

# legal update

Your digest of recent chancery and commercial cases

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## Old values in a new world: domicile of choice vs domicile of origin

Robin Mathew, Q.C.



### Introduction

Two new cases demonstrate how difficult, and elusive, the law of domicile has become. In the modern era of easy migration by a prosperous middle class, its archaic rules complicate income tax, capital gains tax and inheritance tax for emigrant and immigrant – as well as many other significant legal rights and obligations.

In *Agulian v Cyganik* [2006] EWCA Civ 129, the Court of Appeal held that a Greek Cypriot who worked and lived in England from the age of 19 until his death at the age of 63 had not obtained a domicile of choice here. In *Allen v HMRC* [2005] STC (SCD) 614, a Special Commissioner held (for the purposes of inheritance tax) that an English woman, born near Newcastle, had not revived her domicile of origin (having obtained a domicile of choice in Spain) when she voluntarily spent her last six years, the final few incapacitated, with her only relatives near that town.

In both cases, the party which asserted a change of domicile failed to discharge the burden of proof.

### The burden of proof

The *Agulian* case confirmed earlier authorities that "... *the necessary intention must be clearly and unequivocally proved*" and that the domicile of origin is more enduring than a domicile of choice. Although the formula of proof beyond reasonable doubt is often used to describe the test, it is enough that the conscience of the court is satisfied by the weight of the evidence.

### The *Agulian* case

The facts were that personal representatives appealed from a decision that Mr. Andreas Nathanael had been domiciled in England at the date of his death. The successful appeal meant that

the English court had no jurisdiction to entertain a claim by his mistress and later fiancée Renata under the Inheritance (Provision for Family and Dependents) Act 1975.

After a broken engagement in Cyprus, where he had been born, Andreas moved to England at the age of 19. He died there in February 2003 at the age of 63. He left Renata £50,000 out of his estate sworn at £6,527,362.

Throughout his adult life, Andreas lived in London. He lived the life of a Greek Cypriot expatriate. He watched Greek television, he ate Greek food, he moved among expatriate Greek (and sometimes Polish) communities. He kept his Cypriot identity card. He bought some land in Cyprus. However he did have a British passport at all material times and acquired a substantial amount of property in London. For some time he had a relationship with an English woman and fathered a child, whom he took to live in Cyprus; but later she and her mother returned to live with him in London. That relationship ended in 1992 and in 1993 he met Renata who worked as a cleaner at an hotel, which he owned and ran. They began a relationship and lived as husband and wife for the rest of his life. In 1995 he made his will and left Renata the £50,000. They became engaged in 1999 and intended to marry in Easter 2003. But, of course, he died just before that might have happened.

The Court of Appeal said that the High Court had laid far too much weight on his relationship with Renata without explaining why it made all the difference. The whole focus of Andreas' life was his Greek Cypriot culture and his inarticulate intention to return there some time – a moving horizon. But for that, one would have thought that Renata had a very strong case indeed because his whole active life was intimately bound up with England, rather than Cyprus.

■ **The Allen case**

This was an inheritance tax case. If Mrs. Johnson had a domicile in England at her death, then her estate was liable to inheritance tax. If not, then it was not (as the assets were foreign-situated property). Although she was born in England, she left at 12 months to live in the United States. Her mother died there and she returned and was looked after by her grandmother in England. In 1951, aged 29, she married and the couple moved abroad in 1953. Her husband worked for Shell and spent his working life in such places as the West Indies, Venezuela, Indonesia and Nigeria. They never owned or rented any property in the United Kingdom or indeed elsewhere until he retired in 1982, when they settled north of Barcelona. They bought a house and obtained residency permits. They spoke Spanish and the area contained few if any expatriates. They lived, in fact, the life of the locals. They developed the house and planted a fine garden. They keenly embraced Spanish life and culture – watching Spanish television and reading Spanish newspapers. At that point they had clearly obtained a domicile of choice in Spain.

In 1996, Mrs. Johnson's husband died. Following his death, Mrs. Johnson (who suffered from Parkinson's Disease) went to live with her half-sister and her husband in Newcastle. She only brought with her some clothes and jewellery. She left all her other possessions in the house in

Spain and the house and garden were maintained in a state of readiness at all times for her return and occupation. Even her pets were looked after by the locals and fed. She went to Spain for holidays until 1999 when she became unable to travel. Her investments and bank accounts were all held overseas. In 2001, Mrs. Johnson purchased the house adjoining her half-sister's. She intended to renovate it so that she could be looked after there. She still kept the house in Spain. The evidence was that the purchase was not an irreversible decision as to residence. In 2002, Mrs. Johnson died. The works on the house in Newcastle were not complete.

HMRC argued that her domicile of origin had revived even though they agreed that, in or about 1982, Mrs. Johnson had acquired a domicile of choice in Spain. It was also agreed that she had retained it at least until 1996. The burden lay upon HMRC to demonstrate that she had abandoned her domicile of choice. Given the adhesiveness of a domicile of origin, that should not have been too great a difficulty. It would have to be demonstrated that she had both ceased to reside in Spain and ceased to intend to reside there permanently. But the fact was that Mrs. Johnson had lived virtually all her married life and most of her adult life outside England. A telling factor was the extent to which the house in Spain was maintained ready for her occupation, once the visits to Spain ceased (due to her ill health). She lived in the home of her

Newcastle relatives with little or few possessions. She described herself as a "visitor". It was clear, from the evidence, that she regarded her home as being in Spain and not in England. The purchase of the house in Newcastle was not an expression of an intention to abandon the possibility of returning to Spain, the Special Commissioner found. Her lack of "affinity" with the United Kingdom was relevant to the analysis. Accordingly HMRC failed to establish that she had abandoned her domicile of choice in Spain.

As the Special Commissioner emphasised, the burden of proof rested on HMRC and the standard of proof is high. The fact was that Mrs. Johnson intended to return (even though that was a faint hope at the end) to her house in Spain. The acquisition of the house in Newcastle was not significant. The Special Commissioner gave little weight to the fact that Mrs. Johnson clearly realised, towards the end of her days, that she had no prospect of returning to live in Spain as a resident of it. He said that she maintained her intention to return towards the end of her days and that was sufficient. HMRC, he held, had failed to discharge the burden upon them to demonstrate that Mrs. Johnson had ceased to have such an intention.

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**Trademarks: was FCUK lawful?**

French Connection Limited (FCL) needs no introduction as a well known High Street fashion retailer. From about 1998 FCL used the trade mark FCUK extensively in the U.K. The use was of both the trade mark alone and in short advertising strap lines or promotional statements obviously designed to make an impact on the reader. FCUK became a highly valuable brand name for FCL.

When FCUK was created, FCL was

operating in three separate divisions - one in the U.K., one in the United States and one in Hong Kong. The explanation given by FCL for the adoption of FCUK is that it was first used as an identifier for the U.K. division (i.e. as opposed to FCUS and FCHK), after which the advertisers saw its potential and developed the brand.

In December 1998 FCL was granted by the U.K. Trade Mark Registry a

registration of FCUK for certain goods in Class 14 (of the trade mark registration system), in summary watches, jewellery, and packaging for them. The trade mark is one of a number of U.K. registrations and Community Trade Mark registrations for FCUK either on its own or as part of a trade mark for a wide range of goods and services. Almost six years later, in September 2004, a Mr. Dennis Woodman applied to the Registry for a



Malcolm Chapple

declaration that the trade mark was invalid on the ground that it was contrary to section 3(3)(a) of the Trade Marks Act 1994, i.e. that its continued registration was contrary to accepted principles of morality. This trade mark was picked as an example for a test case, the attack being on the trade mark itself used in any circumstances, and not in relation to any particular use.

It is probably hard for anyone who has walked down a busy shopping street on a sunny day not to have come across FCUK, either in a shop window or used in a slogan across a T-shirt. FCUK has undoubtedly been very successful as an indicator of the origin of the goods which were sold under or by reference to it. An indication of that kind is the fundamental purpose of a trade mark. The advertisers were also clearly ingenious in the creation of the strap lines and statements which were a part of the campaign using FCUK.

But there can be no doubt that amongst the public in the U.K. there was an undercurrent of dissatisfaction with the use of FCUK. FCUK was successful and was developed only because of its close association with a highly offensive swear word. To the human eye, the switch of the middle two letters to make FCUK does not disguise the association. Mr. Woodman had no financial interest in obtaining a declaration of invalidity, but pursued his application solely because he felt offended by the use of FCUK and was prepared to try to do something about it. In particular he was unhappy that the use of FCUK was given a 'stamp of respectability' by the official registrations.

The Registry refused Mr. Woodman's application. Mr. Woodman appealed to the "Appointed Person", under the specific trade mark appeals regime, and in May 2006 Mr. Richard Arnold Q.C., the Appointed Person for this appeal, confirmed the Registry's decision in a comprehensive analysis of the law in this area.

What was the basis of Mr. Arnold's decision? Section 3(3)(a) is derived from Article 3(1)(f) of Council Directive 89/104/EC of 21 December 1988 (and so the law has European wide relevance).

It reads, "*A trade mark shall not be registered if it is ... contrary to ... accepted principles of morality*".

This is a simple statement but, inevitably, there is substantial difficulty in applying it. Where is this dividing line between a registrable and unregistrable trade mark? As counsel for Mr. Woodman submitted at the hearing in the Registry, does FCUK pass the test like DICK & FANNY (granted a Community registration) or fail like TINY PENIS and FOOK (both refused U.K. registrations)?

Mr. Arnold's guidance for this test can be summarised as follows:

- The applicability of section 3(3)(a) depends on the intrinsic qualities of the trade mark itself and not on the conduct of the applicant for registration.
- The applicability of section 3(3)(a), as with the other 'absolute grounds' of objection under the 1994 Act, must be assessed as at the date of the application for registration, i.e. December 1998.
- Section 3(3)(a) must be interpreted and applied consistently with Article 10 of the E.C.H.R. So registration should be refused only where this is justified by a pressing social need and is proportionate to the legitimate aim pursued by the applicant for registration (with any real doubt being resolved by upholding the right to freedom of expression and thus permitting registration).
- Section 3(3)(a) must be applied objectively. Thus the personal views of the tribunal are irrelevant.
- While section 3(3)(a) may apply to a trade mark whose use would not be illegal, the legality or otherwise of use of the trade mark is a relevant consideration.
- For section 3(3)(a) to apply, there must be a generally accepted moral principle which use of the trade mark contravenes.
- Mere offence to a section of the public, in the sense that they would consider the trade mark distasteful, is not enough for section 3(3)(a) to apply.

- Section 3(3)(a) does apply if the use of the trade mark would justifiably cause outrage, or would be the subject of justifiable censure, amongst an identifiable section of the public as being likely significantly to undermine current religious, family or social values.
- In the case of a trade mark of a word only, it is necessary to consider the applicability of section 3(3)(a) on the basis of any usage which the public makes of the relevant word. Thus a slang meaning of a word may lead to an objection even if its normal meaning does not.
- A trade mark which does not proclaim an opinion, contain an incitement or convey an insult is less likely to be objectionable than one which does.
- Different considerations apply to trade marks in different categories (such as swear words which may contravene social or family values, and words with religious connotations which may contravene respect for religious beliefs).

Applying this guidance to the evidence before him and after referring to the U.K. registration for the trade mark CNUT, Mr. Arnold dismissed the appeal with the following words:

*"... the intrinsic qualities of the mark FCUK are not such as to render it objectionable.*

*It is not a swear word even though it can be used and has been used to evoke a swear word".*

Malcolm Chapple specialises in telecoms, commercial and intellectual property law, and was counsel for Mr. Woodman.

He is recommended by Chambers & Partners 2007 as "a senior junior who knows his stuff".



The decision of Rimer J. in *Corbett v Bond Pearce* [2006] EWHC 909 (Ch) and the protracted litigation leading to it illustrate a difficult problem stemming from the House of Lords decision in *White v Jones* [1995] 2 AC 207.

### ■ Essential facts

In February 1989 the testatrix made a will ("the February Will") under which she devised one of her farms, Tolcarne, to her nephew, William Corbett ("William"). She also devised her residuary estate to William and his sister Sarah in equal shares. Later, in September 1989, she decided to make a lifetime gift of Tolcarne to William and change her will. She instructed Mr. Nicholson of Bond Pearce to act as her solicitor. He produced a draft will in which she devised to William her interest in another property and left her residuary estate to Sarah's two sons, James and Jonathan, in equal shares ("the September Will").

Mr. Nicholson advised the testatrix that she could safely execute the will before she had effected the gift, and leave it undated, on the basis that it would be effective when the gift was subsequently made. She therefore executed the September Will on about 29 September 1989. The gift was effected in due course on 25 December 1989 and Mr. Nicholson then dated the will 26 December 1989.

### ■ The probate action

William began proceedings in which he sought probate of the February Will and challenged the validity of the September Will on the ground that the testatrix did not have the necessary immediate testamentary intent when executing it. In January 1996 the Court of Appeal pronounced against the September Will and in favour of the February Will on this ground ([1998] Ch 388). The testatrix did not intend the September Will to have immediate effect at the time of its execution. While it is possible to have a will which is on its face conditional, it is impossible, and contrary to section 9 of the Wills Act 1837, for a will to be subject to an unstated condition which has to be proved by extrinsic evidence. The Court of Appeal ordered the costs of all parties both in that court and below to be paid out of the estate.

### ■ The *White v Jones* claim

Following the House of Lords decision in *White v Jones*, James and Jonathan, the disappointed residuary legatees under the September Will, began proceedings for negligence against Bond Pearce. That claim was compromised by agreement in December 1997. The claimants received a sum of £275,000, which represented the full estimated value of the residuary estate under the September Will undiminished by the costs of the probate proceedings. Bond Pearce therefore effectively compensated the claimants for those costs which would not have been incurred but for their negligence.

### ■ William's claim

William as administrator also commenced proceedings for negligence against Bond Pearce on behalf of the estate. Liability was admitted and in May 2000 Eady J. determined that the estate was entitled to recover damages for the loss suffered by it, including in particular the costs of the probate action (*Corbett v Bond Pearce* (2001) PNL R 24). He held that the purpose of the solicitors' retainer had been to procure a legally effective will, which they had negligently failed to do. One of the consequences of that failure was that the estate had been subjected to the costs of a probate action which would not otherwise have been incurred. He also held that it was not a case where the solicitors were being subjected to a double liability or beneficiaries were obtaining double recovery of the same loss. The loss suffered by the disappointed beneficiaries was not the same as that suffered by the estate and the damages paid to them had not gone to the estate.

In April 2001 the Court of Appeal reversed the decision of Eady J. (*Corbett v Bond Pearce* [2001] 3 All ER 769). It held that the solicitors' duty to the testatrix was only to prevent loss which those who would be interested in her estate, whether as beneficiaries under the September Will or as creditors, would suffer if effect were not given to her latest testamentary intentions. Their duty did not extend to preventing loss to beneficiaries under the February Will in that event.

Although the loss claimed by the estate was technically different from that recovered by the disappointed beneficiaries, in substance it was the same. It held that the estate's claim should fail as there would otherwise be double recovery of the same loss. Had the claim succeeded Bond Pearce would have had to compensate both the *White v Jones* claimants and the estate in respect of the costs of the probate proceedings.

The court's order gave rise to subsequent difficulty and was subsequently referred to in unflattering terms by Brooke L.J., Rimer J. and Master Moncaster. In July 2004 the court amended its previous order under the slip rule. The gist of the amended order, which gave rise to quite as much difficulty as the original one, was that, if the assets of the estate were not sufficient to provide for payment of (i) the costs of the probate action and the other loss attributable to the negligence of Bond Pearce, (ii) the creditors and (iii) all legacies under the *February Will*, William as administrator was entitled to recover damages in the amount required to enable the creditors and legacies under the *September Will* to be met in full.

### ■ The decision of Rimer J.

Rimer J. assessed damages in accordance with the amended order although he could not understand its rationale. In particular he could not understand why an investigation of the ability to pay creditors and satisfy legatees under the *February Will* was relevant if the measure of damages was then to be calculated by reference to the ability to satisfy the different legacies provided in the *September Will*. Nor could he understand why damages should be assessed at all by reference to an inability to satisfy the legacies in the September Will, which was a nullity. However, he proceeded to assess damages in accordance with the formula in the order. In round figures, he found that the extent of the loss to the estate attributable to the negligence of Bond Pearce totalled £215,000. The total liability in respect of legacies he found to be £12,000. The available assets were £214,000, so that he assessed damages, subject to possible adjustments for interest, at

## White v Jones - whatever next? ~ continued

£13,000 (£215,000 + £12,000 - £214,000).

### Conclusions

The root cause of the difficulties and confusion that arose here is the decision in *White v Jones* itself. A bare majority of the House of Lords in that case decided to fashion a remedy, to use its own words, in order to meet a perceived injustice to disappointed beneficiaries. Lord Goff of Chieveley said (page 269H), "*If by any chance a more complicated case should arise to test the precise boundaries of the principle in cases of this kind, that problem can await solution when such a case comes forward for decision*". Several more complicated cases,

including *Carr-Glynn v Frearsons* [1999] Ch 326 and this one, have indeed arisen and courts have apparently found it extremely difficult to provide solutions to the resulting problems which are both principled and satisfactory.

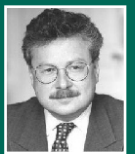
Eady J. was clearly correct as a matter of principle in his decision that it was within the scope of Bond Pearce's duty to avoid subjecting the estate to the costs of a probate action. His conclusion that the claim of the estate to recover such costs should be allowed, regardless of whether disappointed beneficiaries also had a claim, followed from that. It is perhaps unsurprising that the Court of Appeal sought to avoid that result since it

involved Bond Pearce being liable twice for what was in substance, if not in strict legal theory, the same loss. Unfortunately its alternative approach, even if one ignores the obvious error identified by Rimer J., lacks logic and principle. If allowing *White v Jones* claims results in the complexities and illogicalities that arose here, one can ask whether the price of fashioning a remedy for disappointed beneficiaries in a few hard cases is not too high.

Rodney Stewart Smith specialises in the areas of trusts, tax, land and professional negligence. He is praised by Chambers & Partners 2007 for his "excellent judgement calls".

## When not to bring a section 459 petition:

### *Wilkinson v West Coast Capital* [2005] EWHC 3009 (Ch)



Michael Roberts

This keenly contested unfair prejudice petition, set against the background of corporate junketing during the 2003 Monaco Grand Prix weekend at exotic venues such as Nicky's Beach Bar in St. Tropez and the Amber Lounge Nightclub in Monte Carlo, is an interesting read and contains an excellent review by Warren J. of the "no conflict" and "no profit" rules governing fiduciaries.

The facts were as follows. P owned a 40% shareholding in the company. Most of the remaining shares were held by a partnership. In 2003, through a subsidiary controlled by it, the partnership purchased BG Ltd. The company later became insolvent. P alleged that BG Ltd should have been acquired by the company because the opportunity to acquire it had been a corporate opportunity belonging to the company and the acquisition had been agreed by the shareholders. He claimed that the failure of the company to purchase BG Ltd constituted unfair prejudice within section 459 of the Companies Act 1985. He claimed, further, that there had been a breach of the fiduciary duties owed to the company by its other directors. He brought a petition under section 459 seeking an order that his 40% shareholding be acquired by the partnership. He claimed that his shares should be valued as at the date on which the partnership had acquired BG Ltd and on the hypothetical basis that the company had done so, so that the value of his shares would reflect the value of the combined business.

The petition failed. Whilst it was clear that the fact that a company might have been practically unable to take up an opportunity did not exonerate a director who took it for himself, Warren J. held that here there were constitutional restrictions on what the company could do; and an activity precluded by that restriction could not be an activity within the scope of the company's affairs. Hence if the directors, personally, carried out that activity, they were not doing something so related to the affairs of the company that it was being done in the course of their management and in utilisation of their opportunities and special knowledge as directors.

So in these particular circumstances, neither the company nor the petitioner as a shareholder in it had suffered any prejudice for the purposes of section 459 by reason of the company's acquisition of BG Ltd. There was also no unfair prejudice arising out of the way in which the company's affairs were conducted after the acquisition.

It is perhaps this last aspect of the case which deserves particular mention. Unfair prejudice petitions often set sail on a tide of "hot" allegations based on breach of fiduciary duty, focused on "no profit" and "no conflict" principles, by diversion of a corporate opportunity. But, as this case shows, it is important to look at the allegations in the wider commercial context of what actually happens to the corporate opportunity.

Even if the acquisition of BG Ltd by the

partnership had triggered the "no profit" rule, the mere acquisition of the commercial opportunity is not automatically a breach of duty and therefore does not automatically make out the case of unfair prejudice. The application of the "no profit" rule gives rise to certain consequences, one of which would have been that the partnership's subsidiary would have held any profit for the company. As BG Ltd was subsequently sold for a loss, there was in fact no profit to be accounted for and there was therefore no breach of duty by the directors of the company in not pursuing the subsidiary for an account of profits. The sale at a loss would have produced the same result if, by way of the "no conflict" rule, the subsidiary had been regarded as a constructive trustee for the company.

Shareholders hot under the collar at what they perceive as breaches of fiduciary duty on the part of fellow shareholders or directors, or a failure to disclose interests (fully or at all), would do well to consider what the impact actually is on the company in terms of the bottom line. Absent an identifiable loss reflected in diminished value in the company, or an accretion in value that is denied it, prejudice will not be made out.

Michael Roberts is a chancery commercial litigator, specialising in company, insolvency, civil fraud and property matters. He has frequently appeared for both petitioners and respondents on section 459 petitions.

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