



Appeal number: TC/2015/06287
TC/2015/06289
TC/2015/06291
TC/2015/06292

INCOME TAX, CAPITAL GAINS TAX – domicile – whether four appellants have a domicile in the UK – consideration of their father’s and grandfather’s respective domiciles – appeals dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**FREDERICK HENDERSON
GEORGE HENDERSON
CORDELIA HENDERSON
ARABELLA HENDERSON**

Appellants

- and -

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE & CUSTOMS

Respondents

**TRIBUNAL: JUDGE JONATHAN RICHARDS
JOHN ROBINSON**

Sitting in public at The Royal Courts of Justice, Strand, London on 6 to 8 June 2017

Rupert Baldry QC, instructed by Forsters LLP for the Appellants

Akash Nawbatt QC and Rory Cochrane instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellants are the four children of Nicholas Henderson. They are appealing, under s42 of the Income Tax (Earnings and Pensions Act) 2003 and s207 of the Income and Corporation Taxes Act 1988, against HMRC determinations that they have all been domiciled in the United Kingdom since their birth.¹

2. The parties were agreed that the appeals could be determined by reference to the following questions:

(1) Had Ian Henderson, the appellants' grandfather, acquired a domicile of choice in Brazil when Nicholas Henderson, the appellants' father, was born? (If he had not, then he would have had a UK domicile when Nicholas Henderson was born which would have resulted in Nicholas Henderson obtaining a domicile of origin in the UK on his birth. That in turn would result in the appellants obtaining a domicile of origin in the UK when they were born, in which case the appeals should be dismissed.)

(2) If Ian Henderson had acquired a domicile of choice in the Brazil by the time Nicholas Henderson was born, did he abandon that domicile of choice (so that his UK domicile of origin revived) before Nicholas Henderson turned 16? (As noted at [(1)] above, if Ian Henderson had a UK domicile when Nicholas Henderson was born, then it was common ground that the appellants would have a UK domicile on their birth.)

(3) If Ian Henderson had acquired a Brazilian domicile of choice by the time of Nicholas Henderson's birth which he had not abandoned before Nicholas Henderson turned 16 (so that Nicholas Henderson had a Brazilian domicile of origin), had Nicholas Henderson acquired a domicile of choice in the UK at the time of any appellant's birth? (If he had, then that appellant would have obtained a UK domicile of origin on birth and that appeal should be dismissed).

Evidence

3. Nicholas Henderson gave evidence on behalf of his children and Mr Nawbatt cross-examined him. He had previously sworn a statutory declaration in support of his children's claim to be domiciled outside the UK. Evidence in the form of a witness statement from Brian Carter, a friend of Nicholas Henderson, was not challenged and we have accepted that evidence as true.

4. Mr Nawbatt has suggested that Nicholas Henderson's evidence was in places unreliable and misleading. There was an error in his statutory declaration in which he

¹ For tax years 2008-9 onwards, a new statutory regime governed appeals relating to questions of domicile (and involved taxpayers having to appeal against closure notices that HMRC issued). Therefore, strictly this appeal can only determine the appellants' domicile for tax years prior to 2008-09 although little is likely to turn on this since HMRC's position is that the appellants have been domiciled in the UK since birth and there was no suggestion that anything happened in 2008-9 that would have altered their domicile.

said that his wife had been born and brought up in New Zealand whereas, in fact, she had been both born and brought up in the UK. That was a serious error in the context of the issues arising in this appeal not least since the error was made in a document whose evident purpose was to persuade HMRC that his children had a non-UK domicile. We will not, however, determine that the error was made dishonestly as we do not think we had sufficient evidence of the circumstances in which the statutory declaration was prepared and sworn to make such a serious finding. In Nicholas Henderson's favour is the fact that he did not seek to cover up the error in cross-examination. Against him is the fact that the error was such a fundamental one on a matter that was within his knowledge, but not necessarily within that of HMRC. Nevertheless, it is absolutely clear that the statutory declaration was not correct in this respect. Later in this decision, we will give examples of aspects of Nicholas Henderson's evidence that we found inconsistent, and where we consider that he overstated matters. Those instances, coupled with the error in the statutory declaration, have affected our perception of his evidence and we have not been able to accept all of that evidence. However, we would not characterise his evidence as "misleading" since he gave clear and honest answers in cross-examination which included accepting that he had, on occasions, overstated matters.

5. The appellants did not rely on any other witness evidence that was tested in cross-examination, although we have had regard to statutory declarations that Ian Henderson, and his wife Veronica Henderson, have sworn. Mr Nawbatt invited us to draw adverse inferences from the fact that other potential witnesses had not been called and we will consider that point later in this decision.

6. We also had available to us a helpful bundle of documentary evidence.

The law on domicile

Overview

7. There was little dispute between the parties as to the applicable law and they agreed on the following general propositions of law (which we will amplify later in this decision):

(1) As a matter of law, no person can be without a domicile or have more than one place of domicile at the same time for the same purpose.

(2) When they were born, each appellant, being a legitimate child, obtained a domicile of origin that was the same as the domicile of their father, Nicholas Henderson, at the time of the relevant appellant's birth.

(3) Until they attained the age of 16, each appellant had a domicile of dependency that was the same as the domicile of Nicholas Henderson.

(4) Similarly, when Nicholas Henderson was born, he obtained a domicile of origin that was the same as the domicile of his father, Ian Henderson, at the time of Nicholas Henderson's birth. Until he attained the age of 16, Nicholas Henderson had a domicile of dependency that was the same as the domicile of Ian Henderson. On turning 16, Nicholas Henderson's

former domicile of dependency became his own domicile that could be altered by his own actions (rather than those of his father).

5 (5) Both Nicholas Henderson (after he turned 16) and Ian Henderson could acquire a new “domicile of choice” by the combination of residence in a territory combined with the intention to reside in that territory permanently or indefinitely².

10 (6) Nicholas Henderson (after he turned 16) and Ian Henderson could abandon any domicile of choice that they acquired by both (i) ceasing to reside in the relevant territory and (ii) ceasing to intend to reside in that territory permanently or indefinitely. If any domicile of choice is abandoned, either (i) a new domicile of choice is acquired or, if not, (ii) the domicile of origin revives.

The law relating to the acquisition of a domicile of choice

15 8. The parties were agreed that the law was correctly summarised in the 15th Edition of *Dicey, Morris and Collins on The Conflict of Laws* (“Dicey”) as follows:

Rule 10 – 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.

20 9. In *Udny v Udny* (1869) LR 1 Sc & D 44, Lord Westbury amplified on the nature of the intended permanent residence as follows:

25 There must be a residence freely chosen, and not prescribed or dictated by 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 ... can be inferred, the fact of domicil is established.

30 10. In the same case, Lord Hatherley equated this with the concept of “settling” in a country. In *Barlow Clowes International Limited (and others) v Peter Henwood* [2008] EWCA Civ 577, Arden LJ held that there had to be a “singular and distinctive relationship with the country of the supposed domicile of choice”. Other cases (such as *Bell v Kennedy* (1868) LR 1 Sc and Div 307) had emphasised the importance of an intention to end one’s days in the relevant country. Arden LJ explained the relevance of that as follows:

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.

² None of the appellants was aged over 16 at times material to their appeals and therefore their ability to acquire domiciles of choice is not relevant to this appeal.

11. In *Re Fuld's Estate (No 3)* [1968] P 675, Scarman J (as he then was) amplified on the nature of the intention that was required:

5 If a man intends to return to the land of his birth upon a clearly foreseen and reasonably anticipated contingency, e.g. the end of his job, the intention required by law is lacking; but if he has in mind only a vague possibility, such as making a fortune... or some sentiment about dying in the land of his fathers, such a state of mind is consistent with the intention required by law.

10 12. More generally, the parties were agreed that the approach to determining whether a domicile of choice has been acquired is correctly stated in extracts from Dicey that were quoted with approval in *Barlow Clowes*. Those passages indicate that:

- 15 (1) Any circumstance that is evidence of a person's residence, or intention to reside permanently or indefinitely in a country, must be considered in determining whether that person has acquired a domicile of choice; and
- (2) In determining whether a person intends to reside permanently or indefinitely, a 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 is precarious.

The law relating to the abandonment of a domicile of choice

20 13. The parties were agreed that the following statement from Dicey was an accurate statement of the law:

- (1) 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.
- 25 (2) When a domicile of choice is abandoned, either:
- (i) a new domicile of choice is acquired; or
- (ii) the domicile of origin revives.

30 14. Thus, there is some difference between the process of acquiring a domicile of choice and abandoning it. In order to acquire a domicile of choice, it must be shown that the relevant person both resided, and intended to reside permanently in a particular country. However, a person can abandon a domicile of choice by ceasing to reside there, and ceasing to intend to reside there permanently or indefinitely, without necessarily needing to show that a new domicile of choice has been acquired as, if no new domicile of choice is acquired, the domicile of origin simply revives.

35 15. In *Re Flynn (deceased)* [1968] 1 All ER 49 Megarry J considered that the requisite intention to abandon a domicile of choice was established if the relevant person simply had an absence of an intention to return to the country. It was not necessary to meet the much higher threshold of showing that there was a positive intention never to return. However, the absence of the intention to return must be unequivocal and a

person who is in two minds does not have the necessary intention (see the judgment of Lewison J as he then was in *Shaffer v Shaffer and others* [2004] EWHC 188 (Ch).

Burden and standard of proof and other evidential matters

16. Frequently the subject of a domicile dispute (often referred to in decided cases as the “propositus”) will make statements or declarations as to what he or she intends.
5 Dicey says of such declarations:

Declarations of intention may be given in evidence by way of exception to the hearsay rule. The weight of such evidence will vary from case to case. To say that declarations as to domicile are the ‘lowest species of evidence’ is probably an exaggeration.
10 The present law has been stated as follows: “Declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by carefully considering the persons to whom, the purposes for which, and the circumstances in which they are made and they must
15 however be fortified and carried into effect by conduct and action consistent with the declared expressions.

17. The Tribunal has, under its rules, a general discretion to admit hearsay evidence in any event. I will, therefore, consider evidence in the form of declarations of intent that
20 has been put forward in this appeal, but will apply the approach outlined above in assessing its weight.

18. Mr Nawbatt submitted that a number of other witnesses could have been called to support the appellants’ arguments as to the domicile of Ian Henderson and Nicholas Henderson. Mr Baldry said that there were good reasons why other witnesses were
25 not called and we will consider that point later in the decision. However, for the time being it is relevant to note that Mr Nawbatt referred to an old decision of English common law (*Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969) which had been referred to in Australian authorities including *Jones v Dunkel* (1959) 11 CLR 298 and
30 *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229 and which Mr Nawbatt said shed some light on how we should weigh the evidence if we considered that the appellants chose not to call witnesses that they could have called.

19. In *Blatch v Archer*, Lord Mansfield said:

... it is certainly a maxim that all evidence is to be weighed according to the proof which was in the power of one side to
35 have produced, and in the power of the other to have contradicted.

20. Mr Nawbatt submitted that the Tribunal should apply this maxim in the following way:

(1) The Tribunal should ask itself (i) would the “missing witnesses” have
40 been expected to be called by the appellants rather than HMRC (which would only be the case if they were available to give evidence), (ii)

whether those witnesses' evidence would elucidate a live matter at the hearing and (iii) whether those witnesses' absence is unexplained.

5 (2) If, having asked the questions set out above, the Tribunal concludes that there is no good explanation for the appellants' failure to call potentially relevant witnesses, two distinct results flow. First, it would be open to the Tribunal to infer that the evidence of the "missing witnesses" would not have assisted the appellants' case. Secondly, if those witnesses' evidence would have gone to matters on which the appellants bore the burden of proof, the failure to call those witnesses could be taken into account as an adverse inference in deciding whether the appellants have discharged that burden.

21. The parties were agreed that the person seeking to establish a change in domicile bears the burden of proving that the change of domicile took place. The standard of proof is the ordinary standard of the balance of probabilities.

15 22. There was some discussion during the hearing as to whether a domicile of origin is particularly "adhesive" so that particularly strong evidence is needed to establish that a person has acquired a domicile of choice in place of a former domicile of origin. There is certainly some support for that proposition in the authorities. For example, in *Agulian and another v Cyganik* [2006] EWCA Civ 129, Lord Justice Longmore said:

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

25 23. However, it seems clear that statements as to the adhesiveness of a domicile of origin do not represent a separate free-standing rule of law, but rather an approach to the ascertainment of facts based around the proposition that a person's "native character easily reverts and that it requires few circumstances to constitute domicile in the case of the native subject than to impress the national character of one who is originally of another country" (in the words of Sir William Scott in *La Virginie* 5 Rob Adm 99). Arden LJ made this clear at [93] and [94] of *Barlow Clowes* (making the point that, if a person never had any real connection with his or her domicile of origin, it might be correspondingly easier to demonstrate that a replacement domicile of choice had been acquired). More generally, she said:

35 It seems to me that as a general proposition the acquisition of any new domicile should in general always be treated as a serious allegation because of its serious consequences... However, what evidence is required in a particular case will depend on the application of common sense to the particular circumstances.

40 24. Finally, the parties were broadly agreed that determining the domicile of Ian Henderson and Nicholas Henderson involved an analysis of events arising throughout their lives. As Lord Justice Mummery said in *Agulian*:

5 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.

15 We agree with Mr Baldry's observation that this passage is setting out an approach to the ascertainment of facts. Conceptually, looking back at the continuum of a person's life might not be as useful an approach where sudden, unexpected and dramatic changes took place. We have borne this in mind in considering, in particular, circumstances surrounding Ian Henderson's return to the UK in 1966.

20 **Findings of primary fact**

25 25. In this section, we will make findings of primary facts, consisting principally of a recital of events that have taken place in the lives of Ian Henderson and Nicholas Henderson. In subsequent sections, we will make findings as to what their respective intentions were at various points of time so as to enable us to reach conclusions as to their domicile.

1930 to 1966: Ian Henderson's birth, early life and move to Brazil

26. Ian Henderson is the son of Neil Brodie Henderson and the grandson of Brigadier-General Sir Brodie Haldane Henderson. He was born in 1930 and had a domicile of origin in England on birth³. He was educated at Eton College.

30 27. In 1957, Ian Henderson started to work for Parson & Crosland Ltd (the "Company"). This was a "family company" in the sense that some members of the Henderson family owned preference shares in the Company but we had no evidence as to the precise share structure of the Company, or who owned those shares so will not make any detailed findings on this issue.

35 28. The Company had business interests in South America. Nicholas Henderson said in his witness statement that "about half" of the Company's business was based in South America, particularly Argentina and Brazil and that was consistent with Ian

³ There was some suggestion at the hearing and in correspondence, that Brigadier General Sir Brodie Henderson might have been domiciled in Scotland at the time of Ian Henderson's birth. However, Ian Henderson's statutory declaration states that his father had an English domicile and we have concluded accordingly. In any event, nothing turns on this point for the purposes of this appeal.

Henderson's statutory declaration. We have therefore accepted Nicholas Henderson's evidence.

29. In 1960, the Company asked Ian Henderson to go to South America in order to become familiar with its operations there. That assignment was intended to last for 12 months. While in Brazil, Ian Henderson met Veronica Pain who would later become his wife. She was a Brazilian national who was born on 8 August 1940 in Rio de Janeiro and was therefore around 20 when she met Ian Henderson. Between the ages of 11 and 17, Veronica Pain had been educated at boarding school in the United Kingdom and Nicholas Henderson accepted that she would have been fluent in English when she met Ian Henderson.

30. Following completion of his 12-month assignment, Ian Henderson returned to the United Kingdom and continued to work for the Company. Some time in 1961, Ian Henderson returned to Brazil. He and Veronica Pain were married on 28 June 1961 at her local church, Santa Margarida Maria en Lago, in Brazil.

31. Shortly after their wedding, Ian and Veronica Henderson left Brazil for 5 months. In his witness statement, Nicholas Henderson described this absence from Brazil as an "extended honeymoon" but that during these 5 months, Ian Henderson also did some work for the Company in London. However, in his statutory declaration, Ian Henderson said:

Shortly after I was married in Brazil on the 28th June 1961 I returned to the UK to work in London.

While we are sure that Ian and Veronica Henderson would have enjoyed a honeymoon following their wedding, we have concluded that the primary purpose of the return to the UK related to the business of the Company.

32. In or around November 1961, Ian and Veronica Henderson returned to Brazil. Before leaving, they held what Nicholas Henderson described in his witness statement as a "farewell party" for Ian Henderson's family and friends in London who had not been able to attend the wedding in Brazil. However, this party is not mentioned in Ian Henderson or Veronica Henderson's statutory declaration. Therefore, while we accept that there was some kind of social event designed to mark the Hendersons' return to Brazil, we are not satisfied that this event was arranged because of a perception that they would never return to the UK.

33. Ian Henderson was a relatively young man at this time and he owned comparatively few valuable personal possessions. There was some inconsistency in the evidence as to which of these possessions he sold. Nicholas Henderson said in his witness statement that Ian Henderson sold "all of his personal possessions in the UK including his car". Ian Henderson's statutory declaration says that:

On moving to Brazil I disposed of those personal possessions which I did not take with me to Brazil, perhaps the most important of which was my car.

We consider the slightly different account in Ian Henderson's statutory declaration is more likely to be correct.

34. As noted at [28], the Company's business interests in South America were located in both Brazil and Argentina. In Brazil, the Company had offices in both Rio and Sao Paulo. There was little evidence as to how Ian Henderson divided his time between Brazil and Argentina or, when he was in Brazil, between Rio and Sao Paulo. Nicholas Henderson said in cross-examination that his father spent only "a few days at a time" in Argentina and we are prepared to accept this as an accurate recollection of what his father told him. However, it tells us relatively little about how much time in total Ian Henderson was spending in Brazil: for example, if he went to Argentina for three days at a time every week, he would be spending nearly half of his time in Argentina. Ian Henderson said in his statutory declaration that although business interests took him to other parts of South America, his permanent home was in Brazil and he spent the vast majority of his time there. Overall we have concluded that Ian Henderson would have had a permanent home in Brazil and spent most of his time there (although he travelled on business to other parts of South America). However, we are not in a position to make any findings as to how much time Ian Henderson spent in Sao Paulo, as compared to Rio.

35. Ian Henderson had permits entitling him to work, and reside, permanently in Brazil. He had a bank account in Brazil (which he described as his "main account") but kept a bank account in the UK into which dividends from his shareholding in the Company could be paid.

36. Ian and Veronica Henderson had three children while in Brazil: Lavinia (born on 9 May 1962), Nicholas Henderson (born on 3 May 1963) and James (born on 30 December 1964). Following his marriage, Ian Henderson had converted to Catholicism, his wife's religion, and all three children were baptised as Catholics.

37. While living in Brazil, Ian Henderson was instrumental in the development of Brazil's first ever squash court. It was not clear when this event took place. Nicholas Henderson's witness statement also refers to Ian Henderson being a founder member of the Sao Paulo Jockey Club. However, there is no reference to this in Ian Henderson's statutory declaration (although he did refer to his interest in horse-racing). We have therefore concluded that Ian Henderson had some involvement with the Jockey Club in Sao Paulo but without knowing the precise nature of that involvement, we are not satisfied that it was indicative of any particularly strong social links with Brazil.

38. While living in Brazil, the Henderson family lived in unfurnished rented accommodation in Sao Paulo. Veronica Henderson's family lived in Rio, some 250 miles away. Nicholas Henderson's witness statement suggests that a reason they had rented accommodation was that purchasing property in Brazil was both complex and expensive. However, neither Ian nor Veronica Henderson mention this point in their statutory declarations and Nicholas Henderson could not have had first-hand experience of the property market in Brazil in the early 1960s. Moreover, as noted at [46], shortly after returning to London, Ian Henderson was able to afford to buy a

property in a desirable part of London, so we are not satisfied that a lack of financial resources on its own could explain the decision not to purchase property in Brazil.

39. Nicholas Henderson said in his evidence that when he was a child in Brazil, he and his siblings “spoke Portuguese, not English, at home”. He said that they only
5 learned English after he moved to London (in 1966) and that their lack of English caused both him and his siblings difficulties when they started school in England. Moreover, he said that, even after they were living in London:

10 My parents continued to speak Portuguese at home until I was about 7 and, at one point, my siblings and I went “on strike” and insisted on only speaking English in order to improve our fluency.

Mr Nawbatt challenged this evidence saying that Nicholas Henderson left Brazil when he was 3½ years old and couldn’t remember much, if anything, of his life before then. He also noted that no corroborating evidence (from Ian or Veronica Henderson,
15 or from Nicholas Henderson’s siblings) had been given as to the language spoken at home.

40. We agree with Mr Nawbatt that Nicholas Henderson would have little detailed recollection of events before he was 3½ (indeed his statutory declaration refers to memories from this time as “vague recollections”). However, we accept that he
20 would have remembered events that happened when he was 7. If he was speaking Portuguese at home when he was 7 years old and living in London, we are quite prepared to accept that he was speaking Portuguese at home when he was 3½ and living in Sao Paulo. However, that does not mean that we accept that he and his siblings were only speaking Portuguese at home at any particular point. As we have
25 noted, Nicholas Henderson could not have a detailed recollection of events before he was 3½. Moreover, as noted at [45] below, from around May 1966, the Hendersons realised that they would shortly be moving to the UK and were enquiring about schools for their children. Knowing that their children would shortly be attending school in the UK, and both being fluent English-speakers, we do not accept that from
30 May 1966 they would have spoken only in Portuguese to their children.

41. By 1966, both Nicholas Henderson and his older sister, Lavinia, had been registered for a local school in Sao Paulo called Ofelia Fonseca College.

Ian and Veronica Henderson’s move to London in 1966

42. In November 1966, Ian and Veronica Henderson moved to London where they
35 have lived ever since. Neither Ian nor Veronica Henderson deal, in their statutory declarations, with events leading up to this move in any great detail. Neither of them say much about their lives after 1966 in their statutory declarations, although Nicholas Henderson, in his witness statement gave more detail on these aspects.

43. Both Ian Henderson and Veronica Henderson stated in their statutory declarations
40 that there were “management problems” at the Company in 1966. The finance director of the Company announced his intention to leave and the Company therefore needed a new executive director in the UK. We accept that some family pressure was

put on Ian Henderson to become an executive director in the UK and he accepted the appointment and moved back to London.

44. In his witness statement, Nicholas Henderson amplified somewhat on the circumstances surrounding the move to London in 1966. He said that, at the time his father was not wealthy, had a family to support, and employment opportunities in Brazil were limited. He expressed the view that he was “effectively forced back to London”. The problem with this evidence is that it is highly general and not given from the perspective of someone with first-hand knowledge of the events. In 1966, Nicholas Henderson was 3½ years old and could not have known about employment prospects in Brazil. We accept that Nicholas Henderson has based his evidence on his understanding of his father’s view. However, we regard the evidence as weak. If Ian Henderson thought that he had effectively been forced to return to the UK because he could not have supported a wife and family in Brazil, he could have said so in his statutory declaration and could have given direct evidence as to the employment market in Brazil at the time. However, he did not do so and stated only that the return to London had not been his wish or intention.

45. We therefore, make only limited findings on the return to London. We accept that the return was at short notice (as, in May 1966, Veronica Henderson wrote to schools in London enquiring about places for her children whereas, if the return had been planned, she would have written earlier). We also accept that Ian Henderson believed that job opportunities in Brazil were not good (although we will not make any findings as to what work he could actually have done in Brazil). We have also concluded that he only agreed to return after some (unspecified) family pressure was brought to bear on him and that his wife was reluctant to return given that her family lived in Brazil. However, we will not make findings as to the nature of that “pressure” as we were not shown sufficient evidence to enable us to do so. We are not able to say, therefore, whether the “pressure” consisted of threats (such as dismissal from the Company) or involved appeals to family loyalty.

46. Upon returning to England, after a short period in temporary accommodation, Ian Henderson purchased a family home in Kensington. It had four bedrooms, two reception rooms, two bathrooms and kitchen and was located in a desirable part of London near Kensington High Street. He did not maintain any property in Brazil (indeed, prior to his departure from Brazil, he and his family had been living in rented accommodation as noted at [38]).

47. Ian Henderson worked for the Company until 1974 when he left to set up his own business (Henderson Export Limited). That business was focused on Brazil and intended to draw on business contacts that he had made in Brazil and South America. Initially it was successful and in 1976 Ian Henderson was awarded the Cruzeiro do Sol, a Brazilian award, in recognition of his furthering of Brazilian interests in the UK. However, Henderson Export Limited ran into financial difficulties and went into administration in around 1983. The failure of Henderson Export Limited meant that Ian and Veronica Henderson had to sell their home in Kensington.

48. A note of a conversation that took place in 2014 between Ian Henderson and an accountant, Antony Forwood who was evidently involved in some way in the appellants' domicile dispute with HMRC, records Ian Henderson saying that his intentions between 1974 and 1979 (when the Henderson Export business was doing well) were broadly to stay in England until his children had completed their education. Thereafter:

Once the schooling was concluded, they would review the options and decide on the future, which might at that point have involved remaining in England, or alternatively moving elsewhere which could include the Middle East as that as well as Brazil were the two main locations of the [Henderson Export] business initially.

49. Following the failure of the Henderson Export business, Ian Henderson and his wife did not return to Brazil. Instead, he took a job as an administrator in London with a company that had interests in Saudi Arabia. His job involved him being on call for long hours at a time and Veronica Henderson resented the demands it placed on him. He worked there for 7 or 8 years and, despite experiencing a fall in his standard of living because of the failure of his business, was able to acquire a flat in Battersea on a long lease. After leaving that job, he helped his wife with an interior design business that she had established and which continued at the date of the hearing.

50. Until 1983, when the Henderson Export business failed, we accept that Ian Henderson would have made regular business trips to Brazil and since these were for business purposes, he would not personally have borne the expense (although, since Henderson Export was owned by him, he would have been indirectly bearing the cost of business travel financed by Henderson Export). Since then, however, Ian Henderson and his wife have made few trips to Brazil although they do host visitors from Brazil who are visiting London. Modern methods of communication, however, have enabled them to stay in regular contact with friends and family in Brazil.

51. Ian and Veronica Henderson continued to live in London up to the date of the hearing. Their three children all live in London: Nicholas Henderson lives in Chelsea Harbour, his brother James lives in Wandsworth and his sister Lavinia lives in Pimlico (having previously lived in Battersea). Ian and Veronica now have 13 grandchildren.

52. We accept that Ian and Veronica Henderson have not been wealthy, at least since Henderson Export failed. However, based on the limited evidence as to their financial situation that we have (which largely took the form of anecdotal evidence from Nicholas Henderson), we have concluded that they are not in penury. In around 1985 they were able to purchase, with the aid of a mortgage, a property in Battersea. Moreover, James Henderson, Nicholas Henderson's brother, has had a successful business career and owns 25% of a leading multinational public relations group. He provides financial support to his parents and could provide more if his parents' pride enabled them to accept it.

53. Ian Henderson has experienced poor health in his later years. In 2015, he had heart bypass surgery. However, he was still well enough to travel to Brazil in December 2016 and he is well enough to help his wife with her business.

Nicholas Henderson's young adulthood and early career in the army until he was married to Sophie Henderson

54. Nicholas Henderson attended school at Eton College. His school friends noted that he had an interest in Brazil and indeed his nickname at school was "Zico" (after a famous Brazilian football player at the time).

55. Before taking his A levels when he was 18, Nicholas Henderson had been offered a place to read Human Geography at St Andrews University. One of the attractions of this course for him was that it focused on socio-economic geography and he thought it would offer him the prospect of exploring the different levels of society in Brazil and the general movement of the population away from the countryside toward the cities.

56. However, he did not obtain the A level grades necessary to take up this offer and, after a gap year in 1981, he went to Sandhurst Royal Military School in May 1982 and took up a three-year short service commission in 1983. Nicholas Henderson was pressed in cross-examination as to his reasons for joining the army. He suggested that the choice was rather forced on him by his disappointing A-level results. However, in 2007, he was interviewed by the Daily Mail. That article recorded Nicholas Henderson as saying that he had a dream to join the army from a young age. We have accepted his evidence that joining the army was a second choice rather than a "dream". If he had truly dreamed of joining the army from a young age, he would have applied to Sandhurst immediately rather than applying to read Human Geography at St Andrews. Moreover, Brian Carter has known Nicholas Henderson since he was 13 (and was at Eton with him) and his unchallenged evidence was that he was surprised when he decided to join the army as he "did not have him down as the career soldier type".

57. Nicholas Henderson did not seriously consider joining the Brazilian army (even though, as a Brazilian citizen he was required by law to do national service) as he considered that there would be little if any opportunity for career progression in the Brazilian army. He therefore never complied with the requirement that he perform national service in the Brazilian armed forces.

58. Nicholas Henderson spent some of his gap year in 1981 in Brazil staying with his grandparents and a family friend and brushed up on his Portuguese. In his witness statement, Mr Henderson said that:

Throughout my and my siblings' childhoods our parents ensured that we maintained our Brazilian passports.

He exhibited copies of his first Brazilian passport (that he obtained shortly following birth), a passport he held as a teenager and his Brazilian passport current at the hearing. In cross-examination he accepted that the initial passport he had as a young child was not renewed when it expired and he renewed it so that he could use it to travel to Brazil during his gap year. When that passport expired, it was not renewed

until around 2013 (when he used it to travel to Brazil for his uncle's 70th birthday). Nicholas Henderson has not, therefore, held a Brazilian passport continuously through his life to date. On the contrary, his Brazilian passports have been allowed to lapse and have only been renewed for a specific purpose – so that he could travel to Brazil in his gap year in 1981 and again for his uncle's 70th birthday in or around 2013.

59. In 1986, Nicholas Henderson's short service commission with the British Army came to an end and he decided to renew it. In cross-examination, he was pressed as to why if, as he had said in his witness statement that "The time I spent in Brazil [during his gap year] reinforced my desire to make my home and life there" he did not, on expiry of his short-service commission, move to Brazil. In part, he suggested that his decision to renew was driven by his perception that his parents did not have much money at the time and nor did they have a spare bedroom he could stay in. We found that reason unconvincing: at the time Nicholas Henderson was 25 and the choice he faced was not simply between staying in the army and moving back in with his parents. We found more convincing answers that he gave to the effect that he renewed his commission because, for the first time in his life he felt he was doing well at something.

60. Nicholas Henderson was stationed in a number of places around the world during his career with the Army until 1989 (and subsequently). He was selected for a posting in Angola because of his proficiency in Portuguese, but the posting ultimately never went ahead. In 1989 he was stationed in Cyprus and there he met Sophie Tait who was on holiday with friends and who would later become his wife (and who we will therefore refer to throughout this decision as Sophie Henderson). Sophie Henderson and Nicholas Henderson were married at a Catholic church in London in 1990.

25 ***The background of Sophie Henderson***

61. Sophie Henderson was born in London in 1960 to parents of New Zealand origin. Her primary education was predominantly in London, although she spent some time in Scotland and Dartmouth. After her primary education was complete, she went to boarding school at St Mary's Wantage and then spent some time taking A levels in Oxford. After completing her education she trained as a teacher in London and worked for a couple of years at a nursery school in London.

62. Sophie Henderson is a member of a wealthy New Zealand family and is a beneficiary under a family trust (the "Trust") established in New Zealand that provides her with access to significant sums of money. Some time between 1980 and 1982 she acquired a nursery school ("Twice Times") that she ran as a business. At the time of her marriage as well as owning Twice Times, she served as headmistress of it⁴. At that time, she lived in a two bedroom house in Fulham which she owned.

63. She is a keen sportswoman who enjoys skiing and tennis and has been a member of the Hurlingham club in Fulham for most of her life. In 2002, she acquired an

⁴ As noted at [68], Sophie Henderson continued to own the business until around 1999 or 2000 and continued to act as headmistress until around 1993 after which she employed a headmistress.

apartment in the ski resort of Verbier in Switzerland. The Henderson family use that both during the skiing season and in the summer months.

64. In a statutory declaration which he swore in 2010, Nicholas Henderson said:

5 Prior to my marriage, I always held on to the belief that I would
return to Brazil. My wife is domiciled in New Zealand and was
born and brought up there. She is a member of the Todd family
who have substantial business interest in New Zealand. My
current intention is to retire to New Zealand and also spend time
in Brazil.

10 The statement that Sophie Henderson is domiciled in New Zealand is a statement of
his opinion (though Mr Nawbatt made it clear at the hearing that HMRC do not
necessarily agree with his opinion). However, the statement that she was “born and
brought up” in New Zealand is clearly untrue given the facts at [61] and [62]. We
have already outlined how this error has affected our perception of Nicholas
15 Henderson's evidence.

***Nicholas and Sophie Henderson’s early married life together, their children and
their children’s educations***

65. After his marriage, Nicholas Henderson continued his career in the army. That
involved him being posted to several locations around the world. Even when he was
20 ostensibly posted to a location in the United Kingdom, he would still need, in the
course of that posting to make frequent trips overseas.

66. In 1990, when he was married, Nicholas Henderson was posted to a gunnery
school in Dorset. He lived in married quarters with Sophie Henderson and she
commuted to London to work at her nursery school. By 1993, Nicholas Henderson
25 had been posted to Germany and the couple were living in married quarters there.

67. In 1993, the Trust acquired a four-bedroom house for £485,000 in Chelsea
Harbour, London for the couple to live in. Since they were living in Germany at the
time, they did not immediately move in permanently (although they did spend the
occasional night there when they happened to be in London). Nicholas Henderson
30 was pressed in cross-examination as to why the property was acquired at that
particular time. We have concluded that Nicholas and Sophie Henderson realised that
they would shortly be starting a family and this provided part of the rationale for the
purchase. They also thought that 1993 would be a good time to invest in the London
property market although, since the funds for the purchase came from the Trust, we
35 consider that was likely to have been a secondary consideration.

68. Frederick Henderson, the eldest child of Nicholas and Sophie Henderson was born
on 8 September 1993, after the Chelsea Harbour property was acquired. Although the
couple were living in Germany at the time, he was born at a hospital in London.
Following Frederick’s birth, Sophie Henderson ceased to work as the headmistress of
40 the Twice Times nursery school and employed a headmistress instead. The couple had
three other children, George (who was born on 26 October 1994), Arabella (born on

18 September 1996) and Cordelia (born on 8 April 2001). All of the couple's children were born in London.

69. Frederick Henderson initially attended nursery school in Germany where Nicholas Henderson was stationed. After the posting in Germany came to an end, Nicholas
5 Henderson was posted to Camberley in Surrey for 18 months and Frederick attended a local school there.

70. In 1997, Nicholas Henderson was posted to London and the family lived in their house in Chelsea Harbour for two years and Frederick and George attended his wife's school. In 1999, Nicholas Henderson was posted to Windsor and Frederick, George
10 and Arabella went to a local state school there.

71. In 2000 or 2001, Nicholas Henderson was posted to Londonderry. We have accepted his evidence that, before moving to Londonderry, he and Sophie Henderson had a discussion about his children's education to the effect that they would try schools in Londonderry but, if they felt they were not suitable, would send Frederick
15 (who would shortly be old enough) to boarding school. In the event, they concluded that the schools were not suitable and Frederick started at Sunningdale boarding school in 2001. A year later (when he turned 8), George also started at Sunningdale. Arabella attended a local state school while the family was living in Londonderry.

72. In 2003, after six months in the Balkans (where his family did not join him)
20 Nicholas Henderson was posted to Aldershot in England for three years. Arabella and Cordelia attended local state schools there.

73. When they were 11 years old (in 2004 and 2005), both Frederick and George sat aptitude tests and, when they were 13 years old (in 2006 and 2007), sat common entrance exams, with a view to their attending public school in England. They were
25 unsuccessful in their application to Eton College, but were accepted by Harrow School.

74. In 2006, Nicholas Henderson retired from the army and the family moved to London, living in the property in Chelsea Harbour. Initially, Arabella attended Garden House school in London. On turning 11, both Arabella and Cordelia went to boarding
30 school at St Mary's Ascot.

75. In his witness statement, Nicholas Henderson suggested that the decision to send his children to boarding school in the UK was reluctant, and was motivated by a concern that his peripatetic career with the army might harm his children's education. He also said that he considered sending his children to boarding school in the USA, Brazil or Switzerland. We accept that he had a genuine concern that his children's
35 education would suffer if they were continually changing schools. However, we consider that his evidence understated the strength of his and his wife's attachment, as well as the attachment of their extended family, to the English public school system. In particular, Nicholas Henderson's sister (Lavinia Henderson) sent her son to Eton and her four daughters to St Mary's Ascot (the same school that Arabella and
40 Cordelia Henderson attended). Nicholas Henderson's brother (James Henderson) sent

his son to Stowe School and his four daughters to St Mary's Ascot. Andrew Tait (Sophie Henderson's brother) sent his daughters to St Mary's Ascot and his son to Harrow. Nicholas Henderson and his father both attended Eton College. Moreover, Nicholas Henderson and his wife decided to send Arabella and Cordelia to boarding school after he had left the army by which time his nomadic life in the army could no longer have had any effect on his children's education.

76. Nicholas Henderson's statement that he "looked at schools" in the USA, Brazil or Switzerland also needs to be explained. In cross-examination, he accepted that any discussion about boarding schools in the USA or Brazil would have been short-lived. He also accepted that it would be overstating matters to say that, until comparatively recently, he or his wife had performed research on boarding schools outside the UK. He therefore overstated matters when he said he "looked at schools" in the USA or Brazil. We concluded that Swiss boarding schools were considered only relatively recently (as a possible option for Cordelia after she finishes her GCSEs this year). However, the next academic year in Switzerland starts in September 2017 and, as of the date of the hearing, Cordelia is not enrolled at a Swiss boarding school, so we consider it unlikely that there is much prospect of her attending a school in Switzerland.

The Hendersons' life in the United Kingdom after Nicholas Henderson left the army in 2006

77. In January 2008, the Trust purchased a 7-bedroom Grade II listed building ("the Country House") which Nicholas Henderson and Sophie Henderson use as a weekend country house and for summer holidays. One of the reasons for buying the Country House was so that the Hendersons and their children could spend time together at weekends, with the children bringing friends with them if they wanted to. The Country House cost £2 million and, at the date of the hearing, Nicholas Henderson estimated that it was worth around £2.5m.

78. In addition to the main house, the property at the Country House includes a coach house, a cottage ("Groom Cottage") and a barn (that is in a dilapidated state). The main house at the Country House had previously been run as a retirement home consisting of 14 separate bedrooms. The Hendersons wanted to convert the main house but, before doing so, spent some time living there so that they could decide on the nature of the conversion they wanted. Some 6 to 8 months after the Country House was purchased, conversion works started which resulted in the main house being converted into a property with seven bedrooms and four bathrooms. These conversion works cost some £550,000 and took some 18 months to complete.

79. There have also been refurbishment works to the coach house and Groom Cottage. The refurbishment of the coach house cost £150,000 and involved converting a building that had previously not been fit for habitation into a separate property with three bedrooms, two bathrooms, two reception rooms and a kitchen. Nicholas Henderson also uses the property as a registered address for his businesses. Groom Cottage has also been converted and consists of an open plan room on the ground floor with two small bedrooms and bathrooms upstairs. Works on Groom Cottage cost £20,000.

5 80. As well as refurbishing the building, significant work has been done on the grounds of the Country House. Clearing the grounds of rubbish and debris took some 18 months and finished in 2010. A swimming pool and tennis court were built in the grounds with those works finishing in 2012. In total, work on the grounds of the Country House cost around £250,000.

10 81. The works at the Country House were paid for by the Trust and were done to Sophie Henderson's specification. Nicholas Henderson offered views on various issues when asked but he considered that, since his wife (or more accurately the Trust) was paying for the work, she should determine the shape of the project. He does, however, help to maintain the property and mows the lawn (a task that takes 3½ hours).

15 82. In addition to works at the Country House, the Hendersons have refurbished the property at Chelsea Harbour throughout and have moved a partition wall between bedrooms to create one large room. Those works started in 2015 and were completed in early 2017.

20 83. After Nicholas Henderson left the army, he travelled extensively, generally accompanied by his wife and children. The family has been many times to Switzerland, France and the United States. They have also been to Holland, Italy, Greece, Spain, Russia, Vietnam, Indonesia, Singapore, Canada and Botswana. In 2013 or 2014, Nicholas Henderson went with his wife and Frederick to Brazil for two weeks for his uncle's 70th birthday. This was only the second visit to Brazil that Nicholas Henderson had made since 1981 (when he went there on his gap year). Neither George, Arabella nor Cordelia have has ever visited Brazil.

25 84. Nicholas Henderson was asked in cross-examination why he had visited Brazil only twice given the strong attachment to the country that he expressed in his witness statement. His response was that family members had told him that he might be at risk of a fine or some kind of official action given that he did not perform national service there. However, he accepted that this was a one-off conversation and that he had not taken steps to ascertain whether this really was a risk. We have not accepted
30 that his concern explains why he did not visit Brazil more frequently. Rather we have concluded that he enjoyed travel and, when the opportunity for sustained leisure travel became available to him after he left the army there were simply other places he preferred to visit.

Discussions between Nicholas and Sophie Henderson about leaving the UK

35 85. In both his witness statement and in cross-examination, Nicholas Henderson referred to discussions with his wife relating to possible departures from the United Kingdom. In this section, we will determine what those discussions involved. Later sections will address the issue of the relevance of these discussions (and indeed all other relevant evidence) to Nicholas Henderson's intention, or otherwise, to reside
40 permanently in the United Kingdom.

86. Nicholas Henderson said, in his evidence, that he and his wife are happily married. We have therefore concluded that he wants to live with her.

87. Nicholas Henderson left the army in 2006 for a combination of reasons. In part he was frustrated at what he saw as flaws in the way that politicians treated the army which resulted in it being poorly resourced and lives being lost. In part he felt that he had progressed as far in the army as he could as his late promotion to Lieutenant-
5 Colonel meant he could expect little future career progression. In part he wanted to spend more time with his family, having spent a long time away from them when he was in the army.

88. On 27 October 2005 (at which time Nicholas Henderson was serving in Iraq and not in day-to-day contact with his wife), Sophie Henderson signed, on behalf of each
10 of her children, a form DOM1 that contained information relevant to her children's domicile. At the time she signed those forms, Nicholas Henderson had given notice of his intention to retire from the army in 2006. In answer to a question "What are your intentions for the future?", each form contained the handwritten statement "To live in New Zealand". The form also stated that the children would cease to reside in the UK
15 "when my father [i.e. Nicholas Henderson] retires from the army." By signing this form, therefore, Sophie Henderson was making a statement to HMRC that a firm decision had been taken to move to New Zealand in 2006 (as by then Nicholas Henderson would have retired from the army).

89. However, Nicholas Henderson's witness statement (made in 2016) gave a
20 different impression. He said that, in 2006 when he left the army he and his wife discussed the possibility of moving to New Zealand or Brazil, but decided against it because it would disrupt the children's education. Moreover, having left the army to spend more time with his family, he thought that there would be little point in moving to Brazil or New Zealand but continuing to send his children to boarding school in the
25 UK. In his witness statement, (made in 2016), he suggested that it was most likely that he and Sophie Henderson would move to Switzerland "when Cordelia is old enough" and that, in the longer term, he and his wife would retire to Brazil.

90. Therefore, there was a clear inconsistency between Nicholas Henderson's witness
30 statement and the views that Sophie Henderson expressed on the DOM1 form. Of course, those documents were prepared at different times and intentions can change, but there was a degree of inconsistency about the couple's intentions that persisted in other documents and, to an extent in Nicholas Henderson's oral evidence as outlined below.

91. In a letter dated 1 December 2008, Nicholas Henderson's advisers indicated to
35 HMRC that he and his wife intended to leave the UK to retire to New Zealand (even though Nicholas Henderson's oral evidence suggested this idea had been rejected, at least for the time being, in 2006).

92. In his statutory declaration, which was sworn on 12 May 2010, Nicholas Henderson said:

40 My current intention is to retire to New Zealand and also spend time in Brazil. My wife and I have, over the last few years, examined properties in Brazil to establish a base there.

Therefore, Nicholas Henderson's witness statement spoke of an intention to retire to Brazil after living in Switzerland whereas the statutory declaration referred to an intention to retire to New Zealand only to have a "base" in Brazil, which he accepted was not a "strong term". In cross-examination he accepted that his reference to
5 examining properties in Brazil involved some internet searches and discussions with his uncle as to where good areas to live might be. He did not visit Brazil to look at properties and did not purchase any property there.

93. The confusion persisted in some contemporaneous documents as well. In HMRC's notes of a meeting that they had with Nicholas Henderson in April 2013,
10 they recorded Nicholas Henderson as saying that he had "refused" to go to New Zealand as he did not want to "live off" his wife's family and wanted, instead, to establish his own financial credibility so that he could move anywhere and not be dependent on anyone else. Mr Henderson's advisers, in their comments on that note, suggested that "refused" was the wrong word (as Sophie Henderson had not asked
15 him to move) but acknowledged that he did not want, at that time, to go to New Zealand.

94. The reference to Nicholas Henderson's desire to establish his own financial credibility in the meeting note at [93] is consistent with other evidence. After he left the army in 2006, he established a security consultancy business in the UK called
20 Guardian Global Security which initially took the form of an LLP and incorporated in 2011. That has been his main work activity since leaving the army. He was also involved with a UK business that, between 2008 and 2010 provided training on behalf of Scotland Yard to financial institutions (which ceased trading because it was not economically viable). In 2012 he established a company for the purpose of pitching
25 for a Home Office contract, but another contractor secured the work. He has also been involved with a project to establish a basalt manufacturing facility in Saudi Arabia. None of those businesses has returned a significant profit. Guardian Global Security (Nicholas Henderson's main business venture) made a loss in its most recent financial year and in the previous two years made profits of £20,000 and £14,000 respectively.

95. It is not straightforward to resolve the various inconsistencies, not least since we heard no evidence from Sophie Henderson. We have concluded that, after he left the army in 2006, Sophie Henderson expressed a wish to move to New Zealand but Nicholas Henderson was reluctant to do so partly because he did not wish to work for his wife's family business in New Zealand (and so "live off" his wife's family) and
35 partly because he was concerned that such a move might disrupt his children's education. They therefore agreed that they would not move at that point. Nevertheless, the idea of moving to New Zealand has remained on the agenda and has been periodically discussed since 2006. However, to date, Nicholas Henderson has not been keen on the idea and he has established his own business ventures to
40 establish his financial credibility precisely because he does not feel comfortable moving to New Zealand and "living off" his wife's family.

96. We accept that Nicholas and Sophie Henderson discussed briefly, in or around 2006, the possibility of moving to Brazil to live permanently (as Nicholas Henderson says so in his witness statement). However, that idea was rejected in 2006 and has not

remained on the agenda in the same way as a possible move to New Zealand. We have reached that conclusion largely because of the paucity of references to a move to Brazil in the contemporaneous documentation. The idea that the couple might spend time in Brazil only came to be articulated in any detail in Nicholas Henderson's statutory declaration sworn in 2010 and then only in the sense that Brazil might be a "base" to "spend time", as distinct from a place to retire to. If a move to Brazil was under serious consideration then, we would expect that the point would have been made to HMRC earlier.

97. We consider that on occasions, Nicholas Henderson has somewhat "talked up" the strength of discussions between him and his wife about Brazil. He accepted, in cross-examination, that references to examining properties in Brazil consisted of little more than internet searches and discussions with his uncle as to good locations. The reference in his witness statement to he and his wife "looking at" schools in Brazil for his children consisted of little more than a passing suggestion that they might go to boarding school in Brazil which was quickly rejected. The fact that he felt the need to overstate the strength of discussions relating to a possible move to Brazil suggests to us that there was relatively little substance to those discussions.

98. We have concluded that discussions about a possible move to Switzerland have commenced much more recently possibly in response to suggestions in recent years that the tax regime for "non-doms" might be made less generous. In his evidence, Nicholas Henderson linked the potential for Cordelia to finish her schooling in Switzerland after sitting her GCSEs to tax considerations. He mentioned that he had received tax advice on what the implications would be if Cordelia studied for A-levels at a boarding school in the UK while he and his wife moved to Switzerland.

99. Although there have been some discussions about possible moves out of the UK, few tangible steps have been taken to pave the way for a move. Neither Nicholas Henderson nor Sophie Henderson have acquired any property outside the UK, other than the chalet in Switzerland which was acquired in 2002 largely for recreational purposes.

Discussion of Issue 1 – Whether Ian Henderson acquired a domicile of choice in Brazil by the time of Nicholas Henderson's birth

100. The appellants have the burden of proof on Issue 1. They have not discharged that burden. On the contrary, on the evidence that we have seen, we are satisfied that Ian Henderson never acquired a domicile of choice in Brazil.

101. We are satisfied that, by the time Nicholas Henderson was born, Ian Henderson was residing in Brazil. Therefore, the first part of the condition necessary to acquire a domicile of choice in Brazil was satisfied. The question we need to determine is whether, at any point prior to Nicholas Henderson's birth, Ian Henderson had formed the intention to reside permanently or indefinitely there.

102. In May 1963, when Nicholas Henderson was born, Ian Henderson had been living continuously in Brazil for around two years (not counting his initial 12 month assignment which was accepted to be a temporary posting). We quite accept that he

was happy living there, having recently married a Brazilian woman. He made friends there and devoted some of his energy to arranging for a squash court to be built and becoming involved with the Jockey Club. In his witness statement, Nicholas Henderson explained Ian Henderson's social links to Brazil (including those outlined at [37], his contacts within the Brazilian government and the stated fact that Ian Henderson's friends at this time were mainly local Brazilians rather than "expats"). Nicholas Henderson stated that:

By the time my parents were married, my father had become completely immersed in Brazilian life.

103. Veronica Henderson's statutory declaration also refers to Ian Henderson's "complete involvement" in Brazilian life at the time of their marriage. However, although she refers to their circle of friends in Brazil (and also refers to the building of the first squash court) she gives relatively few particulars.

104. We accept that Nicholas Henderson genuinely holds the opinion set out at [102]. However, we are not satisfied that it is an accurate assessment of the strength of Ian Henderson's links to Brazil at the time of his marriage. On 28 June 1961, when he got married, Ian Henderson could not have lived in Brazil for more than 18 months. While no doubt he would have picked up a good amount of Portuguese in that time, we were not shown evidence to suggest that he would have become fluent in such a short time (Ian Henderson does not mention in his statutory declaration when he considered he became fluent in Portuguese). Moreover, he was dividing his time between Brazil and Argentina and, within Brazil, between Sao Paulo and Rio. Common-sense suggests that, to become "immersed" in the life and culture of a Portuguese-speaking country would take some time, a high level of proficiency with Portuguese and sustained presence in a particular community within Brazil. Even taking into account the statements made in the statutory declarations of Ian and Veronica Henderson, the evidence we saw has not satisfied us that Nicholas Henderson's opinion on this issue is correct. That evidence has satisfied us only that Ian Henderson was a gregarious person who made friends within the local community and was prepared to contribute to it.

105. We also consider that two years' residence in Brazil (or three years if the temporary posting is counted) is too short a time for a young man such as Ian Henderson to form a settled intention to reside permanently there. Some facts do support the suggestion that he had formed that intention: he had married a Brazilian woman, his only residence at the time was in Brazil and he did not keep either property or possessions in the UK. However, Ian Henderson needed to earn a suitable income to support him and his wife and therefore, an examination of whether he truly had the intention to live permanently in Brazil can only be understood by considering his ability to earn that income.

106. At the time Nicholas Henderson was born, there was no reason why Ian Henderson needed to question the strength of his attachment to Brazil. He was newly married, enjoyed living in Brazil with his wife and, crucially, the Company wanted him to work there and was prepared to pay him a salary to do so. However, in 1966, when the Company made it clear to him that he was required to return to London, he

5 did what the Company asked partly because of his perception that job opportunities in
Brazil were not good. That strongly suggests to us that Ian Henderson's intention
when Nicholas Henderson was born was not to reside in Brazil permanently, but
rather to reside in Brazil for as long as the Company wanted him to work there and
10 was prepared to pay him a reasonable salary to do so. Put another way, we do not see
how a young man who needed to work for a living could form a settled intention to
reside permanently in a country unless he could be sure that he would be able to work
and earn a suitable income there. Ian Henderson's ability to work in Brazil depended
on his continued employment by the Company (as when the Company no longer
15 wanted him to work there, he did not feel that there were alternative job opportunities
for him in Brazil). We do not consider, therefore, that he could have been sure of a
central factor that would need to be present to enable him to settle in Brazil and, by
analogy with the decision in *Re Fuld's Estate (No 3)*, this points strongly against a
conclusion that Ian Henderson had formed the kind of intention referred to in *Udny v*
Udny.

107. The fact that Ian Henderson needed to be persuaded by the application of some
"pressure" to return to London has not changed our view. We can quite understand
why Ian Henderson and his wife might be reluctant to leave Brazil, not least since
Veronica Henderson was herself Brazilian and would be leaving her family behind.
20 However, what is more significant is that Ian Henderson did comply with the
Company's request to return to London because he felt that, unless he worked for the
Company, he would not be able to earn a suitable income in Brazil.

108. Other evidence of Ian Henderson's averred intention to live in Brazil permanently
strikes us as either weak or equivocal. He sold possessions before moving to Brazil,
25 but he did not have many possessions to sell. The most significant of his assets
appears to have been his car and common-sense suggests that transporting a car to
Brazil would have involved some expense. That he held his main bank account in
Brazil is scarcely surprising given that he lived there. The fact that he had permission
from the authorities to live permanently says little about whether he intended to avail
30 himself of the permission. We attach little significance to the fact that Ian Henderson
rented unfurnished property rather than furnished property in the absence of any
evidence as to why he made this particular decision. Similarly, his conversion to
Catholicism demonstrates attachment to a faith that can be practised anywhere and
does not suggest an intention to live permanently in Brazil specifically.

109. We have considered the significance of the evidence as to Ian Henderson's
children speaking Portuguese at home. Of course, this does suggest an affinity with
Brazil and its culture. However, it is not surprising that Portuguese should be spoken
at home given that Veronica Henderson is a native Portuguese speaker. Moreover, as
35 we have found, the children also spoke English at home.

110. Finally, we consider that the nature of Ian Henderson's intention to reside in
Brazil can be understood by considering how he acted in 1974, when he made the
decision to leave the Company and set up Henderson Export. That business was to
involve trade with Brazil. No evidence was given to the effect that this business could
40 not have been located in Brazil. Ian Henderson does not even mention Henderson

Export in his statutory declaration; still less does he suggest that the business could only have been conducted from London. No doubt there would have been practical issues associated with a move to Brazil in 1974 and we deal with some of these at [118] below. For reasons similar to those set out in that paragraph, we have concluded that, in 1974 even though he had some latitude to move to Brazil, Ian Henderson chose not to do so. That calls into question whether he ever intended to reside there permanently.

111. We recognise that Ian Henderson has sworn a statutory declaration to the effect that he intended to reside in Brazil permanently by the time Nicholas Henderson was born. However, we have concluded that his actions were not consistent with that stated intention.

112. In reaching our conclusion, we have not found it necessary to draw adverse inferences from the failure of Ian or Veronica Henderson to give witness evidence in the appeal and submit to cross-examination. Most of the relevant evidence would have come from Ian Henderson. However, we do not regard his absence as “unexplained”. He is 87 years old and has had heart bypass surgery. The fact that he is well enough to travel to Brazil on holiday or to help his wife in her business does not demonstrate to us that he is well enough to cope with cross-examination. We do not, though, need to draw adverse inferences to support our conclusion since in our view, the appellants have simply not put forward sufficiently good evidence to discharge their burden of proof on Issue 1.

Discussion of Issue 2 – Whether, before Nicholas Henderson turned 16, Ian Henderson abandoned any Brazilian domicile of choice that he acquired

113. Issue 2 strictly does not need to be determined given the conclusion we have reached on Issue 1. However, since we heard full argument on Issue 2, we will express a conclusion on it briefly.

114. If Ian Henderson had acquired a Brazilian domicile of choice prior to Nicholas Henderson’s birth, then HMRC would bear the burden of proof on Issue 2. In order to discharge that burden, they would need to establish that, before Nicholas Henderson turned 16 (on 3 May 1979), Ian Henderson both (i) ceased to reside in Brazil and (ii) ceased to intend to reside there permanently or indefinitely. It is clear that, from 1966, Ian Henderson ceased to reside in Brazil. Therefore, the question relevant to Issue 2 is that of Ian Henderson’s intention.

115. We have concluded that Ian Henderson left Brazil with a degree of reluctance in 1966. Therefore, if he had acquired a domicile of choice in Brazil, we do not consider that the move to London in 1966 of itself demonstrated an intention to cease to reside in Brazil permanently or indefinitely.

116. However, by 1979, circumstances had moved on considerably. Ian Henderson had acquired a property in a desirable part of London and he had lived in that property for 13 years. He had broken his connection with the Company and used his freedom to establish a business of his own which was conducted from the UK. His children were at school in London and indeed he had chosen to send Nicholas Henderson to the

same school (Eton College) that he had attended. Ian Henderson's links to the UK in 1979 were clearly much stronger than they were in 1966.

117. We have considered carefully whether Ian Henderson nevertheless retained an intention to reside in Brazil permanently or indefinitely through Nicholas Henderson's minority. We accept, of course, that if Ian Henderson had returned to Brazil prior to 1979 some difficult choices would need to be made relating to his children's education: the children could have started at schools in Brazil, in which case their education might be disrupted, or they could have gone to boarding school in the UK and returned to Brazil for holidays which would have involved some separation from their parents. We have had no direct evidence from Ian or Veronica Henderson as to whether considerations of their children's education influenced their decision not to return to Brazil.

118. Nicholas Henderson suggested in his witness statement that his parents did not return to Brazil before he turned 16 because they did not want to disrupt the education of himself and his siblings by taking them out of school in the UK. In addition, he said that his mother had an unhappy experience of being at boarding school in the UK while her parents lived in Brazil, so this course of action was not an option either. However, we have no evidence as to Ian or Veronica Henderson's own reasons (as their statutory declarations are more or less silent about matters after 1966) and Nicholas Henderson's explanation is not consistent with other evidence. In 1974, when Ian Henderson was deciding what to do in life after leaving the Company, his children were aged around 12, 11 and 10 respectively and were around the age at which they might be changing schools anyway. The children all spoke Portuguese and Ian Henderson had already countenanced the possibility of sending his children to school in Brazil by registering Lavinia and Nicholas Henderson for a Brazilian school. Moreover, Veronica Henderson had shown a good degree of independence from her parents: she got married at the age of 20 and promptly moved to Sao Paulo (250 miles from her parents' home in Rio de Janeiro) to live with her new husband before moving to the UK when she was 26. While we accept that she may well have experienced moments of unhappiness when she was at boarding school away from her parents as a child, Nicholas Henderson's hearsay evidence has not satisfied us that these feelings of unhappiness influenced a decision as major as whether or not she and Ian Henderson should return to Brazil in 1974.

119. To test the state of Ian Henderson's intentions prior to 1979, we have followed the approach set out in *Agulian* and considered other relevant events in Ian Henderson's life. In 1983, when Henderson Export failed, Ian Henderson still did not take the opportunity to return to Brazil even though that might have been the opportunity for a "fresh start" and even though Nicholas Henderson accepted in cross-examination that the cost of living in Brazil was lower than that in the UK and Ian Henderson had financial problems at the time. Instead, he took a job as an administrator and reinforced his ties to the UK by purchasing a new home in London to replace the one in Kensington that he had been forced to sell. The children's educations were unlikely to be a consideration at this time since they were all over 18. It seems to us that the failure of his business and the completion of his children's education must have loosened his ties to the UK, rather than strengthened them and yet he still did not

return to Brazil. That strongly suggests to us that by 1979, when the business was still doing well and the children were still at school in the UK, he had already ceased to have any intention to reside permanently or indefinitely in Brazil.

120. We have considered whether the file note referred to at [48] demonstrates that Ian Henderson was merely in “two minds” as to whether or not to return to Brazil prior to 1979 which, as noted at [15] would not be enough for him to have abandoned a domicile of choice. The file note is weak hearsay evidence of Ian Henderson’s intentions. It was prepared by someone who was assisting the appellants in their domicile dispute with HMRC. Ian Henderson had a clear interest in giving, and Mr Forwood had a clear interest in recording, an account that suggested that between 1974 and 1979, Ian Henderson had not abandoned any domicile of choice in Brazil. We would have wished to hear Ian Henderson’s first hand account on this issue and, without it, we have given the file note little weight and have concluded that the statements of intention referred to in it are outweighed by other evidence.

121. It is unlikely that facts in existence at the date of the hearing (some 37 years after Nicholas Henderson turned 16) shed much light on the nature of Ian Henderson’s intentions prior to 1979. However, it is of some note that he still has not returned to live permanently in Brazil. Nicholas Henderson strongly maintained in cross-examination that his father still intends to return to live in Brazil. However, we cannot accept that an 87 year old man, who has lived in London for 51 years and whose children largely live close to him in London will return to Brazil now when he has chosen not to do so previously.

122. Our overall conclusion is that HMRC have satisfied us that, before Nicholas Henderson had turned 16, Ian Henderson had abandoned any Brazilian domicile of choice that he acquired. We have not accepted Mr Baldry’s submission that he was in two minds whether to return or not. Accordingly, HMRC succeed on Issue 2 as well.

Issue 3 – Whether Nicholas Henderson acquired a domicile of choice in the UK after turning 16 and, if so, when he did so

123. Issue 3 does not arise given that HMRC have succeeded on both Issue 1 and Issue 2. However, since we had a good amount of evidence on Issue 3 and Nicholas Henderson was cross-examined at some length on that evidence, we will express a decision on it and will approach Issue 3 from the standpoint that, contrary to our conclusion on Issue 1 and Issue 2, Nicholas Henderson had a domicile of origin in Brazil when he turned 16. To lose a Brazilian domicile of origin, Nicholas Henderson would have to acquire a domicile of choice in the UK. Accordingly, to succeed on Issue 3, HMRC must show that Nicholas Henderson started to reside in the UK with the intention of residing in the UK permanently or indefinitely. It is not necessary for Nicholas Henderson to prove an intention to reside permanently in Brazil, New Zealand, Switzerland, or indeed any other country.

124. HMRC have made determinations that each of the appellants was domiciled in the UK from birth. Therefore, it is at least possible that Issue 3 may result in different domiciles for different appellants. Accordingly, if we decide that Nicholas Henderson

has lost any Brazilian domicile of origin (by acquiring a UK domicile of choice), we should identify with some precision when the UK domicile of choice was acquired.

125. If Nicholas Henderson had a Brazilian domicile when he turned 16, we do not consider that the mere act of joining the British army, in preference to the Brazilian
5 army, would have caused him to obtain a domicile of choice in the UK. It was clear from the evidence that we saw that joining the British army involves numerous overseas postings. Nor did his decision to renew his commission in 1986 indicate that he had formed the intention to reside in the UK permanently or indefinitely as he renewed that commission because he felt that he was doing well, rather than because
10 of an attachment to the UK as a place to live permanently.

126. However, by 1993, Nicholas Henderson was married to a woman who had lived in England all her life and, with one eye on starting a family, they had asked the Trust to acquire a family home in Chelsea Harbour. There is no doubt that, since that property was acquired, and despite his nomadic life in the army, Nicholas Henderson has
15 resided in the UK. We did not understand that fact to be in dispute and therefore our analysis of Issue 3 will focus on an examination of Nicholas Henderson's intentions.

127. An examination of Nicholas Henderson's life since 1993 shows a number of factors that point in favour of him having the intention to reside permanently or indefinitely in the UK:

20 (1) The Trust has acquired two very desirable properties in the UK for the use of Sophie Henderson and him (the Chelsea Harbour property in 1993 and the Country House in 2008). Considerable sums have been spent in developing these properties to the personal specification of the couple. In the case of the Country House, the amounts spent on development
25 considerably exceed any resulting increase in its market value which suggests that the motive for the expenditure was to make the Country House a congenial country home for the Hendersons specifically. No other properties are available to the Hendersons apart from the chalet in Switzerland.

30 (2) He has actually resided in the UK since at least 1993, a period of 24 years. We were not shown any evidence that suggested he has resided in any other country except when posted there by the army. Moreover, a number of Nicholas Henderson's postings since 1993 have been to locations within the UK. After the posting to Germany in 1993, we saw
35 evidence of postings to Camberley, London, Windsor, Londonderry and Aldershot. During this time, he was also sent to the Balkans and Iraq. We accept that even while ostensibly being posted in the UK, Nicholas Henderson would have to travel abroad. However, his postings after his first child were born do not appear to have been predominantly to locations
40 outside the UK.

(3) He has chosen to send his children to boarding school in the United Kingdom. As we have found at [75], that decision was not driven by his nomadic life in the army. Of course, it is possible to send one's children to

boarding school in the UK without having any intention of residing in the UK permanently, but Nicholas Henderson clearly attaches significance to living in the same country as that at which his children are at school. (For example, the Country House was purchased in 2008, when his children were of school age, as a place for the family to spend time together at weekends).

(4) When the Country House was purchased in 2008, Nicholas Henderson, having left the army, had a considerable amount of freedom. He accepted in cross-examination that the Trust could be expected to buy property for him and Sophie Henderson to live wherever they chose. In 2008, his children were still of school age, but the end of their school careers would be in prospect and, once all of their children had left school, he and Sophie Henderson would have almost complete freedom to live where they chose. Therefore, how Nicholas Henderson acted when facing the prospect of a high degree of freedom of action sheds a strong light on his intentions. His response, and that of his wife, was to strengthen ties to the UK by embarking on expensive renovations to the Country House to turn it into a place where the family would enjoy spending time together. He established businesses in the UK precisely so that he could establish his own financial credibility so that he would be under less pressure from Sophie Henderson to move to New Zealand and, as he sees it, “live off” her family. The fact that he behaved this way, when facing the prospect of a high degree of freedom of action strongly suggests to us that his intention had been, since 1993, to reside permanently or indefinitely in the UK.

(5) We agree that any domicile of origin that Nicholas Henderson obtained has an “adhesive” quality. However, he would have obtained that domicile of origin by virtue of his father’s attachment to Brazil that involved him living there for just five years. Nicholas Henderson himself had lived in Brazil for just 3½ years as a young child. In those circumstances, we do not regard it as particularly surprising that his protracted period of residence in the UK (even taking into account travels outside the UK with the army) involved him forming the intention to live in the UK permanently or indefinitely.

128. It is suggested that Nicholas Henderson did not intend to reside in the UK permanently or indefinitely because his ultimate intention has always been to go and live in another country. However, we do not accept that this has represented his intention since 1993 for the following reasons:

(1) His evidence as to where he intends to reside permanently or indefinitely has been somewhat confusing and contradictory. His statutory declaration (sworn in 2010) suggested that he intended to retire to New Zealand and spend time in Brazil. Yet in 2013, he told HMRC that he did not want to go to New Zealand and “live off” his wife’s family and in cross-examination he said that the idea of a move to New Zealand had been considered and rejected in 2006 (although it remained on the family

agenda). His witness statement (made in 2016) speaks of an intention to retire to Brazil but we have concluded that plan has not formed the basis of serious discussions between Nicholas Henderson and his wife and, since he and his wife are happily married, we do not consider that he intends to live in a different country from her. As we have noted at [123], Nicholas Henderson does not need to show that he intended to reside in any particular country to succeed on Issue 3. However, the contradictory nature of Nicholas Henderson’s evidence has suggested to us that the true intention since 1993 has been for the couple to reside permanently or indefinitely in the UK although they are keeping that situation under review particularly in the light of proposed tax changes to the status of “non-doms”.

(2) Nicholas Henderson has spoken of his strong attachment to Brazil. However, we have concluded that since 1993, this has little more than an emotional fondness falling short of an intention to reside there permanently. He has visited Brazil only once, for two weeks, since his gap year in 1981 despite making a large number of trips to other overseas countries in that period. Nicholas Henderson does not need to prove an intention to reside in Brazil permanently to succeed on Issue 3. However, we have given examples of instances where he has “talked up” the strength of his attachment to Brazil. We consider he did that to deflect attention away from the strength of his attachment to the UK and this further suggests to us that, since 1993, his intention has been to reside permanently or indefinitely in the UK.

(3) There is much less evidence of actions consistent with an intention to reside permanently outside the UK than there is of actions consistent with an intention to reside permanently in the UK. Since 1993, the Trust has purchased and refurbished property in the UK for the Hendersons, the Hendersons sent their children to schools in the UK and Nicholas Henderson has established businesses in the UK. Nothing like the same actions have been taken in relation to any country outside the UK (other than buying a ski chalet in Switzerland because of Sophie Henderson’s love of ski-ing). Rather, the evidence supporting the proposition that Nicholas Henderson intends to live outside the UK comes largely in the form of statements as to both his, and his wife’s intentions. We have had regard to those statements of intention, but have given them less weight than evidence of actions since Nicholas Henderson has an obvious self-interest in making them. Moreover, Sophie Henderson has chosen not to give evidence in this appeal. Nicholas Henderson has an obvious self-interest in giving evidence as to Sophie Henderson’s intentions since there is a real prospect that her own stated domicile in New Zealand may be the subject of a dispute with HMRC, so his reports as to her intentions carry little weight.

129. Our overall conclusion on Issue 3 is therefore that, even if Nicholas Henderson had a Brazilian domicile of origin, he lost that in 1993 at the time the Trust acquired the property in Chelsea Harbour. HMRC therefore succeed on Issue 3.

Conclusion

130.HMRC have correctly concluded that the appellants were all domiciled in the UK from their birth. The appeals are dismissed.

5 131.This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to
10 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

JONATHAN RICHARDS
TRIBUNAL JUDGE

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