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Ray v Sekhri [2014] *EWCA Civ 119*

Appeal by husband against an order that the court in England and Wales has jurisdiction to entertain a divorce petition issued by his wife on the grounds, he claimed, that neither party was habitually resident or domiciled in the jurisdiction on the date that it was issued. Appeal dismissed.

The central issue in this appeal was whether the trial judge had correctly applied the law to the factual evidence available to him in determining whether the parties were domiciled in this jurisdiction at the time that the wife's divorce petition was issued.

At first instance, before Holman J, the husband sought to argue that neither he nor the wife were habitually resident or domiciled in this jurisdiction at the time that the wife issued her divorce petition in England in August 2012.

Briefly stated, the husband's case was that his father had not acquired a domicile of choice in England at the time of the husband's birth or subsequently, so that the husband's father's domicile of origin prevailed. Consequently, the husband's domicile of origin, at the time of his birth in England, remained in India. Contrary to the wife's assertion, the husband also contended that the wife had not acquired a domicile of choice in England; the wife being born in India, and having moved to Singapore with the husband subsequent to her move to England.

Having heard oral evidence from the parties and the husband's family over the course of four days, Holman J found that the husband and wife were both domiciled in England at the time that the wife issued her petition.

It was common ground between the parties that Holman J had correctly stated the legal context applying to decisions relating to domicile. However, in respect to this own position, the husband appealed on the following three bases:

"a) The judge failed to give proper weight to the adhesive nature of …domicile of origin;

b) The judge failed to take into account and/or to give proper weight to a number of important factual matters;

c) The judge came to a conclusion which was not properly open to him on the evidence as a whole."

Delivering the judgment of the court, McFarlane LJ considered what was said to be a divergence in approach in the role of the appellate court in cases involving domicile. On the one hand, the husband relied on Agulian v Cyanik [2006] EWCA Civ 129 in which Mummery LJ stated as follows:

"...The function of the appellate court is to decide whether the inference is wrong, making proper allowances for any advantages that the trial judge would have had and an appellate court would not have and not interfering with inferences which the judge could reasonably have made."

The wife relied on the judgment of Arden LJ in Barlow Clowes International Limited v Henwood [2008] EWCA Civ 77, which reviewed the law relating to domicile and considered the function of the appellate court, stating that:

"...Thus there is in general a greater latitude where the findings in issue on an appeal are not primary facts but inferences from the proved facts... If an appellate court considers that the judge has come to a conclusion that is plainly wrong and outside the ambit within which reasonable disagreement is possible, it is bound to intervene, even though the question is one of fact."

Having surveyed the evidence heard by Holman J, the Court of Appeal disagreed that the judge lacked evidence upon which he was entitled to base the inferential conclusions to which he came. In particular, it was noted that oral evidence given by the husband's own mother was entirely in accord with the judge's findings on the husband's father's domicile; and that in relation to the husband's father's domicile, the entirety of the evidence was oral, there being no contemporary documentation available.

The Court of Appeal rejected the husband's contention that the judge had failed to give proper weight to a number of factual matters; a significant number of which it was also argued, he failed entirely to mention in his judgment. In this respect, McFarlane LJ stated that:

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

On the final question, the Court of Appeal concluded that the judge's approach was beyond criticism and that his "tightly worded summary of the evidence" amply supported his conclusions. On the basis of his findings, the judge was entitled to conclude, as he did, that by the time of the husband's birth his father's domicile of origin in India had been abandoned in favour of a domicile of choice in England.

The husband sought to argue that Holman J was wrong to determine domicile as at 2008 (the year the couple met) and proceed to consider whether there had been a change in the said domicile when the petition was issued in 2012. It was said that this approach reversed the burden such that it was the husband's to discharge. McFarlane LJ found that it was entirely permissible for Holman J to take December 2008 as a point of reference, and that at all times it is clear that the judge had the target of August 2012 as the key date and his review of the events after December 2008 was nothing other than full. Further, at no point did the judge look to the husband to discharge the alleged shift in burden.

It was accepted by the husband, before Holman J, that the evidence before the court was insufficient to assert that the wife had acquired a new domicile of choice in Singapore prior to issuing her divorce petition. Preferring the evidence of the wife, Holman J had found that the wife had acquired a domicile of choice in England in 2008. Further rejecting the husband's argument that the judge had placed excessive weight on self –serving statements made by the wife in her evidence, McFarlane LJ stressed that there was a

"...unified body of case law which establishes that the privileged position of a trial judge who has

seen and heard the witnesses over the course of an extended period is to be afforded considerable respect by an appellate court which has enjoyed no such advantage."

Having reviewed the evidence, the Court of Appeal accepted that Holman J plainly had a firm and full grasp of the detail of the evidence before him, and therefore dismissed all of the husband's arguments that turned upon the findings made on the evidence.

Summary by Katy Chokowry, barrister, 1 King's Bench Walk

Case No: B6/2013/2254;2254 (A); 2254 (B)

Neutral Citation Number: [2014] EWCA Civ 119

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT FAMILY DIVISION

Mr Justice Holman
FD12D04003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2014

Before :

LORD JUSTICE RIMER
LORD JUSTICE MCFARLANE
and
LORD JUSTICE VOS

Between :

RAY
Appellant

- and-

SEKHRI
Respondent

- -
- -
Mr Timothy Scott QC (instructed by International Family Law Group Llp) for the Appellant
Mr Patrick Chamberlayne QC (instructed by Sears Tooth Solicitors) for the Respondent

Hearing date : 28 January 2014
- -
Judgment
Lord Justice McFarlane :
1. This appeal relates to a divorce petition issued by a wife in England and Wales on 20th August 2012. Her husband asserts that the court in England and Wales does not have jurisdiction to entertain this divorce petition because, he says, neither party to the marriage was habitually resident or domiciled in the jurisdiction on the date that it was issued. At first instance Holman J disagreed with the husband and held that each of the parties was domiciled in England and Wales at the relevant time. In this appeal the husband seeks to establish that Holman J was in error; he asserts that a proper application of the relevant law to the facts of this case could only produce a conclusion that neither party was domiciled in England and Wales in August 2012. Further, depending on the outcome of his appeal in relation to domicile, the husband also seeks to appeal orders for costs in relation to maintenance pending suit proceedings.

2. Neither party submits to this court that Holman J incorrectly stated the legal context

applying to decisions relating to domicile and neither party seeks to persuade us that the existing case law requires further clarification. The issue before us relates to the manner in which the judge applied the law to the factual evidence that was available to him.

3. The judgment of Holman J, which was handed down on 23rd July 2013, is available on Bailii under the neutral citation [2013] EWHC 2290 (Fam). Within that judgment Holman J gives a detailed summary of the background and of the features of the evidence that he regarded as relevant. As that judgment is publicly available, I intend only to offer a summary of the background, rather than reproduce the level of detail contained in the first instance judgment.

4. The couple met in December 2008 having been introduced to each other through an on-line dating agency. They were each, then, in their mid thirties and were successful young professionals. He was, and still is, a successful international lawyer with a partnership in a world class American law firm. The wife was a paediatric anaesthetist working at Great Ormond Street hospital in London and well on the way to achieving her goal of becoming a consultant at a leading London hospital. Within a short time of their first meeting each was plainly contemplating that this might be an enduring relationship. There was, however, a potential problem. The problem was that they had come together at the very moment when the husband's career would see him moving within his law firm to be based in either Hong Kong or Singapore. He raised the problem with the wife on their fourth date on 4th January 2009. He told her of his potential move and invited her to go with him. Whilst he anticipated that this news might bring an end to the whole relationship, the opposite was the case. The wife gave serious contemplation to the prospect of a move to the Far East and, after investigating the various options, they did indeed move to Singapore in 2009. They married in India in December 2009 and their only child, a boy, I, was born in Singapore in December 2010.

5. Despite its favourable start, the relationship has plainly not endured. By August 2011 there were intense and aggressive arguments between the couple and, in September 2012, the wife unilaterally departed from Singapore and returned to England with I, a move which marked the final separation between them.

6. As a result of orders made by the High Court in wardship, the wife was required to return

with I to Singapore. She did so, and she remains living there now, pending a hearing of her application to the Singapore Courts to relocate to England.

7. The couple have each issued divorce petitions: the wife in England on 20th August 2012 and the husband in India on 13th July 2012.

8. Before turning to the evidence relating to the issue of domicile, it is necessary to give a short description of the legal context within which the domicile of each of these two parties falls to be determined.

Domicile: The legal context
9. The jurisdiction of a court in England and Wales to entertain matrimonial proceedings is governed by Domicile and Matrimonial Proceedings Act 1973, s 5 (2) which states:

"The court shall have jurisdiction to entertain proceedings for divorce or judicial separation if (and only if)-

a) the court has jurisdiction under [Council regulation (EC) No. 2201/2003- "Brussels II Revised"] or

b) no court of a Contracting State has jurisdiction under the Council Regulation and either of the parties to the marriage is domiciled in England and Wales on the date when the proceedings are begun."

10. Holman J rightly relied upon paragraph 8 of the judgment of Arden LJ in Barlow Clowes International Limited v Henwood [2008] EWCA Civ 77 as providing a convenient summary of the relevant principles of the law of domicile in the following terms:

"The following principles of law, which are derived from Dicey, Morris and Collins on The Conflict of Laws (2006) are not in issue:

(i) A person is, in general, domiciled in the country in which he is considered by English law to

have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it (Dicey, pages 122 to 126).

(ii) No person can be without a domicile (Dicey, page 126).

(iii) No person can at the same time for the same purpose have more than one domicile (Dicey, pages 126 to 128).

(iv) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired (Dicey, pages 128 to 129).

(v) Every person receives at birth a domicile of origin (Dicey, pages 130 to 133).

(vi) Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise (Dicey, pages 133 to 138).

(vii) Any circumstance that is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice (Dicey, pages 138 to143).

(viii) In determining whether a person intends to reside permanently or indefinitely, the court may have regard to the motive for which residence was taken up, the fact that residence was not freely chosen, and the fact that residence was precarious (Dicey, pages 144 to 151).

(ix) A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently, or indefinitely, and not otherwise (Dicey, pages 151 to 153).

(x) When a domicile of choice is abandoned, a new domicile of choice may be acquired, but, if it is not acquired, the domicile of origin revives (Dicey, pages 151 to 153)."

At paragraphs 10 to 15 of her judgment in the Barlow Clowes case Arden LJ expanded upon the intention required for a domicile of choice, which is principle (vi) in her list. As issues relating to domicile of choice are to the forefront in the present appeal I will reproduce that section of Arden LJ's judgment in its entirety:

"10. The intention of residence must be fixed and must be for the indefinite future. It is not enough for instance that at any given point in time its length has not been determined.

11. In the leading case of Udny v Udny (1869) LR 1 Sc & D 441, the issue was as to the domicile of the respondent's father at the time of his (the respondent's) birth. His father had been born in Scotland but had left Scotland and taken a lease of a house in London. He had a castle in Scotland but that was not habitable. He visited Scotland frequently but had no residence there. In 1844, he sold the lease and his personal possessions and left London for France to avoid his creditors. But he did not intend to reside permanently in France. His first wife died in 1846, and he formed a liaison with the respondent's mother who, in 1853, gave birth to the respondent in London. He married her and went back to Scotland thinking that he would thereby legitimise the respondent, avoid his creditors and bar the entail on his estates. He intended to stay in Scotland because he thought he would be safe from his creditors.

12. The House of Lords held that the respondent's father had lost his domicile of choice in England and that his domicile of origin had revived. One of the issues was whether revival of his domicile of origin was precluded by the fact that he had a possible intention to leave Scotland again if his creditors pursued him there. At 449, Lord Hatherley L.C. held that this possible intention did not mean that he could not have a domicile in Scotland if he had decided that Scotland would be "his chosen and settled abode". Lord Hatherley held that the acquisition of a domicile of choice was best described as "settling" in a place:

"A change of [a person's domicile of choice] can only be effected animo et facto -that is to say, by the choice of another domicile, evidenced by residence within the territorial limits to which the jurisdiction of the new domicile extends. He, in making this change, does an act, which is more nearly designated by the word "settling" than by any one word in our language. Thus we speak of a colonist settling in Canada or Australia, or of a Scotsman settling in England, and the word is

frequently used as expressive of the act of change of domicile in the various judgments pronounced by our Courts."

13. At 458, Lord Westbury made the following observations about the acquisition of a domicile of choice which also emphasise the fixed nature of the requisite intention:

"Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, 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. It is true that the residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or animus manendi, can be inferred the fact of domicil is established." (emphasis added)

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. Thus, in Bell v Kennedy (1868) LR 1 Sc and Div 307, 311, Lord Cairns, having held that it was unnecessary for him to examine the various definitions that have been given of the term "domicile", held that the question to be considered was in substance whether the appellant:

"had determined to make, and had made, Scotland his home, with the intention of establishing himself and his family there, and ending his days in that country?" (emphasis added)

15. In my judgment this test by its reference to ending one's days usefully emphasises the need for the subject to have a fixed purpose that he will live in the country of his domicile of choice."

11. In order to understand the detail of the issues relating to the question of domicile with

respect to each of these two parties, it may be helpful to give the following brief overview before descending to the specific factual material.

Husband's domicile: Overview

12. The husband's parents, Bikas and Ratna Ray, originated from India but came to live in England soon after their marriage in 1964. Bikas remained living in England for almost all of the remainder of his life prior to his untimely death in September 1993 at the age of 58. Bikas could not be described as an Anglophile. Evidence from the family described how he contemplated the prospect that at some time in the future he might return to live in India. In April 1970 he sought to make that prospect a reality by unilaterally determining that he, his wife and the two young daughters who had by then been born to them would go to India in the hope that he would be able to find suitable permanent employment there. His plans, however, came to naught. Employment was not found, his wife was unhappy about the move, the daughters were ill, and in November 1970 the family returned to England and the house in London, which remains the family home, was purchased.

13. The husband was born in September 1971, ten months or so after the family's return to England. In determining the husband's domicile of origin it is therefore necessary to determine Bikas's domicile as at the moment of the husband's birth in September 1971. The husband's contention is that Bikas still maintained his own domicile of origin, namely India, at that time and that the husband's domicile of origin is also therefore India. The wife's case is that, following the family's return to England in November 1970, the evidence establishes that Bikas had a fixed intention to reside in England for the indefinite future and that he determined to settle here, thereby establishing a domicile of choice for Bikas in England by the time of the husband's birth with the consequence that the husband's domicile of origin would therefore also be England.

14. The judge found in favour of the wife's case and held that the husband's domicile of origin was in England. It was conceded on the part of the husband that if the court concluded that his domicile of origin was English then his move to Singapore in 2010 was of an insufficient quality to establish a fresh domicile of choice in Singapore, given the "adhesive" and "tenacious" character of a domicile of origin. The judge's ultimate conclusion, therefore, was that the

husband was domiciled in England as at the date of the divorce petition in August 2012 because that was his domicile of origin.

15. Before this court, it has been necessary to consider other options which arise if we were to hold that the judge was in error in that central finding. The other options are three-fold:

a) If Bikas's domicile remained Indian at the date of the husband's birth, did Bikas subsequently establish a domicile of choice in England during the husband's minority with the consequence that the husband, being a dependant, would also then gain English domicile before his sixteenth birthday?

b) If, contrary to a) above, the husband's domicile remained India as he entered adulthood, did he subsequently establish his own domicile of choice in England prior to departure to Singapore?

c) If, in accordance with b) above, the husband did establish a domicile of choice in England, was that abandoned when he moved in 2010 to reside in Singapore?

Wife's domicile: Overview
16. The wife was born in India in 1973 and remained living in India until she moved to England in July 2002 at the age of 28. Her domicile of origin is therefore plainly India.

17. The wife's case is that the quality of her life here in England was such that she had established a domicile of choice here well before she met the husband in December 2008. The judge accepted that case and made a finding to that effect. The judge then went on to look at events between 2008 and the petition in 2012 before concluding that, despite the move to Singapore, the wife's English domicile of choice was not displaced and she was therefore still domiciled in England as at the date of the divorce petition.

18. The husband attacks the judge's finding and his approach to the issue in two ways. Firstly the husband disputes that the wife ever achieved a domicile of choice in England. Secondly, and in any event, he submits that the judge was in error in arbitrarily picking a point in 2008 to

evaluate domicile when the only issue in this part of the case is the wife's domicile as at August 2012. His case is that the wife's domicile is either still her domicile of origin, namely India, or that she had established a domicile of choice in Singapore by August 2012.

19. Having set the scene it is now necessary to focus in on some of the evidential detail and upon the arguments that have been deployed before this court.

The domicile of Bikas Ray

20. The judge heard evidence from Mrs Ratna Ray, now aged 73, and the husband and his sister in relation to Bikas Ray. Of these three plainly Mrs Ray was the primary witness and the only one who could speak of the key period following the abortive trip to India in 1970 and prior to the husband's birth in l971.

21. Despite holding that the three family witnesses had collaborated to ensure a consistent story, and that this collaboration was orchestrated by the husband, the judge did accept the broad thrust and, indeed, many of the details of their accounts. He concluded that it seemed unlikely that Bikas had acquired any domicile of choice in England in the period up to April 1970 and, even if he had done, he then abandoned it and his Indian domicile of origin reverted when he took the family back to India at that stage.

22. The judge records the unhappy circumstances of the family's sojourn in India and records that Mrs Ray thought that it was "a very irresponsible decision" to go there in the first place and that she clearly wanted to come back to England. Bikas ultimately agreed with her; they returned in November 1970 and purchased the property which became, and remains, the family home.

23. Thereafter the judge records the family saying that Bikas never lost his yearning to return to India. He visited that country on several occasions, but never with his wife, in the l970s and 1980s. He kept a firm control on the family's finances, to the extent that no central heating system was installed in the family home until after his death and he used this control in part to create savings earmarked to support a future return to India. Throughout his life Bikas was highly critical of the British colonial role in India. He also did not enjoy a number of aspects of

life here in England in the closing decades of the 20th century.

24. Mrs Ray obtained British citizenship in 1984 which she says, and the judge accepted, Bikas was appalled about. However, although he was adamant that he would never apply for British citizenship himself, he in fact did so in 1991. In 1992 Mr and Mrs Ray travelled together to India with a view to looking at flats that they might possibly purchase, however she was firmly against a move to live there permanently. At paragraph 25 the judge records this:

"It was very clear from the oral evidence of Mrs. Ratna Ray that nothing would have induced her to leave England and live in a flat in India, and Bikas would not leave her and do so himself."

25. The judge sets out his central conclusions on this aspect of the case at paragraph 27:

"Left entirely to himself [Bikas], may have intended later, if not sooner, to return to India. But what shines out very clearly from all the evidence is that Bikas was first and foremost a family man, albeit quite a strict disciplinarian of his children. He loved and was completely loyal to his wife. He loved his children and would never leave them behind. It was very clear to me, from the evidence of Mrs. Ratna Ray, that the seven months in 1970 were a watershed in the lives of both of them. For her, they were a disaster. Bikas accepted then that they should return to England; and he knew, I stress knew, ever thereafter that she would never return to live in India again although she might, of course, pay visits as indeed she did. The settled intention of Bikas was to remain living with his wife and close to his children. That was his intention when they returned in November 1970. There is no evidence that he ever wavered in that intention."

26. And then, at paragraph 29, the judge concludes:

"In my view, all the talk of ceasing to live in England and returning to live in India, as his home, was no more than a pipe dream after the seven month period, and he knew it. His intention, from immediately after the return in November 1970, was to live permanently and indefinitely in England, for it was here that his wife, together with their then two children, was determined to live. Practical effect was given to that intention by the purchase of [the family home] in July 1971. I am quite satisfied that Bikas had acquired an English domicile of choice by, at the latest,

July 1971. That was his domicile when the husband was born in September 1971 and is accordingly the husband's domicile of origin."

27. Mr Timothy Scott QC, on behalf of the husband, seeks to attack the judge's conclusion on the following bases:

a) The judge failed to give proper weight to the adhesive nature of Bikas's domicile of origin;

b) The judge failed to take into account and/or to give proper weight to a number of important factual matters;

c) The judge came to a conclusion which was not properly open to him on the evidence as a whole.

28. To support his submissions in this regard Mr Scott makes further reference to the judgment of Arden LJ in Barlow Clowes in particular paragraph 85:

"There is a strong line of case law, binding on this court, that the domicile of origin is tenacious. Thus, for example, Lord Macnaghten in Winans v Attorney-General [1904] AC 287 at 290 held that the character of domicile of origin "is more enduring, its hold stronger, and less easily shaken off" than domicile of choice."

Mr Scott also submits that it is incumbent upon a judge hearing a case on the issue of domicile to deal with each major evidential issue that has been raised. He relies upon rule 11 of Dicey and Morris [15th Edn] which provides that:

"Any circumstance which is evidence of a person's residence or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice in that country."

And from paragraph 25 of Arden LJ's in Barlow Clowes:

"Because of the width of the enquiry necessary in order to ascertain a person's domicile, the judge's judgment contains a very full statement of the facts."

29. On this basis Mr Scott is critical of the judge who, he asserts, failed entirely to mention many significant pieces of evidence in his judgment.

30. In his oral submissions Mr Scott understandably directed fire power at the judge's conclusions set out at paragraph 27, to the effect that Bikas was first and foremost a family man who would never leave his wife and children by going on his own to India and that he knew that following the abortive 1970 trip his wife would never return to live in India again. Mr Scott submits that the only passage of evidence that would support such findings is contained on three pages of the transcript of Mrs Ray's testimony which, in any event, deals with a period much later than 1971.

31. In his submissions in response on this point Mr Patrick Chamberlayne QC, for the wife, agrees that the passage in Mrs Ray's oral evidence is important, but he refutes the suggestion that it is a flimsy basis upon which to base the judge's findings. He draws particular attention to the following question and answer:

Question: "Would he have ever gone without you?"

Answer: "That was the thing, he never wanted to go on his own. He thought that when he retired and I was at least nearing the retirement age and by that time the children would be old enough and he would take me. Of course I would not have lived there permanently. I would definitely, you know, have spent some time with my children over here, or wherever they lived, and part of the time over there. But I didn't want to stay in India just....on a permanent basis".

32. Mr Chamberlayne submits that that evidence does indeed establish that Bikas would never have gone to India on his own, and Mrs Ray would never have agreed to go with him to live there permanently, even after they had retired and the children were grown up.

33. In addition Mr Chamberlayne asserts that there is other evidence to support the judge's

findings at paragraph 27. He refers, in particular, to:

i) The husband's evidence that, in the week of his father's death, his father had said that he was "looking forward to spending more time in India" (Mr Chamberlayne submits that that phrase is incompatible with a desire to live permanently in India);

ii) The quality of the evidence from all of the husband's witnesses describing just how great a disaster the abortive trip to India in l970 had been;

iii) Evidence of what the couple did on their return to England (buying a house, having previously rented, and enrolling the children in English schools).

34. Mr Scott's submissions in relation to Bikas's domicile are straightforward and to the effect that there was simply no sufficient evidence to support a finding of domicile of choice in England by 1970/71. He makes a helpful reference to the decision of this court in Agulian v Cyganik [2006] EWCA Civ 129 which considered the role of the appellate court in a case involving domicile where the issue is likely to involve consideration of inferences that have been drawn by the trial judge, rather than findings of primary fact. Giving the leading judgment, Mummery LJ said this (at paragraph 12):

"...this was not an appeal against the exercise of a discretion by the lower court nor was it a case in which the lower court was applying a fairly flexible and imprecise standard involving an evaluation of all the facts. In those cases the appellate court is more reluctant to interfere with the trial judge's decision than in the case of a finding of primary fact or an inference from primary facts. This is an appeal contesting the correctness of an inference as to Andreas's relevant intentions between 1995 and 1999. The function of the appellate court is to decide whether the inference is wrong, making proper allowances for any advantages that the trial judge would have had and an appellate court would not have and not interfering with inferences which the judge could reasonably have made."

35. On the question of the approach of the appellate court, Mr Chamberlayne submits that, once again, the judgment of Arden LJ in Barlow Clowes is more authoritative. Having referred

extensively to the judgment of Clarke LJ in Assicurazioni Generali SpA v Arab Insurance Group [2003] 1 WLR 577 at paragraphs 14 to 17, where distinction is made between primary facts and inferences, and after noting that that passage had been recently approved by the House of Lords in Datec Electronics Holdings Limited v United Parcels Services Limited [2007] 1WLR 1325, Arden LJ says this (at paragraph 6):

"Clarke LJ held that the approach of the appellate tribunal to findings of fact would depend on the extent to which the judge had had an advantage over the appellate court. So, where findings turn wholly or substantially on oral evidence given by witnesses at trial, an appellate court will be slow to interfere. Thus there is in general a greater latitude where the findings in issue on an appeal are not primary facts but inferences from the proved facts... If an appellate court considers that the judge has come to a conclusion that is plainly wrong and outside the ambit within which reasonable disagreement is possible, it is bound to intervene, even though the question is one of fact."

36. Mr Chamberlayne makes the powerful point that, in relation to Bikas's domicile, the entirety of the evidence is oral, there being no contemporary documentation available.

37. Drawing matters together on this point, I do not accept that the judge lacked evidence upon which he was entitled to base the inferential conclusions to which he came in paragraph 27. He had, as Mr Chamberlayne has demonstrated, evidence from a number of sources both as to what the two key players, Mr and Mrs Ray, thought at the time, and also as to their actions in terms of purchasing a property and settling down to bring up their family in England.

38. In any case such as this there is always a range of factors deployed by the advocates before the court on one side or the other. Mr Scott accepts that each of the detailed points that he has made to this court were also made to Holman J. It is not a requirement that the trial judge should slavishly list each and every such factor. He has a responsibility to look at the contours of the case and highlight the prominent elements that, in his view, fall for consideration and which may be determinative of the outcome. In that regard Holman J's approach is, in my view, beyond criticism. On the contrary his tightly worded summary of the evidence amply supports the conclusions to which he comes in paragraph 27 and 29. Based upon the evidence from the

husband and his own witnesses, principally, of course, Mrs Ray, the judge has identified the family dynamics in a manner that was not only open to him, but which was entirely in accord with Mrs Ray's own testimony. On the basis of those findings the judge was entitled to conclude, as he did, that by the time of the husband's birth his father's domicile of origin in India had been abandoned in favour of a domicile of choice in England.

39. The circumstances, as Holman J found them to be, amply come within the language established in the authorities and summarised by Arden LJ in the Barlow Clowes case at paragraphs 10 to 15 (set out at paragraph 10 above). By July 1971 Bikas had demonstrated an intention to reside in England which was fixed and was for the indefinite future. He had chosen to "settle" here and bring up his family in England. The judge was entitled to characterise Bikas's continued contemplation of living once again in India at some distant future time as no more than a "pipe dream".

40. Finally, during the appeal hearing attention was drawn to a passage at page 145 of Dicey that if the person whose domicile is being determined has in mind the possibility of a return to reside permanently in another state should a particular contingency occur, that possibility will be ignored if the contingency is vague and indefinite, but if it is a clearly foreseen and reasonably anticipated contingency it may prevent the acquisition of a domicile of choice in the current state of residence. Two cases were cited in footnotes where such a contingency was the death of one's spouse. The two cases are Inland Revenue Commissioners v Bullock [1976] 1 WLR 1178 and Anderson v Laneuville (1854) 9 Moo. P.C. 325. I am very grateful to both counsel for supplying us with these two authorities and preparing short additional submissions on the point. Having now considered the matter, and as the tentative wording in Dicey suggests, the potential death of a spouse is no more than a matter which may, or may not, prevent the acquisition of a domicile of choice. All will turn upon the facts in any individual case. The reference in Dicey and the two authorities do not therefore take matters any further in the present case.

41. In the circumstances I am clear that the appeal against the judge's conclusion in relation to Bikas's domicile, and hence the husband's domicile of origin, must fail.

42. It follows that it is not necessary for this court to consider the various permutations that would become live issues if the judge's conclusion on this point were to be set aside.

Wife's domicile

43. The wife was born and brought up in India. She trained as an anaesthetist in India and travelled to England for the first time in July 2002 at the age of 28. Thereafter she obtained work within the Health Service and proceeded to enhance her qualifications. By March 2005 she had bought a house in Ealing which became her home. She still owns it. In his judgment, Holman J described how the wife had dreamt for many years of living and working in England. She had had an unsuccessful arranged marriage in India which ended in divorce, the result of which was to place social pressure upon her as a single separated woman in Indian society. This circumstance hardened her resolve to leave India and put all her energy into developing her career. In addition, she had an aunt, also a doctor, in London who impressed her as a role model.

44. In her evidence to the court the wife described how, within a very short time of being in London, she regarded England as her permanent home. She said "I was extremely happy in England. My life revolved around my work and friends. I had no desire whatsoever to return to live in India". Holman J was alive to the need for caution with regard to these self-serving statements, but he regarded them as being wholly consistent with the course of the wife's life and work in this jurisdiction. The judge was not impressed by arguments to the contrary relating to this couple's decision to marry in India or her parents' purchase in 2005 of a small flat in Delhi which they placed in her name. On this point, at paragraph 37, Holman J concluded in these terms:

"I am in no doubt that well before December 2008 the wife had acquired an English domicile of choice. She was living here permanently, not merely in furtherance of her career but because she preferred English attitudes and the English way of life. She had formed, in the words of Arden LJ in Henwood, at paragraph 14 "a singular and distinctive relationship with this country". Her residence here was settled and not fixed for a limited period or particular purpose, but was general and indefinite in its future contemplation. But for her later falling in love with the husband, and his career move to Singapore, none of which she could have foreseen

before she met him, she had every appearance, every intention and every expectation of living lifelong in England, the country of her choice".

45. From that important conclusion, Holman J went on to consider whether the wife subsequently abandoned her English domicile of choice so that her original domicile of origin in India was revived. Before Holman J, the husband accepted that the evidence was insufficient to assert that the wife acquired a new domicile of choice in Singapore prior to issuing her divorce petition.

46. On this aspect of the case Holman J identified that "the essential issue is as to the state of mind and intention of the wife (whose domicile is in issue) when she ceased residing in England and moved to reside in Singapore (or, if different, her subsequent state of mind and intention)". The judge correctly quoted from Dicey, Rule 13 in describing the relevant legal framework:

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

47. The essential case of the husband was that when he moved to work in and from the Singapore office of his firm, his intention was to remain for an indefinite and potentially long period in Singapore and that, as his wife was accompanying him, she must have had the same intention. Her case was that the move was only intended to be, or at all events understood by her to be intended to be, for a finite period of no more than two, or, at the most, three years, after which he and she would return to England where she always intended to reside and pursue her career in the longer term.

48. In clear and attractively succinct terms the judge reviewed the detail of the evidence deployed before him by both parties. I will not repeat that detail here. At the conclusion of this review of the evidence Holman J focussed in upon what he regarded as "the crunch question" in the case. At paragraph 55:

"The crunch question is whether I believe and accept the wife's strong assertion that she herself always understood that the move was for a time limited period and that she expected and

intended to return to England and resume her career here and her residence here. I do believe and accept it. I am, in particular, very clear that the wife had long ago set herself the goal of becoming a consultant at a leading London hospital and has never wavered from that goal and intention. The move to Singapore was, for her, no more than a pause and an episode or as she put it in one email, "a breather". I am thus not satisfied that when she first moved to Singapore, or at any time whilst she remained there, the wife ceased to intend to reside permanently and indefinitely and long term in England. She has never abandoned her English domicile of choice."

49. Before this court Mr Scott seeks to challenge the judge's approach and his findings on the following basis:

a) The judge erred in law in treating December 2008, when the parties met, as the cut off date for considering whether the wife had acquired a domicile of choice in England. Evidence of subsequent acts and omissions was relevant to whether or not she acquired an English domicile of choice at all and there is extensive evidence in the period between 2009 and 2012 which contradicts the wife's claim that she ever intended to live permanently or indefinitely in England;

b) Given that the wife's statements upon which the judge relied as to her own intentions were self-serving, the judge placed excessive weight upon this material;

c) In like manner, the judge erred in accepting the wife's self-serving evidence as to her intention to move to Singapore for only a limited period, when the overwhelming evidence from the husband was that she can have been in no doubt that this was an open-ended, indefinite posting;

d) The judge ignored many key factual matters which would have indicated that the wife either did not have, or had abandoned, a domicile of choice in England.

50. In response Mr Chamberlayne relies upon the judge's core finding which was to accept the wife as a witness of truth and thereby accept her evidence as to her intention and her long-term

plans. Mr Chamberlayne submits that the judge was fully alive to the need for caution when relying upon self-serving evidence, but was entitled, in the end, to accept the truth of her testimony and to find, as he did, that it was fully compatible with her actions. Equally, the judge was entitled to hear the husband's evidence as to the conversations between the couple prior to the move to Singapore, and the judge was entitled, as he did, to prefer the evidence of the wife.

51. In oral submissions Mr Scott once more referred to the case of Agulian v Cyganik. The issue in that case related to the domicile of a man, Andreas, who was born in Cyprus in October 1939 but who lived and worked in England for some forty three years between the age of 19 and his death in February 2003 at the age of 63. At first instance it was held that Andreas was domiciled in England at the date of his death. Mr Scott submits that the question of domicile "as at the date of death" which was the issue in Agulian, should be approached in the same manner as the determination in this case of domicile "as at the date of the divorce petition". In this regard he draws attention to the observations of Mummery LJ at paragraph 46:

"(1) First, the question under the 1975 Act is whether Andreas was domiciled in England and Wales at the date of his death. Although it is helpful to trace Andreas's life events chronologically and to halt on the journey from time to time to take stock, this question cannot be decided in stages. Positioned at the date of death in February 2003 the court must look back at the whole of the deceased's life, at what he had done with his life, at what life had done to him and at what were his inferred intentions in order to decide whether he had acquired a domicile of choice in England by the date of his death. Soren Kierkegaard's aphorism that "Life must be lived forwards, but can only be understood backwards" resonates in the biographical data of domicile disputes."

and at paragraph 51:

"...the division of Andreas's life in England into periods of time led the deputy judge to divorce the post-1995 events, from which he drew an inference of an intention to make a permanent home in England, from the pre-1995 events from which he correctly declined to make that inference. He should have considered, as at the date of Andreas's death, the whole of Andreas's

life in retrospect in order to see whether an inference could be made that he intended to make his home permanently or indefinitely in England."

52. Mr Scott accepted that the judge did look at material post-December 2008, but only with an eye to the question "had the domicile of choice in England changed after December 2008?". Posing matters in that way, the judge had reversed the burden of proof so that it was for the husband to prove a change after December 2008, whereas, the correct position was for the wife at all times to bear the burden of establishing a domicile of choice as at the date of petition in 2012.

53. One particular matter upon which Mr Scott places weight is the eagerness of the wife to apply for jobs in Singapore, possibly starting in October 2009, when such a move would cause her to give up here potential claim for indefinite leave to remain in the UK. This plan of the wife only changed, it is said, after the husband had arranged to obtain immigration advice for her. In submissions, while superficially attractive, this point was not supported by the various emails to which Mr Scott took the court. None of the references to which we were taken established that the wife knew that a premature move to Singapore would compromise her plan to obtain indefinite leave to remain, and thereby in due course qualify for British citizenship.

54. Another matter upon which Mr Scott relied was the assertions made by the husband, and by his firm in press releases and articles, to the effect that this was a permanent posting for the husband in Singapore. The weight placed by counsel upon the material issuing from the husband's firm did not seem to me to be justified. It must, surely, be part of the stuff of the life of a corporate lawyer to be placed in roles, from time to time, in different countries with each one being on an open-ended basis. The publicity to clients and potential clients is very unlikely to describe the role of the new lawyer that they are introducing into their office as "temporary".

55. Mr Chamberlayne in his oral submissions understandably laid stress upon the need for an appellate court to proceed cautiously when invited to interfere with the fact finding determination of a trial judge. In making that submission he took the court to a number of authorities including that of Cook v Thomas and Thomas [2010] EWCA Civ 227 in which the Court of Appeal [Laws, Lloyd and Sullivan LJJ] considered an unfortunate dispute between

family members over property rights. The appeal, in part, considered whether or not the fact finding of the Recorder at first instance should be overturned. Counsel for the appellant submitted that the Court of Appeal could see enough from the transcript of the evidence to be able not only to tell that the judge's findings were unjustified, but also to be able to substitute the proper findings. Lloyd LJ, giving the main judgment of the court, was plainly unattracted by that submission. He said at paragraph 48:

"In a case in which the judge has had the benefit of oral evidence from the witnesses, has made findings of fact which are rationally explained, has described in detail his assessment of the respective witnesses as regards their reliability, and where his findings of fact differentiate with care as to what evidence from which witness is accepted in relation to which part of the history, no one witness being accepted as wholly reliable or rejected as wholly unreliable, an appellant who seeks to show that the judge's findings of fact, or some of them, are unsustainable faces a seriously difficult task... It has been said many times...that an appellate court can hardly ever overturn primary findings of fact by a trial judge who has seen the witnesses give evidence in a case in which credibility was in issue."

56. And then at paragraph 50 Lloyd LJ continues:

"As regards his assessment of particular passages in the evidence, it seems to me that in the present case the court must be even more than normally wary of a proposition that the weight of a witness' evidence can properly be judged from the written record of what was said. That is always a dangerous assumption, if credibility is in issue."

57. For my part the observations of Lloyd LJ in Cook v Thomas are but one example of a unified body of case law which establishes that the privileged position of a trial judge who has seen and heard the witnesses over the course of an extended period is to be afforded considerable respect by an appellate court which has enjoyed no such advantage.

58. Mr Chamberlayne enhanced this submission by once again reminding the court that there were almost no documents that were relevant to the central issues in the case; it all turned on the oral evidence.

59. Mr Chamberlayne submits that the case turned on significant issues of credibility with the judge finding in favour of the wife and against the husband on these key matters. In particular he refers to the following:

a) That the judge found that all three of the husband's witnesses had not given reliable evidence and had "collaborated" (judgment paragraph 21) in compiling their witness statements. That finding of collaboration was made against the firm denials of each of those three witnesses.

b) The judge found against the husband's evidence on key issues of fact in relation to the wife's state of knowledge around the decision to depart to Singapore. He decided against the husband's case and found the wife "completely credible".

c) The judge was right to rely upon the husband's tax returns which, in particular, did not claim non-domicile status with respect to the six properties that he owns in England. The judge rejected the husband's claim simply to have signed the returns without having read them closely.

60. Against that background Mr Chamberlayne submitted that this court had no basis upon which to interfere with the careful and insightful findings of fact made by the judge.

61. So far as the wife's domicile is concerned Mr Chamberlayne submitted that the husband's criticism of the judge for crystallising the wife's domicile of choice as at December 2008, and the reliance placed by Mr Scott on the case of Agulian v Cyganik is both bad in law but also, tellingly, contrary to the submissions made by Mr Scott to Holman J at first instance. It was submitted that all the evidence pointed towards a domicile of choice in England, prior to December 2008 when this couple first met and in the circumstances the judge was fully entitled to come to that conclusion.

62. In considering the wife's domicile after December 2008 Mr Chamberlayne points to the fact that this all turned on oral evidence which the judge heard over the course of four days. The few documents that did exist were utterly incompatible with any view other than that of the wife's which was that her move was temporary. The judge saw some emails that she had sent to friends

and an insurance policy application signed by the wife which indicated that this was a one-off visit for up to 850 days. Mr Chamberlayne accepts that clear and compelling evidence is required in relation to the acquisition of a domicile of choice but, he submits, that evidence does not have to be confined to documentary material. The judge was entitled to rely upon the wife's oral testimony as he did.

63. In his final submissions to the court Mr Scott sought to persuade us that in fact very little turned on credibility in this case.

Wife's domicile: discussion
64. Mr Scott is to be commended for the force and clarity of his submissions on behalf of the husband. The case that he mounts is supported by reference to many matters of detail. The husband's case before this court is in this respect a re-running of the case that was deployed before the judge. We have therefore been able to understand, at the same level of particularity that was presented to Holman J, the full measure of the husband's case. However, despite understanding the husband's detailed argument, and despite the clarity of counsel's submissions, I am totally un-persuaded that there is any error to be found in Holman J's conclusions both as to the facts and as to the application of the law.

65. With respect to the major points raised before this court by Mr Scott, I would summarise my conclusions as follows:

a) It was entirely permissible for Holman J to take December 2008 as a point of reference. In doing so, there is no indication that he was doing any more than 'halting on the journey to take stock' in the manner endorsed by Mummery LJ in Agulian. At all times it is clear that the judge had the target of August 2012 as the key date and his review of events after December 2008 was nothing other than full;

b) Even if the judge had effectively determined the issue as at December 2008 so that, as Mr Scott submits, the burden was then put on the husband to prove a change in domicile of choice thereafter, it is plain that the judge did not approach the case by looking to the husband to discharge such a burden. His decision on the post-December 2008 material turned almost

entirely upon his being satisfied that the wife was telling the truth as to her knowledge and intentions during that period;

c) The judge expressly cautioned himself as to the need for care when evaluating the wife's self-serving evidence. He was, however, able to find support for his finding from other, albeit, limited material (emails and the insurance policy) and from the wife's clear focus upon, ultimately, pursuing her career in England and Wales;

d) I do not regard the evidence as to the permanence of the husband's posting to be as overwhelming or unequivocal as Mr Scott suggests. By common acclaim this husband is a very talented and ambitious international lawyer. It would be impossible for anyone to predict whether any posting at any level for such an individual in a dynamic and global law firm would be 'permanent'. The statements contained in the firm's literature as to permanence really take the matter no further as they would be unlikely to indicate anything to the contrary;

e) The wife's search for jobs in Singapore at a time which would have compromised her applications for indefinite leave to remain in the UK and for UK citizenship could only attract weight if there was clear evidence that she acted in that manner despite clearly understanding the adverse immigration consequences. There is no such evidence; in fact, it is clear that once the husband had provided immigration advice to her, the wife gave priority to securing her UK immigration status in a manner which counts against the husband's case;

f) This most experienced judge plainly had a firm and full grasp of the detail of the evidence before him. He had been exposed to the careful analysis, which has been rehearsed before this court, presented by leading counsel on each side. In the circumstances it was neither necessary nor appropriate for the judge slavishly to list every single factual issue or pointer in the course of his judgment. The process of evaluating the volume of micro-points in any case is the inevitable precursor to the preparation of a final judgment within which the judge analyses those factual matters which are prominent and crucial to the decision before coming to a conclusion. In this regard, the judgment of Holman J in the present case is above criticism.

66. In addition to finding little in support for the submissions made on behalf of the husband,

Mr Chamberlayne is correct in emphasising the need for caution in this court when considering an invitation to interfere with the fact finding determination of a trial judge. Mr Chamberlayne accurately describes this case as turning to a great degree on credibility and upon the oral evidence of the parties. In this regard Holman J's appraisal of the two main protagonists in the course of a four day oral hearing must attract a very wide margin of appreciation and be afforded due respect within the appellate process.

67. For the reasons that I have given, my conclusion is that the appeal against Holman J's determination that the wife had a domicile of choice in England as at the date of filing her divorce petition here must fail.

68. In the circumstances, the husband's potential appeal with respect to costs of the orders for maintenance pending suit does not fall for consideration.

69. The outcome is, therefore, that I would uphold the determinations made by Holman J and dismiss both limbs of the husband's appeal.

Lord Justice Vos
70. I agree.

Lord Justice Rimer
71. I also agree.