[2015] UKUT 0637 (TCC)

Appeal number: FTC/24/2015

PROCEDURE – domicile - whether to hold a preliminary hearing to determine the appellant's domicile of origin - appeal against case management decision - whether First-tier Tribunal applied correct principles

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE RIGHT HONOURABLE CLIFTON HUGH LANCELOT DE VERDON BARON WROTTESLEY **Appellant**

- and -

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON
JUDGE SARAH FALK

Sitting in public at the Royal Courts of Justice, Strand London WC2 on 21 October 2015

Marika Lemos, instructed by New Quadrant Partners, for the Appellant

Akash Nawbatt and David Peter, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against a case management decision of the First-tier Tribunal ("FTT") (Judge Brooks) released on 21 October 2014. The substantive proceedings relate to an appeal against HMRC's determination that the appellant was domiciled in England and Wales during the years of assessment 2000-01 to 2007-08. By its decision the FTT considered and refused the appellant's application for his domicile of origin to be determined as a preliminary issue in advance of the main hearing of the appeal.

2. The sole issue in the substantive proceedings is the appellant's domicile during the tax years in question. Both parties agree that the appellant's domicile of origin will need to be determined in order to decide this question. In summary the appellant claims that his domicile of origin is a discrete issue for which the limited relevant evidence is already prepared, and that resolution of it would both facilitate preparation for and the hearing of the rest of the case and could mean that the remainder of the case would not need to be heard.

Factual and procedural background

3. The appellant was born in 1968 in the Republic of Ireland, shortly after his parents had moved there from the UK and acquired an estate in County Galway. The appellant's father died unexpectedly in 1970, at which time the Irish and UK tax authorities accepted that the father was domiciled in Ireland. The estate was subsequently sold and the appellant left Ireland with his mother, initially to Spain but in 1975 to the UK where the appellant was educated and served in the army until 1995. After leaving the army the appellant worked in or from the UK but also spent increasing amounts of time in Switzerland where he developed an interest in winter sports, eventually competing for the Irish bob skeleton team. In 2001 the appellant married a Swiss citizen who also worked in the UK. The couple lived in London but also had accommodation in Switzerland at the home of the appellant's wife's family, and from around 2008 at a separate home made available by his father-in-law.

4. In April 2001 the appellant filed a claim with the Inland Revenue that he was not domiciled in the UK as from around the year 2000. The claim was made under what was then s 207 Income and Corporation Taxes Act 1988 and Schedule 1A to the Taxes Management Act 1970. In providing details of the claim the appellant maintained that his domicile of origin was Irish. An enquiry was opened into the claim under paragraph 5 of Schedule 1A on 21 June 2001. Following protracted correspondence and an application to issue a closure notice in respect of the enquiry, on 18 April 2012 HMRC issued notices of determination of domicile to the effect that the appellant was domiciled in England and Wales during the tax years 2000-01 to 2007-08 inclusive. Separate enquiries into the appellant's tax returns for those years remain open pending resolution of the domicile dispute.

5. Following an attempt at alternative dispute resolution and an HMRC review the appellant appealed to the FTT in March 2014 against the determinations of domicile in respect of each relevant tax year. In May 2014 the appellant applied to have the issue of the appellant's domicile of origin decided at a preliminary hearing.

Relevance of domicile of origin

6. The appellant's claim to consider domicile of origin separately is based on a combination of submissions as to the factual position and the legal principles that should be applied in determining the appellant's domicile. For ease of reference we will refer throughout to UK and non-UK domicile, although strictly there is no such thing as UK domicile and the dispute is over whether the appellant was domiciled outside the UK as he maintains, or in England and Wales as HMRC has determined.

7. It is convenient to summarise here the key legal principles relied on by the appellant and HMRC's position on them:

(1) The appellant's domicile of origin is determined by the domicile of his father at the time of the appellant's birth. If the father had acquired a domicile of choice in Ireland at that time (as the appellant claims but HMRC disputes), then the appellant's domicile of origin is Irish.

(2) After his father's death and until the appellant turned 16, his domicile followed his mother's, as a "domicile of dependency" (a type of domicile of choice or "quasi choice"). This may or may not have resulted in a UK domicile by the age of 16: the position is currently not agreed, although HMRC can be expected to argue that a UK domicile was acquired. If the appellant's domicile of origin is Irish then Ms Lemos argues that it would be for HMRC to prove that he had acquired a UK domicile.

(3) Once he was 16 the appellant would have been free to acquire an independent domicile. The appellant contends that, if he did acquire a UK domicile via his mother and/or subsequently, then at least from around 2000 he no longer had it. This last point is obviously not accepted by HMRC.

(4) Importantly, the appellant relies on an argument that, if his domicile of origin was Irish, he need only demonstrate that he abandoned any UK domicile of choice. He does not need to demonstrate that he acquired a Swiss domicile of choice because abandonment of a domicile of choice without acquisition of another domicile of choice results in the domicile of origin reviving. He would either be domiciled in Switzerland or Ireland, but in any event he would not be domiciled in the UK. In contrast, if he had a UK domicile of origin then he would need to prove that he acquired a domicile of choice in Switzerland. The appellant submits that this would involve a different and more extensive evidential enquiry. HMRC do not dispute the basic legal principles, but do dispute the appellant's emphasis on the significance of the distinction drawn by the appellant.

Role of this tribunal

8. The jurisdiction of this tribunal on an appeal from the FTT lies only on questions of law (s 11 of the Tribunals, Courts and Enforcement Act 2007 ("the Act")). Section 12 of the Act provides that if in deciding an appeal this tribunal finds that the making of the FTT's decision involved the making of an error on a point of law it:

(a) may (but need not) set aside the decision of the FTT, and

(b) if it does it must either-

(i) remit the case to the FTT with directions for its reconsideration, or

(ii) remake the decision.

Legal principles to be applied

9. The question of whether to order a preliminary hearing is clearly a matter where the FTT is exercising its discretion in a matter of case management. Consequently, this tribunal should be slow to interfere: the test is not simply whether we would have made a different decision.

10. The correct test to apply in these circumstances has been expressed in a number of ways. The authorities were reviewed by Lord Fraser, with whom all other members of the House of Lords agreed, in the leading case of *G v G* [1983] 2 All ER 225 which concerned a child custody decision. He said at page 229:

> "…the appellate court should only interfere when it considers that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution... but has exceeded the generous ambit within which a reasonable disagreement is possible.
>
> [Then quoting from Lord Scarman in *B v W (wardship: appeal)* [1979] 3 All ER 83 at 96, [1979] 1 WLR 1041 at 1055]
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> '..the court may not intervene unless it is satisfied either that the judge exercised his discretion on a wrong principle or that, the judge's decision being so plainly wrong, he must have exercised his discretion wrongly.'
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> The same principle was expressed in other words, and at slightly greater length, in the Court of Appeal… in *Re F (a minor) (wardship: appeal*) [1976] 1 All ER 417, [1976] Fam 238, where the majority held that the court had jurisdiction to reverse or vary a decision concerning a child made by a judge in the exercise of his discretion if it considered that he had given insufficient weight or too much weight to certain factors. Browne LJ said ([1976] 1 All ER 417 at 432, [1976] Fam 238 at 257):
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> 'Apart from the effect of seeing and hearing witnesses, I cannot see why the general principle applicable to the exercise of the discretion in

respect of infants should be any different from the general principle applicable to any other form of discretion.'

…[and quoting from the speech of Bridge LJ in that case]:

'Can this conclusion prevail or is there some rule of law which bars it? The learned judge was exercising a discretion. He saw and heard the witnesses. It is impossible to say that he considered any irrelevant matter, left out of account any relevant matter, erred in law, or applied any wrong principle. On the view I take, his error was in the balancing exercise. He either gave too little weight to the factors favourable, or too much weight to the factors adverse, to the father's claim that he should retain care and control of the child. The general principle is clear. If this were a discretion not depending on the judge having seen and heard the witnesses, an error in the balancing exercise, if I may adopt that phrase for short, would entitle the appellate court to reverse his decision [and Bridge LJ then cited authorities]. The reason for a practical limitation on the scope of that principle where the discretion exercised depends on seeing and hearing witnesses is obvious. The appellate court cannot interfere if it lacks the essential material on which the balancing exercise depended. But the importance of seeing and hearing witnesses may vary very greatly according to the circumstances of individual cases. If in any discretion case concerning children the appellate court can clearly detect that a conclusion, which is neither dependent on nor justified by the trial judge's advantage in seeing and hearing witnesses, is vitiated by an error in the balancing exercise, I should be very reluctant to hold that it is powerless to interfere. '

The decision in *Re F* is also important because the majority rejected, rightly in my view, the dissenting opinion of Stamp LJ... who would have limited the right of the Court of Appeal to interfere with the judge's decision in custody cases to cases 'where it concludes that the course followed by the judge is one that no reasonable judge having taken into account all the relevant circumstances could have adopted ...' That is the test which the court applies in deciding whether it is entitled to exercise judicial control over the decision of an administrative body: see the well-known case of *Associated Provincial Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223. It is not the appropriate test for deciding whether the Court of Appeal is entitled to interfere with the decision made by a judge in the exercise of his discretion."

11. It is also worth referring to the summary by Lawrence Collins LJ in the Court of Appeal judgment in *Fattal v Walbrook Trustee (Jersey) Ltd* [2008] EWCA Civ 427:

"… I do not need to cite authority for the obvious proposition that an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

12. These principles have been applied in a number of Upper Tribunal cases concerning appeals against case management decisions, including *Goldman Sachs International v HMRC* [2009] UKUT 290 (TCC) and *Hargreaves v HMRC* [2014] UKUT 395 (TCC) (currently under appeal). In *Goldman Sachs* Norris J commented that the Upper Tribunal should exercise extreme caution in entertaining appeals on case management issues, cited the passage from *Fattal* above and said that the principle applied "with at least as great, if not greater, force in the tribunals' jurisdiction as it does in the court system".

13. From the cases we derive that one or more of the following features should be present before this tribunal should intervene:

(1) The FTT applied an incorrect principle.

(2) The FTT's decision was plainly wrong, or "exceeded the generous ambit within which a reasonable disagreement is possible".

(3) The FTT failed to take account of relevant considerations or took account of irrelevant considerations.

(4) This can include a case where there is an error in the balancing exercise and insufficient weight or too much weight was given to certain factors.

Legal principles- power to order a preliminary hearing

14. The power of the FTT to order a preliminary hearing is not in doubt. The FTT has broad case management powers pursuant to rule 5 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "FTT rules"), and rule 5(3)(e) specifically contemplates dealing with a point as a preliminary issue. As with all other powers under the rules, in deciding whether to do so the FTT must seek to give effect to the overriding objective of the FTT rules to deal with cases fairly and justly. This includes dealing with a case in ways which are proportionate to its importance, complexity and the parties' costs and resources, and avoiding delay so far as compatible with proper consideration of the issues (rule 2).

15. The FTT had before it the same cases that were cited to us as providing guidance on when to order a preliminary hearing- *Tilling v Whiteman* [1979] 1 All ER 737, *Steele v Steele* (2001) The Times, 5 June, *McLoughlin v Jones* [2002] QB 1312 and *Boyle v SCA Packaging* [2009] 4 All ER 1181. The FTT also noted that they had been applied in tax cases, referring to the *Goldman Sachs* and *Hargreaves* cases referred to at [12] above which cited *Steele* and *Boyle* respectively. There was however some dispute between the parties about the relevance of some of the statements in the cases and their potential application in this case.

16. In essence, Ms Lemos for the appellant argued that the FTT adhered too rigidly to principles enunciated in *Tilling*, *McLoughlin* and *Boyle* without sufficient regard to their factual context, and had disregarded the comments in *Steele*. Mr Nawbatt for HMRC argued that *Tilling*, *McLoughlin* and *Boyle* laid down principles of general application, and that in any event the FTT did not ignore the guidance in *Steele*.

17. In *Tilling*, a case concerning a claim to recover possession of a property, Lord Wilberforce said (at 738-739):

> "The judge took what has turned out to be an unfortunate course. Instead of finding the facts, which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken. … So the case has reached this House on hypothetical facts, the correctness of which remain to be tried. I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional."

18. Lord Scarman said (at 744):

> "The case presents two disturbing features. First, the decision in the county court was upon a preliminary point of law. Had an extra half-hour or so been used to hear the evidence, one of two consequences would have ensued. Either Mrs. Tilling would have been believed when she said she required the house as a residence, or she would not. If the latter, that would have been the end of the case. If the former, your Lordships' decision allowing the appeal would now be final. As it is, the case has to go back to the county court to be tried. Preliminary points of law are too often treacherous short cuts. Their price can be, as here, delay, anxiety, and expense."

19. In *McLoughlin*, David Steel J (sitting in the Court of Appeal) commented as follows, after noting that the preliminary issue of law in that case had been set in train without any attempt to establish the factual premise for it, despite the claimants' pleaded case being highly fact sensitive:

> "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."

20. In *Boyle*, a case where the question whether the claimant was disabled had been treated as a preliminary issue in a claim of alleged discrimination on account of disability, Lord Hope said:

> "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. This is in keeping with the overriding aim of the tribunal system. It was set up to take issues away from the ordinary courts so that they could be dealt with by a specialist tribunal as quickly and simply as possible. As Lord Scarman said in *Tilling v Whiteman* [1980] AC 1, 25, 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. That the power to hold a pre-hearing exists is not in doubt… There are, however, dangers in taking what looks at first sight to be a short cut but turns out to be productive of more delay and costs than if the dispute had been tried in its entirety, as Mummery J said in *National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School* [1995] ICR 317, 323. 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.
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> 10. In *Chris Ryder v Northern Ireland Policing Board* [2007] NICA 43, [2008] 4 BNIL 34, para 16, Kerr LCJ said:
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> > "A number of recent appeals from decisions of the Fair Employment/Industrial tribunals have involved challenges to conclusions reached on preliminary points - see, for instance, *Bombadier Aerospace v McConnell* and *Cunningham v Ballylaw Foods*. While I do not suggest that the hearing of a preliminary issue will never be appropriate for determination by a tribunal, I consider that the power to determine a preliminary point should be sparingly exercised. It is, I believe, often difficult to segregate in a wholly compartmentalised way a single issue in this field from other material that may have relevance to the matter to be decided."
>
> I would respectfully endorse those observations. The problem in this case is not so obviously one of overlap or inappropriate compartmentalisation. Mrs Boyle's complaint that she was subjected to harassment and aggressive and hostile treatment is a distinct issue, although it seems likely that the effects that this may have had on her, if established, will not be capable of being determined without the leading of more medical evidence. It is rather the cost and delay that has been caused by separating out those aspects of the case from the question whether she was a disabled person within the meaning of the Act. The separation of these two fundamental issues, which are likely to be present in many disputed disability discrimination cases, will rarely be appropriate even if the parties are in favour of it."

21. Lord Neuberger agreed with Lord Hope's view that it was an inappropriate case to have a preliminary hearing. Lord Brown added that a preliminary issue as to whether the complainant is disabled was "highly unlikely" to be justifiable unless there was a "probability" that it would determine the whole dispute.

22. In *Steele* Neuberger J (as he then was) set out a total of 10 questions which he said should be considered in deciding whether to order a preliminary issue "at any rate in a

case such as this" (where the question was whether limitation should be taken as a preliminary issue). The case is not fully reported and the FTT cited a summary of nine reasons from The Times report of 5 June 2001:

> (1) Could the determination of the preliminary issue dispose of the whole case or at least one aspect of the case?
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> (2) Could the determination of the preliminary issue significantly cut down the cost and time involved in pre-trial preparation and in connection with the trial itself?
>
> (3) If the preliminary issue was an issue of law, how much effort, if any, was involved in identifying the relevant facts for the purposes of the preliminary issue? The greater the effort the more questionable the value of ordering a preliminary issue.
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> (4) If the preliminary issue was an issue of law, to what extent was it to be determined on agreed facts? The more facts that were in dispute the greater the risk that the law could not safely be determined until the disputes of fact were resolved.
>
> (5) Whether the determination of the preliminary issue could unreasonably fetter either or both of the parties or the court in achieving a just result at trial.
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> (6) To what extent was there a risk of the determination of the preliminary issue increasing costs and/or delaying the trial? In that regard the court could take account of the possibility that the determination of a preliminary issue might result in settlement.
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> (7) The extent to which the determination of a preliminary issue was relevant. The more likely it was that the issue would have to be determined by the court, the more appropriate it was to have it as a preliminary issue.
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> (8) To what extent was there a risk that the determination of the preliminary issue, if apparently helpful in terms of saving costs and time, could lead to an application for the pleadings to be amended to avoid the consequences of the determination?
>
> (9) Was it just and right to order a preliminary issue?

23. We had the benefit of the full transcript. The missing question from the full list of 10 is that:

> "…where the facts are not agreed, the court should ask itself to what extent that impinges on the value of a preliminary issue"

Neuberger J expanded on this by reference to the case in question, commenting that the question of characterisation of the claim for limitation purposes might depend on the detailed evidence that could only be considered at trial.

24. It is also worth expanding on The Times' summary of one other question. In relation to question (6) above, after referring to the possibility of settlement the judge added:

> "In other cases the court may well decide that, although determination of a preliminary issue would not result in a settlement, it will result in a substantial cutting down of costs and time"

25. We do not think that there is any conflict between these cases, and we agree with HMRC that the comments in *Tilling*, *McLoughlin* and *Boyle* are of general application, although clearly it is helpful to have regard to the context of each case. It is also important to bear in mind that in case management decisions the overriding test must always be what is fair and just in the circumstances of the particular case, having regard to the factors listed in rule 2 of the FTT rules. The comments in the cases provide important guidance but do not detract from the importance of this underlying principle.

26. At first sight perhaps the most difficult point in considering how to apply the guidance in the cases is the apparent difference between Neuberger J's reference in *Steele* to disposing of either the whole case or "an aspect of the case" and the emphasis in the other cases on a need for a "knockout" or "decisive" point which has a "probability" of determining the whole dispute. However, provided it is borne in mind that this is guidance which cannot detract from the application of the overriding objective there is no conflict. It would fetter that objective to conclude that the only circumstance in which a preliminary issue can ever be ordered is one where it would result in the whole case falling away. But if it would not have that result then that is a strong indication that the tribunal should be very cautious. In particular, the guidance is clear that the issue should be a discrete one that can sensibly be separated from the remainder of the case. In that context we think an "aspect" of the case is most likely to be a discrete standalone issue, rather than only a step in the analysis in arriving at a conclusion on a single issue. An example might be a case where both domicile and residence were in dispute. These are clearly separate issues or aspects, although given the likely factual overlap it would still not usually be sensible to consider them at separate hearings.

27. Ms Lemos submitted that we should regard the application in this case as not being a "normal" application to hear a preliminary issue but an application for the substantive hearing to be split. We agree with HMRC that this is not a real distinction and is certainly not a basis to disregard the guidance in cases such as *Tilling*, *McLoughlin* and *Boyle*.

28. We think that the key principles to consider can be summarised as follows:

> (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.

29. In this case the preliminary issue is a question of mixed fact and law. Clearly evidence is required to determine it and, although the legal principles are clear, their application to the facts is open to dispute. Both parties also agree that the question of domicile of origin will have to be determined and will not prove irrelevant.

The FTT's decision

30. The FTT considered its power to direct a preliminary hearing and went on to consider *Tilling*, *Steele*, *McLoughlin* and *Boyle*. The FTT then sought to apply the guidance. The core reasoning is in a fairly short section of the judgment and is worth setting out in full:

> "13. Ms Lemos submitted that I should adopt the approach taken by Neuberger J in *Steele v Steele* which had been applied in tax cases (eg *Goldman Sachs International v HMRC* [2009] UKUT 290 (TCC)). However, I was reminded by Mr Nawbatt that *Boyle v SCA Packaging* was a decision of the House of Lords which had also been applied in tax cases (eg *Hargreaves v HMRC* [2014] UKUT 396 (TCC)). As such, he submitted that *Boyle* should be the starting point especially as

Lord Neuberger, the judge in *Steele v Steele*, had agreed with Lord Hope in *Boyle*.

14. It is accepted that irrespective of whether or not a preliminary hearing is directed, unless the matter is settled, a hearing would be a required to determine the substantive issue between the parties. Therefore, in this case, the probability is that a preliminary hearing would not be determinative one way or the other of the entire dispute. Also, I am not convinced that the proposed preliminary issue of Lord Wrottesley's domicile of origin, which will have to be determined in any event, can be entirely divorced from the substantive issue, his domicile between 2000-01 and 2007-08.

15. In such circumstances, and in the absence of a "succinct knockout blow", adopting the approach of Lord Hope in *Boyle* it would appear to be preferable that there should be only one hearing to determine all the matters in dispute.

16. Turning to the guidance in *Mcloughlin v Grover*, I accept the submission of Ms Lemos that it would be possible to determine the issue of Lord Wrottesley's domicile of origin as a preliminary issue and that while this should usually involve questions of law the determination of questions of fact, as would be required in this case, is not precluded. However, despite the restriction under s 11 of the Tribunals, Courts and Enforcement Act 2007 of any right of appeal from the First-tier Tribunal to "any point of law", I do not agree that because there does not appear to be any dispute as in relation to the law applicable to domicile at this stage it necessarily reduces the likelihood of an appeal given the cases on domicile which have come before the Court of Appeal in recent times (eg *Barlow Clowes International Limited v Henwood* [2008] EWCA 577 Civ).

17. In relation to the questions posed by Neuberger J in *Steele v Steele* that are applicable to the present case, although the determination of the preliminary issue is unlikely to dispose of the case as a whole, as Ms Lemos submits it could possibly dispose of at least one aspect of the case. Also the evidence in relation to the domicile of origin issue, which is already available, is separate and distinct from that which will be adduced in the substantive appeal and although Lord Wrottesley's mother would be required to give evidence in relation to both the potential preliminary and substantive issues, her evidence would be different in relation to each and there would be no need for any repetition. As such, Ms Lemos contends, it is inevitable that there would be a significant saving in both time and cost.

18. However, Mr Nawbatt argues that while a preliminary hearing may appear to be helpful in relation to reducing time and costs it would not in fact do so. Having made enquiries from the Tribunal's listing office he understood that although the substantive hearing could be listed for April 2015 there was little prospect of an earlier date being available for any preliminary hearing.

19. In considering whether it just and right to order a preliminary hearing I am especially mindful that not only was it in 2001 that Lord Wrottesley claimed that he had abandoned his UK domicile but also

> the time taken by HMRC to issue the determinations. Clearly Lord Wrottesley has suffered prejudice as a result, not least the loss of his grandmother who, although she had made a witness statement before she died, would have been an important witness in relation to the domicile issue.
>
> 20. Therefore, on balance, having carefully considered all the circumstances of the case, especially that a further hearing will be necessary in any event and that it appears unlikely that a preliminary hearing will be listed sooner than the substantive appeal, I have come to the conclusion that it is not appropriate to direct a preliminary hearing in the present case. Accordingly I dismiss the application.
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> 21. I would hope, however, given that the dispute between the parties commenced over 13 years ago that the parties can agree suitable directions to expedite the substantive hearing."

31. Ms Lemos for the appellant claimed that the FTT was in error and furthermore that the errors were such that the FTT was "plainly wrong". She relied in particular on the claim that domicile of origin was an entirely discrete and limited issue which was ready for trial (unlike the rest of the case), and that there was a good chance that, having regard to the appellant's view that the amount at stake for the tax years in question was a relatively limited sum of £46,000, its resolution would result in disposal of the appeal either by settlement or by the appellant walking away. She argued that the FTT had failed to consider the question as one of efficient and proportionate case management having regard to the amount at stake, had applied principles from *Tilling*, *McLoughlin* and *Boyle* without taking proper account of their different factual contexts and had effectively disregarded the guidance in *Steele* for the reason mentioned at [13] in the FTT decision. However, *Steele* gave a better sense of the broad balancing exercise required and the importance of context. The FTT had also failed to take account of relevant considerations, in particular the effect of the issue on what Ms Lemos described as the incidence of the burden of proof. Determination of domicile of origin could in particular affect the extent of the evidence including the number of witnesses the appellant would call in the substantive proceedings, so affecting pre-trial preparation and the length and cost of the hearing. The FTT also took account of irrelevant considerations, in particular the FTT's availability to hear the appeal as opposed to the parties' readiness.

32. Mr Nawbatt for HMRC argued that the FTT had taken the right principles into account. There were only limited circumstances in which a judge's exercise of discretion in case management should be interfered with, and they were not satisfied. There was no error of law in the FTT's decision. The issue of domicile of origin was neither a succinct one nor potentially decisive. It was also not a discrete issue. Deciding it would not materially affect the evidence or length of the substantive hearing. The FTT was also correct to take account of the possibility of an appeal against a decision on domicile of origin and the impact of that in delaying resolution of the overall proceedings.

Discussion- the FTT decision

33. It is clear that the FTT considered the same cases that were before us and heard similar submissions. We do not consider the decision to be "plainly wrong". We have however not found it straightforward to determine from the FTT's rather brief discussion whether the FTT applied all the correct principles, took all relevant considerations into account and disregarded irrelevant ones, and made no error in the balancing exercise. After careful consideration we have concluded that we are not satisfied that it did.

34. As a general point we think that the FTT may have focused too much on the reference to a "succinct knockout point" in *Boyle*. While it is undoubtedly a key test it must be remembered that the question is one of efficient case management involving the exercise of discretion, and in exercising that discretion it is also helpful to have regard to other comments in both *Boyle* and other cases, including the useful guidance laid down in *Steele.* Although the FTT refers to the guidance in *Steele* at [17] that appears to be in the context of a description of submissions made by the appellant. The other comments and guidance assist in suggesting a number of points which should help the tribunal to exercise its discretion in a way that best meets the overriding objective.

35. More specifically as regards the considerations taken into account, our concerns are as follows.

36. First, the FTT concluded without discussion that deciding the domicile of origin issue would, absent settlement, not dispose of the case as a whole. It is not clear to us that the FTT gave real consideration to the appellant's submissions about the possibility of the appellant walking away, given the limited amount the appellant considers is in dispute. This is also indicated by the statement at [20] that a further hearing "will" be necessary.

37. It is also not clear that the FTT reached a conclusion, or at least a reasoned conclusion, on whether domicile of origin was really a discrete issue that could be considered separately, without overlap with the rest of the evidence and without hindering the tribunal at a subsequent hearing. There is a statement to this effect at [17] but it appears to be a description of submissions made by Ms Lemos rather than a conclusion. In contrast the discussion at [14] indicates that the FTT was not convinced of the point but does not give reasons why the appellant's detailed submissions on this issue were not accepted.

38. It is not clear whether the FTT reached a conclusion on whether a separate hearing on domicile of origin would require a significant amount of evidence. It is clear from *Boyle* that this is a material factor. In the final part of [9] Lord Hope refers specifically to this as a reason why, even if an issue is discrete, it may well not be appropriate to hear it as a preliminary issue.

39. The FTT placed particular reliance on its conclusion that it was unlikely that a preliminary hearing would be listed sooner than the substantive appeal. Whilst the risk of delay is clearly relevant we do not think that FTT availability by itself should

be considered independently of other factors relevant to delay, in particular the extent of pre-trial preparations required by the parties, the relative lengths of the hearings and the possibility of appeal on the preliminary issue.

40. It is not clear that the FTT gave real consideration to the appellant's submission that determination of domicile of origin could materially affect the evidence required at the main hearing, and accordingly the extent and cost of pre- trial preparation.

41. We are also concerned that it appears from [20] that the FTT relied principally on two factors, namely that a further hearing would be necessary and the tribunal could probably not accommodate a preliminary hearing any earlier than the substantive appeal. Even if these points were both correct and appropriate to taken into account, they are not the only factors. We are also concerned that the first may have been insufficiently considered and the second is not a standalone point divorced from other factors material to the question of delay: tribunal availability has at least been given inappropriate weight.

42. Finally, there is an additional issue apparently not considered by the FTT but which we think should be considered. It is evident to us from some of the submissions made, in particular in relation to the possibility that the appellant may walk away if domicile of origin is decided as a preliminary issue, that the appellant's primary objective in the dispute may not relate to the tax years which are the subject of the appeals but to later tax years, and indeed future tax planning. We think consideration should be given to the potential relevance of this point.

43. We are satisfied that the concerns we have identified with the FTT's decision are sufficiently material for us to conclude that the decision involved the making of an error on a point of law. In the circumstances we have concluded that we should set aside the FTT's decision. We have also concluded that, since we have all the material that was before the FTT and heard detailed submissions, we should remake the decision rather than remit it to the FTT.

Discussion- whether to order a preliminary hearing

44. We now proceed to remake the decision by applying the principles we have identified at [28] above to the circumstances of this case.

Will a preliminary hearing dispose of the case or an aspect of it?

45. Neither party contended that resolution of the appellant's domicile of origin will itself determine the dispute, absent settlement or the appellant walking away. That is clearly correct. We also do not consider that it will dispose of an aspect of the case, in the sense of a separate issue. Whilst both parties agree that a determination of domicile of origin will be required (and so should not prove irrelevant) it is only one step in an analysis of the single issue that falls to be determined, namely the appellant's actual domicile for the tax years in question. The appellant's domicile of origin is relevant to this analysis but not determinative of it.

Is it a discrete issue in evidential terms?

46. Ms Lemos argued that, on the particular facts of this case, the evidence relevant to domicile of origin was entirely discrete. The sole question was whether the appellant's father, who undoubtedly had a UK domicile of origin, had acquired an Irish domicile of choice by the date the appellant was born. It was previously accepted that he had done so by the date of his death some two years later, so the enquiry could be limited to those two years. In any event Ms Lemos said it was completely separate from the questions that would need to be considered in relation to any later acquired domicile of dependency or choice. Domicile of dependency followed the appellant's mother after the father's death. She had clearly lost any Irish domicile when she left Ireland and either her English domicile of origin would have revived or she would have acquired a new domicile elsewhere. The intervening events between the father's death and the appellant reaching 16 made the issue entirely discrete.

47. HMRC did not agree that there was no overlap. The appellant did not accept that the appellant's domicile of dependency was in the UK by the time he turned 16. It would therefore be necessary to consider the entire period after his father's death and potentially before it, rather than just pick the story up when the appellant was 16. His mother's evidence would be relevant both to this and to domicile of origin, and it was clear that evidence as to a wife's intentions could be informative about the husband's. There was a risk that if they were considered separately that could fetter the tribunal at the second hearing.

48. Whilst we agree with HMRC that the appellant's mother's evidence would be relevant to both domicile of origin and any later domicile of choice (and in particular any domicile of dependency), the particular and unusual facts of this case mean that there should be no material overlap between the evidence relevant to domicile of origin and other evidence. The appellant's father died unexpectedly when the appellant was very young, only shortly after moving to Ireland. It seems clear that following his death there were financial problems as well as difficulties in running the estate that led or at least significantly contributed to the estate being sold and the appellant leaving Ireland with his mother. We consider it unlikely that any finding on domicile of origin would fetter the FTT at a hearing of the rest of the dispute, since the focus of the enquiry will be quite different, and insofar as it concerns the appellant's mother it will be concerned with her intentions after her husband's death.

Would it require significant evidence? Is it a succint point?

49. Ms Lemos submitted that only limited evidence would be required. The enquiry effectively spanned a couple of years rather than the 30 to 40 years relevant for the rest of the dispute. There were five witnesses (not counting the appellant) but one had died and evidence from three others was very limited. Ms Lemos estimated that a preliminary hearing would take two or at most three days. In contrast the rest of the hearing would take substantially longer. Before the FTT she had estimated it as seven to ten days, but she now thought that might well be an underestimate and it could well be longer than ten days.

50. Mr Nawbatt estimated four to five days for a preliminary hearing compared to ten to twelve (or possibly ten to fifteen) for a full hearing of all the issues. At four to five days domicile of origin was not a succinct point. The evidence was significant and the enquiry would not be limited to a two year period. The likelihood was that it would involve a review of the decade before the appellant's birth and the father's character in his early years in determining the likelihood of his having formed a fixed intention to live permanently in Ireland. As well as witnesses for the appellant there would be contemporaneous documentary evidence to consider relating in particular to the years leading up to the appellant's birth, and which HMRC considers raises serious questions about the appellant's claim.

51. We have concluded that the evidence that would be required and the issues raised do not make the question of domicile of origin a succinct point relative to the rest of the case. The evidence is not insubstantial. It is likely that the four available witnesses will be cross examined and that both parties will wish documentary evidence to be considered. And whilst the appellant's evidence on this point will be less relevant, he may give evidence in addition. We suspect that the appropriate time estimate is between the two estimates provided by the parties. But even at, say, three days it is not easily described as succinct when compared with (say) ten to twelve days for a full hearing.

The impact on timing of dispute resolution

52. Ms Lemos submitted that deciding domicile of origin first would allow both parties to take stock and reach a more realistic view of their overall chance of success. Whilst holding a preliminary hearing did involve the risk of some delay to the main hearing (including the point that the decision on the preliminary issue might be appealed), this should be balanced against the potential for it to lead to a settlement or to one or other party walking away, as well as against its impact on pre-trial preparation and trial length (as to which see below). The appellant might walk away after a decision on the preliminary issue whatever the outcome. The tax at stake for the years in question was only £46,000 and this was relevant in deciding whether to carry on. The individuals involved at HMRC had also changed and nothing would preclude a settlement. As Norris J said in *Goldman Sachs* at [43], we should approach the prospect of settlement by reference to how reasonable parties ought to behave in discharge of their duties to the tribunal, rather than being seduced by "blandishments" or "blustering intransigence".

53. Mr Nawbatt disagreed that there was any realistic chance of settlement or that, viewed objectively, HMRC should walk away. HMRC had not accepted that the tax at stake was only £46,000. Even if the appellant was found to have an Irish domicile of origin this would not affect HMRC's view of his domicile in the relevant tax years. HMRC had reached their determination of the appellant's domicile in that period based largely on other factors, including the fact that the appellant had lived in the UK from the age of five, had served in the army and worked here, and had married a UK resident who also lived and worked in the UK during the years in question. HMRC's willingness to back down would also be affected by the fact that two of the

appellant's children were born during that period, so the appellant's domicile at that time would determine their domiciles of origin.

54. Ms Lemos also argued that the relevant legal principles relating to domicile of origin were settled and there should be no dispute about how to apply them, so an appeal was unlikely. The appellant did not dispute that the appellant's domicile of origin turned on whether his father had acquired a domicile of choice in Ireland, and that this would require clear evidence. Mr Nawbatt disagreed about the possibility of dispute. The prospect of additional delay with a preliminary hearing was very real, and was particularly acute given the possibility of appeal- illustrated by the fact that the present appeal was being heard a year after the FTT decision.

55. We have concluded that, overall, there is a material risk of additional delay if a preliminary hearing is ordered. Self-evidently, hearing the appellant's domicile of origin as a preliminary issue is likely to delay the main hearing, since the dates for that cannot sensibly be fixed until the preliminary issue has both been heard and determined. Even if they could be fixed on a provisional basis, doing so would not be consistent with the appellant's submission that a determination of the preliminary issue could materially impact the extent of pre-trial preparations and hearing length: both of these need to be considered in managing the timetable for the rest of the case.

56. We also agree that the possibility of appeal is a real one. Since the decision is essentially a decision about whether the appellant's father had acquired a domicile of choice by the time of the appellant's birth, it raises exactly the sort of issues that have been considered by the appeal courts in recent years: see *Barlow Clowes International v Henwood* [2008] EWCA Civ 577, *Ray v Sekhiri* [2014] EWCA Civ 119 and *Gaines-Cooper v HMRC* [2008] EWCA Civ 1502. The fact that it manifests itself as a domicile of origin claim as far as the appellant is concerned does not change this.

57. We also do not consider that there is any material prospect of a settlement or of HMRC walking away if domicile of origin is heard first. Viewed objectively, given the substantial time that the appellant has spent in the UK, the extent of the appellant's links to the UK, the potential impact of the dispute on the domicile of origin of two of his children and the fact that HMRC has also not agreed the amount in dispute (having reserved the right under case management directions to request additional information before issuing closure notices in relation to the open enquiries for the relevant year), we do not consider that there is a material prospect that HMRC will agree to settle or walk away if the appellant is successful in showing that he has an Irish domicile of origin. The likelihood is reduced further if the appellant does not succeed.

58. This leaves the possibility of the appellant walking away after his domicile of origin is determined. The relevance of the appellant's motivations for this is considered below, but even if it is appropriate to take the chance that he will do this into account we are not persuaded that the likelihood is sufficiently high for it to have material weight in the balancing exercise. Understandably Ms Lemos was unable to give us any clear indication of what the appellant might do, and whilst we can see that he might walk away, in the absence of significant additional information about the

appellant's affairs and his future plans we cannot say that walking away would be the objectively sensible thing to do. And we note that the appellant can walk away at any time, irrespective of whether there is a preliminary hearing.

Pre-trial preparation/hearing length

59. Ms Lemos submitted that deciding domicile of origin first would make a real difference to the approach to the rest of the case. If the appellant's domicile of origin was Irish the burden of showing he had acquired a UK domicile would shift to HMRC, and he would need only to show he had abandoned any such domicile rather than having to show he had acquired a domicile of choice in Switzerland. Whilst she accepted that the factual issues to consider around the appellant's residence position in the UK and Switzerland and his intentions would be the same irrespective of his domicile of origin, if it was Irish the appellant might well settle for a lighter touch approach, with a reduced deployment of resources including (potentially) fewer witnesses. The limited amount at stake made this more likely. The witnesses were in the main based abroad, and the exercise of taking witness statements and arranging appearance at a hearing was therefore more time-consuming and costly. Whilst the appellant was ready for a hearing on domicile of origin, he was not ready for a hearing on the remaining issues, and any question of tribunal availability was irrelevant to that.

60. Mr Nawbatt pointed out that the correspondence had been going on for over 10 years. The appellant had had plenty of time to prepare, including in the six months or so that the FTT estimated would elapse before a substantive hearing. More time could be requested if necessary. It was the appellant's appeal and it was up to him to decide how to present it. The appellant's own witness statement was already prepared and HMRC had served its full list of documents.

61. Mr Nawbatt did not agree that the shift in burden of proof described by Ms Lemos, or the difference between proving acquisition and abandonment of a domicile of choice, was material and referred to comments in *Barlow Clowes* which he said supported that. The arguments would be very similar and the scope of the factual enquiry and relevant evidence would be the same. It was hard to see which witnesses would not be called.

62. We have concluded that we should not attach material weight to the potential impact on pre-trial preparation or the length of the case. Quite apart from the fact that Ms Lemos was understandably reluctant to give any specific details of the likely impact, we agree with HMRC that this is the appellant's case and it is always open to him to decide how to present it and how much if any evidence to present. Whilst we can see that it may be useful to the appellant to have a resolution on the domicile of origin issue when deciding how much evidence he should put together for the subsequent hearing, this is up to the appellant: it is his case and it is up to him and his advisers how to frame it. Knowing the answer to the domicile of origin point first seems to us to be a procedural advantage not dissimilar to the kind considered by Nugee J in the *Hargreaves* case referred to at [12] above. The extent of evidence prepared will, as is often the case, depend on a number of factors including the

resources the appellant chooses to deploy and an assessment of the strength of different aspects of the case. In addition, the principal witness statement, namely the appellant's own, has already been prepared.

63. We also agree that the scope of the factual enquiry as between England and Switzerland would be the same whatever the outcome on domicile of origin. The only way in which it can in practice be shown that the appellant has lost (or possibly never had) a domicile of choice in the UK or has acquired a domicile in Switzerland is to demonstrate his level of attachment to Switzerland as compared to the UK. This is not a case of a "wanderer" who abandons his domicile of origin by leaving his home country and not settling elsewhere. We also note the comments of Arden LJ in *Barlow Clowes* at [89] to [96] disagreeing with the proposition that it was easier to change from one domicile of choice to another than to change to a domicile of choice from a domicile of origin, and going on to say that any change in domicile should be treated as a serious allegation because of the consequences that it had.

64. It does not seem likely that determining domicile of origin first would shorten the overall time required for hearing the case, both by the FTT and potentially on appeal. Splitting the case will inevitably lead to some repetition or overlap in opening and closing submissions. This would be all the more so if the tribunal was differently constituted, and whilst efforts could be made to avoid that it might be unavoidable. As already indicated it is also by no means clear that fewer witnesses would be called or that their evidence would be less extensive. In addition, at least one witness is likely to be required to give evidence at both hearings.

The overriding objective

65. We would make two further points. First, we think that it is also relevant to bear in mind the length of time the dispute has already been going on and the risk of evidence going stale. Whilst this last point is most obvious in relation to domicile of origin (and so could be regarded as a reason to hold a preliminary hearing) the risk also applies to the rest of the case. Since we have concluded that, overall, a preliminary hearing is likely to delay matters further we think this weighs heavily in the overall balancing exercise of what is fair and just in this case.

66. Secondly, we should say something more about the possible motivation behind any decision of the appellant to walk away after a determination of his domicile of origin. Ms Lemos submitted that one potentially relevant factor was that, should the appellant decide to return to the UK in the future, his domicile of origin could become relevant again, particularly in the light of recently proposed changes to the law of domicile for tax purposes.

67. The overriding objective of the tribunal is to deal with cases fairly and justly. However, this must relate to the dispute before the tribunal. That dispute relates to the appellant's domicile for the tax years 2000-01 to 2007-08. There is no statutory basis for the tribunal to consider a separate dispute over domicile of origin. We are concerned that to direct a separate or preliminary hearing could effectively allow that

to occur. Whilst it may be useful to the appellant to have an independent determination of his domicile of origin, we do not think it would be an appropriate use of tribunal time to facilitate that unless it is a necessary consequence of action that has another clear justification.

Conclusion

68. In remaking the decision we have concluded that the balancing exercise comes out in favour of refusing to direct a separate or preliminary hearing on the question of the appellant's domicile of origin. The power should be used sparingly, particularly as regards an issue of mixed fact and law, and there is no clear justification to exercise it here. A conclusion on the appellant's domicile of origin will not dispose of the whole case or a separate aspect of the case. It is not a succinct point in the circumstances of the case. Overall we think it would be likely to increase the time and resources, including tribunal resources, needed to resolve the dispute. The prospect of additional delay is a material factor. We are also not persuaded that the difference it might make to the appellant's pre-trial preparation is a material consideration here given that the factual enquiry will remain the same and the appellant always has a choice about the evidence he wishes to present. Finally, whilst the appellant might walk away that is wholly uncertain, and to accord particular weight to it would effectively risk tribunal resources being employed for purposes other than those for which it has jurisdiction, namely to resolve the actual dispute before the tribunal.

Disposition

69. The appellant's application for the domicile of origin issue to be determined as a preliminary issue is dismissed.

TIMOTHY HERRINGTON

SARAH FALK

UPPER TRIBUNAL JUDGES

RELEASE DATE: 23 November 2015