TAX PLANNING FOR FOREIGN DOMICILIARIES[1]

Christopher Sokol QC[2]

1. A very highly respected heart consultant once said to me "the most important piece of advice I can give anyone is, choose your parents carefully". It may have been the most important advice he ever gave, I hope it was not also the most useful.

2. But it has to be said if you were able to take that advice you would get off to a pretty good start in the tax planning stakes as well. Being able to elect to be the child of non-United Kingdom domiciliaries could solve an awful lot of problems.

3. Sadly that option is not yet available, but having a non-United Kingdom domiciliary as your spouse or civil partner or indeed child can give you a very valuable fiscal advantage.

4. So what is the advantage? I am not going to try to give you a complete list but I shall mention some relating principally to inheritance tax. As you know property situated outside the United Kingdom or treated as situated outside the United Kingdom under the terms of a death duty agreement (an often forgotten extension) held by an individual who is neither domiciled in the United Kingdom nor deemed to be a United Kingdom domiciliary by Inheritance Tax Act 1984 s267 is excluded property (s6) and excluded property simply does not fall within a person's death estate for the purposes of inheritance tax (s5(1)). It is, in fact, excluded.

5. The two points to notice here are that it makes absolutely no difference

---

1 This is the text of a talk not an opinion. There are certainly omissions there may be errors and it definitely does not constitute advice.

2 15 Old Square, Lincoln's Inn, London WC2A 3EU; Tel: 020 7242 2733; Fax: 020 7831 8095; E-mail: taxchambers@15Oldsquare.co.uk

where the non-United Kingdom domiciliary is resident or when or how he acquired the property concerned.

6. Section 6(1A) extends this exemption by providing that the beneficial holding of a non-domiciliary in an authorised unit trust or a share in an open-ended investment company is also excluded property. The holding in this case does not have to be situate outside the United Kingdom to qualify, for the simple reason that so many unit trusts and open-ended investment companies were set up outside the United Kingdom so as to constitute excluded property, that the financial services industry complained bitterly to the government who last year decided to give them a helping hand; the relevant amendment was not made to be nice to taxpayers.

7. Inheritance Tax Act 1984 s267 which we have mentioned, is a mischievous little provision which treats a person not domiciled in the United Kingdom under the general law as domiciled here for the purposes of that Act if:

(i) he has been domiciled in the United Kingdom within the three years immediately preceding the relevant time (which tends, infrequently, to catch the emigrant who makes a premature disposition); or

(ii) he was resident in the United Kingdom in not less than 17 of the 20 years of assessment ending with the year of assessment in which the relevant time falls (which tends, quite commonly, to catch the immigrant who leaves his IHT planning too late). The test of residence here is the same as for income tax.

8. It is worth mentioning that these deemed domicile provisions do not apply to property within s6(2) so that it seems that a person who is not domiciled and not *ordinarily* resident in the United Kingdom during the year in question under the general law, could make a gift or other beneficial transfer of gilts free of IHT even if he were a deemed United Kingdom domiciliary under s267. This is a provision well worth bearing in mind for those United Kingdom resident foreign domiciliaries who have waited too long to take proper advice, and they are not at all uncommon.

9. As you know there is a parallel set of provisions relating to settled property by virtue of s48(3). When property comprised in a settlement is situated outside the United Kingdom, the property, but not the reversionary interest in it, is excluded property if the settlor was domiciled outside the United Kingdom at the time the settlement was made. A reversionary interest, although outside s48, can fall within s6(1) i.e. by being excluded as part of the individual's free estate. Domicile of course includes deemed domicile for these purposes, so the

provisions of s267 treating individuals as domiciled in the United Kingdom in the circumstances already described are again read in.

10. Section 48 is of considerable value to the individual whose domicile of origin is elsewhere but who has been or is likely to be resident in the United Kingdom for a significant period of years. It enables him or her to settle property upon trust whilst he is non-United Kingdom domiciled, which will constitute excluded property so far as it is situated outside the United Kingdom. The resulting benefit, that it is not treated as part of his IHT estate, will be retained even after he has become, if he does, a United Kingdom domiciliary or more probably a deemed domiciliary under s267. That property is protected from the IHT charge for as long as his settlement lasts, until of course the law changes.

11. One result of the changes in the Finance Act 2006 is that the advantages of property being excluded property for inheritance tax purposes are significantly enhanced. The new and oppressive regime for capital taxation of settled property very largely simply does not apply; it does not matter, when settled property is excluded, whether the trusts of the settlement are serial transitional, immediate post-death or a long time after death or very shortly beforehand. The trust assets are not within the scope of the charge to IHT.

12. This puts a very considerable responsibility upon professional advisers. People who come to the United Kingdom having domiciles of origin elsewhere often have some knowledge of the United Kingdom tax system as regards non-domiciliaries and therefore can be very dangerous clients. Little knowledge in this field is indeed a bad thing and especially when as often it leads to complacency. Many do not really know of the deemed domicile rules contained in s267. The consequence of this is that the adviser whether he is a solicitor or accountant must make enquiries in relation to a client who could be a nondomiciliary if all the facts relating to that individual's status were known and must do so at the first opportunity he is given and further must consider and advise in good time what action should be taken.

13. I say 'must' with complete conviction. Recently, I settled pleadings in an action for professional negligence against a firm of accountants who had:

(i) failed to recognise as soon as they should have done that their client had a domicile outside Great Britain; and

(ii) when they did eventually recognise it failed to give the advice which they should have given in the circumstances; their advice was not wrong as such but it was certainly incomplete.

As a result of (i) and (ii) the client suffered both an immediate and unnecessary tax charge and also was not put in the fiscal position for the future that she ought to have been.

14. The claim is being defended of course but the real question at the end of the day is 'how much'; the liability issue is barely alive. This is not a position in which you wish to see yourselves and nor should you have to, so long as the question of a non-United Kingdom domicile is recognised as soon as it can be and when recognised addressed with equal vigour. I will speak about that a little more, shortly, but first we should return to s48.

15. Finance Act 2006 s157 inserted into s48 three new subsections (3A), (3B) and (3C). They are retrospective being deemed to have come into force on 5th December 2005. They are designed to counteract the following scheme:

(i) A, a non-domiciliary settles a fund for himself for a term of years with remainder to B the trustees having power to advance capital to A during the currency of his interest;

(ii) the fund would comprise only excluded property e.g. cash at bank outside the United Kingdom or shares in an open-ended investment company or units in an authorised unit trust;

(iii) A would sell his interest in possession to X who would be a United Kingdom domiciliary or deemed domiciliary. Often X would borrow money to effect the purchase, securing the debt on his United Kingdom assets thus reducing the IHT liability in respect of them on his death;

(iv) as A and X are unconnected persons dealing at arm's length there is no transfer of value at that point and there would be nothing to prevent a person connected with X (though not X) from subsequently purchasing B's reversionary interest. When X dies he would be treated as entitled to A's excluded property by virtue of s49(1), so its value would be left out of account in determining the overall value of his IHT chargeable estate and his other assets would be reduced for that purpose by the amount of the debt secured on them to fund his purchase.

16. Under the new provisions property is not excluded property if:

(i) a person is or was beneficially entitled to an interest in possession in it

(ii) who is or was at that time domiciled in the United Kingdom and

(iii) the entitlement arose directly or indirectly as a result of a disposition on or after 5th December 2005 for consideration in money or money's worth whoever that consideration is given by.

Such entitlement will be caught whether it arose directly or indirectly – for example by will or upon intestacy. So a person inheriting from X would equally well be caught.

17. It is interesting to note that these anti-avoidance provisions affect only property in which an interest in possession subsists; however the scheme would work equally well where the property was relevant property i.e. where there was no interest in possession at the material time.

18. However, you might very well ask, why should anyone part with money to become nothing more than the possible object of the trustees' discretion under a discretionary trust; an interest in possession is one thing and a mere hope is another. Well the answer is that to adapt George Orwell some discretionary interests are more discretionary than others. Following the analysis of the House of Lords in *IRC v. Pearson* (HL) [1980] STC 318 an interest in possession equates to a right to income if there is any. So, it follows, the existence even of a power of accumulation (not just a trust to accumulate, pace Lord Russell who of course got it right) prevents an interest in possession from arising. So a very vested, ascertained and valuable interest can still be kept outside the anti-avoidance provision of s48(3B) in cases where the draftsman of the settlement has carefully had these provisions in mind.

19. In the case of a relevant property settlement the time when the excluded property status would be effective to avoid IHT would be on the occasion of the 10 yearly and exit charges and in particular perhaps when the settlement was brought to an end. Again none of these are beyond the wit of man to achieve. I suggest therefore that the concept of the purchase of an interest in an excluded property settlement should still be considered for the purposes of IHT planning.

20. There has been some debate on what happens when a nondomiciliary has established an excluded property settlement in which he retains an interest as beneficiary but subsequently becomes domiciled in the United Kingdom. This typically happens when an individual has a United Kingdom domicile of origin but acquired a domicile of choice elsewhere, returns to the United Kingdom, generally in old age and his domicile of origin revives. It is not all that uncommon. I am not going to go into the technical arguments concerning this which are rather obscure, particularly if you do not have the legislation in front of you, but the current position seems to me to be as follows.

21. Formerly the Revenue officially accepted that the property remained excluded, so, in particular the gifts with reservation restrictions did not apply, though the relevant passage has now disappeared from the Revenue Manual and the terms of subsequent published utterances have been neither consistent nor clear. However the Revenue has also maintained that if the settlor after acquiring or resuming a United Kingdom domicile disposed of his interest they would regard that as a transfer of value. In my view the correct position on the first point is reasonably clear and the settlor's resumption of United Kingdom domicile does not trigger the gifts with reservation restrictions. I have had recent practical experience of this and at least so far as I know in that case my conclusion, though questioned, has not been challenged. On whether there is a transfer of value if that reservation comes to an end during the settlor's lifetime and when he is domiciled in the United Kingdom the Revenue can make out a better technical argument, though I doubt that was the intention of the legislature or that that result is correct. However unless you have a client who is happy to provide you with a test case in the House of Lords the safe course must be to advise the client in these factual circumstances to keep any benefit under the settlement which he has retained, until his death.

22. Although these are not specific results of the Finance Act 2006 I should mention some possible tripwires in dealing with non-domiciliaries and excluded property. They are as follows:

(i) the IHT exemption for transfers between spouses or civil partners does not apply where at the time of the transfer the transferor but not the transferee is domiciled in the United Kingdom. In that case there is a limited exemption of £55,000 less any amount previously relieved under this provision (s18); incidentally for the fiscal year 1981/82, exactly a quarter of a century ago, the exempt figure was, guess £50,000, as good an example of stealth taxation through the backdoor as one could wish for. It is worth remembering however that in some cases this derisory limit may be overridden by the terms of a double taxation agreement between the states concerned, see for example Article 8 of the US/UK Treaty;

(ii) where the settlor or settlor's spouse or civil partner has an initial interest in the settlement within IHTA 1984 s80 if the property is to constitute and remain excluded property the initial settlor must be non-United Kingdom domiciled when the settlement was established and the person with the initial interest, the deemed settlor, must be non-United Kingdom domiciled at the time that that interest terminates;

(iii) like provisions i.e. s82(3) of the IHTA 1984, apply where instead of a deemed second settlement you have an actual second settlement and the trust property moves between them. For the property to constitute excluded property throughout, the settlors of both settlements must be non-United Kingdom domiciliaries at the time the respective settlements are made. This becomes of considerable practical importance when you are considering varying effective trust provisions i.e. the distinction between a revocation or partial revocation and resettlement on the one hand and the exercise of a power of appointment or advancement within a continuing settlement on the other.

23. We have talked a lot about excluded property and its principal requirement is that it is situated outside the United Kingdom. This is less straightforward than it sounds. Unlike capital gains tax where there are detailed statutory rules TCGA 1992 ss275, 275A, 275B and 275C determining where assets are situate, the IHTA 1984 contains no such provisions. The CGT tests are not read-in and logic will take you only so far. It is rather a matter of general law, in particular private international law, known unfortunately often correctly as 'the conflict of laws'.

24. The location of some assets is unsurprising. Interests in land are situate where the land is and chattels where they happen to be at the relevant time. The movement of a very valuable chattel such as an important picture can therefore have marked IHT implications. Registered shares and government securities are situate where they are registered, bearer shares like chattels are situate where they happen to be at the time of gift or death. Ordinary debts are situate where the debtor resides; bank debts, that is the debt owed by the bank in respect of a client's cash to the holder of the account not the other way round, are usually situated at the branch where the account is maintained. So a United Kingdom resident non-domiciliary should maintain his bank accounts out of the United Kingdom so far as possible, though there is specific relief (s157) for the foreign currency accounts of individuals who are neither domiciled nor resident in the United Kingdom. Specialty debts, those debts due under a deed, are situate where the deed is kept so, like chattels, the movement of the relevant piece of paper can have significant IHT consequences, for better or for worse. The situs of a chose in action, for example a partnership share, is generally situated where the rights comprising the chose in action are enforceable; this will depend first on the law under which the partnership is governed. If it is English law that will generally be where the business of the partnership is carried on which can of course cause confusion where that is in several different places. In that case it seems to be a matter of fact – if there is a principal place of business it is probably situate there; if not each country's business may be treated as if it were a separate asset. To make matters more difficult other countries have different rules as to the situs of partnership shares, a good example of the appropriateness of the term 'conflict of laws'. Further the private international law tests to apply at this rather

recondite stage are not statutory but to be derived from a large body of old and not always perfectly reconcilable authority. It is thought that LLPs for this purpose are to be treated in the same way as ordinary partnerships, but that proposition has yet to be tested.

25. At this point you might be forgiven for thinking that we are getting into rather obscure areas of principally academic interest, however nothing could be further from the truth. A detailed and timely appreciation of these rules and how they work can save a non-domiciliary a considerable amount of money and most importantly can do so when there are very few other options left.

26. A classic example is to be found in the Privy Council decision of *Kwok Chi Leung Karl v. The Commissioners of Estate Duty of Hong Kong* [1988] STC 728. Mr. Kwok Senior owned shares which were situate in Hong Kong and which would be liable to estate duty on his death. Mr. Kwok at this point seems to have known that his end was near. A company, Tolu, was incorporated and registered in Liberia and it duly appointed a registered agent in Monrovia for the service of process on it there. The directors were three of the testator's sons and its capital was 100 bearer shares held by his four sons and his wife. The company resolved to acquire from the testator his Hong Kong shares in consideration of a non-negotiable promissory note for their value in US dollars – clearly a chose in action – payable upon demand after 60 days in Monrovia. Eight days later the contract for the sale of shares was executed by which time Mr. Kwok was ready to meet his maker, so the next day he died.

27. The next two material facts will not surprise you. Mr. Kwok Senior's executor, in fact Mr. Kwok Junior, said and here I paraphrase "My pa didn't have any Hong Kong shares when he died he had only the benefit of a debt payable by a Liberian resident in Monrovia and as that was property situate outside Hong Kong and its situs clearly Monrovia, hey presto there can be no charge to Hong Kong estate duty". The Commissioner of Hong Kong Estate Duty replied and I paraphrase again "You've got to be joking" or words to that effect.

28. Ultimately the executor's appeal came before the Judicial Committee of the Privy Council in London. Counsel for the appellant's (one Robert Walker QC as he then was) heart must have sunk when he knew who his court was to be. The first three were Lords Bridge, Brandon and Templeman none of whom were known for particular appreciation of artificial tax avoidance schemes. Lords Ackner and Oliver made up the rest of the court. Lord Oliver delivered the judgment of the Board which is accurately summarised in the head note to the report which I quote:

> "*[the] transactions … had the effect of transferring the testator's property*

> *in Hong Kong into a single obligation represented by the promissory note. That obligation, although not immediately recoverable by action, was a chose in action and its situs on the testator's death by the ordinary rules applicable to choses in action, was where Tolu was resident and where under the contract creating it, the primary obligation to pay was expressed to be performed – viz. in Monrovia. Accordingly upon the death of the testator it was "property … situate outside [Hong Kong]" so that no estate duty was payable in respect of it. The appeal would therefore be allowed."*

29. So what can we derive from this rather exotic example. Let us take the classic case of the United Kingdom resident nondomiciliary who occupies a nice but expensive house in Chelsea. Formerly the standard route for keeping its value out of his IHT estate was for the property to be owned by a non-United Kingdom incorporated and resident company the shares in which were held by non-United Kingdom trustees. However in the case of *R v. Dimsey* [2001] STC 1520 the Criminal Court of Appeal put this longstanding structure under threat by giving as its opinion that the occupier of the United Kingdom property would be chargeable, at least in principle, to income tax on the cash equivalent of the value of his occupation under as it now is ITEPA 2003 ss102-113, the so-called shadow director argument.

30. It does not really matter whether their Lordships were right or hopelessly wrong (the latter is probably the better view) as in practice anyone who establishes such a structure now is on notice of challenge. The problem is that without the interposition of the company the trust asset is directly the residential property which is in the United Kingdom and therefore cannot be excluded property, or can it? What if for example Mr Kwok's scheme were adopted in respect of the United Kingdom property perhaps with slightly less torrid geography? What if there were an executed contract of sale with a non-United Kingdom purchaser the performance of which would take place outside the United Kingdom? What if there were a long-term call option in favour of such a purchaser and the sale contract pursuant to that option exchanged only *in extremis?* Remember it is not necessary to devalue the property in any way or to make any non-arm's length transactions; it is simply a case of transferring the value of the United Kingdom property out of the United Kingdom and into excluded property. I suspect many of you have clients who are in this position. In some cases you may feel able to rely on your client not being a shadow director as a matter of fact, but that inevitably is risky. This alternative may well merit investigation however I should point out I am not offering a blueprint, rather, food for further thought.

31. To come back to where we started, the best thing you can do for a non-domiciliary is first of all to recognise that he or she is one, and the second and if

necessary, convince the Revenue accordingly. Of course where someone is domiciled, like where property is situated, is a matter of the general law or more precisely private international law and not of tax law that is why despite the huffing and puffing of Red Dawn, alias Ms. Primarolo and despite the open "ongoing review" the purpose of which is to create uncertainty and fear of reliance on the status quo, it is actually an area of law which is quite difficult for the government to interfere with either quickly or often. So the likelihood is that the legal substratum of domicile will remain the same for the foreseeable future.

32. There are more popular errors in respect of the law of domicile than I think on any other subject that I regularly deal with. Here are some of them:

(i) an individual's domicile of origin is where he is born. ***Wrong***. It is where his father is domiciled at the time of his birth or if illegitimate where his mother was. There is actually absolutely no requirement for an individual ever to have been physically present in his or her country of domicile. This was brought home to me vividly some years ago when I told a very fashionable young lady who moved between Sydney and Hampstead and who had certainly never bought a Cape apple in her life, that she was in fact South African; until her husband restrained her, I was sure I was going to get thumped;

(ii) when you settle indefinitely in another country you lose your domicile of origin and acquire a domicile of choice. The last bit ***is*** true but the first is ***not***. You never lose your domicile of origin, at most it is in abeyance. As a result it will revive when you have abandoned one domicile of choice without acquiring another. That generally is good news for those whose domicile of origins are other than United Kingdom but dangerous the other way round;

(iii) a husband and wife will be treated for tax purposes as having the same domicile. ***Wrong***. It used to be the case that a wife acquired her husband's domicile on marriage, the so-called domicile of dependency, however that has not been true in respect of United Kingdom law for more than 30 years now and it is perfectly possible and indeed not all that uncommon, for couples to have different domiciles;

(iv) the domicile of a child is that of his or her parents. Well up ***to a point***. A legitimate child's domicile follows that of the father unless the child lives only with the mother but in either case only up until marriage or the age of 16. After that the child's domicile of origin subsists until he or she acquires a domicile of choice by a combination of physical residence in another country, together with the intention of residing there permanently or indefinitely. This means, perhaps somewhat unexpectedly, that the children of a former non-United Kingdom domiciliary who has acquired a United Kingdom domicile or deemed domicile may still be non-United Kingdom domiciliaries themselves. Let us take an example. In 1945 Mr. Chang Senior comes to London from Shanghai and has a domicile of origin in China. At a time when he is still undecided as to whether to stay in the United Kingdom or not he has a son, for the sake of familiarity we will call him Jacki. Jacki therefore has a Chinese domicile of origin. Jacki is determined as soon as he has saved enough money in the noodle bar to go to Hollywood and become an actor, so he has never acquired a domicile of choice in the United Kingdom. At this point his wife gives birth in quick succession to two lovely daughters whose domicile of origin is of course China, that of their father at the relevant time. Some 16 years later Jacki realises sadly that he is not going to make it to Hollywood after all, he stays in the United Kingdom and becomes a United Kingdom domiciliary, certainly for the purposes of inheritance tax, by virtue of the 17 out of 20 year test under s267 and possibly also under general law. Since Jacki's decision to remain in the United Kingdom is made after his daughters have attained the age of 16 their domiciles are unaffected; it is still China even though no member of their immediate family has set foot there for more than 60 years and it will continue to be China until they acquire a domicile of choice elsewhere; if indeed they do. Of course the girls themselves will be subject to s267 in due course so that once they have completed 20 years residence in the United Kingdom they will be deemed to be domiciled here, unless they take some avoiding action, but even so there is a very valuable window of opportunity between, to be safe, their attaining their respective majorities and the time when s267 bites. This window is especially significant of course in a case where the children's mother is domiciled in the United Kingdom;

(v) if you stay in the United Kingdom for an extended period you will acquire a domicile of choice here and if you stay here for only a short period you will not. ***Both wrong***. Looking at the second of these first, as it is the more dangerous error, the law is relatively simple. If a person comes to the United Kingdom with the intention of residing here permanently or indefinitely he will be domiciled here from the day of his arrival; indefinitely means without any fixed time limit or intention of leaving upon a specific event. Equally if a person leaves the United Kingdom with the intention of residing permanently or indefinitely in another country he will be domiciled there from the day of his arrival. In fact, if somewhat curiously, you can acquire a new domicile of choice much more quickly than you can acquire a new permanent residence – a fact often overlooked, especially in CGT planning.

33. The length of time a person stays in a particular jurisdiction may well be evidence of where he is domiciled, but is certainly not conclusive and one should never accept that a client with a non-United Kingdom domicile of origin has acquired a domicile of choice in the United Kingdom on grounds of length of residence alone (as the Revenue is inclined to argue); it is a question of looking at all the facts of the case. This approach was recently confirmed by the Court of Appeal in *Agulian v. Cyganik* [2006] EWCA Civ 129, one of many significant authorities on domicile which are unrelated to tax law, of which more in a moment.

34. The other important function of the tax adviser to the client who is resident but not domiciled in the United Kingdom is to keep him non-domiciled. So far as IHT is concerned there are two aspects to this. First to prevent or at least delay him becoming a deemed domiciliary under s267; second to prevent him becoming domiciled in the Untied Kingdom under the general law.

35. The first is essentially a matter of arithmetic. Judicious absences when a person has not been resident in the United Kingdom for the year of assessment in question can be employed to great effect – particularly since the 'available accommodation' test was abandoned – and simple residence is based on days of physical presence per annum in the United Kingdom. It may be tiresome for clients to have their movements dictated at least to some extent by fiscal impositions but the alternative is simple, pay the tax. The second aspect – remaining generally non-United Kingdom domiciled is somewhat more sophisticated and more complex.

36. In *Cyganik v. Agulian,* which I mentioned earlier, the deceased had a domicile of origin in Cyprus, had lived in the United Kingdom for some 43 years between the ages of 19 and 63 and probably was about to marry here when he died. A claim was brought against his estate under the Inheritance (Provision for Family and Dependants) Act 1975 and jurisdiction to entertain such a claim depends on the deceased having died domiciled in England and Wales. The Court of Appeal comprising Lords Justice Mummery and Longmore and Mr. Justice Lewison held that the deceased had always remained at heart a Cypriot, he had retained strong ties with the land of his birth, he had close family and property there and visited regularly; further even when in England still lived very much as a Cypriot, in the Cypriot community.

37. There is in fact nothing remarkable in this decision – which is a good example of the relative irrelevance of the length of stay in this country. However two other aspects of the case are interesting. First it is very strong decision as it actually involved overruling the first instance judge who had heard all the oral evidence, which of course the Court of Appeal had not; second the Court relied

very heavily on the tests laid down in a single case – *In the Estate of Fuld (No.3)* [1968] Probate 675 one of the few decisions at first instance of Lord Scarman who analysed the position at pp.684-685 as follows:

> "*In the light of these cases, the law, so far as relevant to my task, may be stated as follows: (1) The domicile of origin adheres – unless displaced by satisfactory evidence of the acquisition and continuance of a domicile of choice; (2) a domicile of choice is acquired only if it 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. (3) It follows that, though a man has left the territory of his domicile of origin with the intention of never returning, though he be resident in a new territory, yet if his mind be not made up or evidence be lacking or unsatisfactory as to what is his state of mind, his domicile of origin adheres. And, if he has acquired but abandoned a domicile of choice either because he no longer resides in the territory or because he no longer intends to reside there indefinitely, the domicile of origin revives until such time as by a combination of residence and intention he acquires a new domicile of choice.*"

38. In practice all the circumstances of the way the client lives his life will be looked at but the two key elements are:

(i) there must be a clear and subsisting nexus with the place of domicile of origin, supported by ample evidence e.g. the acquisition/retention of residential property and frequent visits;

(ii) there must be a real contingency upon which he will return.

39. Sometimes of course it is a case of a person having a United Kingdom domicile of origin seeking to establish the acquisition of a domicile elsewhere, in

which case the tests are, as it were, reversed. I was once flown over to Jersey to advise a noble Earl resident there as to his domicile. I did not really understand why as it seemed pretty clear that he was fully and finally settled there. It soon became apparent that the concern of the client and his various attendant advisers revolved around one question. He had provided detailed testamentary instructions as to his internment in the family vaults in Shropshire or wherever – would this, I was asked, prejudice his status as a Jersey domiciliary? It was not a question I was expecting or indeed had been previously asked but I felt confident in firmly advising that his Lordship could visit the United Kingdom as often and for as long as he wished, once he was dead without any adverse tax consequences. Tax practice can become quite surreal sometimes. On the other hand where he in fact was residing at the end of his life, could be very material.

40. In all this concentration on the distinction between the United Kingdom domiciliary and the non-United Kingdom domiciliary taxpayer, one must not lose sight of the fact that the same reliefs and exemptions may be as valuable to the latter as to the former. The non-domiciliary can take equal benefit of the IHT agricultural and business asset reliefs – AIM listed shares, which are treated for these purposes as unquoted are often overlooked for some reason, and of course such planning arrangements as may be current at the relevant time such as, at the moment, employee benefit trusts. This is especially true in a case where the domicile position is insecure either on the facts or because s267 will bite soon; in fiscal matters, belt and braces are very desirable.

41. I will end with perhaps the single most important piece of practical advice. Gather your evidence as to your client's domicile as soon as the question occurs to you, do not leave it until a point of tax liability turns on it. The best evidence will almost inevitably be your client's and by the time the tax charge has arisen, usually he will not be around to give it.