements of his to the police and was subject in certain circumstances to deportation" was "*beside the point*"; the "*possible danger* of being deported if he misbehaves himself does not militate against the acquisition of a domicil of choice animo et facto" (emphasis added).

59. I propose, finally, to refer to some specific examples of cases which have involved contingencies.

60. In *Doucet v Geoghegan* (1878) 9 Ch D 441, the Court of Appeal upheld the decision that the deceased had acquired a domicile of choice in England in place of his French domicile of origin. He had lived for many years in England but had said that he intended to return to France. The trial judge had heard oral evidence from "numerous witnesses [who] deposed that he had made various parol declarations that he intended to return to France when he made his fortune". As set out in the Headnote, these declarations were not considered "sufficient to rebut the conclusion to be derived from the facts of his life, especially of his English marriages" that he had acquired a domicile of choice in England. Sir George Jessel MR considered, at p.456, that these declarations were "much too indefinite"; a "declaration that a man means to return when he has acquired a fortune *is not sufficient to outweigh* actions which shew an intention of permanent residence" (emphasis added). James LJ at p. 457, said:

> "He is reported to have said, that when he had made his fortune he would go back to France. *A man who says that is like a man who expects to reach the horizon, he finds it at last no nearer than it was at the beginning of his journey. Nothing can be imagined more indefinite than such declarations. They cannot outweigh the facts of the testator's life*." (emphasis added)

I have highlighted the above passages because they provide a further illustration of the exercise in which the court is engaged. It is clear that even a contingency which is based on a vague or indefinite event will be relevant but it has to be weighed with the rest of the evidence to determine whether the person has the required intention.

61. In *Goulder v Goulder* [1892] P 240, which was relied on by Mr Williams, the husband was found to be domiciled in England. The husband had been born in France to English parents. The husband did not participate in the proceedings because his whereabouts were not known. His father gave evidence, at p.240, that "his own intention, and, as far as he was aware, his son's intention, was to return to England when they had made sufficient money to maintain them". The husband's parents had moved to "a suburb of Calais, where a large lace-making business is carried on, chiefly by English", at p.241/p.242. This community of English lace-makers had existed, at p.242, "for many generations"; "[t]hey appear to go and reside there for the purpose of carrying on their business and making money, but, according to the evidence, with the ultimate fixed intention of returning to England". The judgment is brief and there is no investigation or consideration of the extent to which the

husband's intention of returning to England when he had made sufficient money was or was not realistic. The judge simply accepted the evidence that this was his intention.

62. In *Winans v Attorney-General* [1904] AC 287 ("*Winans*"), the House of Lords overturned the lower courts' determination that the deceased had lost his domicile of origin and was domiciled in England because they concluded, by a majority, that the Crown had failed to discharge the onus of proving the necessary intention. In his speech, the Earl of Halsbury LC noted, at p.289, that the deceased intended to return to the USA, his domicile of origin, "when his boats succeeded". His boats were "cigar-shaped boats, in which he took a deep interest as inventor". Although, *it "may be that your Lordships do not think that he was likely to succeed,* but it may be confidently asserted that the inventor *thoroughly believed he would succeed*" (emphasis added). In his speech, Lord Macnaghten, at p.298, was "unable to come to the conclusion that [the deceased] ever formed a fixed and settled intention of abandoning his American domicil and settling finally in England". This included because "I think up to the very last he had *the expectation or hope* of returning to America and seeing his grand schemes inaugurated" (emphasis added).

63. I, finally, refer to Holman J's decision in *Ray v Sekhri* [2014] 1 FLR 612. One of the issues he had to decide was where the husband's father had been domiciled when the husband was born. Holman J decided that the father had lost his domicile or origin in India and had acquired a domicile of choice in England. He summarised his conclusion as follows:

> "[29] In my view, all the talk of ceasing to live in England and returning to live in India, as his home, was no more than *a pipe dream* after the 7-month period, and he knew it. *His intention, from immediately after the return in November 1970, was to live permanently and indefinitely in England,* for it was here that his wife, together with their then two children, was determined to live. Practical effect was given to that intention by the purchase of 30 Colin Gardens in July 1971. I am quite satisfied that Bikas had acquired an English domicile of choice by, at the latest, July 1971. That was his domicile when the husband was born in September 1971 and is accordingly the husband's domicile of origin." (emphasis added)

It can be seen from this brief passage that Holman J referred to the father's talk of returning to live in India as a "pipe dream" but he did so as part of his overall assessment of the evidence when determining the father's actual intention. This decision was upheld by the Court of Appeal because, at [38], Holman J's conclusion was supported by his findings which had been based on a sufficient assessment of *all* the evidence. In summary, at [39]: the father "had demonstrated an intention to reside in England which was fixed and was for the indefinite future. He had chosen to 'settle' here and bring up his family in England. The judge was entitled to characterise [the father's] continued contemplation of living once again in India at some distant future time as no more than a 'pipe dream'".

64. In conclusion, the general approach the court takes when determining the issue of domicile is as referred to above. This includes matters such as the burden of proof

and the need for the court expressly to determine, if it is alleged, that a person has lost a domicile of choice.

65. The further question which arises in this case is the manner in which the court considers the issue of intention when the intention is linked in some manner with a prospective event or a particular contingency. In particular, is there a threshold that has to be surmounted?

66. First, it is clear that the acquisition of a domicile of choice and its loss are two sides of the same coin. Adapting what Megarry J said in *Flynn*, at p.115 C, if both residence and intention "are each no more", a person loses or abandons their domicile of choice. This also means that, the "necessary animus", as it was put in *Flynn*, is the same. This is summarised in *Dicey*, at Rule 15(1), at [6R-077]:

> "A person abandons [or loses] a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently or indefinitely, and not otherwise."

67. Secondly, as also summarised in *Dicey*, at [6-078], derived from what Megarry J said in *Flynn* and which was applied by Sir Jocelyn Simon P in *Qureshi*, at p.191 C/D:

> "A domicile of choice is lost when both the residence and the intention which must exist for its acquisition are given up. It is not lost merely by giving up the residence nor merely by giving up the intention. It is not necessary to prove a positive intention not to return: *it is sufficient to prove merely the absence of an intention to continue to reside*." (emphasis added)

68. Thirdly, the issue of a person's intention is an issue of fact which requires the court to consider *all* the evidence. The court is determining, what Scarman described in *Fuld*, at p.682 F, as "that most subjective of all fields of legal inquiry - a man's mind." As Arden LJ emphasised in *Barlow Clowes*, at [68], the "ultimate fact in issue was [the person's] intention"; in order to "ascertain whether such an intention was shown on the evidence, the judge had to make primary findings of fact and then make a global evaluation of all the relevant facts". The evidential landscape is very wide and potentially includes "[a]ny circumstance which is evidence of a person's … intention to reside permanently or indefinitely in a country": *Dicey*, at [6R-049].

69. The potential scope of the evidential landscape means that, as it is expressed in *Cheshire, North and Fawcett, Private International Law*, 15th Ed, 2017, at p. 156, "it is impossible to formulate a rule specifying the weight to be given to particular evidence". This comment links with Megarry J's observation in *Fuld*, at p.682 F, that it is not "easy to harmonise" what had been said in different cases which, in his view reflected, at p. 683 A, that different judges "concerned with different factual situations have chosen different language to describe the law".

70. I repeat, therefore, my comment above that I consider it would be unwise to suggest that the cases establish, or indeed to seek to craft, a clear rule or a prescribed or harmonised approach when dealing with the issue of contingencies in the context of determining whether a person has the required intention. This applies to the role a contingency might have when the court is determining whether a person has or has

not lost the requisite intention for the purposes of establishing whether a person has acquired a new or has lost an existing domicile. This element will only be one piece in the evidential puzzle and it would, therefore in my view, be equally unwise to focus too much on whether it is a likely or unlikely or a "vague possibility" or a "clearly foreseen and reasonably anticipated contingency" as though the decision depends on this issue by itself.

71. In *Fuld*, at p.685 A/B, Scarman J observed that "no clear line can be drawn" because, it is an issue of fact which will depend on "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". So, for example, in *Mark*, the wife had the requisite intention to acquire a domicile of choice in England "despite considerable uncertainty as to whether this will be possible": Lady Hale, at [47]. Indeed, perhaps even plainer examples are given by *Boldrini* and *Szechter* in which the court considered that the fact that the person's intention to remain in England might be frustrated by the actions of the Government was, respectively, said to be "beside the point" and "immaterial". I would also note that no significant analysis was undertaken of the likelihood of the contingency arising, namely the right to reside not being extended or the risk of deportation.

72. Another example is *Winans* in which the deceased, at p.289, "meant to travel back to his own country when his [cigar shaped] boats succeeded". As to the prospects of the boats succeeding, the Earl of Halsbury said, at p.289: "It may be that your Lordships do not think that he was likely to succeed, but it may confidently be asserted that the inventor thoroughly believed that he would succeed"; and Lord Macnaghten said, about this and a related project, at p.296/p.297: "Of course, to us these schemes of Mr. Winans appear wild, visionary, and chimerical. But I have no doubt that to a man like Mr. Winans, wholly wrapt up in himself, they were very real". Despite the deceased's intention being connected with such an uncertain event, the House of Lords decided, when considered with the rest of the evidence, that the Crown had not established that he had lost his domicile of origin. As expressed by Lord Macnaghten, at p.298: "I think up to the very last he had an expectation or hope of returning to America and seeing his grand schemes inaugurated". In his minority speech, Lord Lindley would have upheld the lower courts' decisions, that the deceased had acquired a domicile of choice in England, including because he considered, at p.300/p.301, that: "A dim hope and expectation of being at some time able to return to America when he had succeeded in constructing a ship to his liking - which he never did - is spoken to by his son, but when last does not appear. I can find nothing to displace the only inference which I can draw from Mr. Winans' conduct for the last twenty or twenty-five years of his life". Having regard just to these observations, it is not surprising that Scarman J considered that no clear line could be drawn.

73. In summary, an intention which is based on a contingency which is "much too indefinite" may not be "sufficient to outweigh actions which shew an intention of permanent residence" (*Doucet*). Also, as Buckley LJ said in *IRC v Bullock*, at p.1186 C, it may "be hard, if not impossible, to conclude that [a person] retained any real intention of … returning or removing" if that intention is based on "an event or condition of an indefinite kind". However, although an intention which is based on a contingency that is "vague and indefinite" (*Fuld*) might often be insufficient or

"ignored", this is not a rule and does not mean that an intention based on such a contingency is necessarily insufficient to prevent the acquisition or the retention of a domicile of choice. In the particular circumstances it may be hard, or even impossible, but this will depend on the other facts in the case. It may be, for example, as in *Szechter*, that the court considered this to be "immaterial" in the circumstances of the case. Or, as in *Winans*, that although the event on which the deceased's intention to return to the USA was uncertain, or even "chimerical", this was insufficient to prove the intention required to establish a domicile of choice in England.

74. In conclusion, the nature of the contingency on which an intention is said to be based can, of course, be a relevant factor in the court's decision. No doubt, also, in some cases this issue will feature more prominently than in others which may justify the court conducting a more detailed investigation of the nature of the contingency. I would suggest, however, that this should be conducted with a relatively light touch in respect of the likelihood or otherwise of the contingency occurring. Apart from the fact that it is only one factor and that no clear line can be drawn, this reflects the fact that the court is considering the person's *subjective* intentions and determining whether it is "bona fide" as it was expressed in *Mark* or a "real intention" as it was expressed in *IRC v Bullock*.

75. I would further suggest that, if the court were to conclude that the intention was bona fide, it would be likely to require cogent evidence for a court to decide that the intention was not "real" because of the nature of the contingency or the likelihood of it occurring. This is because "cogent and clear evidence" is required to establish a change of domicile with the cases showing that, in general terms, if there is a threshold, it is a relatively high threshold before the court is likely to ignore or discount an intention because it is based on a vague or indefinite event. Or, to put it another way, before the court will decide that the intention is not sufficient to prevent the acquisition of a domicile of choice or not sufficient to prevent a domicile of choice being lost or abandoned.

Determination

76. The judge was undoubtedly not assisted by the fact that both parties were acting in person. However, it is regrettably clear to me that the judge, having found that the wife had acquired a domicile of choice on England by 2016, did not properly consider the issue of whether she had lost this by 11 October 2022. There are passages in the judgment which might support the view that he did address this issue, as submitted by the husband. However, this was a key issue in the case which needed to be expressly and clearly addressed and, even if touched on by the judge, he did not clearly address it.

77. Further, in any event, even if the judge did decide that the wife had lost her domicile of choice in England, his decision is not sustainable for other reasons. First, the judge considered that the burden of proof was solely borne by the wife. As referred to above, the husband had the burden of proving that the wife had lost her domicile of choice in England.

78. Secondly, the judge did not consider the whole evidential history when deciding the issue of domicile. His conclusion that the decision to leave England in 2019 meant

that "the wife's intention to make England her permanent or indefinite home at that point came to an end" was based only on an analysis of the evidence up to that point and did not include any analysis of what happened thereafter. He did not, for example, include within his analysis the significant fact that the wife and the children returned to England in October 2022 and have been living here since then.

79. Thirdly, the judge did not apply the right legal approach. The judge did not address what Arden LJ referred to as the "ultimate fact in issue", namely the wife's intention. He decided that the circumstances surrounding the family's departure from England in September 2019 were such that the "inescapable conclusion" was that the wife's intention to make England her permanent or indefinite home "came to an end". This is, with respect, a circular argument that does not explain why the wife no longer had the required intention. The wife's case was that she retained or had not lost the intention to make England her permanent or indefinite home because she intended to return here. As Lewison LJ said during the course of the hearing, one way of analysing the key issue was whether the wife's state of mind was sufficient to continue to support her domicile of choice in England. The judge does not directly engage with this issue. His focus was on the fact that the future was "uncertain", an issue to which I now turn.

80. Fourthly, the judge's conclusion that the family's decision to leave England in September meant that the wife's intention "to make England her permanent or indefinite home at that point came to an end" was based on the plan to return being an "aspiration" and that "[e]verything thereafter was uncertain". Simply stated, that her intention had come to an end because the intention to return was based on an "aspiration" and the future was "uncertain". As can be seen from the cases referred to above, the fact that something is "uncertain" does not mean that the required intention is not present. This can be seen from *Mark* and from *IRC v Bullock*. In the latter case, the fact that the husband's intention to return to Canada was based on an uncertain contingency, namely his wife's death, was sufficient for him to retain his domicile of origin. Accordingly, a more detailed analysis was required in the present case in order to decide whether the wife had or had not retained the required state of mind.

Conclusion

81. For the reasons set out above, it is clear that the judge's decision must be set aside. It is also, in my view, clear that this court is not able to remake the decision itself. The evidence is not so clear that it would be right for us to do so especially in the absence of hearing oral evidence. Accordingly, the matter will have to be remitted for rehearing so that the court can determine (i) whether the wife lost her domicile of choice in England prior to 11 October 2022; and (ii) whether the proceedings should be stayed.

Lord Justice Popplewell:

82. I agree.

Lord Justice Lewison:

83. I also agree.