

THE NEW LAW OF DOMICILE

James Kessler MA FTII, Barrister¹

No-one could accuse the Government of being over-hasty in its reform of the law of domicile. The Law Commission considered and consulted for three years before publishing its report. That was so long ago that the report is now out of print; though anyone then interested in the subject will still have a copy gathering dust on their shelves. It has now been announced that "the Government have accepted the recommendations of the report and will introduce legislation when a suitable opportunity arises."²

In this article I do not propose to review the entire set of the Law Commission's proposals. I want instead to address a short but practical question. Will the new law affect an individual who is a long term UK resident, but presently accepted as not domiciled here? I shall call this individual "the foreign domiciliary". (The term "non-domiciliary" is best avoided: every individual is domiciled somewhere.) I shall assume that the foreign domiciliary first came to this country over the age of 16.

It is possible to consider this question, because the Commission's report included a draft Bill. This article proceeds on the assumption that the draft Bill will be enacted in its present form. (Such consideration for the interest of the individual: he knows what the law is, and is told in good time exactly what it may become! In tax law, this is exceptional. But I digress.)

The question comes down to this: will the foreign domiciliary acquire a UK domicile under the new law? Most readers of this *Review* will be interested in the taxation consequences of UK domicile.³ It must be borne in mind that the implications of new domicile extend far beyond tax. Matters of marriage and divorce, succession law and others all depend on the individual's domicile. For instance, a claim under the Inheritance (Provision for Family and Dependents) Act 1975 can only be made against an individual domiciled in England.

¹ James Kessler, 24 Old Buildings, Lincoln's Inn, London, WC2A 3UJ
Tel: (071) 242 2744 Fax: (071) 831 0895
Author of *Tax Planning for the Foreign Domiciliary* & co-author of *Tax Planning & Fundraising for Charities with Precedents* (updated to Jan 1992) both published by Key Haven Publications PLC.

² HC Written Answer 17th October 1991; see [1991] STI 886.

³ Foremost among these are the loss of the remittance basis for taxation of income and capital gains; and the loss of the IHT "excluded property" exemption for property outside the UK.

The Present Law

Domicile is determined according to the principles of the common law.⁴ These principles must be derived from decided cases. This is not so easy: every judge uses his own words, and these must be understood in the light of the facts of the case. A single snippet from a single decision can mislead.

With that caveat, this is how the law was explained in a recent case:

"Unless I find evidence which satisfies the conscience of the Court ... or, as it is sometimes put, convincing evidence, that Sir Charles formed a settled intention to reside permanently in Monaco, I must hold that he remained domiciled in England."⁵

The test, according to Nourse J, is whether the individual has "formed a settled intention to reside permanently" in his new country of residence.

The New Law

The new law can be stated in a nutshell: it is spelt out in a few words in the Schedule to the draft Domicile Bill:

"An adult acquires a domicile in another country if-

- (a) he is present there, and
- (b) he intends to settle there for an indefinite period."⁶

Attention must focus on condition (b): the intention to settle for an indefinite period.

What does this mean? The difficulty is that "indefinite" is a word with a wide semantic field: or more simply, its meaning is unclear.

An indefinite period may be a short one. A holiday may be of an indefinite period. The duration of a contract of employment is usually indefinite.

Thus, consider an example based on the simple facts of *IRC v Bullock*: Mr Bullock intended to return to Canada in the event of his surviving his wife. He was not domiciled here under the present law.⁷ But at first sight it does seem that he had settled in the UK for an "indefinite" period. If this is correct then he would have become UK domiciled under the new law; the proposed reform would affect many foreign domiciliaries who are long term UK residents.

⁴ Subject to the changes made by the Domicile and Matrimonial Proceedings Act 1973 which are not relevant for present purposes.

⁵ *Re Clore (No. 2)* [1984] STC 609 at p 614.

⁶ Paragraph 2(2) Schedule 1, draft Domicile Bill.

⁷ [1976] STC 409.

To properly understand the new law it is necessary to examine the present law in more detail. In describing the present law, words like "indefinite" (or its close synonym, "unlimited") are often used; but the meaning it gives to them is a restricted one.

The words of Scarman J are often quoted:

"A domicile of choice is acquired only if it be affirmatively shown that the propositus ... has the intention of residing ... *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 state of mind is consistent with the intention required by law."⁸

[My italics]

Dicey & Morris summarise the present law thus:

"Every independent person can acquire a domicile of choice by the combination of residence and intention of permanent or *indefinite* residence...."⁹

[My italics]

⁸ *In the Estate of Fuld (No 3)* 1968] P 675, 684-5.

⁹ Dicey & Morris on the *Conflict of Laws*, 11th edition, 1987, page 128.

Having used the word "indefinite" in the passage cited above, Dicey & Morris explain it in this way:

"The intention which is required ... is the intention to reside permanently or for an unlimited time in a country."¹⁰

In *IRC v Bullock* itself, Buckley LJ commented on an earlier dictum that:

"A domicile of choice is acquired when a man fixes voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time."

He said:

"I accept that statement ... with this qualification only, that the expression "unlimited time" requires some further definition. A man might remove to another country because he had obtained employment there without knowing how long that employment would continue but without intending to reside there after he ceased to be so employed. His prospective residence in a foreign country would be indefinite but would not be unlimited in the relevant sense."¹¹

It is submitted that the Courts will understand the word "indefinite" in the Domicile Bill to have the same meaning as when the word was used by Lord Scarman in *Fuld*; the same meaning as used by Dicey & Morris; and the same meaning as was given to "unlimited" in *Bullock*.

Thus the test of acquiring a new domicile will be not be changed by the new law. There are several reasons to justify this view. First, this is clearly the intention of the Law Commission in its report.¹² Second, it accords with common sense; and with the use of the word "settle" in the Bill. Third, there is a presumption that statute does not intend to alter the common law; especially where, as here, it uses the words used to expound the common law.

¹⁰ Ibid, page 130.

¹¹ [1976] STC 409 at page 414.

¹² See the report para 5.8 to 5.14. Although the Courts do not strictly refer to Hansard in construing a statute, it is permissible for them to refer to a Law Commission report.

Onus of Proof

Under both the present and the future law, the burden of proving that the foreign domiciliary has acquired a UK domicile will rest on the Revenue.

Under the new law, the question of whether an individual has acquired a new domicile is to be decided on the balance of probabilities. Under the existing law, there is some authority for saying that something more convincing is required than the mere balance of probabilities.¹³

If the new law makes a change here, which is debatable, the change is of academic rather than practical interest. For in practice, cases are *not* decided by the degree of proof: a Court rarely finds it difficult to make up its mind. The Court will hear the evidence and decide whether the individual is domiciled here or elsewhere.

Thus in one representative case a County Court Judge decided a case on the balance of probabilities, going out of his way to stress that he would have decided differently if the matter had to be proved "beyond reasonable doubt." Lord Denning MR would have none of this:-

"The judge showed an uncommon nicety of approach. I must say that, if I was sitting as a judge alone, and I was satisfied that the statement was made, that would be enough for me..."¹⁴

The "heavy onus" which presently rests on the Revenue alleging that a foreign domiciliary has acquired a UK domicile makes a good debating point in correspondence; it makes a fine forensic point before the Commissioners or in Court; but at the end of the day it carries little weight.

Unusual Cases

There are circumstances where the new law *may* bring about the acquisition of a UK domicile. These follow from the new rules for the familiar trilogy of categories: children, lunatics and married women.

¹³ The better view is that the Courts simply apply the balance of probabilities test. However one factor considered by the Court is the *prima facie* unlikelihood that a person will change his domicile; so correspondingly more evidence is needed to satisfy that "balance". The weight given to this factor has gradually weakened in the light of modern conditions, and would continue to weaken even without statutory law reform.

¹⁴ *Hornal v Neuberger Products Ltd* [1957] QB 247.

I would mention four cases:

- (1) A person (adult or child):
 - (a) whose father was foreign domiciled;
 - (b) whose parents died when he was a child; and
 - (c) who (when a child) was closely connected with the UK.
- (2) A person (adult or child):
 - (a) whose father is foreign domiciled;
 - (b) who did not have his home with either parent when a child;
 - (c) who (when a child) was closely connected with the UK.
- (3) An adult person:
 - (a) who was foreign domiciled;
 - (b) who lacked mental capacity; and
 - (c) who is closely connected with the UK.
- (4) A woman:
 - (a) who married a foreign domiciled man before 1st January 1974;
 - (b) who was UK domiciled at the time of her marriage;
 - (c) who has not acquired an independent domicile (under the usual "settled for an indefinite period" test).

For this purpose "child" means a person under 16.

This list is not comprehensive.¹⁵ A full discussion would be beyond the scope of the present article.

In these cases a person may have a foreign domicile under the present law, but a UK domicile under the new law. It will be evident that cases of this sort will be rare - but not unknown.

¹⁵ Further cases would arise where the father dies (or changes his domicile) during the individual's childhood.

Conclusion

The enactment of the draft Domicile Bill will not change the position of the typical foreign domiciliary. That, at least, is the law.

It is the duty of the advisor to consider whether any of his clients do fall into the exceptional categories which are affected by the new law; but such cases will be rare.

Without affecting the law, the reform may change the practice. At the present time there are a number of individuals whose claim to a foreign domicile is accepted by the Revenue, but which might be difficult to sustain before the Commissioners. The reform might spur the Revenue to review cases in this category. (The individuals in this doubtful category must also bear in mind that it is not only the Revenue which may take this point: there may be other interested parties, such as divorcing spouses or disappointed beneficiaries under a will.)

The answer, so far as UK tax is concerned, is for clients in this category to sort out their UK tax planning in good time. This should be done well before the time that they may be said to have acquired a UK domicile. (It should also be completed before the time that they are deemed to have acquired a UK domicile for IHT purposes, if that is sooner.¹⁶)

For these individuals, a review of their tax position before the draft Domicile Bill becomes law would be highly desirable.

Those who like to leave their tax planning to the last minute will note that the draft Domicile Bill takes effect from the 1st January of a year specified in the Act; so there will be plenty of notice before these changes take place.

*The second edition of the author's **Tax Planning for the Foreign Domiciliary** is under preparation.*

¹⁶ This may happen after as little as 15 years' residence: see Chapter 10 of the author's *Tax Planning for the Foreign Domiciliary*.