DOMICILE OF CHOICE: THE ENGINEER'S TALE

Peter Vaines[1]

The recent Special Commissioner's case of *A Civil Engineer v Commissioners of Inland Revenue* SpC 299 raised a number of issues surrounding the acquisition of a domicile of choice and the agreement of the position with the Inland Revenue. It is difficult to dispel the impression that this was a difficult case which became practically impossible by the time the matter came to be argued.

The Appellant was born in England with an English domicile of origin and in 1960 at the age of 21 went to Hong Kong to work, taking up a permanent position with the Hong Kong Government but later forming his own consulting practice. He continued to live and work in Hong Kong for the next 30 years. Throughout his time in Hong Kong he lived in rented accommodation but that is entirely normal and gives rise to no implication that his stay should be considered temporary. He had some property in the UK which was occupied for part of the time by his parents but this was disposed of in 1976. His visits to the UK were extremely limited and there is every indication that Hong Kong was the centre of his business and social life. However he left Hong Kong in September 1989.

His movements between September 1989 and January 1990 are not recorded but in January 1990 he went to Jersey, returning to the UK on 23rd April 1990 to take up residence in a house in Sussex purchased in the joint names of himself and his wife. Whilst he was in the Channel Islands he founded one trust in Jersey[2] and another in

---

1 Peter Vaines FCA, ATII, Barrister, Haarmann Hemmelrath, Tower 42, Old Broad Street, London EC2N 1HQ. Tel: (020) 7382 4800; Fax: (020) 7382 4838.
Email: peter_vaines@hhp.de

2 The Jersey Trust is described as a charitable foundation with the Red Cross as the only beneficiary but with power to add beneficiaries. One can only speculate as to the reason for establishing a trust in this manner but it may have had something to do with an attempt to secure the charitable exemption under Section 23 IHTA 1984 (see further on this point Red Cross Trusts: *PTPR* Volume 1 Issue 2). In any event, the Special Commissioner decided that it was not charitable as far as the law relating to UK tax is concerned.

Guernsey to which funds were added on 23rd April 1990.[3] In due course a letter was written by his accountant to the Inspector of Taxes saying that he had severed his business, social and personal connections with Hong Kong "as of November 1990" but no explanation regarding the significance of this date was ever given. In July 1991 he submitted a form P86 to the Inland Revenue on which he answered "yes" to the question: "Do you intend to stay permanently in the United Kingdom?"

The question naturally arose whether or not the Appellant was UK domiciled at the time of the transfers to the trusts in April 1990 because if he was domiciled in the UK at that time, the transfers to the trust would have been chargeable transfers on which inheritance tax was payable. The taxpayer argued that he had acquired a domicile of choice in Hong Kong and the transfers were therefore of excluded property. The Inland Revenue argued that he had never lost his English domicile of origin - but even if he had done so, his Hong Kong domicile of choice had been abandoned before he made the transfers into trust.

To establish a Hong Kong domicile of choice, the Appellant had to show that he satisfied the test established in Rule 10 of Dicey & Morris: The Conflict of Laws: 13th Edition:

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

The Special Commissioner observed that if the Appellant had in mind retiring to his country of origin on a clearly foreseeable and reasonably anticipated contingency such as the termination of his employment, he would not acquire a domicile of choice. Accordingly it was open to the Appellant to show that he did not intend to leave Hong Kong when he retired or perhaps on the change of sovereignty in 1997 or for any other reasons.

It is possible that he could have explained satisfactorily that his intention was to remain permanently resident in Hong Kong. However, it was rather difficult for him to sustain such an intention after he had already left. All he could say is that he had intended to remain permanently in Hong Kong but had subsequently changed his mind. The Inland Revenue can perhaps be forgiven for suggesting that actions speak louder than words and his actions whilst not actually in conflict with his words did

---

[3] The Jersey Trust is described as a charitable foundation with the Red Cross as the only beneficiary but with power to add beneficiaries. One can only speculate as to the reason for establishing a trust in this manner but it may have has something to do with an attempt to secure charitable exemption under section 23 IHTA 1984 (see further on this point Red Cross Trusts: *PTPR* Volume I, Issue 2). In any event, the Special Commissioner decided that it was not charitable as far as the law relating to UK tax is concerned.

not lend them any support. Furthermore, when the actions support the argument for a substantial tax charge and the words do not, it is only human nature to feel that some further enquiry should be made into the background to the expressed intentions.

The Special Commissioner was unable to identify anything by way of evidence which had a bearing on the Appellant's long term intentions. He noted that the Appellant had not made any plans for retirement and observed that there was nothing about his intentions regarding the hand over of sovereignty to China in 1997. This latter point is perhaps a little harsh because in 1989 little attention was being given to the likely effects of the change of sovereignty; it was just too far ahead. Fortunes can be made (and lost) in eight years in Hong Kong. Indeed, the Appellant may very well have decided to reside permanently in Hong Kong before the Joint Declaration in 1984 when the issue of sovereignty was addressed. It is arguably unreasonable to suggest that before 1989 he should have given any consideration to what might happen in 1997 and the circumstances were unlikely to have given rise to any foreseeable grounds for leaving.

The Special Commissioner suggested it was common knowledge that many British people worked in Hong Kong during their working lives intending to retire to the UK thereby retaining their domicile of origin. Whilst this proposition could be challenged, and the Appellant would no doubt have been wise to do so, his challenge would have seemed rather empty having already retired to the UK.

However, it is clear that whatever evidence may have existed that he intended to remain permanently in Hong Kong lost a good deal of weight on his departure and anyway it was not enough to persuade the Special Commissioner that he had acquired a domicile of choice in Hong Kong.

That finding of course concluded the issue but it was really only half the battle. Even if the Appellant had been able to persuade the Special Commissioner that he had acquired a Hong Kong domicile of choice sometime during his period of residence there, that did not mean that he was still domiciled in Hong Kong when he made the transfers to the trusts. He left Hong Kong in September 1989 and did not make these transfers to the trusts until April 1990 – after he had ceased to reside there. That is not crucial on its own; if he had previously acquired a Hong Kong domicile of choice, it could only have been lost by satisfying Rule 13 in Dicey & Morris which sets out the conditions for the loss of a domicile of choice:

> "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".

Accordingly, if he could have established that although he had ceased to reside in Hong Kong he had not ceased to intend to reside there permanently perhaps by showing that he had some positive intention to return, he would not have lost his domicile of choice. It would have been retained until such time as he ceased to have that intention. The Appellant could have had a good reason to return to the UK temporarily, but no such reason was put forward. Indeed there was nothing to suggest that he ever had any intention to go back to Hong Kong at all after his departure in 1989. When completing the form P86 in June 1991 he said that he intended to stay permanently in the UK and the Special Commissioner took this to mean that this had been his intention ever since his arrival. However, even if he could have made something of this argument he never even got to first base, the Special Commissioner having decided that he had never acquired a domicile of choice there in the first place.

It is difficult to avoid the impression that the appeal was doomed from the outset. One may speculate about the position had the Appellant addressed the whole issue of his domicile whilst he was still residing in Hong Kong and before he had decided to leave. He could well have been able to adduce sufficient evidence that some time between his arrival and in 1960 and his departure in 1989 he had formed the intention of residing in Hong Kong permanently or indefinitely – and that he only changed his mind towards the end of his period there. That would have been an uphill struggle but starting the argument at a time when practically everything was against him made it difficult to see how there could have been any realistic prospect of persuading the Inland Revenue or the Special Commissioner.