TC07645

PROCEDURE – application for final and partial closure notices – appeal against an information notice – whether the First-tier Tribunal has the jurisdiction to determine (and, if so, should determine) the Appellant's domicile as a preliminary issue in the course of the proceedings before addressing whether the Respondents have reasonable grounds for continuing with their enquiries, the requested information is reasonably required or an officer of the Respondents has reason to suspect an under-assessment – yes in each case – conclusion that the Appellant was UK-domiciled in the tax years in question

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/06734; TC/2019/00922

BETWEEN

MR EVERT HENKES **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 24 and 25 February 2020

Mr Keith Gordon, instructed by Mercer & Hole, Chartered Accountants, for the Appellant

Mr Sebastian Purnell, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

TABLE OF CONTENTS

INTRODUCTION

1. This decision is concerned with two related matters as follows:

   (1) an application dated 17 October 2018 for an order directing the closure, by way of final closure notices ("FCNs" and, each, an "FCN") of the enquiries by the Respondents into the tax returns made by the Appellant in respect of the tax years ending 5 April 2015 and 5 April 2016 (or, in the alternative, an order directing that partial closure notices ("PCNs and, each, a "PCN") be given in respect of the Appellant's claim to be entitled to be taxed on the remittance basis in respect of those two tax years; and

   (2) an appeal (notified on 8 February 2019) against a notice dated 22 January 2019 (the "IN") seeking:

      (a) certain information which the Respondents say is required to be provided to them before they can be in a position to issue the FCNs or PCNs referred to in paragraph 1(1) above; and

      (b) similar information in relation to the tax year ending 5 April 2014.

2. The Appellant is a taxpayer who considers himself to be domiciled outside the UK. Accordingly, in respect of the tax years referred to in paragraph 1 above, the Appellant filed his tax returns on the basis that he was entitled to be taxed (and elected to be taxed) on the remittance basis.

3. The Respondents have, since 8 December 2016, been looking into the domicile status of the Appellant, in the course of their enquiries into the tax year ending 5 April 2015 and, from 1 November 2017, the tax year ending 5 April 2016. In relation to both tax years, the questions which were raised by the Respondents related to the Appellant's claim to be domiciled outside the UK. In the course of their enquiries, the Respondents reached the conclusion, following the making of the application for the FCNs, that, whilst they accepted that the Appellant had a domicile of origin outside the UK, they considered that the Appellant had acquired a UK domicile of choice at some point after 2003, when the Appellant retired from his position as CEO of the global chemicals business of Shell, and before the start of the tax year ending 5 April 2014. Accordingly, the Respondents issued the IN in order to ascertain information about the Appellant's worldwide income and gains. In short, the Respondents consider that:

(1) they are entitled to amend the Appellant's self-assessment to tax in respect of each of the two later tax years and to check the Appellant's income and gains position in respect of the earliest tax year because they consider that the Appellant was in fact UK-domiciled during the relevant tax years; and

(2) in order to do that, they need the further information which they have requested in the IN.

THE RELEVANT LEGISLATION

4. The legislation which is relevant to the present decision is the legislation pertaining to closure notices and the legislation pertaining to INs.

Closure notice legislation

5. The relevant legislation in relation to closure notices is to be found in Section 28A of the Taxes Management Act 1970 (the "TMA"), as amended by the Finance (No 2) Act 2017 in relation to enquiries which were either opened on or after 16 November 2017 or in progress immediately before that date – see paragraph 44 of Schedule 15 to the Finance (No 2) Act 2017. As so amended, that section provides as follows:

"28A Completion of enquiry into personal or trustee return or NRCGT return

(1) This section applies in relation to an enquiry under section 9A(1) or 12ZM of this Act.

(1A) Any matter to which the enquiry relates is completed when an officer of Revenue and Customs informs the taxpayer by notice (a 'partial closure notice') that the officer has completed his enquiries into that matter.

(1B) The enquiry is completed when an officer of Revenue and Customs informs the taxpayer by notice (a 'final closure notice') –

(a) in a case where no partial closure notice has been given, that the officer has completed his enquiries, or

(b) in a case where one or more partial closure notices have been given, that the officer has completed his remaining enquiries.

(2) A partial or final closure notice must state the officer's conclusions and –

(a) state that in the officer's opinion no amendment of the return is required, or

(b) make the amendments of the return required to give effect to his conclusions.

(3) A partial or final closure notice takes effect when it is issued.

(4) The taxpayer may apply to the tribunal for a direction requiring an officer of the Board to issue a partial or final closure notice within a specified period.

(5) Any such application is to be subject to the relevant provisions of Part 5 of this Act (see, in particular, section 48(2)(b)).

(6) The tribunal shall give the direction applied for unless satisfied that there are reasonable grounds for not issuing the partial or final closure notice within a specified period.

(7) In this section 'the taxpayer' means the person to whom notice of enquiry was given.

(8) In the Taxes Acts, references to a closure notice under this section are to a partial or final closure notice under this section."

6. A taxpayer has the right to appeal against any conclusion stated or amendment made by a closure notice, whether that be an FCN or a PCN – see Section 31(1)(b) of the TMA – and, where an appeal is made to the First-tier Tribunal, the First-tier Tribunal has the power to increase or reduce an assessment or to allow or disallow (to any extent) any claim or election – see Section 50 of the TMA.

7. Another provision in the TMA which is relevant in the context of this decision is Section 28ZA. This provides that, "at any time when an enquiry is in progress under section 9A(1)… of this Act in relation to any matter, any question arising in connection with the subject-matter of the enquiry may be referred to the tribunal for its determination". The section further provides that any such referral must be made jointly by the taxpayer and an officer of the Respondents and that more than one such referral may be given under the section in relation to any enquiry.

IN legislation

8. The relevant legislation in relation to INs is to be found in Schedule 36 to the Finance Act 2008 ("Schedule 36"). The main provision of that schedule which is relevant to this decision is paragraph 1(1), which provides as follows:

"(1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")—

(a) to provide information, or

(b) to produce a document,

if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position."

A notice given under paragraph 1(1) of Schedule 36 is referred to throughout the schedule, and in this decision, as a "taxpayer notice".

9. Various expressions used in paragraph 1(1) of Schedule 36 are defined elsewhere in the schedule. The expression "checking" is defined by paragraph 58 to include "carrying out an investigation or enquiry of any kind". The expression "tax" is defined by paragraph 63(1) to include, among other taxes, income tax and capital gains tax (see paragraph (1)(a) and (b)). Paragraph 64 sets out what is meant by "tax position" but the details of the definition are not relevant to these proceedings.

10. Paragraph 29(1) of Schedule 36 confers a right on a taxpayer to whom a taxpayer notice has been given to appeal against the notice or any requirement in the notice. The right of appeal does not apply to a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's "statutory records" (as defined in paragraph 62 of Schedule 36) (see paragraph 1(2) of Schedule 36) or if the tribunal has approved the giving of the notice (see paragraph 1(3) of Schedule 36). However, it is common ground that neither of those provisions is relevant in this case. Paragraph 32 of Schedule 36 contains provisions about the procedure for appeals under Part 5 of Schedule 36 (and paragraph 29(1) is in that Part). And paragraph 32 of Schedule 36 provides that, notwithstanding Sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007, a decision of the tribunal on an appeal under Part 5 of Schedule 36 is final.

11. Finally, paragraph 21 of Schedule 36 is relevant to the information which the Respondents have requested in the IN in respect of the tax year ending 5 April 2014. As there is no open enquiry in relation to that tax year, an IN may be issued in respect of it only if one of four conditions in that paragraph is satisfied in relation to the tax year in question. In that regard, it is common ground that the condition which is relevant in this case is Condition B, which is set out in paragraph 21(6) of Schedule 36 and stipulates as follows:

"Condition B is that an officer of Revenue and Customs has reason to suspect that—

(a) an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed,

(b) an assessment to relevant tax for the chargeable period may be or have become insufficient, or

(c) relief from relevant tax given for the chargeable period may be or have become excessive."

12. Accordingly, to the extent that the IN relates to that tax year, the Respondents are required to show that one of their officers has "reason to suspect" the existence of one of the matters referred to in that paragraph.

THE EVIDENCE

13. In the course of the hearing, I was provided with the written and oral testimony of three witnesses – the Appellant himself, his adviser, Ms Elizabeth Cuthbertson of Mercer & Hole, Chartered Accountants ("M&H"), the Appellant's adviser, and Mr Matthew Bibby, an officer of the Respondents. I was also provided with exchanges of correspondence between the parties (and between the parties and the First-tier Tribunal) on and after 8 December 2016, when the Respondents opened their enquiry into the tax year ending 5 April 2015.

14. The following facts emerged from the evidence referred to above:

The Appellant

(1) the Appellant was born in Venezuela in 1943 and his father did not have a UK domicile;

(2) he was raised in South America and educated in the USA;

(3) he is a Dutch citizen and has never held (or applied for) UK citizenship;

(4) at the age of 23, in February 1967, he moved to London and has worked and lived in London since that date apart from periods when his work took him outside the UK. He worked for the Shell group between 1973 and his retirement in 2003. Between March 1983 and August 1986, he was based in Singapore and between November 1992 and 1995, he was based in the Netherlands. During those periods, he had no intention of

remaining in the relevant jurisdiction and he and his wife retained their then UK property although, during the first of those periods, their then UK property was let to tenants (see the letter of 17 July 2018 from M&H);

(5) over the period since he got married and acquired his first UK property (both of which occurred in 1968) he has owned, consecutively, three properties in the UK, the last of which was acquired in 1996;

(6) he is married to a British wife and has three children and seven grandchildren. All of his children and grandchildren live in the UK near him and, so far as he is aware, have no plans to leave the UK. He sees his grandchildren two to three times per month when he is in the UK. In addition, his wife has significant family living in the UK;

(7) following his retirement from Shell in 2003, he and his wife acquired (through a company) a substantial property in the Alicante province of Spain. The house has twice been extended substantially since he and his wife first acquired it and has five en-suite double bedrooms and a study, a swimming pool, a tennis court and a boule/pétanque court. It also has an orchard with fruit trees. Two insured cars are kept at the property. The whole extended family stay there from time to time to such an extent that they keep some clothes and other personal effects there and he and his wife are often accompanied by other guests when they stay there;

(8) in addition, in its letter of 22 December 2017, M&H outlined the strong roots which he and his wife have within the local community in which the property is located. These include a long-standing relationship with a local doctor and a lawyer, the latter of whom was engaged to deal with the purchase of the property. That letter also referred to there being good relationships with the neighbours and the use by him and his wife of various local service-providers such as a taxi-driver, a property manager, a gardener and a swimming pool contractor;

(9) he and his wife have shipped a substantial number of items from the UK to the Spanish property and, as at 17 July 2018, had not shipped any items to their property in the UK within the previous 15 years. Both properties have works of art within them. The Spanish property has within it some of the Appellant's favourite works of art, including an antique local map;

(10) notwithstanding the existence of his Spanish property, he spends most of his time in his London home. Although the relevant information for the tax year ended 5 April 2016 were not provided at the hearing, his visits to the Spanish property amounted to approximately 57 days in the tax year ending 5 April 2012 (of which approximately 33 days were during August and over the Christmas and Easter periods), approximately 52 days in the tax year ending 5 April 2013 (of which approximately 38 days were during August and over the Christmas and Easter periods), approximately 47 days in the tax year ending 5 April 2014 (of which approximately 20 days were during August and over the Christmas and Easter periods) and approximately 51 days in the tax year ending 5 April 2015 (of which approximately 32 days were during August and over the Christmas and Easter periods);

(11) despite retiring from his full-time job with Shell in 2003, he has continued to work on a part-time basis as a non-executive. He sits (or has sat since 2003) on various boards in jurisdictions outside the UK such as Finland, Singapore, the USA, China and Russia and he travels to attend board meetings outside the UK when required;

(12) the date of his retirement is uncertain. He has said that he has no plans to stop working for as long as his health allows him to do so and continues to seek new work opportunities. M&H's letter of 15 May 2017 stated that "[our] client remains fit and well, and active both physically and mentally, and therefore has no fixed timescale for stopping working in the current circumstances." However, M&H's letter of 22 December 2017 said that he recognised that, because of the decline in opportunities resulting from Brexit and his advancing years, job opportunities may become scarcer and accelerate his retirement;

(13) the extent to which the Appellant's continuing residence in the UK while he continues to work is beneficial or essential is also a little unclear. In its letter of 15 May 2017, M&H said that "given the nature of our client's business and the fact that the UK is such a prominent business centre and hub for international professionals, the UK is a natural fulcrum for such work and is the reason he has retained a base here rather than relocating elsewhere". However, it is common ground that much of the work which the Appellant carries out as a non-executive director takes place outside the UK and, in M&H's letter of 21 July 2017, M&H said that "[whilst] the UK is a suitable base for our client as an international businessman and has not been detrimental in securing his directorships, his contacts are located all over the world and are not specific to the UK";

(14) there are inconsistencies in the evidence as to whether:

(a) his wife's reluctance to leave the UK is a reason for delaying his retirement; and

(b) that reluctance might delay or ultimately prevent him from leaving the UK after his retirement and while his wife remains alive.

The letter from M&H of 22 December 2017 said that "our client's wife is naturally reluctant to leave the UK and this has caused some delay in our client's retirement. This does not negate his intention to leave the UK once the business reasons conclusively expire. Our client has consequently said that he would leave the UK should his wife predecease him even if she delayed or ultimately prevented him from leaving the UK once he fully retired from professional appointments". However, in its letter of 23 April 2018, M&H said that "[our] client wishes to clarify that any reluctance his wife may have to leave the UK has not delayed his retirement in any way…Any reluctance that our client's wife may have to leave the UK is not an issue hampering our client's retirement or departure from the UK. Our client intends to leave the UK when he retires as mentioned above";

(15) there are similar inconsistencies in the evidence in relation to whether he has reached a final decision to the effect that Spain will be the jurisdiction to which he will relocate when he leaves the UK. In its letter of 15 May 2017, M&H said that the Appellant "has not yet made a final decision as to where he intends to relocate...Developments in Europe's political landscape and other geopolitical events are likely to play a part in determining where he settles" and mentions Spain only as a possible location. In contrast, in its letter of 22 December 2017, M&H said that the Appellant's intention upon coming to the UK (an intention which M&H said remained unchanged at the date of its letter) was to "retire on the Mediterranean coast" and that the Spanish property was "in readiness for his retirement", whilst, in its letter of 23 April 2018, M&H described Spain as the "key jurisdiction";

(16) he has a substantial number of friends both within and outside the UK and his brother and sister live outside the UK;

(17) he has no preference as to where he dies although he has said that, if he were unfortunate enough to contract a serious illness, he would prefer to be in Spain;

The enquiries

(18) on 16 February 1984, following the completion by the Appellant of a domicile questionnaire, the Inland Revenue (the Respondents' predecessor) confirmed its acceptance of the fact that, at that time, the Appellant was not domiciled in the UK;

(19) the Respondents commenced their enquiry into the tax year ending 5 April 2015 on 8 December 2016 and their enquiry into the tax year ending 5 April 2016 on 1 November 2017;

(20) in the course of both enquiries, there were numerous exchanges of correspondence between the Respondents and M&H in relation to the Appellant's domicile position, before the Appellant made the application for the closure notices. The Respondents raised questions relating to the Appellant's domicile in their letters of each of 10 January 2017, 17 March 2017, 20 June 2017, 14 November 2017, 15 March 2018, 8 June 2018, 2 July 2018 and 11 September 2018. M&H replied to those letters with the provision of information on each of 16 February 2017, 15 May 2017, 21 July 2017, 22 December 2017, 23 April 2018 and 17 July 2018;

(21) in each of their last three letters, M&H expressed the view that the Appellant had provided enough information to the Respondents in order for the Respondents to conclude that the Appellant had not acquired a UK domicile of choice and invited the Respondents to issue closure notices;

(22) as of 11 September 2018, when Mr Vanian Foley of the Respondents wrote the last of the letters to M&H referred to in paragraph 14(20) above asking for further information in relation to the Appellant's domicile, the Respondents had not yet reached a decision in relation to the Appellant's domicile;

(23) Mr Bibby volunteered to assist in relation to the Appellant's case on or around 29 October 2018, at a time when he had had approximately six months' experience of working for the Respondents;

(24) following his review of the file, Mr Bibby reached the conclusion that, on the balance of probabilities, the Appellant had acquired a UK domicile of choice at some point after his retirement from Shell in 2003 and before the tax years to which the application and the appeal relate. He sought confirmation of this view internally from the Respondents' technical team and, after receiving that confirmation on 3 December 2018, he proceeded on 5 December 2018 to tell M&H of the Respondents' conclusion;

(25) as a result of that conclusion, he believed that the Respondents would need to obtain information about the Appellant's worldwide income and gains in relation to the relevant tax years;

(26) on 3 January 2019, Mr Bibby wrote to the Appellant to explain the reasons for reaching his conclusions. Those reasons were that:

> (a) the Appellant had lived in the UK for nearly 50 years during which time he had built up significant ties to the UK and a very settled UK-centric life. During those periods when the Appellant lived outside the UK by reason of his employment, he maintained his ties to the UK and afterwards returned to the UK;
>
> (b) although the Appellant had stated his intention to leave the UK when he retired, the Appellant was already 75 and there appeared to be no indication as to when that intention would come to fruition. His residence here appeared therefore to be open-ended; and

(c) the Appellant's statements of intention had to be considered in the light of all surrounding facts;

(27) at the hearing, Mr Bibby added the following to his list of reasons for concluding that the Appellant had acquired a UK domicile of choice by the relevant time:

(a) the inconsistency in the replies given to Respondents' questions as noted in paragraphs 14(13) to 14(15) above;

(b) the fact that, as the Appellant was still actively soliciting new positions, there must be some doubt as to when, if ever, the Appellant would retire. For example, the Appellant had recently taken on a position that was due to last for 10 years; and

(c) the Appellant and his wife had close family ties to the UK; and

(28) at the hearing, Mr Bibby conceded that:

(a) at the time when he took over the case, there were still some outstanding questions which Mr Foley had raised, the answers to which he would have found helpful in determining the Appellant's domicile status;

(b) if the Appellant had not applied for the FCNs, he might have issued an IN to obtain answers to some of those questions before reaching his conclusion on the Appellant's domicile status but that, for pragmatic reasons, once the application had been made, he had decided to see if he already had enough information to reach that conclusion;

(c) he had received help from the Respondents' technical team in drafting his letter of 3 January 2019 and therefore could not explain how the quotation on domicile from a leading textbook which was set out in that letter had erroneously been attributed to Lord Chelmsford in *Udny v Udny* (1869) LR 1SC & D441 ("*Udny*"); and

(d) he could not point to any single specific moment or event which had occurred between the Appellant's retirement from Shell in 2003 and the start of the tax year ending 5 April 2014 which would have indicated that the Appellant had acquired a UK domicile of choice.

SUMMARY OF THE ISSUES

15. Given the terms of the legislation set out in paragraphs 4 to 12 above, and without, at this stage, dealing with the question of the order in which they should be addressed, the issues which I am required to decide in this case are as follows:

(1) have the Respondents satisfied me that they have reasonable grounds for not issuing an FCN in relation to each of the tax years ending 5 April 2015 and 5 April 2016?

(2) have the Respondents satisfied me that they have reasonable grounds for not issuing a PCN in relation to each of the tax years ending 5 April 2015 and 5 April 2016?

(3) have the Respondents satisfied me that, to the extent that the IN relates to the tax years ending 5 April 2015 and 5 April 2016, the information requested by the Respondents in the IN is reasonably required? and

(4) have the Respondents satisfied me that, to the extent that the IN relates to the tax year ending 5 April 2014:

(a) the information requested by the Respondents in the IN is reasonably required; and

(b) an officer of the Respondents has reason to suspect that one of the circumstances described in paragraph 21(6) of Schedule 36 exists?

DISCUSSION

Introduction

16. At the heart of each of the issues set out in paragraph 15 above is a reasonability-based test. The parties do not agree on the extent to which, in seeking to determine each reasonability-based test:

(1) I am entitled, as a matter of jurisdiction, to determine the disputed domicile status of the Appellant during the tax year or tax years to which the relevant test applies (the "jurisdictional question"); and

(2) if I am so entitled, whether I should exercise my discretion in such a way that I do determine the disputed domicile status of the Appellant during the relevant tax year or tax years (the "case management question").

17. Much of the argument at the hearing related to these two fundamental disagreements between the parties. Given the difficulty of the above questions, I decided to reserve my decision in relation to them at the hearing.

18. However, before I address those questions, I must briefly mention the recent decision of the First-tier Tribunal (Judge Robin Vos and Mrs Helen Myerscough) in *Epaminondas Embiricos v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKFTT 236 (TC) ("*Embiricos*"), which is presently the subject of appeal to the Upper Tribunal, with an expected hearing date in October this year. In *Embiricos*, the First-tier Tribunal held that the Respondents were not entitled to resist an application for a PCN by a taxpayer whom the Respondents had determined to be UK-domiciled even though the Respondents were unable to amend the relevant taxpayer's self-assessment to reflect that conclusion because the Respondents did not yet have the information necessary to do so.

19. Although *Embiricos* related only to the mechanical question of whether the Respondents are entitled to resist the making of a PCN where they have determined that a taxpayer is UK-domiciled but have insufficient information to be able to amend the taxpayer's self-assessment, the answer to that question is potentially significant in the present context. This is because, if the Upper Tribunal (or any further appellate body to whom the *Embiricos* case may progress) were to uphold the decision of the First-tier Tribunal in that case, then the Appellant in this case would be entitled to succeed in his application for PCNs in respect of the tax years ending 5 April 2015 and 5 April 2016, regardless of my decision in relation to the questions set out in paragraph 16 above. I will therefore return at the end of this decision to the impact of the litigation in *Embiricos* on the outcome of the present application and appeal.

20. However, as that is not the only basis on which the Appellant relies in making his application for the PCNs in this case, it suffices to note at this stage that, while that ongoing litigation meant that, at the hearing, I did not invite the parties to make submissions in relation to the question to which *Embiricos* relates, I did not consider it appropriate to stay the Appellant's application for the PCNs as a whole pending the conclusion of that litigation.

21. I now turn to address the two questions which I have described in paragraph 16 above.

The jurisdictional question

22. There are two distinct parts to the jurisdictional question.

23. The first is unique to the present proceedings, arising as it does out of the prior management of this case by the First-tier Tribunal, whilst the second is of more general

relevance as it relates in general to the powers of the First-tier Tribunal in determining applications for closure notices and appeals against INs.

Prior case management

24. So far as the first part of the jurisdictional question is concerned, Mr Purnell submitted on behalf of the Respondents at the start of the hearing that, on a proper interpretation of the correspondence which had been exchanged between the parties and between the parties and the First-tier Tribunal in advance of the hearing, the First-tier Tribunal had effectively already ruled that the issue of the Appellant's domicile would not be addressed and determined in the course of the present proceedings. Accordingly, in Mr Purnell's view, it would be an abuse of process and beyond my jurisdiction to hear arguments in relation to the Appellant's domicile with a view to reaching a conclusion on it. In response, Mr Gordon submitted on behalf of the Appellant that, on a proper interpretation of that correspondence, the First-tier Tribunal had reached no such conclusion and the matter was fully within my power to deal with as I saw fit.

25. I determined this issue in favour of the Appellant at the hearing for the reasons which are set out in paragraphs 28 to 31 below.

26. The correspondence on which Mr Purnell relied was as follows:

(1) On 1 March 2019, the First-tier Tribunal wrote to the parties to the following effect:

"The Tribunal has expressed the view …in relation to the closure application, that the Tribunal will not determine [the Appellant's] domicile when determining whether or not to order closure, but will only do so on appeal against a closure notice (assuming that a closure notice is issued on the basis that [the Appellant] was domiciled in the UK).

The matter has been referred to Judge Mosedale. The Judge understands each parties' [sic] competing views. Her concern is that it is not entirely clear whether the [First-tier Tribunal] would have jurisdiction to determine [the Appellant's] domicile in either or both an application for closure or an appeal against an information notice seeking information on the taxpayer's worldwide income. She is not aware of the point having been considered before and considers it possible that the [First-tier Tribunal] need to do no more in such a hearing than decide whether it was reasonably arguable that the taxpayer was domiciled in the UK. At the same time, she can understand that a person may not want to provide information on his worldwide income to HMRC if it is irrelevant to his UK tax liability."

Then, after suggesting that an application for PCNs might enable the First-tier Tribunal to determine the domicile question before the Appellant had to provide the Respondents with information about his worldwide income, the First-tier Tribunal went on as follows:

"If the application is maintained for a final closure notice, however, it seems imperative that before the hearing of the application, a decision is made as to whether or not the hearing can and will finally determine [the Appellant's] domicile, as that will affect each parties' [sic] approach to the necessary evidence to be produced at the hearing, not to mention the length of the hearing".

Finally, at the end of that letter, the First-tier Tribunal directed each party to notify it and the other party of its position on three matters, one of which was "[whether] the [First-tier Tribunal] in the hearing of the application for a final closure notice and appeal against the information notice must as a matter of law determine [the Appellant's] domicile, and if so, why";

(2) on 11 March 2019, M&H responded to the First-tier Tribunal's letter dated 1 March 2019. In its response, M&H said that it saw no reason why a preliminary issue – such as, in this case, the Appellant's domicile – could not be addressed by the First-tier Tribunal in an application for closure notices and an appeal against INs. It went on to explain the basis for this view and to indicate its consent for the question of the

Appellant's domicile to be addressed at a separate referral hearing under Section 28ZA of the TMA should the Respondents be willing to agree to that approach;

(3) on 28 March 2019, the Respondents also responded to the First-tier Tribunal's letter of 1 March 2019. In their response, the Respondents said, inter alia, that "the [First-tier Tribunal] should guard against an inappropriate shifting of matters that should be determined by [the Respondents] during the enquiry stage to case management by the [First-tier Tribunal]." They went on to say that an efficient use of the time and resources of the First-tier Tribunal would be to allow the Respondents to gather all the facts and make an informed decision as to whether and what to assess and then for all matters in dispute to be heard at one hearing;

(4) the First-tier Tribunal wrote to the parties on 1 April 2019 in the following terms:

"The [Appellant] maintains its case that the [First-tier Tribunal] has jurisdiction to determine the question of domicile as a preliminary issue in either or both the closure notice application or appeal against the information notice. [The Respondents] do not appear to specifically comment on this although the implications of [the Respondents'] letter may be that [the Respondents] consider evidence of [the Appellant's] worldwide income may itself be evidence in relation to domicile (although this is not made entirely clear by [the Respondents]).

The Judge remains concerned that the question of [the Appellant's] domicile is not a question that would have to be answered by the [First-tier Tribunal] before determining the closure notice application or the appeal against the [IN]. And if it is not a question that must necessarily be determined in those hearings, then the grounds on which to hold a preliminary issue cannot be met. While it could be said that details of [the Appellant's] world wide [sic] income would not be reasonably required if he was not UK domiciled, it may well be said that they are reasonably required in circumstances where it is uncertain whether or not he is UK domiciled. Similarly, while it could be said [the Respondents] may already be in a position to close the enquiry if they knew [the Appellant] did not have a UK domicile, it may be said that [the Respondents] can satisfy the [First-tier Tribunal] that the Tribunal [by which I believe the First-tier Tribunal to have meant "the enquiry"] should not be closed while the question of domicile remains uncertain. In other words, the Judge's preliminary view is that the [First-tier Tribunal] could reach a conclusion in both proceedings without determining domicile and therefore the matter of domicile cannot be a preliminary issue."

The First-tier Tribunal went on to say that, "while [the Respondents] are no doubt right to be concerned not to increase the burden on the [First-tier Tribunal] with…joint referrals, nevertheless the Judge's preliminary view is that it is reasonable for someone who is not UK domiciled not to wish to disclose information to [the Respondents] that does not affect his UK tax liability. It may therefore be appropriate for [the Respondents] to consider whether a joint referral to determine the question of domicile is the way forward in this matter";

(5) also on 1 April 2019, M&H wrote to the First-tier Tribunal in response to the letter from the Respondents of 28 March 2019 to reiterate its view that, because of the binary threshold nature of the domicile question, the domicile question "can be determined on an appeal against a Schedule 36 notice…because it lies at the heart of the question of reasonableness of [the Respondents'] information request";

(6) on 10 April 2019, the Respondents wrote to M&H to say that they did not consent to a referral of the domicile question under Section 28ZA and gave reasons for their refusal in that regard. The Respondents went on:

"[The Respondents'] position in relation to domicile as a preliminary issue is one of agreement with the Judge's view expressed in the [First-tier Tribunal's] letter of 1 April 2019; that domicile does not need to be determined in order to resolve the substantive matters of the application for a closure notice and appeal against [an] [IN], and therefore the question of domicile cannot be a preliminary issue";

(7) on 11 April 2019, M&H wrote to the First-tier Tribunal in response to the Respondents' letter of 10 April 2019. In its letter, M&H said that the Respondents' grounds for refusing to agree to a joint referral under Section 28ZA of the TMA were inconsistent with the Respondents' stated objectives, that it felt obliged to accept that that was the end of the matter so far as concerned a referral under that provision but that it reserved its right to make a costs application in due course.

M&H then went on to address the matter of the hearing and, having noted that the hearing was set down for two days, it said:

"To avoid the risk of further delays, we consider that any such hearing should be able to hear all arguments (covering both the [First-tier Tribunal's] jurisdiction on such appeals/applications as well as the factual disputes) rather than have the former dealt with at any preliminary hearing."

In that context, M&H noted that the expressions of view which had been ascribed to Judge Mosedale in the letter from the First-tier Tribunal of 1 April 2019 had clearly been described as preliminary and therefore it was not making any formal application for recusal. However, it went on to note that the Respondents had taken heart from "the Judge's view expressed in the [First-tier Tribunal's] letter of 1 April 2019" and said that, in the circumstances, it asked only "that the [First-tier Tribunal] makes it clear that, whichever judge hears the appeal and application, the question of the [First-tier Tribunal's] powers in a case such as this remains undecided";

(8) on 29 May 2019, the First-tier Tribunal wrote to both parties and said the following in relation to the question of whether the issue of domicile could be addressed at the hearing in relation to the closure notice application and the appeal against the IN:

"The Judge does not really understand [the Appellant's] application in the last paragraph of its letter of 11 April. Firstly, it is stated not to be an application for recusal. If it was, the Judge would refuse it as there are no good grounds given. The Judge herself has not expressed any concluded view on the matter and the [First-tier Tribunal's] email of 6 February 2019 contained the views of the Registrar, and not those of the judge. In any event, it is unlikely that the hearing will be allocated to Judge Mosedale who is simply dealing with the file as a matter of case management on the papers. Secondly, it is for the hearing judge to decide what is or is not before him or her.

The Judge's view is that [the Appellant] has not so far made out a case for the [First-tier Tribunal] to hear any matter as a preliminary issue; therefore the Judge will instruct the [First-tier Tribunal to set down a 2 days hearing which will consider:

- The [Appellant's] application for a closure notice, final or partial;
- The [Appellant's] appeal against the [IN]"; and

(9) on 4 June 2019, M&H wrote to the First-tier Tribunal to say that, in relation to the possibility of recusal, the First-tier Tribunal's letter of 29 May 2019 provided the comfort that it was seeking and therefore that it proposed to say no more about that matter. It also said that it was "grateful for the [First-tier Tribunal's] decision to avoid any further delays that would have been caused by a preliminary hearing".

27. Mr Purnell submitted that the correspondence summarised above showed that Judge Mosedale had reached the following conclusions in relation to the conduct of the present proceedings during her case management of the proceedings:

(1) the First-tier Tribunal could reach a conclusion in relation to both the application for the closure notices and the appeal against the IN without determining the question of the Appellant's domicile;

(2) as such, the matter of domicile could not be determined as a preliminary issue;

(3) in the light of those conclusions, there would be no directions in relation to the service of witness statements on the substantive question of domicile (as that was not an issue that would fall to be determined at the hearing of the proceedings) and there would be no directions for the filing by parties of skeleton arguments (as the issues to be determined in the proceedings were narrow and not particularly fact-dependent);

(4) the Appellant had not challenged Judge Mosedale's conclusions as set out in the First-tier Tribunal's letters of 1 April 2019 and 29 May 2019 or asked for those conclusions, or the directions which had been given in relation to the proceedings, to be reconsidered; and

(5) therefore the Appellant's attempt to have the matter of the Appellant's domicile determined in the course of the present proceedings should be rejected on the basis that it went against Judge Mosedale's careful case management of the proceedings.

28. As I have already indicated in paragraph 25 above, I said at the start of the hearing that I did not agree with Mr Purnell's characterisation of the correspondence set out above.

29. It is true that, in its letter of 1 April 2019, the First-tier Tribunal said that Judge Mosedale was at that time unconvinced that the Appellant's domicile was a matter which needed to be addressed in the course of the present proceedings. However, that was expressly said to be "a preliminary view" on the part of Judge Mosedale. And, in its letter of 11 April 2019, M&H clearly challenged that preliminary view, in the passage set out in paragraph 26(7) above starting "To avoid the risk of further delays…" and in the final paragraph of the letter, in which it asked "that the [First-tier Tribunal] makes it clear that, whichever judge hears the appeal and application, the question of the [First-tier Tribunal's] powers in a case such as this remains undecided".

30. In its response to M&H's letter, on 29 May 2019, the First-tier Tribunal said that, in its letter of 1 April 2019, Judge Mosedale had "not expressed any concluded view on the matter" and that "it is for the hearing judge to decide what is or is not before him or her". In my view, these words make it clear beyond doubt that Judge Mosedale was leaving it up to the hearing judge to decide whether it was appropriate to reach a determination in relation to the Appellant's domicile before deciding the application and the appeal. The mere fact that the letter went on to say that the Judge's view was that the Appellant had not so far made out a case for the First-tier Tribunal to hear any matter as a preliminary issue is of no relevance whatsoever in this regard. Viewed in context, all that that was saying was that the Appellant had not yet established that it was necessary for the domicile question to be addressed at a separate preliminary hearing before the main hearing in relation to the application and the appeal. It did not affect the fact that, as it had just stated, it would be up to the hearing judge at the hearing of the application and the appeal to decide whether the domicile question was one which needed to be answered in the course of the proceedings before him or her. M&H correctly understood that when, in its response to the First-tier Tribunal on 4 June 2019, it thanked the First-tier Tribunal for "[avoiding] any further delays that would have been caused by a preliminary hearing". I would add that, notwithstanding Mr Purnell's observations which I have summarised in paragraph 27(3) above about the absence of directions in relation to witness statements and skeleton arguments, both parties did in fact produce witness statements and skeleton arguments in advance of the hearing before me.

31. For the above reasons, I do not think that the prior case management of these proceedings prevents me from addressing the question of domicile in the course of these proceedings if I think that that is both permitted by law and the appropriate course of action.

The powers of the First-tier Tribunal

32. I now turn to consider the second part of the jurisdictional question, which is whether the First-tier Tribunal is entitled to determine the question of a person's domicile in the course of considering an application for a closure notice or an appeal against an IN. As I have mentioned in paragraph 23 above, this is a question which is of general application. Moreover, although there is as yet no binding decision by a superior court in relation to that question, it has recently been addressed in another First-tier Tribunal decision (by Judge Andrew Scott) - *The Executors of Mrs R W Levy v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKFTT 418 (TC) ("*Levy*").

33. Indeed, not only are the facts of this case, in almost all material respects, identical to the facts in *Levy* but that case was argued before the First-tier Tribunal by the same counsel and, with one exception to which I will return below, the arguments made in *Levy* were the same as the arguments which were made in the course of the present proceedings. In *Levy* too:

(1) there was an enquiry into the domicile status of a taxpayer who had been claiming the right to use the remittance basis in respect of two tax years;

(2) the taxpayer made an application for an FCN (or, in the alternative, a PCN) to be issued in respect of those two tax years;

(3) following the making of that application, the Respondents reached a decision that the taxpayer was domiciled in the UK;

(4) accordingly, the Respondents issued an IN to the taxpayer seeking information about the taxpayer's worldwide income and gains in respect of the two tax years in question and the tax year next following the later of those two tax years; and

(5) the taxpayer's executors (the taxpayer's having since died) appealed against the IN.

34. The only meaningful differences between the two cases which I have identified are that:

(1) by the time that *Levy* was heard, the taxpayer herself was no longer available to give evidence on her own behalf; and

(2) the IN in *Levy* covered, in addition to the two tax years in respect of which the closure notice applications had been made, a tax year after those tax years and in respect of which the Respondents then opened an enquiry whereas, in this case, to the extent that the IN covers a tax year in respect of which no closure notice application has been made, that tax year is earlier than the tax years in respect of which the closure notice applications have been made and that earlier tax year is not under enquiry. This means that, whereas paragraph 21(6) of Schedule 36 is a relevant consideration in the present case, it was not a relevant consideration in *Levy*.

35. The first of these differences might have had some relevance in the present proceedings if Judge Scott had reached the conclusion in *Levy* that the First-tier Tribunal had the power to determine the question of domicile but ought not to exercise that power. However, as I read his decision, that is not the conclusion which Judge Scott in fact reached. Instead, he concluded that the First-tier Tribunal did not have the power to determine the question of domicile at this stage in the process.

36. As for the second of these differences, very little turns on it for present purposes as it was common ground before me that the language used in paragraph 21(6) of Schedule 36 – "reason to suspect" - was sufficiently similar to the language used in paragraph 1(1) of Schedule 36 – "reasonably required" – to make no relevant difference in this context.

37. Thus, for all relevant purposes, the question which I am about to address is precisely the same question as the one which Judge Scott addressed in *Levy*. And, as I have reached a different conclusion in relation to the question from that which Judge Scott reached, I should say at the outset that I have reached my conclusion with some diffidence, given the comprehensive nature and persuasiveness of his decision.

The closure notice legislation

38. I will start my analysis in relation to this question, as did Judge Scott, with the legislation in Section 28A of the TMA in relation to closure notices. In relation to that legislation, the natural starting point is the judgment of Arden LJ (as she then was) in the Court of Appeal in *The Commissioners for Her Majesty's Revenue and Customs v Vodafone 2* [2006] EWCA Civ 1132 ("*Vodafone 2*"). That case concerned an application for a closure notice by a company under paragraph 33 of Schedule 18 to the Finance Act 1998 and not an application for a closure notice under paragraph 28A of the TMA but it is common ground that nothing turns on this distinction.

39. In *Vodafone 2*, the Court of Appeal upheld a decision by Park J to the effect that a question of law could be determined as a preliminary issue in considering an application for a closure notice. In *Levy*, Judge Scott provided the following description of the decision in *Vodafone 2*:

"24. The case of Vodafone 2 concerned the compatibility of the United Kingdom's rules on controlled foreign companies (CFCs) with European law. The Inland Revenue had opened an enquiry into the company's corporation tax return on the grounds that a Luxembourg company was a CFC of Vodafone and the profits of the Luxembourg company should have been apportioned to it. Vodafone resisted the provision of information to the Inland Revenue unless formally requested to do so. The compatibility of the United Kindgom's [sic] CFC provisions had already been referred to the European Court in another case (Cadbury Schweppes) and the company's view was that the CFC provisions were unenforceable.

25. The company applied to the Special Commissioners for the issue of a closure notice under paragraph 33 of Schedule 18 to FA98. The question arose in the course of the proceedings as to whether the Commissioners had power to determine a question of law and, in particular, whether they could refer a matter to the ECJ. The Inland Revenue submitted that, for the purposes of applications for closure notices, all that mattered was their view as to the law or the reasonableness of their view.

26. The Special Commissioners disagreed. They decided to make a reference to the European Court immediately so that it could be heard together with the previous reference (Cadbury Schweppes). If the CFC provisions were unenforceable, there could be no reasonable grounds for the enquiry to continue.

27. The High Court agreed with the decision of the Commissioners. At [37] of its judgment Park J held:

"If the reasonableness of the grounds for not issuing a closure notice depends on a question of law which the Commissioners can decide, surely the right course is for them to decide it. Or at the very least it must be open to them to decide it."

28. The mere fact that the issue might need to be referred to the ECJ for its resolution was an irrelevance. That was simply the mechanism for deciding the legal question. He considered that the result was not unreasonable, unworkable or disruptive. He dismissed a concern that applications under paragraph 33 of Schedule 18 to FA98 could be used to bring enquiries prematurely to an end. At [43] of his judgement he commented as follows:

"Paragraph 33 is meant to be a protection to a taxpayer, by giving it a procedure whereby, if it believes that an enquiry is being inappropriately protracted and pursued by the Revenue, it can bring the matter before the independent and specialist tribunal. The Special Commissioners can, I believe, be relied upon to spot cases where the procedure is being abused and to give short shrift to applications in such cases."

29. The Inland Revenue appealed but the appeal was dismissed by the Court of Appeal. Lady Justice Arden (as she then was) gave a judgement with which Lord Justice Moore-Bick and Lord Justice Mummery agreed. At [18] Lady Justice Arden referred to the main point made by the Inland Revenue that there was no power under paragraph 33 of Schedule 18 to FA98 for the Commissioners to "determine incidental questions of law". Lady Justice Arden continued:

"[19] If the Revenue are right on this point, it would mean that the Commissioners' role under paragraph 33 is to be satisfied that the Revenue have reasonable grounds for not giving a closure notice within a specified period so that they can continue with their factual investigation. But there are no words of limitation in paragraph 33 which would serve to restrict the Commissioners' role to that of scrutinising the factual investigation being performed by the Revenue.

[…]

[21] Paragraph 33 on its face, however, would seem to confer on the Commissioners a power to do anything that the Commissioners reasonably consider necessary to enable them to be satisfied as to the matters required by that paragraph. That interpretation also promotes the effectiveness of paragraph 33, which it may be presumed Parliament wished to achieve. On that basis it is legitimate to put the question in the following way, that is to ask whether there is anything in the wording of paragraph 33 to suggest that it does not confer jurisdiction to decide incidental points of law, that is points of law that need to be resolved in order to decide whether there are reasonable grounds for not giving a closure notice. […]

[22] […] it is difficult to see why Parliament should wish to limit the protection given to taxpayers by paragraph 33 to situations where the Revenue is pursuing enquiries into the facts which it can be shown are unfounded as a matter of fact, and not wish to extend the same protection to cases where the Revenue is proceeding on the basis of a particular view of the law, to which the taxpayer raises a serious challenge which the Commissioners can conveniently deal with at that stage. It would mean that the taxpayer would have to resort to judicial review."

30. Lady Justice Arden then considered the quite different question as to the exercise of the Commissioners' power to determine incidental questions of law. On that question she held as follows at [25]:

"There are likely to be cases where it is not possible to say that a point of law raised by a taxpayer needs to be, or can be, determined before a closure direction application under paragraph 33 is determined. It will be a matter that the Commissioners will have to consider in the light of the facts surrounding the particular application before them. […] In the present case the Commissioners took into account that the burden on the taxpayer of investigating the facts would be considerable (paragraph 113 of the decision of the Commissioners). I agree that that is a relevant consideration in a decision whether to determine a preliminary point of law before dealing with a paragraph 33 application."

31. Lady Justice Arden also dismissed at [26] an argument by the Inland Revenue to the effect that jurisdiction under paragraph 33 of Schedule 18 to FA98 to determine incidental points of law would render otiose paragraph 31A of that Schedule (a mechanism for both parties to agree to submit questions to the Special Commissioners for determination):

"The two provisions do not cover the same ground. A point of law for the purposes of paragraph 33 would have in general to be so fundamental as to be capable of bringing the enquiry to a halt if decided in a particular way. This will not always be the case under paragraph 31A.""

40. Judge Scott then went on to state the following conclusions as to the impact of the case:

"32. In my view, a number of propositions can be taken from the Court of Appeal's decision in Vodafone 2, namely:

(1) paragraph 33 of Schedule 18 to FA98 has no words of limitation relating to the way in which the tribunal should approach the question as to whether HMRC have reasonable grounds to continue with an enquiry: if it is necessary to determine a question of law, the tribunal is free to do so;

(2) that operates in conjunction with "situations where the Revenue is pursuing enquiries into the facts which it can be shown are unfounded as a matter of fact": the same protection to the taxpayer to seek a closure notice in relation to those situations should apply to ones where a view of the law is unfounded;

(3) the facts surrounding the particular application before the tribunal will have to be considered and a relevant consideration will be whether determining a point of law would mean that a considerable burden on the taxpayer of investigating facts would be lifted; and

(4) a point of law that falls to be determined in the proceedings for the application would, in general, have to be so fundamental as to be capable of bringing the enquiry to an end.

33. Applying those propositions to the circumstances of this case, none of them, in my judgment, provide much assistance to Mr Gordon. Indeed, the way in which the Court of Appeal approached the enquiry in the normal case as one where HMRC were conducting enquiries into facts that were "unfounded" might be said to point in the opposite direction, suggesting, as it does, that the relevant test of reasonableness is set at a level where the facts show an "unfounded" investigation. Moreover, the ratio of the case is, clearly, addressed to the issue as to whether the tribunal had jurisdiction to determine points of law and, for that purpose, to make references to the Luxembourg court for a preliminary ruling. That is evident from the detailed reasoning of the Court of Appeal but is also clearly stated at [2] of their judgment. In these proceedings, there is no material dispute about the law. The dispute is about the application of the law to the particular facts of the case. And Vodafone 2 was not concerned with such a case."

41. I agree with Judge Scott that the decision of the Court of Appeal in *Vodafone 2* has no direct application to the application for the FCNs and PCNs in the present case because the preliminary issue which was in point in *Vodafone 2* was a question of law, whereas the present case concerns a mixed question of law and fact – namely whether the Appellant was domiciled in the UK in the relevant tax years. (It is a mixed question of law and fact because the answer turns on the application of certain principles derived from a considerable body of case law to the specific facts in any particular case).

42. However, I have drawn a different conclusion from Judge Scott on the implications of the decision for a case such as this.

43. Mr Purnell submits that, in order for the Respondents to be able to resist the Appellant's applications for the FCNs and the PCNs (and, for that matter, in order to prevail in relation to the appeal against the IN), they merely need to demonstrate that the conclusion which they have reached in relation to the Appellant's domicile in the tax years in question is a reasonable one. It is not necessary for them to show that that conclusion was the right one (and that the Appellant actually did have a UK domicile in the tax years in question) because the determination of that question should be deferred until a later stage in the process - the

substantive hearing of the appeals against the closure notices, once issued. At the present stage in the process – ie when the First-tier Tribunal is merely considering whether there are reasonable grounds for not ordering the closure notices to be issued and whether the information requested in the IN is reasonably required (and, in relation to the tax year ending 5 April 2014, the officer of the Respondents might have reason to suspect that one of the circumstances set out in paragraph 21(6) of Schedule 36 exists) - it is beyond the jurisdiction of the First-tier Tribunal to answer the question of whether or not the Appellant actually had a UK domicile in the tax years in question.

44. For his part, Mr Gordon submits that the Respondents would not have reasonable grounds for resisting the issue of the FCNs (or for that matter the PCNs) which are the subject of the application, and that the Appellant should succeed in his appeal against the IN, if the Appellant is able to establish in the course of the present proceedings that he did not have a UK domicile in the tax years in question and that there is no reason in law why the First-tier Tribunal should not address that question as a threshold issue at this stage.

45. It may be seen that these are precisely the same submissions which each party made in relation to the question of law which was in point in *Vodafone 2*. And, in *Vodafone 2*, the Court of Appeal held that the first-tier appellate body – now the First-tier Tribunal – did have the power to determine the preliminary issue in question. Mr Purnell submits that *Vodafone 2* is of no relevance in this context because the question which is in point in this case is an "impressionistic" question, unlike the "mechanistic" question that was the subject of the decision in *Vodafone 2*. By that he means that the question in the present case requires consideration of both law and fact, unlike the much simpler question of law which was in point in *Vodafone 2*.

46. However, whilst I recognise the clear difference between the nature of the two questions, and see also that that difference might potentially be relevant at the stage when the case management question needs to be decided (see paragraphs 105 to 134 below), I can see no difference in principle between the two in terms of the jurisdictional question which I am now addressing. In both cases, there is a threshold question which is perfectly within the competence of the relevant court or tribunal to decide (albeit, in the case of *Vodafone 2*, only after a referral to Europe) and the answer to the question is binary, in that, leaving aside the potential impact in this case of the eventual outcome of the ongoing litigation in *Embiricos*, it will conclusively determine the success or failure of the application for the closure notice, without the need for further consideration of the outstanding information being sought. As such, I think that, in terms of my jurisdiction in this case, the principle set out in *Vodafone 2* is as applicable to the mixed question of law and fact in this case as it is to a question of pure law.

47. I might have been inclined to reach a different decision if, in her decision in *Vodafone 2*, Arden LJ had drawn a distinction between the question of law which was in point in that case and other threshold questions, such as questions of fact or mixed questions of law and fact. However, she did not do that. On the contrary, for the reasons which follow, I believe that she implied that the same process ought to apply no matter what the nature of the threshold question.

48. At the hearing in relation to these proceedings, much was made of the fact that, in reaching her conclusion in *Vodafone 2*, Arden LJ likened the question of law which was relevant in that case "to situations where the Revenue is pursuing enquiries into the facts which it can be shown are unfounded as a matter of fact". It must be said that those words are somewhat ambiguous, as may be seen from the fact that each of Mr Purnell and Mr Gordon submitted that they supported his case. In Mr Purnell's view, Arden LJ, in using those words, was referring to circumstances where a particular fact on which the Respondents were relying clearly had so little merit that it could not be said that, in relying on that fact, the Respondents

were acting reasonably. In contrast, in Mr Gordon's view, Arden LJ, in using those words, was referring to circumstances where a particular fact on which the Respondents were relying might well seem reasonable but could be determined at the hearing to be wrong.

49. In *Levy*, Judge Scott favoured the former interpretation and declined to extend the approach to questions of law in *Vodafone 2* to the mixed question of law and fact in *Levy*.

50. However, whilst conceding that Mr Purnell's interpretation is certainly a tenable one, I am more inclined to favour Mr Gordon's view on this point. I say this for the following reasons.

51. First, when one looks at the exact words which Arden LJ used when she made her comparison between the question of law in her case and questions of fact, she referred to facts which "are shown to be unfounded". The use of the word "shown" suggests to me that she was referring to a process at the relevant hearing pursuant to which the status of a particular fact as being true or false is conclusively determined as opposed to a process pursuant to which the reasonableness of the Respondents' view as to the relevant fact is tested. That view gains support when one considers that Arden LJ did not say that what was "shown" in such proceedings was whether or not the Respondents' belief in the relevant fact was a reasonable one. Instead, she said that what was "shown" in such proceedings was whether or not the fact believed in by the Respondents was "unfounded" – ie incorrect.

52. More importantly, because I recognise that Arden LJ was merely making a comparison in using those words and not focusing very precisely on how questions of fact do fall to be determined in such proceedings (as that was not the matter which she was addressing), I can see no distinction in principle between the threshold question of law which was in issue in *Vodafone 2* and the threshold mixed question of law and fact which is in issue in the present proceedings. In both cases, there is a question which, once determined by the relevant court or tribunal, produces a binary answer and, subject to the potential impact in this case of the eventual outcome of the ongoing litigation in *Embiricos*, is capable of bringing the proceedings to a close. Moreover, in both cases, it is a question which the relevant court or tribunal, as a specialist tax court or tribunal, is perfectly capable of answering. Putting this another way, to paraphrase Arden LJ at paragraph [21] in *Vodafone 2*, there is nothing in the wording of paragraph 28A(6) of the TMA to suggest that it does not confer jurisdiction on the First-tier Tribunal to reach a conclusion in relation to a mixed question of law and fact which needs to be resolved in order to decide whether there are reasonable grounds for not giving the closure notice.

53. I do not think that the decision of the First-tier Tribunal (Judge Marilyn McKeever) in *Eastern Power Networks plc and others v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 0494 ("*EPN*"), on which Mr Gordon also relied in his submissions, is of meaningful assistance in advancing the position on this point either way. That case is not binding on me. More relevantly, it also related to questions of law as opposed to mixed questions of law and fact and seems to me to have involved a straightforward application of the Court of Appeal decision in *Vodafone 2*.

Possible objections to the above analysis

54. I have considered the following possible objections to the conclusion which I have reached above.

55. Before describing those possible objections, I should observe that each of them (with the exception of the first one) is equally applicable to the conclusion which was drawn by the Court of Appeal in relation to the question of law in *Vodafone 2*. That suggests to me that, with the exception of the first reason, none of them is likely to be regarded as being of such overwhelming significance as to change the conclusion which I have reached above.

Practical application of the "reasonable grounds" language

56. I have considered whether the conclusion I have outlined above could be said to have refined out of existence the reference in paragraph 28A of the TMA to there being reasonable grounds for the Respondents to resist an application for a closure notice.

57. I have concluded that it does not have that result. Taking the words of Arden LJ in paragraph [22] of the decision literally, and assuming that it is open to the First-tier Tribunal to reach a conclusion on the veracity of every single fact which the Respondents believe to be true and which underlies their decision to continue with the enquiry, there is still scope for applying the reasonability-based test to the conclusions which the Respondents have drawn on the basis of the facts as so found. In other words, whether or not the Respondents have reasonable grounds for continuing the enquiry depends not on the reasonableness of their belief in any fact which can be objectively determined but rather on the reasonableness of the conclusion which they have drawn from each such fact as so objectively determined. That would make perfect sense and still leave the relevant First-tier Tribunal with a decision to make on the reasonability of the Respondents' conclusion.

58. For completeness, I should add that, even if one were to say that there are certain questions of fact which the relevant First-tier Tribunal does not have the power to determine objectively at proceedings of this nature, with the result that a reasonable belief in the relevant fact by the Respondents should suffice for the purpose of the proceedings - and there is nothing in the decision of Arden LJ in *Vodafone 2* or the language in Section 28A which tends to support that proposition - that is a matter to be addressed at some future time by another First-tier Tribunal. The question with which I am faced relates to a specific mixed question of law and fact the answer to which, like the question of law in *Vodafone 2*, will, subject to the potential impact of the eventual outcome of the ongoing litigation in *Embiricos*, determine whether the present enquiry should be brought to an end or should be allowed to continue. In other words, it is a threshold binary question which, in the words of Judge Scott at paragraph 32(4) in *Levy*, is "so fundamental as to be capable of bringing the enquiry to an end".

59. In my view, it is therefore indistinguishable from the question of law which was being considered in *Vodafone 2* and, by parity of reasoning, should be treated in exactly the same way. The view expressed by Arden LJ in paragraph [23] of *Vodafone 2* – to the effect that there would need to be clear language in the section to the effect that the First-tier Tribunal was not empowered to determine the question of law and could consider only whether the Respondents' view on that question was reasonable if that was what Parliament intended – is as applicable to the mixed question of law and fact which has arisen in this case as it was to the question of law in *Vodafone 2*.

Section 28ZA of the TMA

60. I have also considered another objection to the conclusion which I have reached above which was raised by Mr Purnell at the hearing.

61. This was to the effect that the existence of Section 28ZA of the TMA implies that there must be some limitation to the scope of the matters which the First-tier Tribunal is able to consider in relation to an application under Section 28A of the TMA for a closure notice. Section 28ZA specifies that, at any time when an enquiry is in progress in relation to any matter, any question arising in respect of the subject-matter of the enquiry may jointly be referred by the parties to the First-tier Tribunal for its consideration. Mr Purnell submitted that there would be no point in Parliament's providing for this joint process of referral if, in the absence of the Respondents' agreement to make the referral, the taxpayer could simply apply for a closure notice under Section 28A and effectively compel the Respondents to have the relevant question determined at the proceedings in relation to that application.

62. The identical argument was raised by counsel for the Respondents in *Vodafone 2* – in relation to paragraph 31A of Schedule 18 to the Finance Act 1998, the corporation tax equivalent of Section 28ZA – and it was rejected by Arden LJ in paragraph [26] of the decision. The reasons given for that rejection – namely, that the joint referral process in paragraph 31A covers a much wider range of matters than the fundamental binary threshold question of law which was the subject of *Vodafone 2* – applies equally to Section 28ZA in the context of the issue in this case. Accordingly, again by parity of reasoning with the reasoning in *Vodafone 2*, I do not think that this alters the conclusion I have reached above.

Peremptory applications

63. Mr Purnell also raised a related objection, which was that, if the First-tier Tribunal had the power to determine, in the proceedings in relation to the closure notice, questions such as the question which is at issue in this case, then there would be nothing to stop every taxpayer who was served with a notice of enquiry from immediately making an application for a closure notice and forcing the Respondents into substantive proceedings in the First-tier Tribunal before the enquiry had properly begun.

64. I believe that this point does not go to the question of whether or not the First-tier Tribunal has the power to determine mixed questions of law and fact or questions of fact so much as the question of whether or not the First-tier Tribunal should exercise that power in any particular case. As the questions which I have set out in paragraph 16 above make clear, identifying the powers which are conferred on the First-tier Tribunal by Section 28A is quite distinct from reaching a conclusion as to whether or not the First-tier Tribunal should exercise those powers in any particular case. This was a point made by Arden LJ in *Vodafone 2* at paragraph [25], which is set out in full in the extract from *Levy* in paragraph 39 above. The same point was made by Park J in the High Court in that case when he said, in paragraph [43] of his judgment, that "[the First-tier Tribunal] can, I believe, be relied on to spot cases where the procedure is being abused and to give short shrift to applications in such cases".

65. It may be that, in a particular situation, the fact that the enquiry is still at an early stage and the matter which is in dispute needs to develop further before it can properly be litigated would mean that the First-tier Tribunal should decline to exercise its power to determine the matter. However, that does not mean that the power to do so does not exist.

66. In summary, it may be that there would be situations where it would be inappropriate for the First-tier Tribunal to determine a mixed question of law and fact or a question of fact. However, the same is true of a pure question of law. The main point is that that is a question in relation to the use of a power, which I go on to consider in paragraphs 105 to 134 below. It is not relevant to the fundamental (and logically-prior) question, which I am now addressing, of whether the power exists in the first place.

Non-application of issue estoppel or abuse of process

67. The next possible objection relates to the extent to which any decision which a First-tier Tribunal may make in the course of determining a mixed question of law and fact in proceedings under Section 28A would bind both the Respondents and a future First-tier Tribunal to whom an appeal against the closure notice might be made. It would seem from paragraphs [60] to [69] of the decision in *Levy* that both parties in that case were proceeding on the understanding that any decision which a First-tier Tribunal might make in the course of closure notice proceedings in relation to the relevant taxpayer's domicile would not bind either the Respondents in issuing their closure notice or the First-tier Tribunal in any subsequent appeal against the closure notice by the relevant taxpayer.

68. However, in these proceedings, Mr Gordon put forward a contrary view, which was that that was not the case and that any such decision I might make would bind both the Respondents and the First-tier Tribunal in any subsequent appeal against the closure notice.

69. I was not provided with any authority to the effect that any decision which I might make to the effect that the Appellant did not have a UK domicile in the relevant tax years would prevent the Respondents from issuing the ensuing closure notices in respect of those tax years on the basis that he did and then amending the Appellant's self-assessments in respect of the relevant tax years on a "best judgment" basis, as Judge Scott in paragraph [61] in *Levy* envisaged to be a possibility in that case.

70. However, regardless of whether the Respondents would be capable in theory of ignoring my decision in issuing their closure notices on the basis that the Appellant had a UK domicile in the relevant tax years, it is my view that it would be pointless for them to do so because, on the inevitable subsequent appeal by the Appellant against the closure notices, they would be precluded from arguing that that was the case.

71. In *Levy*, Judge Scott reached the contrary view. He said that the domicile question could be re-litigated in any appeal against the closure notices. In reaching that conclusion, he referred, in paragraphs [64] to [69] of his decision, to the limitations on issue estoppel in a tax context stemming from the "Caffoor principle", which arose out of the Privy Council decision in *Caffoor v Income Tax Commissioner* [1961] AC 584 ("*Caffoor*"), as that principle was applied in *King v Walden* [2001] STC 822 ("*King*"). He based that conclusion on the fact that the "issue" which was being addressed in the proceedings in *Levy* was not whether the Appellant had a UK domicile but rather whether the Respondents had reasonable grounds for not closing their enquiries, with the result that any decision in relation to the appellant's domicile in the proceedings in relation to the closure notice application and appeal against the IN would not bind a First-tier Tribunal which was being called upon to decide a subsequent appeal against an amended self-assessment which arose as a result of the enquiries to which the closure notice application related and the IN to which the appeal related.

72. I can understand the view that the sole "issue" to which the current proceedings relate is the reasonability of the grounds for refusing to close the enquiries (and the corresponding reasonability-based tests in paragraphs 1 and 21(6) of Schedule 36) and that therefore any decision in relation to the Appellant's domicile - which is merely a step in reaching those determinations, albeit a fundamental step – is not a matter which can qualify for issue estoppel, by way of parallel reasoning with the decision in *King* in relation to the wilful default or neglect which was the basis for the earlier assessments to tax in that case.

73. However, in my opinion, that would be not be a correct interpretation of the application of the "Caffoor principle" in the context of this case. This is because the more restricted application of issue estoppel which stems from the "Caffoor principle" is confined to those tax cases which concern assessments to tax or payments of tax. It does not apply to all tax cases simply because they relate to tax – see the discussion on this point in paragraphs [171] to [175] in the decision of Henderson J (as he then was) at first instance in *Littlewoods Retail Ltd & others v The Commissioners for Her Majesty's Revenue and Customs* [2014] EWHC 868 (Ch) ("*Littlewoods*"). In those paragraphs, Henderson J made it clear that the "Caffoor principle" does not apply to all tax cases simply because they relate to the tax legislation. Instead, the principle is confined to those tax cases "where the basic question for determination is the correct amount of tax payable for the relevant year or period of assessment…"

74. Any decision in relation to the Appellant's domicile in the course of the present proceedings would not of course relate to an assessment to tax in respect of the relevant tax years but would instead inform the application of the reasonability-based tests in the context

of the enquiries and the IN which necessarily preceded any such assessment. As such, I believe that the general law of issue estoppel – pursuant to which a conclusion on a question of law and fact which has been reached by a court or tribunal in the course of earlier proceedings is treated as *res iudicata* for the purposes of proceedings which occur subsequently – would be applicable to any determination of the Appellant's domicile in these proceedings, with the result that the "Caffoor principle" would have no application in the present context.

75. I note that similar observations on the limitations of the "Caffoor principle" may be found in the decision by Special Commissioner Charles Hellier in *Carter Lauren Construction v The Commissioners for Her Majesty's Revenue and* Customs [2006] SpC 603, at paragraphs [45] to [61], and the decision of the First-tier Tribunal (Judge Richard Thomas and Ms Patricia Gordon) in *Michael Hegarty and Flora Hegarty v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 774 (TC), at paragraphs [56] to [68].

76. For the above reasons, I believe that, if I were to determine in these proceedings the issue of the Appellant's domicile in the relevant tax years, the doctrine of issue estoppel would prevent either party from arguing for a contrary outcome to the question in any subsequent proceedings in relation to the closure notices which would result from the enquiries and the IN.

77. I would add that it would be surprising to me if that were not the case. Since a fundamental threshold issue in relation to whether or not the Respondents have reasonable grounds for continuing with their enquiries and asking for further information from the Appellant is whether the Appellant had a UK domicile in the tax years to which the enquiries relate, it would be an odd outcome if a decision made in the course of these proceedings in relation to the issue of the Appellant's domicile in the relevant tax years would be capable of being ignored and re-argued by the losing party in the course of proceedings in relation to the appeal against the closure notices in due course. (I accept that any decision made in the course of the present proceedings in relation to the Appellant's domicile would relate only to the issue of the Appellant's domicile in the tax years which are under consideration. It would not prevent another court or tribunal from reaching a contrary conclusion in relation to the Appellant's domicile in other tax years. But that is not the point in this context.)

78. Even if I am wrong in concluding that the anomalous application of the doctrine of issue estoppel in tax cases pursuant to the "Caffoor principle" would not be in point in these circumstances, I believe that, were I to determine the question of the Appellant's domicile in the relevant tax years in the course of the present proceedings, the doctrine of abuse of process, which was described by Henderson J in *Littlewoods* at paragraph [191] as being "much less inflexible than issue estoppel", would prevent the Appellant's domicile from being re-argued by the losing party in the course of proceedings in relation to the appeal against the closure notices in due course.

79. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, Lord Diplock described the doctrine of abuse of process as "an inherent power which any court of justice must possess to prevent misuse of its procedure in a way, which although not inconsistent with the literal application of its procedural rules would nevertheless be manifestly unfair to a party to litigation before it". Similar views were expressed in *Hackett v The Commissioners for Her Majesty's Revenue and Customs* [2016] UKFTT 781 (TC), where the First-tier Tribunal (Judge Roger Berner) said as follows at paragraph [38] of its decision:

"What is required is a broad, merits-based judgment, taking account of all the facts and circumstances. The proper approach is to ask whether in all the circumstances a party's conduct is an abuse. Although that will often give the same result as asking whether the conduct is an abuse and then, if it is, asking whether the abuse is excused or justified by special circumstances, it will not invariably do so, and it is always necessary for the question of abuse to be considered by reference to all the circumstances of the individual case."

80. Similar views may also be found in the judgment of Lord Bingham in paragraphs [31A] to [31F] of his decision in *Johnson v Gore Wood & Co* [2002] AC 1, Henderson J in paragraphs [243] to [251] of his decision in *Littlewoods* and the First-Tribunal (Judge John Brooks) in paragraphs [3] to [5] of its decision in *Spring Capital Limited v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 465 (TC).

81. As a result of the doctrine of issue estoppel and the broader, more flexible, doctrine of abuse of process, I consider that, were I to determine in the course of the present proceedings that the Appellant had a UK domicile in the relevant tax years, with the result that the enquiries would necessarily continue until the Respondents had the necessary information to amend the Appellant's self-assessments in respect of the relevant tax years, I do not see how, in any subsequent appeal by the Appellant against the relevant closure notices, the Appellant would be able to argue that, despite my finding during these proceedings, he did not in fact have a UK domicile in the relevant tax years at all. Instead, any appeal by the Appellant would be confined to questions of quantum or any other matter (apart from his domicile) which might have affected the revised self-assessments.

82. Conversely, in my view, if I were to determine in the course of the present proceedings that the Appellant did not have a UK domicile in the relevant tax years, with the result that the enquiries into the relevant tax years should be closed, then, even if the Respondents were to issue closure notices which were predicated on the Appellant's having a UK domicile and then amend the Appellant's self-assessments in respect of the relevant tax years on a "best judgment" basis, I do not see how, in any subsequent appeal by the Appellant against the relevant closure notices, the Respondents would be able to sustain their position that the Appellant had a UK domicile in the relevant tax years and the appeal would therefore necessarily succeed.

83. Thus, whilst I agree with Judge Scott's comments in *Levy* about the need for the tax administration system to be efficient and effective, I do not see that the conclusion which I have reached above prevents that from being the case in relation to my determination of the issue of the Appellant's domicile in the tax years in question.

The IN legislation

84. To the extent that these proceedings relate to the appeal against the IN, the jurisdiction of the First-tier Tribunal depends on the proper interpretation of paragraphs 1 and 21(6) of Schedule 36. The language used in those provisions is similar to the language used in Section 28A of the TMA but the regime in relation to INs is quite distinct from the regime governing closure notices and therefore the reasoning of Arden LJ in *Vodafone 2* is not in point when addressing the interpretation of the Schedule 36 provisions.

85. Moreover, at the hearing, neither party referred me to any previous decision in which the jurisdiction of the First-tier Tribunal in relation to an appeal against an IN issued under paragraph 1 of Schedule 36 – that is to say, a taxpayer notice – has been addressed.

86. However, the parallels between the two regimes so far as the current proceedings are concerned is obvious. In both cases, it is necessary to determine whether the burden on the Respondents is merely to satisfy the First-tier Tribunal that its conclusion in relation to the Appellant's domicile is reasonable or instead to satisfy the First-tier Tribunal that that conclusion is correct. As so stated, I agree with the approach adopted by Judge Scott in *Levy*, which is to proceed on the initial assumption that the same answer should be given to that question in the context of both regimes.

87. Of course, by virtue of adopting that approach, Judge Scott concluded that it was not open to the First-tier Tribunal in the context of an appeal against an IN to reach a determination

on the merits of the Respondents' conclusion whereas the result of my adopting the same approach in this decision is the conclusion that I can.

88. As is the case in relation to Section 28A of the TMA, there is nothing express in the language of paragraphs 1 or 21 of Schedule 36 to suggest that, in such cases, I am confined to determining whether the Respondents' view on the Appellant's domicile is reasonable. Instead, those paragraphs merely require the First-tier Tribunal to consider whether:

(1) the requested information is reasonably required; and

(2) in the case of the information requested in relation to the tax year ending 5 April 2014, an inspector of the Respondents has reason to suspect that one or more of the circumstances in paragraph 21(6) of the schedule exists.

89. I can therefore see no reason why, in common with my conclusion in relation to the application of Section 28A of the TMA, the First-tier Tribunal cannot itself address and determine the threshold question of domicile before considering the questions set out in paragraphs 15(3) and 15(4) above in the light of that determination. After all, in this particular case, the question of the Appellant's domicile is all that is needed in order to determine the answers to those questions. If he is not UK-domiciled, then the information requested is palpably not reasonably required and there is obviously no reason to suspect that any of the circumstances in paragraph 21(6) of Schedule 36 exists, whilst both tests are clearly passed if he is UK-domiciled.

Possible objections to the above analysis

90. Mr Purnell objected to that conclusion. He said that the role of the First-tier Tribunal in such appeals was supervisory, and not merits-based, in nature, with the result that the First-tier Tribunal was merely entitled to consider the reasonableness of the views of the Respondents underlying the IN and not whether those views were right. He made two points in support of his submission that the language in paragraphs 1 and 21(6) of Schedule 36 should be read as precluding the First-tier Tribunal from making that determination.

Absence of rights of appeal

91. Mr Purnell's first point was to refer me to paragraph [51] in *Levy*, where Judge Scott held that the fact that the determination by the First-tier Tribunal of an appeal against an IN given under paragraph 1 was "final and conclusive", pursuant to paragraph 32(5) of Schedule 36, was "consistent with the nature of the statutory question to be determined by the tribunal, namely a supervisory and not a merits-based one".

92. However, at the hearing, no authority was cited to me in support of the view that the absence of a right of appeal against the First-tier Tribunal's decision has the effect that the jurisdiction of the First-tier Tribunal in the proceedings before it is limited to being supervisory in nature.

93. And, as I have noted above, I can see nothing in the language set out in the relevant provisions of Schedule 36 to suggest that the First-tier Tribunal in an appeal against an IN should not be able to determine the domicile of the appellant, as a threshold question in relation to whether requested information or documents are reasonably required or in relation to the reasonableness of the Respondents' view that one or more of the conditions in paragraph 21(6) is satisfied, as opposed merely to considering, in that context, whether the Respondents' views on the appellant's domicile are reasonable.

94. I accept that it is anomalous that the only effective right of appeal against a decision by the First-tier Tribunal in relation to the questions set out in paragraph 93 above is an application for judicial review, but, in the absence of clear words to the relevant effect, I do not see why

that anomaly means that the powers of the First-tier Tribunal should be regarded as not extending to the ability to determine a mixed question of law and fact which is so fundamental to the questions.

Third party notice cases

95. Secondly, Mr Purnell relied on two decisions in relation to INs issued under paragraph 2 of Schedule 36 ("third party notices") to support his position in this case - the Court of Appeal decision in *R (on the application of Derrin Brother Properties Ltd and others) v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 15 ("*Derrin*") and the decision of Simler J in *Alexander Kotton v The Commissioners for Her Majesty's Revenue and Customs* [2019] EWHC 1327 (Admin) ("*Kotton*"). Both of those cases involved a judicial review of the actions of the First-tier Tribunal in approving the issue of, and the actions of the Respondents in issuing, third party notices in order to assist a foreign tax authority.

96. Since both of those cases related to the powers of the First-tier Tribunal in approving third party notices and not in considering appeals against taxpayer notices, they were dealing with a completely separate regime within Schedule 36 from the regime governing the IN in this case. As noted in paragraph [10] in *Derrin*, in the case of a third party notice, the taxpayer to whom the notice relates does not have any right to make representations to the Respondents or to insist that any representations that he does make must be given to the First-tier Tribunal. In addition, he does not have any right of appeal and it is possible for the First-tier Tribunal to approve a proposal by the Respondents that they not be required to provide the taxpayer to whom the notice relates with a copy of the notice (see paragraph 4(1) of Schedule 36). These aspects of the regime are related to the origins of the regime (in Section 20 of the TMA) – see *Derrin* at paragraphs [11] to [15]. The comments made in paragraphs [67] et seq. in *Derrin* in relation to "a judicial monitoring scheme rather than a system of adversarial appeals from third party notices, which could take years to resolve" need to be read in that light. In contrast to the position in relation to third party notices, an appeal against a taxpayer notice under paragraph 29 of Schedule 36 is heard at an inter partes hearing at which both parties are represented and can make submissions.

97. I can therefore see nothing in either case which sheds any light on the powers of the First-tier Tribunal in hearing an appeal against a taxpayer notice issued under paragraph 1 of Schedule 36.

98. More specifically, in *Derrin*, the taxpayers were seeking judicial review on the basis that the third party notices did not comply with the requirements of Schedule 36 and/or violated Article 6 of the European Convention on Human Rights (the "Convention"), when taken in conjunction with Article 8 of the Convention and/or Article 1 of the First Protocol to the Convention. Thus, even if the differences between the taxpayer notice and the third party notice regimes were to be disregarded, the Court of Appeal decision in *Derrin* does not in any way touch on the issue which I am here addressing of whether a First-tier Tribunal is entitled in the proceedings before it to determine a threshold question of law or a mixed question of law and fact which is a fundamental condition precedent to any consideration of whether information or documents are reasonably required by the Respondents.

99. In *Kotton*, Simler J did at least consider, albeit in the context of the machinery of the third party notice regime, the relationship between the underlying investigation and the information sought. The issue in that case was whether the taxpayer was entitled to question, in the judicial review proceedings, the merits of the underlying tax investigation by the foreign tax authority or whether it was sufficient in those proceedings for the Respondents to show that the information was reasonably required for the purposes of the investigation. She said the following in paragraph [62] et seq.:

"62. …the FTT must be satisfied that in all the circumstances, the officer giving the notice is justified in concluding that the information or documents are reasonably required for checking the tax position of the taxpayer. Again, that does not require any examination of the nature and extent of the underlying tax investigation, but rather a focus on whether there is a rational connection between the information and documents sought and the underlying investigation. The very purpose of the investigation is to establish the correct position by reference to all the evidence gathered and it is therefore unsurprising that the legislation does not make the approval of a notice conditional on the tax investigation itself being reasonably required.

63. Fourthly and in light of those conclusions, I do not agree with Mr Simpson that the facts support a conclusion that no reasonable officer could have concluded that the information and documents are reasonably required in this case. That the STA may already have evidence that leads it to believe the Claimant was resident in Sweden for tax purposes does not mean that the AMEX information is not reasonably required. This further information may add support to the STA's case and be required for that reason, or alternatively it may undermine the evidence so far available leading to the conclusion that the Claimant is not tax resident in Sweden. On either basis that there is existing evidence pointing in one direction does not mean that additional evidence that may shed light on this very question is not reasonably required.

64. The submissions made by Mr Simpson on the facts seem to me to underscore that there is a real dispute as to the Claimant's correct tax residence status and that the information sought is, at least potentially, directly relevant to that dispute. In particular, I do not accept the submission by Mr Simpson that all the credit card statements could show is that purchases were made from a particular retailer but saying very little about whether the Claimant was at any particular shop or retailer when the purchase was made. If the statements reveal spending necessarily linked to a geographical area, for example relating to meals or other consumables, accommodation or even transport, they are likely to support an inference that the purchase was made by the Claimant in a particular geographical area (here, in or near Billdal in Sweden) and to be relevant to the tax residence question.

65. It is therefore irrelevant that the STA has not explained why it is now enquiring into the Claimant's residence status or said what has changed. Similarly, although the operation of the relevant CFC rules is not clearly explained by the STA in its correspondence, that too is irrelevant: as Orrick said in the 8 May 2018 letter, those rules are relevant only if the Claimant's tax residence in Sweden can be established. That is what is being checked at this stage of the investigation. In any event, the CFC rules may ultimately have no relevance at all because if the Claimant is liable to income tax in Sweden as tax resident there, he may have unlimited liability to tax on a worldwide basis (subject to double taxation issues) as Mr Simpson accepted. None of the factual points raised are knock-out blows that establish beyond dispute that the Claimant is not or cannot be tax resident in Sweden in the relevant period. Nor do the points raised on behalf of the Claimant show the investigation to be a sham or pursued in bad faith. Mr Simpson expressly disavowed any allegation of bad faith and the arguments advanced do not begin to displace the presumption that both the STA and HMRC (in providing assistance) are conducting a genuine investigation and exercising their investigation powers honestly and in good faith."

100. It is quite clear from this extract that Simler J was dealing with a situation where there was a clear link between the underlying investigation and the information and documents which were being sought. In other words, in that case, the investigation was into the question of the taxpayer's residence and the only question was whether the information and documents which were being sought were reasonably required for that investigation. In that situation, it was not appropriate for the taxpayer to seek to argue that the investigation itself was wrongly-founded. It was too early in the process for that issue to be litigated. Instead, the tax authority were entitled to ask for the relevant documents which might in due course be of considerable assistance to it in litigating the substantive question.

101. In contrast, in this case, the investigation – ie the information which is being sought - is into the worldwide income and gains of the Appellant. However, that investigation would be wholly irrelevant if the Appellant were not to have been domiciled in the UK in the tax years in question. Therefore, it is reasonable to ask if the whole basis on which the investigation is based is fundamentally flawed. Indeed, the present facts are an example of the "knockout blows" to which Simler J referred in paragraph [65] of her decision. By implication, she was saying that, if any such knockout blow existed, then it would be appropriate to take that into account in determining the reasonability of the request.

102. I have therefore concluded that neither *Derrin* nor *Kotton* is authority for the proposition that the conclusion which I have reached on the scope of the First-tier Tribunal's powers in an appeal against a taxpayer notice in these circumstances is incorrect.

Issue estoppel and abuse of process

103. The same reasoning as I have set out in paragraphs 67 to 83 above applies to the determination of the Appellant's domicile in the course of considering the Appellant's appeal against the IN. Again, once the question has been determined in the course of the current proceedings, both the doctrine of issue estoppel and the doctrine of abuse of process would mean that the Appellant's domicile in the relevant tax years could not be re-litigated in the course of any appeal against the closure notices which arise out of the enquiries.

Conclusion in relation to the jurisdictional question

104. For the reasons set out in paragraphs 22 to 103 above, I consider that I do have the power to determine the Appellant's domicile status in the course of the present proceedings.

<u>The case management question</u>

Introduction

105. As I have already noted, in paragraph [25] of the decision in *Vodafone 2*, which is set out in full in the extract from *Levy* in paragraph 39 above, Arden LJ drew a clear distinction between the existence of a power to determine a question and the exercise of that power.

106. It is clear from that paragraph that it would not be appropriate for me to determine the domicile of the Appellant in these proceedings merely because I have concluded that I have the power to do so. I also need to consider whether this is a case where it is appropriate for me to exercise that power.

Guiding principles in relation to applications for closure notices

107. In looking for guidance on the principles to which I should have regard in considering that question, a good starting point is the summary by Judge Falk (as she then was) in paragraph [15] of her decision in *Beneficial House (Birmingham) Regeneration LLP v The Commissioners for Her Majesty's Revenue and Customs; Stanley Dock (All Suite) Regeneration LLP v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 801 (TC) ("*Beneficial House*"). Judge Falk said as follows:

"(1) The procedure is intended as a protection to a taxpayer against enquiries being inappropriately protracted, providing a "reasonable balance" to HMRC's substantial powers to investigate returns (HMRC v Vodafone 2 [2006] STC 483 at [33] and [34]) and protecting the taxpayer against undue delay or caution on the part of the officer in closing the enquiry (Eclipse Film Partners No 35 LLP v HMRC [2009] STC (SCD) 293 at [17]). The Tribunal is required to exercise a value judgment, determining what is reasonable on the facts and circumstances of the particular case (Frosh at [43]). This involves a balancing exercise.

(2) The reasonable grounds that HMRC must show must take account of proportionality and the burden on the taxpayer (Jade Palace Limited v HMRC [2006] STC (SCD) 419 at [40]).

(3) The period required to close an enquiry will vary with the circumstances and complexity of the case and the length of the enquiry: complex tax affairs and large amounts of tax at risk are likely to extend an enquiry, but the longer the enquiry the greater the burden on HMRC to show reasonable grounds as to why a time for closure should not be specified (Eclipse Film Partners, and Jade Palace at [42] to [43]). It may be appropriate to order a closure notice without full facts being available if HMRC have unreasonably protracted the enquiry: see Steven Price v HMRC [2011] UKFTT 264 (TC) at [40].

(4) A closure notice may be appropriate even if the officer has not pursued to the end every line of enquiry. What is required is that the enquiry has been conducted to a point where it is reasonable for the officer to make an "informed judgment" of the matter (Eclipse Film Partners at [19]).

(5) If it is clear that further facts are or are likely to be available or HMRC has only just received requested documents and may well have further questions, then a closure notice may not be appropriate: see for example Steven Price, and also Andreas Michael v HMRC [2015] UKFTT 577 (TC). The Tribunal should guard against an inappropriate shifting of matters that should be determined by HMRC during the enquiry stage to case management by the Tribunal. However, the position will turn on the facts and circumstances of each case: Frosh.

(6) The Supreme Court's comments on the subject of closure notices in HMRC v Tower MCashback LLP[2011] UKSC 19, [2011] 2 AC 457 are highly relevant. In particular, Lord Walker commented that whilst a closure notice can be issued in broad terms, an officer issuing a closure notice is performing an important public function in which fairness to the taxpayer must be matched by a "proper regard for the public interest in the recovery of the full amount of tax payable", although where the facts are complicated and have not been fully investigated the "public interest may require the notice to be expressed in more general terms" (paragraph [18]). Lord Hope also said at [85] that the officer should wherever possible set out the conclusions reached on each point that was the subject of the enquiry. In Frosh the Upper Tribunal commented at [49] that a closure notice in broad terms is "not the norm" and so should not be taken as an appropriate yardstick for assessing whether HMRC's grounds for not closing the enquiry are reasonable."

The overriding objective

108. In addition to the above, as is the case in relation any exercise of a power by the First-tier Tribunal to regulate its own procedure, I am required to bear in mind at all times the overriding objective in Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"), which is to deal with cases fairly and justly. Rule 2(2) of the Tribunal Rules stipulates that dealing with a case fairly and justly includes

"(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues."

The time and costs of the Appellant

109. In terms of other factors to be taken into account in my decision on this question, Mr Purnell drew my attention to paragraph [25] in *Vodafone 2*, in which Arden LJ approved of, and agreed with, the approach of the original Commissioners in taking into account, as a relevant consideration in their decision to exercise the power to determine the preliminary question of law at the closure notice application stage, the fact that the burden on the taxpayer of investigating the facts which would not need to be investigated if the preliminary question of law were to be resolved in the taxpayer's favour would be considerable.

Gulliver

110. Mr Purnell also submitted that paragraphs [4], [22] and [24] in the decision of the First-tier Tribunal (Judge Jonathan Richards) in *Stuart Gulliver v The Commissioners for Her Majesty's Revenue and Customs* [2017] UKFTT 0222 (TC) ("*Gulliver*") were relevant to my consideration of whether or not to exercise my power to determine the question of the Appellant's domicile in these proceedings.

Preliminary hearings

111. Finally, Mr Purnell urged me to take into account in addressing this question the case law in relation to applications for questions to be determined at preliminary hearings. In particular, he referred me to the decision of the Upper Tribunal in *The Right Honourable Clifton Hugh Lancelot de Verdon Baron Wrottesley v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 637 (TCC) ("*Wrottesley*"), where the Upper Tribunal dismissed the application of the taxpayer to have his domicile of origin determined as a preliminary issue in advance of the hearing of his appeal against the Respondents' determination that he was domiciled in the UK from and including the tax year ending 5 April 2001 to and including the tax year ending 5 April 2008.

112. In the course of its decision in that case, the Upper Tribunal referred to a number of earlier decisions in relation to whether or not to order a preliminary hearing to determine an issue. It noted that, inter alia:

> (1) in *McLoughlin v Jones* [2002] QB 1312, David Steel J, sitting in the Court of Appeal, said as follows:
>
> "19. In my judgment, the right approach to preliminary issues should be as follows. (a) Only issues which are decisive or potentially decisive should be identified. (b) The questions should usually be questions of law. (c) They should be decided on the basis of a schedule of agreed or assumed facts. (d) They should be triable without significant delay, making full allowance for the implications of a possible appeal. (e) Any order should be made by the court following a case management conference";
>
> (2) in *Boyle v SCA Packaging* [2009] All ER 1181 ("*Boyle*), Lord Hope said the following at paragraph [9]:
>
> "It has often been said that the power that tribunals have to deal with issues separately at a preliminary hearing should be exercised with caution and resorted to only sparingly….preliminary points of law are too often treacherous short cuts. Even more so where the points to be decided are a mixture of fact and law….The essential criterion for deciding whether or not to hold a pre-hearing is whether, as it was put by Lindsay J in CJ O'Shea Construction Ltd v Bassi [1998] ICR 1130, 1140, there is a succinct, knockout point which is capable of being decided after only a relatively short hearing. This is unlikely to be the case where a preliminary issue cannot be entirely divorced from the merits of the case, or the issue will require the consideration of a substantial body of evidence. In such a case it is preferable that there should be only one hearing to determine all the matters in dispute"; and

(3) also in *Boyle,* Lord Neuberger agreed with Lord Hope's view that it was an inappropriate case to have a preliminary hearing and Lord Brown added that a preliminary hearing to determine whether the complainant was disabled was "highly unlikely" to be justifiable unless there was a "probability" that it would determine the whole dispute.

113. The Upper Tribunal in *Wrottesley* then observed that the overriding objective in Rule 2 of the Tribunal Rules had also to be borne in mind in the case of all case management decisions such as the one being addressed and then set out the following eight key principles to be considered in a case such as the one before it:

"(1) The matter should be approached on the basis that the power to deal with matters separately at a preliminary hearing should be exercised with caution and used sparingly.

(2) The power should only be exercised where there is a "succinct, knockout point" which will dispose of the case or an aspect of the case. In this context an aspect of the case would normally mean a separate issue rather than a point which is a step in the analysis in arriving at a conclusion on a single issue. In addition, if there is a risk that determination of the preliminary issue may prove to be irrelevant then the point is unlikely to be a "knockout" one.

(3) An aspect of the requirement that the point must be a succinct one is that it must be capable of being decided after a relatively short hearing (as compared to the rest of the case) and without significant delay. This is unlikely if (a) the issue cannot be entirely divorced from the evidence and submissions relevant to the rest of the case, or (b) if a substantial body of evidence will require to be considered. This point explains why preliminary questions will usually be points of law. The tribunal should be particularly cautious on matters of mixed fact and law.

(4) Regard should be had to whether there is any risk that determination of the preliminary issue could hinder the tribunal in arriving at a just result at a subsequent hearing of the remainder of the case. This is clearly more likely if the issues overlap in some way- (3)(a) above.

(5) Account should be taken of any potential for overall delay, making allowance for the possibility of a separate appeal on the preliminary issue.

(6) The possibility that determination of the preliminary issue may result in there being no need for a further hearing should be considered.

(7) Consideration should be given to whether determination of the preliminary issue would significantly cut down the cost and time required for pre-trial preparation or for the trial itself, or whether it could in fact increase costs overall.

(8) The tribunal should at all times have in mind the overall objective of the tribunal rules, namely to enable the tribunal to deal with cases fairly and justly"

(see paragraph [28]).

114. In reaching its conclusion to refuse the application by the taxpayer for his domicile of origin to be determined at a preliminary hearing, the Upper Tribunal in *Wrottesley* held that:

(1) resolution of the question at a preliminary hearing would not itself dispose of the case, absent settlement or the taxpayer's walking away. The determination of the taxpayer's domicile of origin was just one step on the way to determining the single issue in the case – namely, the taxpayer's domicile. Thus, it would not dispose of any issue in the case – it was merely relevant to the ultimate determination of that issue (see paragraph [45]);

(2) as a mixed question of fact and law, evidence would be required to determine it, although "there should be no material overlap between the evidence relevant to domicile of origin and other evidence" with the result that any finding on domicile of origin would be

unlikely to fetter the First-tier Tribunal which was hearing the rest of the dispute (see paragraph [48]);

(3) the evidence that would be required and the issues raised did not make the question of domicile of origin a succinct point relative to the rest of the case. A reasonable time estimate for that question to be determined would be somewhere between the two to three day estimate of the taxpayer and the four to five day estimate of the Respondents and that could not be described as succinct in comparison to the ten to twelve day estimate for a full hearing in relation to the domicile question (see paragraph [51]);

(4) there was a material risk of additional delay if a preliminary hearing were to be held because:

(a) it would delay the main hearing;

(b) the possibility of an appeal against the decision at the preliminary hearing was a real one;

(c) there was no material prospect of a settlement or the Respondents' walking away if the domicile of origin question were to be addressed as a preliminary matter, particularly if the taxpayer were to fail to establish at that preliminary hearing that he did have a non-UK domicile of origin; and

(d) the likelihood of the taxpayer's walking away after his domicile of origin was determined was not sufficiently high to have any material weight in the balancing exercise

(see paragraphs [55] to [58]). The risk of further delay to what had already been a protracted process weighed heavily in the overall balancing exercise of what was fair and just in the case (see paragraph [65]); and

(5) the taxpayer had not established that the potential beneficial impact, on pre-trial preparation and the length of the case, of having a preliminary hearing was significant enough to carry material weight in the balancing process (see paragraphs [62] to [64]).

115. Accordingly, the balancing exercise came out in favour of refusing to direct that a preliminary hearing should take place.

116. Mr Purnell submitted that the result of a similar balancing process in this case would reveal that I should not exercise any power to determine the question of the Appellant's domicile as a preliminary issue. The issue of the Appellant's domicile was not a pure question of law, there were no agreed facts and the likelihood of an appeal against any determination I might make – with consequent delay in resolving the substantive reasonability-based questions which were inherent in Section 28A(6) of the TMA and paragraphs 1 and 21(6) of Schedule 36 – suggested that it would be inappropriate for the question of the Appellant's domicile to be determined in these proceedings.

Conclusion

117. In reaching my conclusion on whether or not to exercise my power to determine the question of the Appellant's domicile as part of these proceedings, I have taken into account the principles set out in paragraph [15] of the decision in *Beneficial House* – see paragraph 107 above - and the overriding objective in Rule 2 of the Tribunal Rules to deal with the case fairly and justly. More specifically, I have weighed up the need for the Respondents to be able properly and fully to exercise their investigative powers in relation to the Appellant's tax affairs in the tax years in question against the right of the Appellant not to have to spend inappropriate time and costs as a result of an unnecessarily protracted investigation. What is needed is a

balance between the right of the Respondents to ensure that it has the armoury to pursue the investigations which are necessary in order for it to be able to assess each taxpayer to the correct amount of tax and the right of the Appellant to be protected from undue delay in closing the enquiries.

118. In doing the above, I have been mindful of the injunction set out in paragraph [15(5)] in *Beneficial House* to "guard against an inappropriate shifting of matters that should be determined by [the Respondents] during the enquiry stage to case management by the [First-tier Tribunal]", recognising that the position turns on the facts and circumstances in each case. I have also taken into account the length of the enquiries hitherto, the conduct of the enquiries and the effect which any determination of the Appellant's domicile would be likely to have on the substantive questions in these proceedings.

119. In applying the principles described above to the facts in this case, I have concluded that this is a case where the balance points strongly in favour of my exercising my power to determine the Appellant's domicile in these proceedings. I say that for the following reasons:

(1) the enquiries in this case have been continuing since 8 December 2016. Over that period of time, as has been noted in paragraphs 14(19) to 14(21) above, the Appellant, through his advisers, M&H, has answered a considerable number of questions in relation to his domicile. In my view, the exchanges between the parties in the period between the start of the enquiry into the tax year ending 5 April 2015 and the date when the application for the closure notices was made demonstrate that this is clearly not a case of a peremptory application for closure notices shortly after enquiries have commenced. On the contrary, the Appellant has co-operated fully and extensively with the enquiries and given adequate warning - in M&H's letters of 22 December 2017, 23 April 2018 and 17 July 2018 – that the application for closure notices would be made if the Respondents continued to raise additional questions in relation to his domicile;

(2) as late as 11 September 2018, the Respondents were expressing the view that they did not have sufficient information on which to reach a conclusion in relation to the Appellant's domicile and it was only after the Appellant made the application for the closure notices that the Respondents expressed the view that the Appellant had acquired a domicile of choice in the UK;

(3) accordingly, the Appellant has already been put to a considerable amount of trouble and cost in responding to the questions which the Respondents have raised in the course of the enquiries and the enquiries have been going on for some time. Moreover, it was only after the Appellant made the application to bring matters to a head that the Respondents finally reached a conclusion in relation to the Appellant's domicile and then asked for information from the Appellant in relation to his worldwide income and gains;

(4) the information which is now being sought by the Respondents is wholly irrelevant to the Respondents if, as the Appellant contends, he was not domiciled in the UK in the tax years in question;

(5) both parties accept that the question of the Appellant's domicile in the tax years in question is both binary and fundamental in that:

(a) if the Appellant was not UK-domiciled in the tax years in question, then the enquiries should be closed without the need for any amendment to the Appellant's self-assessments in respect of the relevant tax years and the Appellant should be entitled to succeed in his appeal against the IN; and, conversely

(b) if the Appellant was UK-domiciled in the tax years in question, then, subject to the eventual outcome of the ongoing litigation in *Embiricos*, the Respondents

should be entitled to continue with their enquiries in relation to the relevant tax years and the Appellant's appeal against the IN should be dismissed;

(6) the jurisdiction of the Appellant's domicile is a question which is within the competence of the First-tier Tribunal, as a specialist tax tribunal, to answer – as it is a mixed question of law and fact - and a question which both parties were informed by the First-tier Tribunal in advance of the hearing was something which the hearing judge might wish to determine in the course of the hearing; and

(7) the time allocated for the hearing in the course of case managing the application and the appeal – two days – was more than adequate to cover both:

(a) the legal arguments which are addressed in this decision on whether or not I have the power to determine the Appellant's domicile in the course of these proceedings and, if I have that power, whether or not I should exercise it; and

(b) the legal arguments and evidence on the substantive question of the Appellant's domicile itself.

The hearing ended some one-and-a-half to two hours before the scheduled close of the second day and, although Mr Purnell chose not to cross-examine the witnesses for the Appellant, there was plenty of time for him to do so if he had so wished without preventing the hearing from being completed within the allotted time frame.

120. In reaching the conclusion which is set out in paragraph 119 above, I have taken into account the fact that the Appellant has not adduced any evidence to show that answering the outstanding questions in the IN in relation to his worldwide income and gains would be time-consuming or costly. As I have noted in paragraph 109 above, in *Vodafone 2*, Arden LJ approved of, and agreed with, the approach of the Special Commissioners in that case to treat, as a relevant consideration in deciding whether or not to determine a preliminary question of law in dealing with the closure notice application in that case, the fact that it would be burdensome for the taxpayer to provide the requested information and documents which would not need to be provided if the preliminary question of law were to be decided in the taxpayer's favour (see paragraph [25] in *Vodafone 2*). In *EPN*, Judge McKeever rejected a submission on the part of the Respondents in *EPN* to the effect that that passage in *Vodafone 2* gave rise to a presumption that the First-tier Tribunal should not decide a preliminary question of law at the closure notice application stage unless the taxpayer could prove that the burden of investigating the facts would be considerable. On the contrary, Judge McKeever was of the view that that passage merely meant that the likely burden of investigating the facts was a factor which needed to be taken into account in deciding whether or not to exercise the power to decide the preliminary question (see paragraphs [179], [183] and [188] in *EPN*). I agree with her conclusion on that point. And, in this case, even if it would be relatively straightforward and inexpensive for the Appellant to produce the requested information, I do not think that that one factor would outweigh the factors described in paragraph 119 above.

121. I should add that, in any event, it is somewhat hard to avoid the assumption that the provision of the requested information would in fact be relatively time-consuming and costly to produce. First, there is the fact that the Appellant has chosen to incur the expense of initiating the present proceedings in order to avoid doing so and, secondly, there is the fact that, throughout his working life, the Appellant has held a number of senior management positions in which he was presumably well-remunerated and the fact that he elected to pay the remittance basis charge which was required in order to benefit from the remittance basis. These features suggest that he is a man of some means whose worldwide financial affairs are likely to be relatively complex. However, as I have said in paragraph 120 above, I have not assumed that that is the case in reaching my conclusion.

122. Mr Purnell said that my conclusion on this question should take into account the decision of Judge Richards in *Gulliver*. However, it is not apparent to me why the decision in *Gulliver* is relevant in this context. The decision seems to me to relate to whether the Respondents had reasonable grounds for resisting a closure notice for which the taxpayer had applied on the basis that the Respondents had conceded in an earlier letter that the taxpayer had acquired a Hong Kong domicile of choice and yet were asking questions in the course of the enquiry which were designed to establish that the taxpayer had never acquired a Hong Kong domicile of choice. The taxpayer in *Gulliver* was not seeking a determination from the First-tier Tribunal as to whether or not he had acquired a Hong Kong domicile of choice and therefore the First-tier Tribunal was not asked to consider that issue.

123. Finally, I turn to Mr Purnell's contention that the decision in *Wrottesley* (and the other cases to which reference was made in that decision in relation to when it may be appropriate to address an issue at a preliminary hearing) should have a bearing on how I should exercise my discretion in this case.

124. That contention is founded on an underlying assumption to the effect that:

(1) the factors which should be taken into account in determining whether, in the course of a single hearing in relation to any proceedings, one issue should be addressed as a preliminary issue in advance of another (or others) are necessarily the same as

(2) the factors which are required to be taken into account in determining whether, in the course of any proceedings, one issue should be addressed at a preliminary hearing held in advance of the main hearing in relation to the proceedings.

(The same underlying assumption as to the similarity of those two things appears to underlie Mr Purnell's interpretation of the letter from the First-tier Tribunal of 29 May 2019, as noted in my discussion in relation to the part of the jurisdictional question which turned on the prior case management of these proceedings – see paragraphs 24 to 31 (and paragraph 30 in particular) above.

125. However, I do not accept that that underlying assumption is a reasonable one to make in all cases. More importantly, I think that it is not a reasonable one to make in this specific case.

126. In the case of a decision to hold a preliminary hearing, the proceedings as a whole are necessarily placed on hold while the issue in question falls to be determined at the preliminary hearing. Accordingly, in considering whether a preliminary hearing should be held in order to determine the relevant issue, it is entirely appropriate to weigh up the significance of the issue (in terms of avoiding the need for a further hearing in the proceedings, depending on the outcome in relation to the issue at the preliminary hearing), and the potential delay to the proceedings as a whole, both as a result of having decided to hold the preliminary hearing (and thereby deferring the preparation for the main hearing) and in terms of possible appeals and settlements which might arise or occur as a result of that outcome.

127. The same is not necessarily true in relation to the question of whether an issue should be addressed as a preliminary issue in the course of a single hearing. Of course, it could be the same if the result of doing so were inevitably to be that there would need to be an adjournment of the hearing after submissions in relation to the preliminary issue had been made and before the other issue or issues which are in dispute in the proceedings could be addressed. But where, as is the case here, the preliminary issue is a fundamental step in the process whereby the relevant court or tribunal addresses the main issue which is the subject of the proceedings – and, in effect, subsumes that main issue in terms of the impact which the decision in relation to the preliminary issue will have on the outcome of that main issue - and there is no need for the proceedings to be adjourned after the preliminary issue has been heard, then I do not see a

parallel at all. In the latter case, the preliminary issue is simply a step in the management of the single hearing and one where the issue of a potential delay to the proceedings as a whole, both as a result of having decided to address the preliminary issue first (and thereby deferring the hearing on the main issue) and in terms of possible appeals and settlements which depend on the outcome of the determination in relation to the preliminary issue simply do not arise.

128. In this case, as I have already mentioned, the proceedings were set down for a two-day hearing - a length of time which the Appellant clearly thought to be adequate both to address the question of whether I had the power to determine the preliminary issue (and should exercise that power) and the preliminary issue itself – ie the substantive question of the Appellant's domicile – before addressing the reasonability-based tests on which the proceedings ultimately turn. Moreover, on my view of the correspondence which passed between the parties and the First-tier Tribunal in the course of the case management of these proceedings, Judge Mosedale reached the same view – see paragraphs 24 to 31 above. In addition, in my view, that time frame was, as it happens, perfectly adequate to do just that, as was shown by the early end to the proceedings. In the circumstances, I do not readily follow how the case law in relation to whether or not to hold a preliminary hearing in order to determine a single preliminary issue in advance of the main hearing has any relevance in this context.

129. I should add that, even I am wrong in my conclusion that, in this case, the factors to be taken into account in determining whether it is appropriate for the issue of the Appellant's domicile to be addressed as a preliminary issue should not be synonymised with the factors to be taken into account in determining whether a preliminary hearing is appropriate, I believe that the weight of the various factors in this case point to the appropriateness of considering the domicile question as a preliminary issue by reference to that standard in any event.

130. In saying this, I should make it clear that what I am considering here as the potential preliminary issue is not the issue of whether or not I should exercise my power to determine the Appellant's domicile as a preliminary issue – ie the case management question itself. After all, that is the question which I am presently addressing in this section of the decision and therefore, to take into account the likelihood of further appeals and/or settlements as a result of my decision on that issue would be entirely circular and self-cancelling. Instead, the potential preliminary issue which I am here considering is the issue of whether or not the Appellant had a UK domicile in the relevant tax years. And, in looking solely at that issue, it seems to me that the preponderance of the factors which I would be required to take into account in considering whether that issue should be addressed at a preliminary hearing point in favour of doing so because:

> (1) the question of the Appellant's domicile in the relevant tax years is a "succinct, knockout point" (in the words of Lord Hope in *Boyle*) which will dispose of both the application and the appeal in their entirety, possibly subject only to the eventual outcome of the ongoing litigation in *Embiricos*;
>
> (2) the question is capable of being decided after a relatively short hearing, on the basis of submissions and evidence which are entirely divorced from the submissions and evidence in relation to the reasonability-based issues which are at the heart of the test in each of Section 28A(6) of the TMA and paragraphs 1 and 21(6) of Schedule 36;
>
> (3) the determination of the issue will not hinder me from arriving at a just result in relation to the reasonability-based issues – on the contrary, it will inform the reasoning in relation to those issues to such an extent that it will be unnecessary to invite further submissions in relation to those issues separately. The parties are effectively agreed on the effect which any decision on the domicile issue would have on the substantive reasonability-based issues; and

(4) as it is so fundamental to the conclusion in relation to the reasonability-based issues, it does not give rise to the potential for further delay – on the contrary, determining the Appellant's domicile at this stage would significantly reduce the time and cost of disposing of the application and the appeal.

131. Another way of putting this is that the issue of the Appellant's domicile is, to all intents and purposes, the sole issue which needs to be determined in order to determine the application and the appeal because, once that issue is decided, the dispute between the parties will be at an end (possibly subject only to the eventual outcome of the ongoing litigation in *Embiricos*) and there will be no reason to address the reasonability-based issues as separate issues.

132. In my view, the above factors outweigh the fact that the question is a mixed question of law and fact in relation to which there is some dispute as to the relevant legal principles and a more material dispute in relation to the application of those principles to the facts.

133. Having said that, for the reasons which I have already set out in paragraphs 123 to 128 above, I do not believe that the factors set out in *Wrottesley* in relation to whether or not a preliminary hearing is appropriate are in fact relevant to the question which I am now addressing, which is whether or not the domicile of the Appellant in the relevant tax years should be determined as a preliminary issue at the hearing in these proceedings.

134. For the reasons set out in paragraphs 105 to 133 above, I have concluded that this is an appropriate case in which to exercise my power to determine the question of the Appellant's domicile in the relevant tax years before I address the reasonability-based issues which are at the heart of the test in each of Section 28A(6) of the TMA and paragraphs 1 and 21(6) of Schedule 36.

Priority between the application and the appeal

135. The conclusion which I have reached above – to the effect that there is no distinction to be made between the application and the appeal as regards how I should approach the preliminary question of domicile – means that it is, strictly speaking, unnecessary for me to express a view on the relative priority between the two. To my mind, the application and the appeal stand or fall together because, leaving aside the impact of the eventual outcome of the ongoing litigation in *Embiricos*, the Appellant's domicile in the relevant tax years will ultimately determine the reasonability-based tests in all of the relevant provisions.

136. However, I should record that, at the hearing, Mr Gordon urged me to address the issue of my power to determine the Appellant's domicile in the course of these proceedings first in relation to the appeal under Schedule 36 and only then, in the light of the answer to that question, in relation to the application under Section 28A of the TMA. He pointed out that:

(1) logically, it made sense to address the question of whether information requested in an outstanding IN despatched in the course of an ongoing enquiry was reasonably required before turning to address the question of whether the Respondents had reasonable grounds for resisting an application to close the enquiry; and

(2) in any event, in this case, in relation to the tax year ending 5 April 2014, there was no open enquiry and hence no closure notice was being sought. Thus, in relation to that tax year at least, the question of whether the information requested in the IN was reasonably required and whether an officer of the Respondents had reasonable grounds for believing that one or more of the circumstances set out in paragraph 21(6) of Schedule 36 existed must necessarily be addressed in isolation from any consideration of the ambit of Section 28A of the TMA.

137. Whilst I can see some logic in both of those points, I would observe only that, in *X Limited, Y Limited, Z Limited, 17 Individuals v The Commissioners for Her Majesty's Revenue and Customs* [2020] UKUT 0029 (TCC) ("*X Limited*"), the Upper Tribunal refused to interfere with a decision by the First-tier Tribunal in that case to the effect that, in circumstances where the same issue (in that case the reliability of the records of the corporate appellants) was relevant both to an application by the corporate appellants for a closure notice and to an application by the Respondents under Schedule 36 for the approval of third party notices to be sent to the individual appellants, the application by the Respondents should be heard first. However:

(1) the Upper Tribunal in that case declined to provide any guidance as to the priority of such matters in general, saying that each case had to be considered in the light of its particular circumstances;

(2) the First-tier Tribunal in that case had already observed that there was "no necessary priority" between closure notice applications and applications under Schedule 36 (see paragraphs [51] and [52] in the Upper Tribunal decision in *X Limited*); and

(3) in both *Embiricos* and *Levy*, the relevant First-tier Tribunal addressed the application for the closure notices in advance of the appeal against the IN.

Domicile

Introduction

138. Now that I have concluded that I do have the power to determine the Appellant's domicile in the course of these proceedings and that it is appropriate that I should exercise that power, I need to address the legal principles which are relevant for that purpose. Before doing so, I should summarise the position of the parties in relation to this question at the hearing.

139. The Respondents submitted that the Appellant had acquired a domicile of choice in the UK when all of the relevant facts were considered in the light of the applicable case law. This was of course subject to the fact that the Respondents also submitted that they did not have to establish that their view on the question was right – they merely had to establish that their view on the question was a reasonable one to have reached and not totally without substance.

140. In contrast, the Appellant contended that, when all of the relevant facts were considered in the light of the applicable case law, the Respondents had not established that the Appellant had acquired a domicile of choice in the UK. Indeed, the Appellant went further than this. He said that, even if the Respondents were right to say that they had merely to show that their view in relation to the Appellant's domicile was a reasonable one to have reached, the Respondents' view was so devoid of substance that, on the basis of the Respondents' own test, the Appellant should be entitled to succeed in relation to both the application and the appeal.

141. It can be seen from the above summary that, even if I had decided that the Respondents were right to say that I have no power to reach a determination in relation to the Appellant's domicile in these proceedings (or that, if I did have such power, I ought not to exercise it), I would still have had to deal in some way with the domicile question in this decision, even if it was to determine only whether the Respondents' conclusion in relation to the Appellant's domicile was a reasonable one to have reached or completely devoid of merit.

The relevant principles

142. The law on domicile, although not always easy to apply, is well-established. The relevant principles may be described as follows:

(1) everyone has a domicile of origin, which may be supplanted by a domicile of choice - "[the] domicile of origin adheres - unless displaced by satisfactory evidence of the acquisition and continuance of a domicile of choice" (Scarman J in *Re Fuld* [1968] P 675 ("*Fuld*") at pages 682 and 684);

(2) the acquisition of a domicile of choice is a conclusion or inference which the law derives from a combination of residence and intention. Both factors need to be present. In the words of King LJ in *Kelly v Pyres* [2018] EWCA Civ 1368 ("*Kelly*") at paragraph [33vii)], "[residence] without intention or intention without residence will not do to establish a domicile of choice";

(3) in *Fuld* at page 682, Scarman J stated 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". As was noted by Lord Westbury in *Udny* at page 458, "this is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation";

(4) so far as concerns the reference to "unlimited time":

(a) Buckley LJ in *Inland Revenue Commissioners v Bullock* [1976] 1 WLR 1178 ("*Bullock*") said the following at page 1184:

"…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 the foreign country would be indefinite but would not be unlimited in the relevant sense. On the other hand,…I do not think that it is necessary to show that the intention to make a home in the new country is irrevocable or that the person whose intention is under consideration believes that for reasons of health or otherwise he will have no opportunity to change his mind. In my judgment, the true test is whether he intends to make his home in the new country until the end of his days unless and until something happens to make him change his mind";

(b) Scarman J in *Fuld* said the following at pages 684 and 685:

"…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…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" (*Fuld* at pages 684 and 685); and

(c) Arden LJ in *Barlow Clowes International Limited v Henwood* [2008] EWCA Civ 577 ("*Barlow Clowes*") said the following at paragraph [14]:

"Given that a person can only have one domicile at any one time for the same purpose, he must in my judgment have a singular and distinctive relationship with the country of supposed domicile of choice. That means it must be his ultimate home or, as it has been put, the place where he would wish to spend his last days" (see also in this respect Lord Cairns in *Bell v Kennedy* (1868) LR 1 Sc and Div 307 at page 311);

(5) since the acquisition of a domicile of choice depends on both residence and intention, it is clear that length of residence in a particular jurisdiction cannot of itself lead to the conclusion that the propositus has acquired a domicile of choice in that jurisdiction. In *Agulian*, the propositus in question had resided in England for around 43 years (see *Agulian* at paragraph [25]). In *Bullock*, the propositus in question had resided in England for some 40 years (see *Bullock* at pages 1181 and 1182). In both cases, the propositus was found not to have acquired a domicile of choice in England. In *Udny*, the Lord Chancellor, Baron Hatherley noted as follows:

"Time is always a material element in questions of domicil; and if there is nothing to counteract its effect, it may be conclusive upon the subject. But in a competition between a domicil of origin and an alleged subsequently-acquired domicil there may be circumstances to shew that however long a residence may have continued no intention of acquiring a domicil may have existed at any one moment during the whole of the continuance of such residence. The question in such a case is not, whether there is evidence of an intention to retain the domicil of origin, but whether it is proved that there was an intention to acquire another domicil. As already shewn, the domicil of origin remains till a new one is acquired animo et facto";

(6) the decision in *Bullock* is of particular relevance in this case given the length of time in which the propositus had had his main residence in England and the propositus's intention to return to his domicile of origin if his wife predeceased him. In that case, Buckley LJ said the following at page 1185:

"In the present case the commissioners, adopting the language of Lord Chelmsford in the passage from Moorhouse v Lord ((1863) 10 HL Cas 272 at 285, 286) which I have already cited, expressed the view that the taxpayer had in contemplation some event (that is his wife's change of mind or prior death), on the happening of which his residence in England would cease. They therefore concluded that he had not acquired a domicile of choice in England. The learned judge, on the other hand, was very much impressed by the fact that the taxpayer had established his matrimonial home in England and that there was no foreseeable prospect of that matrimonial home ever being established elsewhere. He clearly regarded this as the decisive factor in deciding that the taxpayer had acquired a domicile of choice in England.

For the purpose of determining the true nature and quality of the taxpayer's intention it is clearly necessary to take into account all relevant circumstances. Domicile is distinct from citizenship. The fact that the taxpayer chose to retain his Canadian citizenship and not to acquire United Kingdom citizenship would not be inconsistent with his having acquired a domicile in the United Kingdom, but his adherence to his Canadian citizenship is, in my opinion, one of the circumstances proper to be taken into consideration in deciding whether he did acquire a United Kingdom domicile. The declaration as to domicile contained in the taxpayer's will is also a matter to be taken into account, although the weight to be attributed to it must depend on the surrounding circumstances.

Undoubtedly the fact that a man establishes his matrimonial home in a new country is an important consideration in deciding whether he intends to make that country his permanent home (see, for example, Forbes v Forbes: Platt v Attorney General of New South Wales ((1878 3 App Cas 336 at 343); Attorney General v Yule ((1931) 145 LT 9 at 14)), but this is not a conclusive factor. In Forbes v Forbes (Kay 341 at 366) Page-Wood V-C said: 'The effect of the

residence of the wife being, after all, but evidence of intention, may be rebutted by stronger evidence of a contrary character.'

The learned judge disregarded as remote the theoretical possibility that the taxpayer might somehow persuade his wife to live in Canada or that she might change her mind and reconcile herself to life in Canada. I think he was justified in so doing on 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, I think, clear however from the findings of the commissioners that the taxpayer has 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 on 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 on 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 LJ in Doucet v Geoghegan ((1878) 9 Ch D 441 at 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 LT 374 at 376) Lord Campbell LC 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". Buckley LJ concluded that there was "nothing embryonic, vague or uncertain" about the taxpayer's intention to return to Canada on the death of his wife and therefore that he did not have the requisite intention to end his days in England;

(7) 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. Each case takes its tone from the individual propositus whose intentions are being analysed: anglophobia, mental inertia, extravagant habits, vacillation of will - to take four instances at random - have been factors of great weight in the judicial assessment and determination of four leading cases. Naturally enough in so subjective a field different judicial minds concerned with different factual situations have chosen different language to describe the law. For the law is not an abstraction: it lives only in its application, and its concepts derive colour and shape from the facts of the particular case in which they are studied, and to which they are applied. Thus the relationship of law and fact is a two-way one: each affects the other" (see *Fuld* at pages 682 to 683);

(8) when considering intention, Dicey and Morris 15th edition ("Dicey") says that the weight to be accorded to declarations of intention "will vary from case to case. To say that declarations as to domicile are the 'lowest species of evidence' is probably an exaggeration. The present law has been stated as follows: "Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined carefully considering the persons to whom, the purposes for which, and the circumstances in which they are made and they must however be fortified and carried into effect by conduct and action consistent with the declared expressions". This echoes the statement by Mummery LJ in *Agulian v Cyganik* [2006] EWCA Civ 129 ("*Agulian*") at paragraph [13] that "little weight is attached to direct or indirect evidence of statements or declarations of intention by the person concerned. Subjective intentions have to be ascertained by the court as a fact by a process of inference from all the available evidence about the life of the person, whose domicile is disputed" and the statement by King LJ in *Kelly* at paragraph [33iii)] that "[the] court will view evidence of an interested party with suspicion". In *Frederick Henderson; George*

Henderson; Cordelia Henderson; Arabella Henderson v The Commissioners for Her Majesty's Revenue and Customs [2017] UKFTT 556 (TC) ("*Henderson*"), the First-tier Tribunal (Judge Jonathan Richards and Mr John Robinson) was disinclined to accord much evidential weight to statements of intention which had been made by the main witness for the appellants because those statements were inconsistent with the actions that the appellants had taken (see paragraph [128(3)]);

(9) in addition, "special care must be taken in the analysis of the evidence about isolating individual factors from all the other factors present over time and treating a particular factor as decisive" (Mummery LJ in *Agulian* at paragraph [46(2)]). Instead, all factors need to be taken into account;

(10) as regards the burden of proof, Scarman J said the following in *Fuld* at pages 685 and 686:

> "It is beyond doubt that the burden of proving the abandonment of a domicile of origin and the acquisition of a domicile of choice is upon the party asserting the change. But it is not so clear what is the standard of proof: is it to be proved beyond reasonable doubt or upon a balance of probabilities, or does the standard vary according to whether one seeks to establish abandonment of a domicile of origin or merely a switch from one domicile of choice to another? Or is there some other standard?
>
> In Moorhouse v. Lord, Lord Chelmsford said that the necessary intention must be clearly and unequivocally proved. In Winans v. Att.-Gen., Lord Macnaghten said that the character of a domicile of origin "is more enduring, its hold stronger and less easily shaken off." In Ramsay v. Liverpool Royal Infirmary, the House of Lords seemed to have regarded the continuance of a domicile of origin as almost an irrebuttable presumption. Danger lies in wait for those who would deduce legal principle from descriptive language. The powerful phrases of the cases are, in my opinion, a warning against reaching too facile a conclusion upon a too superficial investigation or assessment of the facts of a particular case. They emphasise as much the nature and quality of the intention that has to be proved as the standard of proof required. What has to be proved is no mere inclination arising from a passing fancy or thrust upon a man by an external but temporary pressure, but an intention freely formed to reside in a certain territory indefinitely. All the elements of the intention must be shown to exist if the change is to be established: if any one element is not proved, the case for a change fails. The court must be satisfied as to the proof of the whole; but I see no reason to infer from these salutary warnings the necessity for formulating in a probate case a standard of proof in language appropriate to criminal proceedings.
>
> The formula of proof beyond reasonable doubt is not frequently used in probate cases, and I do not propose to give it currency. It is enough that the authorities emphasise that the conscience of the court (to borrow a phrase from a different context, the judgment of Parke B. in Barry v. Butlin) must be satisfied by the evidence. The weight to be attached to evidence, the inferences to be drawn, the facts justifying the exclusion of doubt and the expression of satisfaction, will vary according to the nature of the case. 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";

(11) the reference in the above passage to the adhesive nature of the propositus's domicile of origin raises the question of whether the standard of proof might vary depending on whether that which is sought to be shown is the acquisition of a domicile of choice (and the consequent loss of a domicile of origin) or the loss of a domicile of choice. More importantly in this context, it also raises the question of whether a domicile of origin might be more adhesive – and therefore the standard of proof in establishing that that domicile of origin has been replaced by a domicile of choice might be higher –

if the propositus has always had (and retains) a strong connection with his or her domicile of origin than if the propositus's link to his or her domicile of origin has always been, or has become, more tenuous – see, in this respect, *Henderson* at paragraphs [22] and [23];

(12) in *Henderson*, reference was made to the following passage from the decision of Arden LJ in *Barlow Clowes*:

"92. Secondly, it is said that as a practical matter it is easier to establish that the domicile of origin has been retained because it is associated with a person's native character and thus presumably in most cases it can be inferred that he would have wanted that domicile. Thus, for example, Sir William Scott in La Virginie 5 Rob Adm 99, quoted in Udny at 451, said:

"It is always to be remembered that the native character easily reverts, and that it requires fewer circumstances to constitute domicile in the case of the native subject than to impress the national character of one who is originally of another country."

93. But that second rationale does not apply universally. The following examples spring to mind. There can be cases where the subject never had the national character of his domicile of origin or has specifically disclaimed his intention to reside in his domicile of origin or where that domicile is not relevantly distinctive. There can be cases where the subject never had any real connection with the country of his domicile of origin because he was brought up elsewhere. Cases where a person only has a domicile of origin because it has arisen under the default rule as I have referred to it above may fall into the last category, at least where the subject was unaware of the revival of the domicile of origin. There can be persons who (like Mr Henwood) have developed an aversion to their country of origin. There can also be cases where the contest is between two jurisdictions within the same federal or quasi-federal system, and the "native character" of citizens of one state may be little different from that of citizens of another state.

94. 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. In this case, Mr Henwood had an aversion to England because of childhood memories. If his domicile of origin arose at all in this case, it arose only because of the default rule. In those circumstances, it is not improbable that he would wish to acquire a domicile of choice elsewhere and accordingly there is no reason why the court should approach a case that he has done so with undue scepticism. There were of course other reasons why certain evidence adduced by Mr Henwood, namely that he had created, was to be approached with caution. But that was a wholly separate matter.

95. Accordingly, although the judge's approach was not internally consistent (and is open to criticism on that basis), I do not consider that he had to consider whether evidence to meet a more serious case had been adduced if there was an interval of time when under the default rule his domicile of origin revived.

96. For the reasons given above, I would respectfully disagree with the following dictum of Longmore LJ in Agulian, relied on by Mr Vos, in so far as it lays down any general rule of law:

"….it is easier to show a change from one domicile of choice to another domicile of choice than it is to show a change to a domicile of choice from a domicile of origin." ([56])"";

(13) I agree with the conclusion reached in *Henderson* that "there is no separate free-standing rule of law" as regards the adhesiveness of a domicile of choice and that each case will always turn on its own specific facts. However, more importantly in the context of these proceedings, it is necessary to consider whether the standard of proof might be affected by the level of the propositus's attachment to his or her domicile of origin;

(14) in that regard, I have taken note of the observations of Arden LJ in *Barlow Clowes*, to the effect that the strength of the links between the propositus and his or her domicile of origin may well be a relevant factor in considering whether the propositus has acquired a domicile of choice in a different jurisdiction because, in circumstances where there is no attachment to a domicile of origin, "it is not improbable that [the propositus] would wish to acquire a domicile of choice elsewhere". Nevertheless, while this is clearly a relevant factor to be taken into account in determining whether a domicile of choice has been acquired, I do not think that it has any bearing on either:

(a) that which needs to be shown by the party which carries the burden of proof; or

(b) the standard of proof which needs to be satisfied by that party,

for the reasons set out in paragraphs 142(15) and 142(16) below;

(15) regardless of the level of attachment which the propositus has to his or her domicile of origin, the party which is alleging that a domicile of choice has been acquired still needs to show that the propositus had the necessary intention to do so. A lack of any attachment to a domicile of origin will carry little weight if the propositus can demonstrate that that intention did not exist because, for example, he or she had an intention to end his or her days in a third jurisdiction. As Longmore LJ said in *Agulian* at paragraph [53]:

"All the cases state that a domicile of origin can only be replaced by clear cogent and compelling evidence that the relevant person intended to settle permanently and indefinitely in the alleged domicile of choice"; and

(16) similarly, the standard of proof is the ordinary civil standard of the balance of probabilities – see King LJ in *Kelly* at paragraph [33ii)], citing with approval the statement in Dicey to the effect that "the standard of proof [is] the ordinary civil standard. Cogent and clear evidence is needed to show that the balance of probabilities has been tipped regardless of whether the issue is the acquisition, or loss, of a domicile of choice".

The submissions of the parties

143. I now turn to the submissions of the parties in relation to the application of the principles set out in paragraph 142 above to the facts in this case.

144. The Respondents accept that the Appellant had a domicile of origin outside the UK. However, they allege that:

(1) the Appellant's attachment to his domicile of origin is weak;

(2) the Appellant has lived in the UK for a considerable period of time. With the exception of his two stints of working abroad – in Singapore between March 1983 and August 1986 and in the Netherlands between November 1992 and 1995 – he has lived in the UK since 1967, a period which, ignoring those two stints, amounted to some 40 years as at the start of the tax year ending 5 April 2014;

(3) since he got married in 1968, the Appellant and his wife have owned, consecutively, three properties in the UK and, even when the Appellant was working abroad, he and his wife retained their home in the UK;

(4) the Appellant's wife is British and so too are the Appellant's three children and seven grandchildren;

(5) the Appellant's children and grandchildren have always lived in the UK and, so far as the Appellant is aware, have no plans to leave the UK;

(6) the Appellant's wife's family also live in the UK;

(7) those connections mean that the Appellant has much to keep him in the UK – the Appellant's grandchildren live near the Appellant's house in the UK and the Appellant sees his grandchildren two or three times a month when he is in the UK;

(8) moreover, although the Appellant and his wife own a substantial property in Spain, the Appellant spends most of his time in his UK home – the figures set out in paragraph 14(10) above show that the Appellant spends relatively little time in his Spanish property and such time as he does spend there tends to be over the traditional vacation periods of Christmas, Easter and August. In addition, when he and his wife are staying at the Spanish property, they are often accompanied by friends or family. Thus, the Spanish property is no more than a holiday home and is not a residence;

(9) the Appellant has no intention of leaving the UK while he continues to work and, by his own admission, he has no plans to stop working and is in fact continuing to look for new opportunities to carry on working even now. Thus, there must be some doubt as to when, if ever, the Appellant will retire;

(10) in addition, there is some suggestion in the correspondence – see M&H's letter of 22 December 2017 – that the Appellant's wife is reluctant to leave the UK and that reluctance might delay his retirement and might well mean that the Appellant does not leave the UK even if he retires, unless his wife predeceases him;

(11) there is some suggestion in the correspondence – see M&H's letter of 15 May 2017 - that the Appellant has not yet decided where he will go as and when he does leave the UK;

(12) the Appellant's statements of intention should be given little evidential weight in the light of the inconsistencies in some of his responses during the enquiries and bearing in mind the injunction in the prior case law to approach statements of intention which are made by the propositus with some care and consider how those statements fit in with the propositus's actual conduct and actions – see paragraph [13] in *Agulian*, paragraph [128(3)] in *Henderson* and the statement from Dicey referred to in paragraph 142(8) above; and

(13) the features set out above demonstrate that, on the balance of probabilities:

(a) the Appellant's sole or chief residence is in the UK. Even if I were to conclude that the property in Spain was a residence and not merely a holiday home, the facts show clearly that the Appellant's "chief" residence is his home in the UK; and

(b) the Appellant's stated intention to leave the UK when he retires should be seen as more of a "vague possibility" than a "clearly foreseen and reasonably anticipated contingency" (in terms of the contrast drawn by Scarman J in *Fuld*, as referred to in paragraph 142(4)(b) above) and no more than "embryonic, vague [and] uncertain" (in the language of the judgment of Buckley LJ in *Bullock* (see paragraph 142(6) above)). As such, in the words of Arden LJ in *Barlow Clowes*, the UK should be regarded as the Appellant's "ultimate home or, as it has been put, the place where he would wish to spend his last days" (see paragraph 142(4)(c) above).

145. In response, the Appellant submits that:

(1) as is made clear in both *Agulian*, *Bullock* and *Udny*, the mere fact that the Appellant has lived in the UK for many years does not, in and of itself, mean that he or she has an intention to remain here – see paragraphs 142(4) to 142(6) above;

(2) in order for the Respondents to establish that the Appellant had acquired a UK domicile of choice prior to the tax years to which the application relates, they need to provide cogent and clear evidence to the effect that, on the balance of probabilities, the Appellant had, at some point prior to those tax years, formed an intention to remain here indefinitely;

(3) whilst it is true that an intention to leave the UK on the occurrence of a contingency which is no more than a "vague possibility" and "embryonic, vague [and] uncertain" would equate to such an intention, the contingency in this case is far from that. The Appellant fully intends to leave the UK when he stops working and that is no less "clearly foreseen and reasonably anticipated" than the contingency in *Bullock* – ie the death of the propositus's wife. In fact, in that regard, it is noteworthy that the propositus in *Bullock* was some four years older than his wife and therefore, taken together with the the fact that women statistically outlive men, highly likely to predecease her so that the contingency in *Bullock* was less likely to occur than the contingency in this case;

(4) the Respondents have accepted that the Appellant did not have a UK domicile of choice prior to his retirement from Shell in 2003. Accordingly, if he were to have acquired a UK domicile of choice prior to the tax years in question, there would need to have been some event after 2003 and before those tax years from which it could reasonably be inferred that the Appellant's intentions changed and he acquired his intention to remain indefinitely in the UK – for an example of this, see the approach adopted in paragraphs [45] to [50] in *Agulian*. However, in this case, on Mr Bibby's own admission, the Respondents cannot point to any such watershed moment. On the contrary, the Respondents are merely alleging that, at some point after his retirement from Shell in 2003 and before the tax years to which the application relates, the Appellant developed an intention to remain in the UK but without showing how or when that intention arose; and

(5) the property in Spain is more than a holiday home – it is a place where the Appellant and his wife live and where they entertain their friends and family. It is therefore a residence. The fact that the Appellant's children and grandchildren retain items of clothing and other personal effects there, that a number of items have been shipped there, that it has twice been extended substantially and that two cars are retained there all suggest that it is more than a holiday home.

Conclusion

146. I have found this question to be the most difficult of the questions which I am required to answer in the course of this decision.

147. The question is whether the Respondents have provided sufficiently clear and cogent evidence to satisfy me that, on the balance of probabilities, at some point prior to the tax year ending 5 April 2014, the Appellant acquired a UK domicile of choice. For that to be the case, the Appellant must, at some point prior to that tax year:

(1) have had his only or chief residence in the UK; and

(2) have formed the intention to remain in the UK indefinitely, as that term has been interpreted in the case law summarised in paragraphs 142(4) to 142(6) above.

148. I do not have much difficulty in answering the first part of the above question. It is true that, throughout the period from 2003 and prior to the tax year ending 5 April 2014, the Appellant and his wife owned a property in Spain. There is some dispute between the parties as to whether that property is a residence or merely a holiday home, which I address below. However, in terms of the first part of the question, I do not think that anything turns on the

outcome of that dispute. This is because, in my view, even if the property in Spain is more than a holiday home and amounts to a residence, it is not, in my view, the Appellant's "chief" residence. The relative brevity of the Appellant's stays there in comparison to the time which he and his wife spend in their UK property, coupled with the timing of those stays – a majority of the time when the Appellant is in the Spanish property falls within the holiday periods of Christmas, Easter and August – and the fact that, when he and his wife are there, they are often accompanied by friends and family, lead me to conclude that the Appellant's chief residence is his house in the UK. That is where the Appellant spends most of his time and is surrounded by his greater family and his wife's family.

149. However, the second part of the question is much more difficult to answer.

150. In seeking to answer it, I have taken into account the following case law principles and facts.

151. First, it is clear from the statement from *Fuld* which is set out in paragraph 142(7) above that every case on domicile is highly fact-dependent and that the facts in each case tend to affect the way that the law in relation to domicile is expressed. As Scarman J so aptly put it, "different judicial minds concerned with different factual situations have chosen different language to describe the law….Thus the relationship of law and fact is a two-way one: each affects the other". This means that it is difficult, if not impossible, to extrapolate from a conclusion based on the application of the relevant law to the specific facts of an earlier case how the relevant law should apply to the specific facts in this case.

152. Secondly, as the same statement from *Fuld* demonstrates, we are dealing here with a question of the Appellant's intentions, which is to say the Appellant's state of mind. As I have noted in paragraph 142(8) above, this requires note to be taken of declarations of intention which the Appellant has made in the course of the enquiries and in giving his evidence but those declarations need to be examined critically in view of the fact that it is clearly in the interests of the Appellant to say that his intentions are not to remain in the UK indefinitely. This means that the Appellant's intentions instead "have to be ascertained by the court as a fact by a process of inference from all the available evidence about the life of the [Appellant]" (see Mummery LJ in *Agulian* at paragraph [13]).

153. Thirdly, I agree with the Respondents that the Appellant has no meaningful attachment to any jurisdiction apart from the UK.

154. The Appellant's attachment to his domicile of origin is weak. At the hearing, neither party made any submissions or advanced any evidence as to the precise jurisdiction which constituted that domicile of origin. The most likely candidates are Venezuela, where the Appellant's father was living at the time of the Appellant's birth, or the Netherlands, where the Appellant's father came from and whose citizenship the Appellant acquired and continues to hold. (In this regard, I note that, in his completed domicile questionnaire of 1984, the Appellant said that he considered his domicile of origin to be Venezuela and that, in its letter of 16 February 2017, M&H asserted that the Appellant's father was domiciled in Venezuela at the time of the Appellant's birth and subsequently domiciled in the Netherlands. The Respondents have never challenged any of those assertions).

155. However, nothing in the evidence with which I was presented suggested that the Appellant has any great attachment to either Venezuela or the Netherlands. He appears to have no meaningful links to Venezuela and he has not sought to argue that he has a domicile of origin in the Netherlands. He has his Dutch passport, of course, and he has family (including his sister) and doubtless many friends there, but he has at no point in the process sought to make anything of his links to the Netherlands or said that that is where he intends to go when he leaves the UK.

156. Similarly, the Appellant does not in my view have a strong attachment to any other jurisdiction. It is true that he has a property in Spain but he has been somewhat equivocal about his attachment to that jurisdiction.

157. In that regard, I should say, first, that I am not persuaded that the property in Spain, for all its substance, is more than a holiday home. When one looks at the amount of time which the Appellant spends there, and the fact that he and his wife are generally there over the holiday periods and often accompanied by friends or members of their family, the impression I have formed is that the property is no doubt a beautiful place to stay but it is not a place where the Appellant and his wife spend much time living their everyday lives together. In its letter of 22 December 2017, M&H outlined the strong roots which the Appellant had within the local community in which the property is located. These included a long-standing relationship with a local doctor and a lawyer, the latter of whom had been engaged to deal with the purchase of the property. It also referred to there being good relationships with the neighbours and the use of various local service-providers. I am not convinced that any of those factors is indicative of the fact that the property is a residence, as opposed to a holiday home.

158. But even if that conclusion might be said to be unjustified, and the property in Spain is genuinely a second residence, a more important question in this context is whether Spain is where the Appellant intends to live full-time at some point before he dies. The evidence in that regard is somewhat equivocal. It is true that:

(1) the letter from M&H of 22 December 2017 said that the Appellant had always intended to retire to the Mediterranean coast when his career was over and that the Spanish property was "in readiness for his retirement"; and

(2) the letter from M&H of 23 April 2018 described Spain as the "key jurisdiction" in relation to potential destinations when he retires.

However, against that should be set the letter from M&H of 15 May 2017, which said that the Appellant "has not yet made a final decision as to where he intends to relocate...Developments in Europe's political landscape and other geopolitical events are likely to play a part in determining where he settles" and which mentioned Spain only as a possible location. In addition, in his evidence, the Appellant said that he had no preference as to where he died although, were he to contract a serious illness, he would prefer it to be in Spain.

159. Be that as it may, I realise that the question I am addressing in this case is whether the Respondents have provided clear and cogent evidence that, on the balance of probabilities, the Appellant has acquired a UK domicile of choice and that, as a result, the Appellant's lack of attachment to his domicile of origin or, for that matter, any other jurisdiction is not determinative. What ultimately matters in this context is not whether the Appellant has a strong attachment to a jurisdiction other than the UK but instead whether the Appellant intends to remain in the UK indefinitely, as that term has been interpreted in the case law summarised in paragraphs 142(4) to 142(6) above.

160. However, as the extracts from the cases set out in paragraph 142 demonstrate, the position is a little more nuanced than that. This is because, if the attachments which the Appellant has to the UK are significant, his lack of attachments to any other jurisdiction can affect both the adhesiveness of his domicile of origin and the proper interpretation of his intentions as regards the UK. By way of example, in both *Bullock* and *Agulian*, despite the fact that the propositus had lived in the UK for many years, there was a clear and strong link to the propositus's domicile of origin. In *Bullock*, the fact that the jurisdiction to which the propositus intended to go if his wife predeceased him was Canada, his domicile of origin, the jurisdiction in which he had lived until he was 22 and the jurisdiction whose citizenship he had retained throughout his life, was relevant in establishing the credibility of his desire to return to Canada but for his

wife's objections and the credibility of his intention to do so if his wife changed her mind or predeceased him. The propositus in that case refused to take part in local or parliamentary elections in the UK, frequently visited Canada and was a regular reader of a Toronto newspaper. In *Agulian*, the evidence showed that the propositus maintained strong links with Cyprus – he returned there frequently, sent his daughter to live there when she was a child and never lost his desire to return there. In the words of Mummery LJ at paragraph [25], while he was in the UK, he "continued to live the life of a Greek Cypriot, talking Greek, watching Cypriot television…and would have regarded himself very much as a Cypriot rather than British". In short, he had a strong emotional attachment to his domicile of origin. This was an important factor in the Court of Appeal's conclusion that the propositus had not acquired a UK domicile of choice. In the words of Mummery LJ at paragraph [49], the lower court had "underestimated the enduring strength of [the propositus's] Cypriot domicile of origin". In contrast, in this case, the Appellant has no strong attachments to his domicile of origin or any other jurisdiction against which his attachments to the UK can be weighed.

161. Fourthly, the Appellant has strong links to the UK.

162. He has lived here since 1967, apart from two three-year stints working abroad, when he retained his family home here, thereby suggesting that he fully intended to return to the UK following his overseas posting. By any standards, that is a very long time. And, whilst I realise that long residence alone is not determinative – as I have noted in relation to both *Bullock* and *Agulian*, it can be outweighed by links to a domicile of origin or some other jurisdiction – it is inevitably a factor to be taken into account in addressing whether a UK domicile of choice has been acquired.

163. Then there is the fact that a very good reason why the Appellant would wish to remain in the UK for the rest of his days is that he has many personal connections here. That is where his children and grandchildren live and spending time with them is of great importance to the Appellant – he said in his evidence that he saw his grandchildren two to three times a month when he is in the UK. In addition, the Appellant's wife is British and her family are in the UK, so that is another reason why the Appellant might wish to stay in the UK indefinitely.

164. The latter point leads naturally on to the fifth point, which I regard to be a matter of some significance. This relates to the identity and nature of the event which, the Appellant has alleged, will trigger his departure from the UK. In *Fuld*, Scarman J drew a distinction between an intention to leave a jurisdiction which was dependent on some clearly-defined fixed contingency and an intention to leave a jurisdiction which was dependent on some vague and inchoate possibility. In the passage set out in paragraph 142(4)(b) above, he said:

"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".

165. At the hearing, Mr Gordon submitted that, in this case, the Appellant fell firmly in the former category because he has stated on many occasions that he intends to leave the UK as soon as he retires. However, I think that the position is much more equivocal than that.

166. In the first place, the correspondence is not altogether consistent in terms of establishing that the Appellant's continuing work is the reason for his continuing residence in the UK. It is true that, in its letter of 15 May 2017, M&H said that "given the nature of our client's business and the fact that the UK is such a prominent business centre and hub for international professionals, the UK is a natural fulcrum for such work and is the reason he has retained a base here rather than relocating elsewhere". However, it is common ground that much of the work which the Appellant now

carries out in his capacity as a non-executive director takes place outside the UK, so that the work itself (as distinct from accessing further work opportunities) is not a reason for the Appellant to continue to be based here. And, as for the fact that having a base in the UK is beneficial or essential for the Appellant to access further work opportunities, in its letter of 21 July 2017, M&H said that "[whilst] the UK is a suitable base for our client as an international businessman and has not been detrimental in securing his directorships, his contacts are located all over the world and are not specific to the UK."

167. In my view, there is some distance between:

(1) saying that the UK is so desirable as a base for obtaining further work that it amounts to a reason for staying here while continuing to look for that further work; and

(2) saying that living in the UK is merely "a "suitable base…and has not been detrimental" to such aspirations.

The latter statement suggests that the Appellant's ability to seek suitable opportunities for further work is not, in fact, the reason why the Appellant is remaining in the UK and that naturally begs the question of what that reason might be.

168. In the second place, it is not entirely clear when, if ever, the Appellant will actually retire from his work. The Appellant said in his evidence that, although he recognises that job opportunities may become scarcer as he gets older, he has no plans to retire for as long as his health allows. This echoed the statement in M&H's letter of 15 May 2017 to the effect that "[our] client remains fit and well, and active both physically and mentally, and therefore has no fixed timescale for stopping working in the current circumstances". My reading of that statement is that the Appellant's intention to retire is no more than a vague aspiration on the Appellant's part and that it is perfectly feasible that the Appellant will never get around to retiring before he ends his days in the UK.

169. In the third place, it is not as clear as it could be that the Appellant will be certain to leave the UK as soon as he does retire. In the letter from M&H of 22 December 2017, M&H said that "our client's wife is naturally reluctant to leave the UK and this has caused some delay in our client's retirement. This does not negate his intention to leave the UK once the business reasons conclusively expire. Our client has consequently said that he would leave the UK should his wife predecease him even if she delayed or ultimately prevented him from leaving the UK once he fully retired from professional appointments". M&H were saying in that letter that not only was the Appellant's retirement's being delayed by his wife's reluctance to leave the UK but that that reluctance might delay his departure from the UK following his retirement and might even prevent him from leaving the UK at all unless his wife predeceased him.

170. I have noted that the Appellant sought to remedy this in M&H's letter of 23 April 2018. In that letter, M&H said that "[our] client wishes to clarify that any reluctance his wife may have to leave the UK has not delayed his retirement in any way…Any reluctance that our client's wife may have to leave the UK is not an issue hampering our client's retirement or departure from the UK. Our client intends to leave the UK when he retires as mentioned above". Whilst the Appellant might say that this clarification means that the original passage referred to in paragraph 169 above can safely be disregarded, I do not think that I can simply ignore the fact that the statement contained in that passage was made in the first place. It was a significant statement in relation to the Appellant's plans for the future and it was made in the course of correspondence with the Respondents in response to questions posed in the course of the enquiries. So it is not as if the statement was made off-the-cuff in the course of giving oral evidence or at a meeting in circumstances where the Appellant might have been flustered or might not have chosen his words appropriately. Instead, it was made in a letter which, I can only assume, must have been the subject of some extensive discussions between the Appellant and his advisers before it was

sent to the Respondents. I therefore believe that the fact that the original statement was made in the first place must inevitably cast some doubt on the fixedness of the Appellant's intention to leave the UK upon his retirement.

171. Sixthly, I have taken into account the fact that the Respondents have been unable to point to a single event or moment in the period after the Appellant's retirement from Shell in 2003 at which the Appellant might have made his decision to remain in the UK indefinitely. Whilst I can see that that is a weakness in the Respondents' case, I do not think that it is necessarily fatal. First of all, an intention to remain in a jurisdiction does not necessarily have to be the result of the occurrence of a single event or moment – it can be something which develops organically over a relatively long time in the course of the propositus's life. Indeed, I would imagine that to be the more common scenario. It is helpful in this context to bear in mind the statement by Mummery LJ in *Agulian* at paragraph [46(1)] to the effect that:

"Although it is helpful to trace [the propositus'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."

And, in the paragraph next following that one, Mummery LJ expressly warned of the dangers inherent in a domicile case of "isolating individual factors from all other factors present over time and treating a particular factor as decisive". It seems to me that the language used in these passages is counselling against a focus on any single event or moment at the expense of the whole picture.

172. I would add that, even if the Appellant's decision to remain in the UK indefinitely were to be attributable to a single event or moment, that event or moment might well have occurred before the Appellant's retirement from Shell in 2003 – either after the Respondents previously accepted (on 16 February 1984) that the Appellant did not have a UK domicile of choice or before that acceptance (leading to the conclusion that that acceptance was wrong). Another possibility is that the relevant single event or moment did occur after the Appellant's retirement from Shell in 2003 – as the Respondents have alleged - but that the Respondents have simply not yet discovered when that event or moment occurred.

173. In taking all of the above considerations into account, I have asked myself whether, bearing in mind that I am trying to ascertain the subjective intentions of the Appellant in circumstances where it is in the Appellant's interests to assert that he does not intend to remain in the UK indefinitely, the evidence which I have seen and heard tends to support that proposition or instead leads me to conclude that, on the balance of probabilities, by the time that the tax year ending 5 April 2014 commenced, the Appellant intended to remain in the UK indefinitely, as that term has been interpreted in the case law summarised in paragraphs 142(4) to 142(6) above. Although this is a difficult question to answer, I have decided, on balance, that the latter is the case. In view of the length of time which the Appellant has spent in the UK over the course of his life, his strong connections with the UK in terms of his wife and family and the uncertainties that I have outlined in paragraphs 166 to 170 above in relation to the fixedness and clarity of the circumstances which would lead the Appellant to leave the UK, I think that the Respondents have done enough to discharge the burden of showing that, in the words of Arden LJ in *Barlow Clowes*, the UK is the Appellant's "ultimate home or, has it has been put, the place where he would wish to spend his last days". I therefore believe that, by the time

that the tax year ending 5 April 2014 commenced, the Appellant had acquired a domicile of choice in the UK.

174. For completeness, whilst it is no doubt obvious from the conclusion which I have reached on this point, I should end this section of my decision by saying that, if I am wrong to have concluded that the issue of the Appellant's domicile should be determined as a preliminary issue in the course of these proceedings and therefore wrong to have dismissed the Respondents' submission that they merely needed to show that they had reasonable grounds for their view that the Appellant was UK-domiciled in order to continue with their enquiries and in order for the appeal against the IN to be dismissed, I believe that the Respondents do have such reasonable grounds, based on the relevant case law and the evidence which I have seen and heard.

CONCLUSION

175. The conclusion which I have reached in paragraphs 138 to 174 above means that my decision in relation to the issues set out in paragraph 15 above is as follows:

(1) the Respondents have satisfied me that they have reasonable grounds for not issuing an FCN in relation to each of the tax years ending 5 April 2015 and 5 April 2016;

(2) if the eventual outcome of the ongoing litigation in *Embiricos* is a determination by the relevant appellate court that the Respondents are unable to issue a PCN in relation to a tax year without amending the relevant taxpayer's self-assessment in respect of that tax year, then the Respondents have satisfied me that they have reasonable grounds for not issuing a PCN in relation to each of the tax years ending 5 April 2015 and 5 April 2016;

(3) in contrast, if the eventual outcome of the ongoing litigation in *Embiricos* is a determination by the relevant appellate court that the Respondents are able to issue a PCN in relation to a tax year without amending the relevant taxpayer's self-assessment in respect of that tax year, then the Appellant will be entitled to succeed in his application for a PCN in relation to each of the tax years ending 5 April 2015 and 5 April 2016 although, in the light of the conclusion which I have reached in relation to the Appellant's domicile in each of the relevant tax years, I would be surprised if the Appellant wished to maintain his application for the PCNs in those circumstances. After all, the question of his domicile in the relevant tax years will already have been determined and therefore he would be prevented (by the principles of *res iudicata*) from appealing against the PCNs on the basis that he did not have a UK domicile in the relevant tax years (see paragraph 81 above). Accordingly, in that event, unless the Appellant withdraws his application for the PCNs in question beforehand, I direct the Respondents to issue a PCN in respect of the tax years ending 5 April 2015 and 5 April 2016 stating their conclusion in respect of the Appellant's domicile and amending his self-assessments in respect of the relevant tax years to withdraw his claim to the remittance basis within 30 days of the date when the ongoing litigation in *Embiricos* is finally determined – by which I mean the earlier of the date on which a decision is published from which there is no further right of appeal or the date on which the period for making an appeal against a decision expires without permission to make the appeal's having been sought;

(4) the Respondents have satisfied me that, to the extent that the IN relates to the tax years ending 5 April 2015 and 5 April 2016, the information requested by the Respondents in the IN is reasonably required;

(5) the Respondents have satisfied me that, to the extent that the IN relates to the tax year ending 5 April 2014:

(a) the information requested by the Respondents in the IN is reasonably required; and

(b) an officer of the Respondents has reason to suspect that one of the circumstances described in paragraph 21(6) of Schedule 36 exists; and

(6) therefore, the appeal against the IN is dismissed.

LIMITED RIGHT TO APPLY FOR PERMISSION TO APPEAL

176. This document contains full findings of fact and reasons for the decision.

177. There is no right of appeal against this decision to the extent that it relates to the IN (see paragraph 32(5) of Schedule 36 to the FA 2008).

178. Any party dissatisfied with this decision to the extent that it relates to the application for the FCNs or the PCNs has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Rules. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

179. I realise that, as a result of the fact that there is no right of appeal against this decision to the extent that it relates to the IN, any appeal against this decision to the extent that it relates to the application for the FCNs or the PCNs will necessarily be being addressed in the context of there being a valid outstanding IN requesting information about the Appellant's worldwide income and gains in respect of the tax years ending 5 April 2015 and 5 April 2016. However, that is a matter which the relevant appellate court will doubtless take into account in reaching its conclusion in relation to the appeal against my decision in relation to the application.

TONY BEARE

TRIBUNAL JUDGE

RELEASE DATE: 20 MARCH 2020