CA on appeal from Chancery (Evans-Lombe J) before Waller LJ; Arden LJ; Moore-Bick LJ. 23rd May 2008.

Lady Justice Arden :

1. This is an appeal against the order of Evans-Lombe J dated 10 July 2007. The question that the judge had to decide was whether Mr Henwood was domiciled in England and Wales on 19 December 2005, being the date on which the Appellants presented a bankruptcy petition against him. It is common ground that, by virtue of s 265 of the Insolvency Act 1986, the courts of England and Wales have no jurisdiction to make a bankruptcy order against him unless he was domiciled here on that date.

2. The bankruptcy petition is based on a judgment debt. In 2001 Mr Henwood was found liable by the High Court of the Isle of Man ("the IOM") to the Appellants, Barlow Clowes International Limited (in liquidation) ("BCI") and the receivers and managers of certain investment portfolios formerly promoted by BCI in damages for having dishonestly assisted in the disposal of monies stolen from BCI. The Privy Council upheld the judgment in October 2005. On 10 November 2005 a statutory demand for the judgment debt, which with interest by then amounted to over £9m, was served on Mr Henwood, pursuant to an order for substituted service. The bankruptcy petition was presented on 19 December 2005. On 16 March 2006 Mr Henwood applied for a declaration that the court had no jurisdiction to hear the bankruptcy petition on the grounds that he was not domiciled in England and Wales. Evans-Lombe J held that Mr Henwood had acquired a domicile of choice in Mauritius and that he was not domiciled in England and Wales on 19 December 2005. The judge made a declaration accordingly, and dismissed the bankruptcy petition. The appellants appeal from that order.

3. In this judgment, I will start by considering the basis on which a judge's findings of fact can be reviewed on appeal. I will next set out the basic principles of the law of domicile. I will then summarise the facts as found by the judge and his judgment. After that, I will outline the parties' submissions. I will then summarise my conclusions and then amplify those conclusions by setting out my detailed reasons.

4. The judge's ultimate conclusion as to domicile was based on the inferences that he drew from the evidence. Mr Henwood, in resisting this appeal, contends that the circumstances in which this court can review the judge's factual findings are limited. The law on this point is set out in a well-known passage from the judgment of Clarke LJ in ***Assicuriazioni Generali SpA. v Arab Insurance Group*** [2003] 1 WLR *577* at [14] to [17]:

> *"[14] The approach of the court to any particular case will depend upon the nature of the issues and the kind of case determined by the judge. This has been recognised recently in, for example,* ***Todd v Adam*** *[2002] EWCA Civ 509,[2002] 2 All ER (Comm) 97 and* ***REEF Trade Mark v Bessant*** *(t/a REEF) [2002] EWCA Civ 763, [2003] RPC 101. In some cases the trial judge will have reached conclusions of primary fact based almost entirely upon the view which he formed of the oral evidence of the witnesses. In most cases, however, the position is more complex. In many such cases the judge will have reached his conclusions of primary fact as a result partly of the view he formed of the oral evidence and partly from an analysis of the documents. In other such cases, the judge will have made findings of primary fact based entirely or almost entirely on the documents. Some findings of primary fact will be the result of direct evidence, whereas others will depend upon inference from direct evidence of such facts.*
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> *[15] In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a "rehearing" under the RSC and should be its approach on a "review" under the CPR.*
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> *[16] Some conclusions of fact are, however, not conclusions of primary fact of the kind to which I have just referred. They involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way.*
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> *[17] In* ***Todd v Adam****, where the question was whether a contract of service existed, Mance LJ [2002] 2 All ER (Comm) 97 at [129] drew a distinction between challenges to conclusions of primary fact or inferences from those facts and an evaluation of those facts, as follows:*
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> *"With regard to an appeal to this court (which would never have involved a complete rehearing in that sense), the language of 'review' may be said to fit most easily into the context of an appeal against the exercise of a discretion, or an appeal where the court of appeal is essentially concerned with the correctness of an exercise of evaluation or judgment—such as a decision by a lower court whether, weighing all relevant factors, a contract of service existed. However, the references in CPR 52.11(3) and (4) to the power of an appellate court to allow an appeal where the decision below was 'wrong' and to 'draw any inference of fact which it considers justified on the evidence' indicate that there are other contexts in which the court of appeal must, as previously, make up its own mind as to the correctness or otherwise of a decision, even on matters of fact, by a lower court. Where the correctness of a finding of primary fact or of inference is in issue, it cannot be a matter of simple discretion how an appellate court approaches the matter. Once the appellant has shown a real prospect (justifying permission to appeal) that a finding or inference is wrong, the role of an appellate court is to determine whether or not this is so, giving full weight of course to the advantages enjoyed by any judge of first instance who has heard oral evidence. In the present case, therefore, I consider that (a) it is for us if necessary to make up our own mind about the correctness or otherwise of any findings of primary fact or inferences from primary fact that the judge made or drew and the claimants challenge, while (b) reminding ourselves that, so far as the appeal raises issues of*

judgment on unchallenged primary findings and inferences, this court ought not to interfere unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible. In relation to (a) we must, as stated, bear in mind the important and well-recognised reluctance of this court to interfere with a trial judge on any finding of primary fact based on the credibility or reliability of oral evidence. In the present case, however, while there was oral evidence, its content was largely uncontentious."

5. This passage was recently approved by the House of Lords in ***Datec Electronic Holdings Ltd v United Parcel Service Ltd*** [2007] 1 WLR 1325 at [46]. I do not need to set out those passages.

6. Clarke LJ held that the approach of the appellate tribunal to findings of fact would depend on the extent to which the judge had had an advantage over the appellate court. So, where findings turn wholly or substantially on oral evidence given by witnesses at trial, an appellate court will be slow to interfere. Thus there is in general a greater latitude where the findings in issue on an appeal are not primary facts but inferences from the proved facts. Applying that to this case it is unlikely that this court could go behind the judge's finding that Mr Henwood was determined to resist paying the debt due to the appellants (as found by the judge in [56] of his judgment). The inference as to whether Mr Henwood intended to stay permanently or indefinitely in Mauritius is based solely on the primary facts proved and for this purpose the judge is unlikely to have an advantage over this court. If an appellate court considers that the judge has come to a conclusion that is plainly wrong and outside the ambit within which reasonable disagreement is possible, it is bound to intervene, even though the question is one of fact. This standard does not apply if the judge has misdirected himself in law as to the correct approach to the evidence. If he has made an error of law in this way, there is no further requirement that the judge's finding should be plainly wrong or outside the ambit within which reasonable disagreement is possible.

7. As is pointed out on behalf of Mr Henwood, the fact that a finding that he is domiciled overseas enables him to avoid bankruptcy proceedings is not a reason for finding that he is domiciled in England and Wales. The same principles apply in this case as in any other case.

Relevant principles of the law of domicile

General principles

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

   (i) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it (Dicey, pages 122 to126).

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

   (iii) No person can at the same time for the same purpose have more than one domicile (Dicey, pages 126 to128).

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

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

   (vi) Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise (Dicey, pages 133 to138).

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

   (viii) In determining whether a person intends to reside permanently or indefinitely, the court may have regard to the motive for which residence was taken up, the fact that residence was not freely chosen, and the fact that residence was precarious (Dicey, pages 144 to151).

   (ix) A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently, or indefinitely, and not otherwise (Dicey, pages 151 to153).

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

9. I need to amplify two of these principles at this point.

The intention required for a domicile of choice ((vi) above)

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

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

12. The House of Lords held that the respondent's father had lost his domicile of choice in England and that his domicile of origin had revived. One of the issues was whether revival of his domicile of origin was precluded by the fact that he had a possible intention to leave Scotland again if his creditors pursued him there. At 449, Lord Hatherley L.C. held that this possible intention did not mean that he could not have a domicile in Scotland if he had decided that Scotland would be "*his chosen and settled abode*". Lord Hatherley held that the acquisition of a domicile of choice was best described as "settling" in a place: *"A change of [a person's domicile of choice] can only be effected animo et facto -that is to say, by the choice of another domicile, evidenced by residence within the territorial limits to which the jurisdiction of the new domicile extends. He, in making this change, does an act, which is more nearly designated by the word "settling" than by any one word in our language. Thus we speak of a colonist settling in Canada or Australia, or of a Scotsman settling in England, and the word is frequently used as expressive of the act of change of domicile in the various judgments pronounced by our Courts."*

13. At 458, Lord Westbury made the following observations about the acquisition of a domicile of choice which also emphasise the fixed nature of the requisite intention: *"Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness;* ***and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation****. It is true that the residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case so soon as the change of purpose, or animus manendi, can be inferred the fact of domicil is established."* (emphasis added)

14. Given that a person can only have one domicile at any one time for the same purpose, he must in my judgment have a singular and distinctive relationship with the country of supposed domicile of choice. That means it must be his ultimate home or, as it has been put, the place where he would wish to spend his last days. Thus, in ***Bell v Kennedy*** (1868) LR 1 Sc and Div 307, 311, Lord Cairns, having held that it was unnecessary for him to examine the various definitions that have been given of the term "*domicile*", held that the question to be considered was in substance whether the appellant: "*had determined to make, and had made, Scotland his home, with the intention of establishing himself and his family there,* ***and ending his days in that country***?" (emphasis added)

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

All the facts which throw light on the subject's intention must be considered ((vii) above)

16. A finding as to domicile requires a careful evaluation of all the facts. This point is illustrated by a memorable passage from the judgment of Mummery LJ in ***Agulian v Cyganik*** [2006] EWCA Civ 129 at [46(1)]: "*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.*"

17. Some commonly occurring facts call for special mention. The fact that residence is precarious or illegal is a circumstance that is relevant to the question of intention (but the fact that presence is illegal does not prevent residence): ***Mark v Mark*** [2006] 1 AC 98.

18. A person can acquire a domicile of choice without naturalisation. (Dicey, page 136.). On the other hand, citizenship is not decisive: ***Wahl v Wahl*** [1932] 147 LT 382. An intention to be buried in a particular place has in some circumstances been treated as an important factor, but in other cases discounted (Dicey, page 140). If a person leaves a country to evade his creditors, he may lose his domicile there, unless he plans to return as soon as he had got rid of his debts.

19. Frequently the subject of a dispute as to domicile (often called "*the propositus*") will make statements or declarations as to what he intends. But the court should not rely on these statements unless corroborated by action consistent with the declaration. Thus Dicey states:

    "The person whose domicile is in question may himself testify as to his intention, but the court will view the evidence of the interested party with suspicion. Declarations of intention made out of court 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. 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 considering the persons to whom, the purposes for which, and the circumstances in which they are made and they must however be fortified and carried into effect by conduct and action consistent with the declared expressions.****". Thus in some cases the courts have relied to some extent on declarations of intention in deciding issues as to domicile; indeed, in one case, the declaration was decisive. But in other cases the courts have refused to give effect to the declarations on the ground that they were inconsistent with the conduct of the propositus: a domicile cannot be acquired or retained by mere declaration. The courts are, in particular, reluctant to give effect to declarations which refer in terms to* ***"domicile"*** *since the declarant is unlikely to have understood the meaning of the word. Declarations which are equivocal have little effect: thus a declaration of intention to reside permanently in the United Kingdom is no evidence of acquisition of a domicile of choice in any of the countries which are included in the United Kingdom; although it may be evidence of the abandonment of a domicile elsewhere."* (pages 142 to 143)

Abandonment of a domicile of choice ((ix) and (x) above)

20. A domicile of choice is lost when the subject both ceases to reside in the relevant country and gives up the intention permanently or indefinitely to reside there. A domicile of choice in one place may be lost by acquiring a domicile of choice in another place, but it is not necessary to show that the subject has acquired a new domicile of choice because, as Dicey states:

"On abandoning a domicile of choice, a person may acquire a new domicile of choice, or he may return to and settle in the country of his domicile of origin. He may also simply abandon his domicile of choice without acquiring a home in another country. It was at one time thought that in such a case the previous domicile was retained until a new one was acquired. But it is now settled that where a person simply abandons a domicile of choice his domicile of origin revives by operation of law. This rule has been much criticised since it may result in a person's being domiciled in a country with which his connection is stale or tenuous and which, indeed, he may never even have visited. It has been abolished in New Zealand and Australia, and replaced by a statutory rule that a domicile continues until a new domicile is acquired. The English and Scottish Law Commissions have proposed similar legislation." (page 152)

Revival of the doctrine of origin on loss of domicile of choice ((x) above)

21. The revival of the domicile of origin (see (x) above) occurs as a matter of law. As no person can be without a domicile, the law attributes a domicile to a person who does not have one. A domicile of origin provides the domicile if there is no clear evidence as to a domicile of choice elsewhere (as in *Winans*). The rule, that the domicile of origin revives where a domicile of choice has been abandoned and another domicile of choice has not yet been obtained, represents therefore a default rule. The rule about revival removes the need to come to the conclusion in any particular case that a person had a domicile of choice.

The parties' basic positions

22. It is common ground that (1) Mr Henwood's domicile of origin was England and Wales; (2) he had acquired a domicile of choice in the IOM prior to 1992 and (3) he bears the onus of showing that he had a domicile different from his domicile of origin. It is also common ground that Mr Henwood has lost his domicile of choice in the IOM. However, the parties differ in their explanation for this. The appellants contend that Mr Henwood abandoned his domicile of choice in 1992 by leaving the IOM and ceasing to have the necessary intention to reside there permanently or indefinitely. They further contend that he did not acquire a domicile of choice elsewhere. Mr Henwood's case is that he lost his domicile of choice in the IOM by acquiring another domicile of choice, that is, a domicile of choice in Mauritius.

23. The appellants contend that, when Mr Henwood left the IOM in 1992 and went to Mauritius, he intended only to acquire a holiday home in Mauritius, and did not acquire a domicile of choice there. Indeed the appellants' case is that Mr Henwood never acquired a domicile of choice in any other country and so his domicile of origin revived and then persisted until at least 19 December 2005.

24. Mr Henwood contends that, as the judge found, he acquired a domicile of choice in Mauritius, and that this domicile of choice persisted until (and beyond) 19 December 2005.

Facts as found by the judge

25. Because of the width of the enquiry necessary in order to ascertain a person's domicile, the judge's judgment contains a very full statement of the facts. As they can be found in the judge's judgment, I do not propose to summarise them in detail again save so far as is necessary for the disposition of this appeal.

26. Mr Henwood was born in England in 1948, and has British citizenship. He and Mrs Henwood also acquired Seychelles citizenship in 1996. It is not disputed that Mr Henwood's domicile of origin is England. He spent his early years in the UK, USA, the Bahamas and the Seychelles. Throughout his adult life he has travelled a great deal and has developed and maintained connections with a number of countries, including France, the IOM, Singapore, the Seychelles, Hong Kong and the UK.

27. In 1975 (aged about twenty-six years) Mr Henwood moved to the IOM, having had a short marriage ending in divorce, and in 1977 he married the present Mrs Henwood, who lived in the IOM, as did her parents, acquired a property, called the Grange, as their home and set up in business there. It is accepted that at that time he abandoned his domicile of origin in favour of a domicile of choice in the IOM. In 1988, the Grange was registered in joint names. Mr Henwood set up a company called International Trust Corporation Ltd ("ITC"), whose shares were later settled on trust for his wife and any children, save for one share which Mr Henwood held on trust for Mrs Henwood. In December 1988, ITC transferred all its assets to a company called OCRA Isle of Man Ltd ("OCRA").

28. In 1988 Mr and Mrs Henwood acquired what is now a substantial and luxuriously appointed property in France ("*the French Property*"), and in the subsequent years they spent the bulk of their summer months there and invested large sums of money in it. (This property was later transferred to a French SCI which Mr and Mrs Henwood owned in equal shares.)

29. Following the collapse of Barlow Clowes in 1988, the Henwoods' life in the IOM became very uncomfortable socially and professionally. They sought to leave the IOM, though (the judge found) Mr Henwood retained substantial business interests there. After a number of short visits to Mauritius, Mr Henwood took up employment with IMM Ltd and remained there at the end of 1992. In November 1992 the Henwoods let the Grange to Mrs Henwood's parents on a twenty-year lease (described by the judge as a twelve year lease) at a peppercorn rent, with an option to extend it for a further 5 years. In December 1992 Mr Henwood leased a fully furnished villa in Mauritius ("the Villa").

30. After Mr Henwood left the IOM, he continued to travel extensively. The Henwoods' connection with Mauritius between 1992 and 2005 included the following aspects (as found by the judge, and to some extent contrasted with the position in France):

(i) The Villa was occupied by the Henwoods for 14 years initially on a three month lease and then on an annual renewable lease which has been renewed in successive years (without any obligation to do so on either side). For reasons explained by the judge, this lease came to be held in the name of a company owned by Mrs Henwood. (It was not lawful for foreigners to own property in Mauritius until 2002.)

(ii) Mr Henwood continued to travel extensively. He spent only limited periods each year at the Villa. Thus in the period 1992 to 2006, he spent on average 87 days (roughly three months) per year in Mauritius. Those periods were in most years substantially exceeded by periods spent in France. During those periods, the Henwoods stayed mostly at the French Property.

(iii) A relatively small proportion of the Henwood's possessions were moved to the Villa compared to those that remained in the French Property.

(iv) Though the Villa was rented and there was no enforceable obligation to renew the lease each year, over the years the Henwoods spent their own money on the Villa, eg. providing it with a swimming pool, rebuilding the kitchen and creating a beach. Mr Henwood's evidence in his second witness statement was that he would never have spent the time, money and energy on developing the Villa unless it had been a long term project at the outset to become a permanent home. Overall, however, they spent much more on the renovation and improvement of the French Property than on the Villa.

(v) In May 2006, Mrs Henwood bought a property near the beach in Tamarina, Mauritius, which had not then been built. This enabled them to obtain the right of permanent residence on an application in Mrs Henwood's name. Accordingly Mr Henwood's right to reside in Mauritius depends on Mrs Henwood continuing to be the owner of a property in Mauritius. Mrs Henwood had not decided whether to rent or to live in the property on its being built.

(vi) The Henwoods employed a number of staff at the Villa and at the French Property. At the French Property Mr Henwood also employed a secretary and maintained a home office from which he could conduct business.

(vii) The Henwoods did make enquiries about the practicalities of obtaining Mauritian citizenship, but did not apply for this, principally because they would have had to give up their British citizenship and passports. They held residency permits from 1992 to 2001.

(viii) Mr Henwood's job with IMM Ltd came to an end in 1996 in the wake of bad publicity about the Barlow Clowes collapse, and he moved to a company set up by his wife. It became clear this business was not viable and he sought to develop work opportunities in other areas. As part of this he became involved with working for the Seychelles government and thus obtained Seychelles citizenship. His work permits in Mauritius ended in 2001 or 2002.

(ix) The judge rejected Mr Henwood's evidence that he had retired. The judge held that he continued to work for OCRA. The judge accepted that, until the Henwoods obtained the right of permanent residence in Mauritius, they could only live there for three months on any one visit, without a specific extension, which Mr Henwood appears to have obtained from time to time.

31. As noted above, on 19 December 2005 the bankruptcy petition against Mr Henwood was presented. During December 2005 Mrs Henwood had taken initial steps to purchase a property in Mauritius (different from the Villa). A contract to purchase a Mauritian property was signed in May 2006. The consequence of the purchase was the grant to the Henwoods of the right permanently to reside in that country (though Mr Henwood's right would be dependent on his wife remaining the owner of the property). These rights were confirmed in June 2006.

32. Mr Henwood gave evidence and was cross-examined. Mrs Henwood did not give evidence. It appeared that Mr and Mrs Henwood were not living together and that Mrs Henwood might at the time of the trial be living in IOM. Mr Henwood said that she could not give evidence because she was suffering from a mental illness. He said that she was under care of doctors in the United Kingdom and the IOM.

33. In the course of his evidence, Mr Henwood made several statements about his intentions. For instance, in his second witness statement, he stated that after his first marriage had ended in divorce: "*I think I made up my mind at this stage never to live in England again.*" He also described the move to Mauritius in 1992 as a fresh start and a new chapter in their lives and as a place where he and Mrs Henwood hoped they would stay long-term and make a permanent home. "*In many ways, Mauritius reminded me of my earlier life in Seychelles and The Bahamas of which I had such happy memories…*". Mr Henwood used his Mauritian address in a number of documents such as his witness statements in the proceedings leading to the judgment on which the petition was based. On 21 December 2005, he executed a will stating that he was domiciled in Mauritius. That will stated that he confirmed his domicile in two earlier wills, which were not in evidence. He stated in his will that he wanted to be buried in the graveyard of a Church in Mauritius, whose correct name was not given.

The judge's judgment

34. In this judgment, paragraph references given in square brackets preceded by "J" are references to the relevant paragraph of the judge's judgment. (Other references to paragraph numbers in square brackets are to paragraphs of this judgment).

35. After introducing the background to the case, the issues and the law [J1-11], the judge recited the factual history with the following introduction: *"Because they provide a convenient description of Mr Henwood's life which, as to the facts, is largely unchallenged I propose to adopt paragraphs 18 to 65 of Mr Henwood's counsel's closing submissions as a description of the background facts of this case. For ease of reference I will use the paragraph numbers in the original. I will intersperse those paragraphs with passages of my own showing where that description is challenged by the Respondents. It goes without saying that the Respondents do not accept those passages in the text or quotations from exhibits which describe Mr Henwood's own statements of his intentions, from time to time, or those of his wife."* (J[13])

36. The judge discussed the law at [J14-27]. He held, inter alia, that:

"(i) Where a person is seeking to show he has abandoned his domicile of origin in favour of a domicile of choice, he must show a strong case on the evidence that he has abandoned his domicile of origin. By contrast, once a domicile of choice has been established, it is easier to satisfy a court that that domicile of choice has itself been abandoned in favour of a new domicile of choice [J16].

(ii) For the creation of a new domicile of choice, residence in that country must be 'freely chosen'. However, even if Mr Henwood's reason for taking deliberate steps to establish himself in Mauritius was to avoid for example the bankruptcy proceedings, those steps would still be capable of supporting a claim to a domicile of choice. Indeed such a motive could even confirm his intention to reside permanently or indefinitely in Mauritius [J20-25].

(iii) The judge accepted the Appellants' submission that, where Mr Henwood was occupying two residences, ie. the Villa and the French Property, he had to show that he was occupying one of them as his 'chief' residence in order for that place to be his domicile of choice. In other words, "if, on the evidence, the conclusion were to be reached that The French Property was more of a home to the Henwoods than the Villa, Mr Henwood would have failed to establish a domicile of choice in Mauritius" [J27]."

37. The judge then set out the issue before him at [J28-29], though he made no mention of the question of which place was Mr Henwood's 'chief' residence.

38. At [J30], the judge made adverse findings as to Mr Henwood's credibility. He said that: "*Mr Henwood was a most unsatisfactory witness who was indeed, from time to time shown to be telling untruths or to have done so in the past.*" ([J30]). He held that: *"Wherever there is a conflict between the evidence of Mr Henwood unsupported by documents and the evidence of the [appellants] I would unhesitatingly accept the latter in preference to the former."* ([J30])

39. I read this as meaning that the judge did not accept Mr Henwood's evidence on any matter on which he was challenged by the appellants unless it was supported by appropriate independent evidence. That would logically exclude documents created by Mr Henwood himself or on his instructions.

40. At [J31] the judge summarised the appellants' submissions for saying that Mr Henwood had not acquired a domicile of choice in Mauritius. In [J32-50], the judge discussed Mr Henwood's connections with other countries: France, the IOM, Singapore, the Seychelles, Hong Kong, Brunei and the United Kingdom. He noted at [J32] that the appellants did not say that the French property constituted or had constituted Mr Henwood's home or that his domicile has been or was currently in France.

41. The judge's own findings about the French property are of some importance and accordingly I will set them out in full:

"France

32. It is common ground that The French Property was purchased in June 1988 simultaneously with the collapse of Barlow Clowes. It is not suggested that these two events were in any way linked. It was bought more than 4 years before Mr Henwood left the IOM at a time when I have found that Mr Henwood's domicile was there and remained there until December 1992. It is not in issue that when it was acquired it was acquired as a holiday home. The Respondents do not suggest that it has ever constituted the Henwoods' home. The petition states at paragraph 1 that "the debtor's centre of main interest [in the case of an individual his home] is not within a member State and therefore the EC Regulation does not apply." The Respondents therefore, are not suggesting that The French property constitutes or has constituted Mr Henwood's home nor that his domicile has been or currently is France. They do suggest however, that it could become Mr Henwood's home in the future and that his retention of it undermines his claim to a domicile of choice in Mauritius.

33. I have already accepted the Respondents' factual case on the evidence that the French Property is a more substantial establishment than the Villa, in which the Henwoods have invested much more money by way of improvement and extension than they have invested in the Villa. Mr Henwood retains an interest, jointly with his wife in The French Property. It contains more of their chattel assets than the Villa does. They have spent the bulk of the summer months there. Mrs Henwood's parents and their relatives and friends have visited them there. In most years, since the Henwoods started to occupy the Villa, Mr Henwood has spent substantially more time in France than in Mauritius and of that time in France he accepts the majority will have been while staying at The French Property. I do not accept Mr Henwood's evidence that his lengthy sojourns at The French property were materially caused by the requirement to supervise works of repair and improvement at the property or, as he suggested, that it has been in some way rendered uninhabitable by flooding. Mr Henwood filed a French Tax return every year. The house includes facilities from which a business can be conducted. In spite of Mr Henwood's denials I find that he has a French secretary available to serve him at the house.

34. I do not accept Mr Henwood's evidence that The French property is genuinely up for sale. The only documentary support for this was certain written instructions to local land agents, shortly before the hearing, to place the

property on the market. Dispatching those letters does seem to me to be creating self serving evidence by Mr Henwood in an attempt to minimise the significance of The French Property as an alternative residence to the Villa.

35. Later in this judgment I will deal with the significance of the apparent attempts of Mr Henwood to avoid having to pay the Petitioning Debt. Having regard to the fact that France is a Member of the European Union and that Mr Henwood, through his shareholding in the French SCI which owns the property and his wife, retains a right to reside there, it is unlikely that the Respondents would have any difficulty in enforcing the judgment comprising the Petition Debt against Mr Henwood in France by insolvency proceedings there. I say it is likely because I have not been referred to the relevant provisions of French Law governing the commencement of insolvency proceedings against individuals who are not domiciled in France. I assume that the Respondents have in mind seeking to execute their judgment on Mr Henwood's interest in the SCI."

42. The judge decided that the evidence as to Mr Henwood's connections with countries in which he did not have a residence did not assist, nor did the evidence as to Mr Henwood's business involvement with OCRA. He turned to the evidence about Mr Henwood's marriage and noted that no challenge was made to Mr Henwood's presentation of a happy relationship with Mrs Henwood "*at least until mid 2006*" ([J39]). The judge accepted that Mrs Henwood's intentions were an important consideration in assessing Mr Henwood's intentions at the relevant time. The judge continued:

"41. However in the absence of any suggestion that their marriage was in difficulties on or about the 19th December 2005 and in the light of her cooperation in obtaining from the Mauritian authorities permission for both of them to permanently reside in Mauritius it does not seem to me that her absence undermines Mr Henwood's case fatally. It was not suggested that he was preventing her giving evidence that it was not Mr Henwood's intention permanently to reside in Mauritius at the relevant date or subsequently. There was no evidence of an intention by her to sell her newly acquired property in Mauritius thereby undermining Mr Henwood's right of permanent residence in that country. Indeed if in fact it is the case that the Henwood marriage was in difficulties by December 2005, this does not assist the Respondents' case necessarily, because it would remove a reason for Mr Henwood to wish to return to the IOM in due course."

43. The judge reviewed the evidence as regards Singapore, Seychelles, Hong Kong and Brunei, but was satisfied that Mr Henwood had not established a domicile there. The judge commented on Mr Henwood's marriage and his business involvement with OCRA, an international association of businesses apparently concerned with providing assistance to wealthy individuals to assist them with the investment and preservation of their assets.

44. The judge made certain findings relevant to the position of Mrs Henwood and OCRA. He rejected Mr Henwood's evidence that she took any part in the running of OCRA. He found that OCRA had an office in all the countries with which Mr Henwood had a connection excluding France but including Mauritius.

45. The judge held that Mr Henwood could only be domiciled in one of the jurisdictions where he has resided in the past or continued to have a residence. "*In my view it is highly unlikely that any married couple would deliberately abandon the idea that they had a home where they were based or to which they would not wish ultimately to return*" [J51]. He rejected any suggestion that the Henwoods retained any intention to return to live in the United Kingdom. He then recorded that the appellants did not suggest that the Henwoods ever intended to make their home in the UK or France. This left the IOM or Mauritius as candidates for the domicile of Mr Henwood.

46. [J52] to [J62] are headed "*Conclusions*". At [J52 - 58] the judge then set out his reasons for his coming "*with great reluctance*" to the conclusion that Mr Henwood had established a domicile of choice in Mauritius. He recapitulated Mr Henwood's reasons for leaving the IOM and the evidence about the Villa, in particular the amount of work that the Henwoods had done on it and the fact that they had permanent staff there:

"Reasons pertaining to the Villa

(i) Between paragraph 35 and 46 of their written submissions counsel for Mr Henwood have set out a largely unchallenged account of the events of Mr Henwood's life following the collapse of Barlow Clowes. In particular they described his ostracism in the IOM following that collapse leading to the disappearance of his business, his departure with his wife on a worldwide holiday which included visits to Mauritius, the emergence of business opportunities in Mauritius and the Seychelles, his finding of the Villa and taking a lease of it for an experimental period of three months and finally his move with his wife from the IOM to Mauritius and the Villa leaving the Grange, his home in the IOM, occupied by his parents-in-law under a long tenancy at a nominal rent under which they were conspicuously over-housed. The Henwoods did not go to The French property at this point. It seems to me that these occurrences are consistent with the intention expressed by Mr Henwood in his witness statements of establishing a new home away from the IOM (and also from the UK) from which he felt that he had been driven out. Mr Henwood's various expressions of his intentions at this time were not directly challenged in the course of his cross-examination. Thus there was no challenge to his having formed an aversion to living in the United Kingdom as the result of his tragic early life history. There was no challenge to his having formed an aversion to living in the United Kingdom as the result of his tragic early life history. There was no challenge to his statement that by 1992, as the result of his travels he had formed a liking for "island life" which he found particularly agreeable on Indian Ocean islands and, in particular, Mauritius with its substantial population and relatively developed society where he was able to find friends and establish a social life.

(ii) The fact that as at December 2005 Mr Henwood and his wife had occupied the Villa as a residence for a period of approximately fourteen years which he or they both visited for appreciable periods every year.

(iii) The fact that their occupation of the Villa has taken a form which indicates that it was intended to be permanent, as opposed to self-catering holiday accommodation which might be abandoned at any time. True it is that the Henwoods occupied the Villa under an annually renewable lease which gave no right of future renewal. That it was expected by landlord and tenant that the lease would be renewed on the expiry of each annual period is supported by a written statement on behalf of the Henwoods' landlord which was in evidence. I have set out above a summary of the various works of improvement which the Henwoods have, over the years, effected at the Villa at their own expense. Also set out above is a description of the staff, engaged on a permanent basis by the Henwoods to look after the Villa, and themselves when they are there, and also when they are not. It is not challenged that when the Henwoods moved to the Villa in 1992 they took some of their possessions with them and that they have since kept possessions there giving a clear indication of their intention to return there from time-to-time.

(iv) Mr Henwood has shown the Villa as his address on various documents, in particular his diary where, in places it is described as "home", the emergency address of his wife appearing on his passport, and in a recent will."

47. The judge also relied on Mr Henwood's employment in Mauritius and his obtaining the right of permanent residence. The judge then turned to the relevance of Mauritian bankruptcy law. It was common ground that the law of Mauritius did not allow for bankruptcy proceedings against an individual who was not carrying on business in Mauritius and thus that any judgment obtained against him in the IOM would not be enforceable in Mauritius by bankruptcy proceedings. The judge found that it was highly likely that Mr Henwood was at all material times aware of the attractions to him of Mauritian bankruptcy law. (There was however no direct evidence on this since Mr Henwood had denied that this was a motivation.)

48. The judge's reasoning is summarised at the start of [J61]: Mr Henwood moved to Mauritius in 1992 having then, or alternatively before December 2005, the intention of permanently residing there; the result was that the domicile of choice in the IOM was abandoned and a new domicile of choice in Mauritius established; the attractions of Mauritian bankruptcy law were very likely to have been what drove Mr Henwood to form this intention.

49. In J[60] the judge set out an alternative analysis. He says that if the appellants were correct that Mr Henwood moved to Mauritius with the intention only of establishing a holiday home, the strongest case against Mr Henwood would have been that he always intended to return to the IOM when the hue and cry died down. If that were so, Mr Henwood's domicile of choice in the IOM would have persisted, and so his application would succeed on that ground in any event:

"60. If, as the Respondents suggest, Mr Henwood and his wife moved to the Villa with the intention only of establishing a further holiday home, Mr Henwood was not abandoning his domicile of choice in the IOM. It has always seemed to me that the strongest case against Mr Henwood's contentions is that, notwithstanding the circumstances of his departure from the IOM, he always intended to return there with his wife when the hue and cry had died down. That was where his adopted family lived and where, as recent evidence suggests, Mrs Henwood's instincts would drive her to wish to return to. Why otherwise retain the Grange, their former residence, and not sell it and with the proceeds provide Mrs Henwood's parents with a house more consistent with their requirements? If this factual analysis is correct Mr Henwood has not abandoned his domicile of choice in the IOM and the application succeeds on this ground."

The appellants' case

50. Mr Geoffrey Vos QC, for the appellants, submits that Mr Henwood's domicile of origin must have revived when he left the IOM in 1992 and that accordingly the onus of proof on Mr Henwood was a heavier one than if he was seeking simply to show that one domicile of choice had superseded another.

51. Mr Vos submits that the judge erred in failing to make a finding as to which of Mr Henwood's homes was his chief residence. The chief residence need not be the biggest residence that a person has, but it must be his main home. For this proposition, Mr Vos relies on *Udny*, and distinguishes the facts of *Bell v Kennedy*.

52. The concept is one of the real home. Thus the character of a person's residence is relevant not only to the question of intention but also to the question whether his residence constitutes residence of the kind required to obtain a domicile of choice.

53. If a person has a chief residence in one country but does not intend to remain there indefinitely, he does not acquire a domicile in that country. Equally, if a person has a secondary residence in one country (for example, a holiday home visited every winter), he does not acquire a domicile in that country even if he intends to retain that residence indefinitely. The present case is the latter situation. The judge wrongly asked himself whether Mr Henwood intended to reside permanently in Mauritius but failed to ask whether Mauritius was Mr Henwood's chief residence. The judge made no finding as to where Mr Henwood's chief residence was.

54. In this case Mauritius was clearly not Mr Henwood's chief home. He initially went to Mauritius on an experimental basis and at that point his domicile of origin revived. In any event his home in Mauritius was not his chief residence. The French property was his chief residence. His wife's parents did not even know the address of the Henwoods in Mauritius.

55. Mr Vos submits that the judge erred in failing to take into account the evidence about Mrs Henwood. She was important because it was she who enabled Mr Henwood to live in Mauritius and because her conduct threw light on Mr Henwood's intentions. She did not give evidence because of ill-health. However, it was clear that she was in the IOM with her elderly parents. Mrs Henwood gave the Grange in the Isle of Man as her address in the annual return of the parent company of OCRA. She was the manager of the French property, which was substantial. She

had not made up her mind whether to live in the newly purchased property in Tamarina, Mauritius or whether to let it out. At the date of the trial, she had not visited Mauritius since May 2006. If she could have given evidence that she intended to live permanently or indefinitely in Mauritius, that would have provided significant support for Mr Henwood's case.

56. Overall, the judge's conclusion was plainly wrong on the evidence before him. The French property was more important. Mr Henwood had told repeated lies. He did not even know the name of the church near which he said he wished to be buried. It was, in fact, a Catholic Church, and he was an Anglican. Mr Henwood spent less than ten weeks a year in Mauritius. The mere fact that a person seeks to escape his creditors does not mean that he will want to stay there for the rest of his life. The judge did not take into account that Mr Henwood was a professional adviser in asset protection. He kept his formal documentation such as his birth certificate in France.

57. Mr Vos submits that it was not open to the judge to hold in the alternative that Mr Henwood retained his domicile of choice in IOM***: Urquhart v Butterfield*** (1837) 37 Ch D 357. This alternative case was contrary to Mr Henwood's case and was not put to any of the witnesses.

58. The judge had to consider all the relevant circumstances.

The respondent's case

59. Mr Antony White QC, for the respondent, points out that Mr Charles Aldous QC, who appeared for the appellants before the judge, conceded that the standard of proof on the balance of probabilities applied. In any event there is no authority for applying a higher standard of proof where the domicile of origin arises under what I have called the default rule. If there is no higher standard of proof, it cannot matter whether Mr Henwood acquired his domicile of choice in Mauritius in 1992 or at some later date prior to December 2005.

60. Mr White submits that there was no need for any finding as to Mr Henwood's chief residence. Mr White submits that that the question whether a residence is a "*chief*" one is a facet of the requirement of intention to reside in a place indefinitely. He relies on statement in the commentary in Dicey under Rule 10 at p133 that ""*Residence" means very little more than physical presence"*. He also relies on ***Mark* and *IRC v Duchess of Portland*** [1982] Ch 314.

61. The judge was not required to make separate findings about Mrs Henwood. There was some evidence that she was indisposed and thus unable to give evidence.

62. The judge's overall conclusions involved factual findings that he was entitled to make. The summary in J[52] was based on evidence that was substantially unchallenged. The appellants have failed to show any error of approach. The judge was well aware of the unreliability of Mr Henwood's evidence that he did not have to give himself a warning about accepting it (see generally ***Hill v Spread Trustee Co Ltd*** [2007] 1 BCLC 450 at [89]).

63. Mr White submits that Mr Henwood's desire to protect himself from bankruptcy is a strong indication that he had an intention to reside permanently in Mauritius.

64. Mr White submits that there was no formal admission at trial that Mr Henwood had abandoned his domicile of choice in the IOM. However, he made no alternative case that Mr Henwood had a domicile of choice in the IOM at the relevant date. The appellants did not accept that the Isle of Man was the domicile of choice. Mr White informed the court that he submitted that his domicile of choice shifted but that he did not say that it was abandoned. Accordingly, the judge was entitled to reach his alternative conclusion.

Conclusions

Summary

65. It may be helpful if I start by giving my overall conclusion. For the reasons given below, I conclude that some, but not all, of the criticisms of the judge's judgment are made out. However those criticisms have also led me to conclude that there is a fundamental flaw in the judge's reasoning. There was one supremely important ultimate issue in this case: did Mr Henwood have the intention to reside permanently or indefinitely in Mauritius as at the date on which the petition was presented? That intention would have to be a matter of inference from the proved or admitted facts. As Dicey states, any circumstance, that is evidence of a person's intention to reside permanently or indefinitely in a country, must be considered in determining whether or not that intention existed (see [8(vii)] above). This is in line with the basic rule of evidence that an inference must be consistent with all the relevant proved or admitted facts. This proposition is also supported by a number of the authorities cited in this court, including ***Agulian, Re Fuld (deceased) (No. 3)***[1965] P 675; ***Re Clore (deceased) (No. 2)*** [1984] STC 609 and ***Buswell v IRC*** [1974] 1 WLR 1631. In this case, however, the judge in his assessment of the ultimate issue failed to take into account various important matters, especially the circumstances relating to Mr Henwood's residence in France and Mrs Henwood's absence from Mauritius. The judge may have been misled by the fact that neither party asserted that Mr Henwood had acquired a domicile of choice in France. The judge failed to appreciate that Mr Henwood's connection with the French property was nonetheless a relevant circumstance. The impression given by the judgment is that the French connection was "*the elephant in the room*". But the true position was that, even though the appellants did not contend that France was the country of Mr Henwood's domicile, Mr Henwood's connections with the French property were relevant to whether he intended permanently reside in Mauritius.

66. For these reasons, and the other reasons given below, I have concluded that this court must make its own evaluation of the facts. I return to this question at [116] to [128] below.

The judge did not consider all the circumstances that bore on the question whether Mr Henwood had the requisite intention to reside permanently or indefinitely in Mauritius

67. There was no issue but that Mr Henwood had resided from time to time in Mauritius. The principal question at trial was whether he had the necessary *intention* to reside there. In order to succeed on this point, Mr Henwood had to show on the balance of probabilities that it was his intention to remain there permanently or indefinitely.

68. To ascertain whether such an intention was shown on the evidence, the judge had to make primary findings of fact and then make a global evaluation of all the relevant facts. The ultimate fact in issue was Mr Henwood's intention. This had to be a matter of inference from all the relevant facts, giving such weight to Mr Henwood's declarations as to his own intention as the law allows. An inference of this kind must be drawn on the balance of probabilities, and thus the judge had to be satisfied that the inference that he drew as to Mr Henwood's intention was more likely than not on all the relevant and proved facts.

69. In this case, the judge drew his inference from some only of the proved facts. The judge divided his reasons for concluding that Mr Henwood had established the necessary intention into four subject matters: (1) reasons pertaining to the Villa; (2) employment in Mauritius; (3) citizenship of Mauritius and (4) Mauritian bankruptcy law. (The judge presented the alternative basis for his decision as if it were in itself a reason for his conclusion. However, that must have been a typographical error because it was clearly a separate matter).

70. There were material matters that the judge left out of account. For instance, he did not consider what light the evidence as to the French property, or as to Mrs Henwood's absence from Mauritius since May 2006, or the untruths told by Mr Henwood when giving evidence threw on his intention.

71. The judge made findings of primary fact about the French property (see J[32] to [35], set out in [41] above), but at no stage asked what the implications of those facts were for the ultimate fact in issue, namely whether Mr Henwood had the necessary intention.

72. The position regarding Mrs Henwood's absence from Mauritius is more complex. The judge did consider the probative effect of her conduct in J[40] and J[41]. The judge held that the relevant point in time was December 2005. He went on to hold that, in the absence of evidence (1) that their marriage was then in trouble or (2) that Mr Henwood had prevented her from giving evidence that he did not have the relevant intention or (3) that she intended to sell the newly purchased Mauritian property, her position shed no light on the question whether Mr Henwood intended to stay in Mauritius permanently or indefinitely. Had matters stopped there, it would have been difficult for the appellants to sustain a challenge that the judge was not entitled to deal with the evidence as to Mrs Henwood's position as he did in J[41]. However, it is apparent from J[60] set out in [49] above that the judge considered that her attachment to the IOM would be one of the matters which would draw Mr Henwood back to the IOM once the storm over Barlow Clowes had passed. He thus accepted that her connection with the IOM threw light on Mr Henwood's intention. There could not be any reason to treat her position differently for the purposes of the judge's primary conclusion.

73. Thus, in my judgment, relevant evidence was left out of account in the process of evaluating whether the evidence showed that Mr Henwood had an intention to reside in Mauritius permanently or indefinitely. It follows that the judge's conclusions cannot stand either on the primary basis for his decision or (in consequence) on his alternative basis.

74. That means that this court must consider what inference he should have drawn from the totality of the relevant facts. There are other issues with which I must deal before I come to that point.

Other points which arise out of the judge's "Reasons pertaining to the Villa" and other reasons for his Conclusion

75. The judge's first set of reasons were "*Reasons pertaining to the Villa*". In short, the judge held that since Mr and Mrs Henwood left the IOM, because they felt ostracised as a result of the negative publicity they received from the collapse of Barlow Clowes, and acquired a permanent home in Mauritius, and because Mr Henwood was partial to the island life, the necessary intention was shown. The statement about island life could not of itself bear the weight the judge sought to place on it because there was other evidence that Mr Henwood was also fond of the French way of life that he was able to enjoy at the French property.

76. The judge's next reason related to Mr Henwood's employment in Mauritius. But this had terminated in 2002, and Mr Henwood did not have a permit to work there. Accordingly, I do not see how these facts could support an inference as to his intention at least as at the date of the petition.

77. The judge also relied on Mr Henwood's rights of residence in Mauritius. He accepted that to obtain Mauritian citizenship Mr Henwood would have to have given up British citizenship and that the wish to retain a British passport and thereby to enter France without restriction was a good reason for not applying for Mauritian nationality. Mr and Mrs Henwood obtained rights of permanent residence because of Mrs Henwood's acquisition of property. But it does not follow from the acquisition of those rights of themselves that Mr and Mrs Henwood intended to reside in Mauritius indefinitely. Those factors would have to be weighed in the balance with all the other relevant factors.

78. The judge's last reason was Mr Henwood's desire to avoid bankruptcy, and his wish to take advantage of the favourable regime in Mauritius, enabling him to avoid bankruptcy, so long as he did not carry on business there. That desire provided him with a motive to want to stay in Mauritius, but it would not of itself mean that he necessarily intended to stay there permanently, so this fact would have to be considered in conjunction with other evidence as to Mr Henwood's ultimate intentions as regards his residence.

79. It is necessary to consider both the individual and the cumulative effect of the relevant factors. However, in my judgment, none of the reasons given by the judge, whether taken on their own or cumulatively, could of themselves warrant the inference as to intention which the judge drew irrespective of other evidence bearing on the question of intention.

Weight given by the judge to Mr Henwood's own statements about his motivation for residence in Mauritius

80. In giving his reasons pertaining to the Villa, the judge placed weight on two statements by Mr Henwood as to his motivation, namely (1) his statement that he intended to set up a new home away from the IOM when he left the IOM in 1992 and (2) his statement that he liked island life. As to (1), the judge had also recognised at J[13], quoted at [35] above that Mr Henwood's statements of intention were challenged by the appellants. The fact that the appellants accepted that Mr Henwood abandoned his domicile of choice in IOM did not mean that they accepted that he had the intention necessary to establish a domicile of choice elsewhere.

81. Moreover, the first statement at least was a statement of the kind that the courts have held should be treated with suspicion because they are self-serving. There is no unequivocal corroborating evidence that Mr Henwood intended to set up a home in the sense that the judge meant, namely a home where he was based and would ultimately return (see J[51], considered below).

82. The judge could give little weight to Mr Henwood's own statements as to his attraction to island life in the light of his finding as to Mr Henwood's lack of credibility as a witness (above, [38]).

83. These factors further undermine the judge's assessment, which I have already held was fatally flawed by failing to consider the totality of the circumstances bearing on the question whether Mr Henwood intended permanently or indefinitely to reside in Mauritius, in particular, the evidence as to his connection with France and as to Mrs Henwood's connection with the IOM.

Did Mr Henwood bear a heavier burden of proving that his domicile of choice had changed if in the meantime his domicile of origin had revived?

84. This point was not taken before the judge but needs to be decided if for no other reason then that it is relevant to the evaluation of the facts that this court must undertake.

85. There is a strong line of case law, binding on this court, that the domicile of origin is tenacious. Thus, for example, Lord Macnaghten in ***Winans v Attorney-General*** [1904] AC 287 at 290 held that the character of domicile of origin "*is more enduring, its hold stronger, and less easily shaken off*" than domicile of choice. Lord Macnaghten added at 291 that a change of domicile is a serious matter because the change may involve "*far reaching consequences in regard to succession and distribution and other things which depend on domicile.*" At 292, he held that the question was whether it had "*with perfect clearness and satisfaction*" been shown that the testator had "*a fixed and settled purpose*" or "*a determination*" or "*a fixed and deliberate intention*" to abandon his American domicile and settle in England.

86. These authorities give rise to the question whether the standard of proof applying when it is sought to show abandonment of a domicile of origin in favour of a domicile of choice is the criminal standard or the civil standard. In ***Re Fuld (deceased) (No. 3)*** at 685, Scarman J dismissed the idea that the standard was the criminal standard:

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

87. In the later case of ***Buswell v IRC*** [1974] I WLR 1631, it was conceded before this court that Scarman J was correct to say that the standard of proof was always the civil standard and not the criminal standard but Orr LJ, with whom Russell and Stamp LJJ agreed, considered that this was a correct view of the law. The rejection of the criminal standard of proof is consistent with the approach taken by Lord Nicholls in a well-known passage in ***Re H and others (minors)(sexual abuse: standard of proof)*** [1996] AC 563 and 586 to 587:

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation established. Ungoed-Thomas J expressed this neatly in ***In re Dellow's Will Trusts*** *[1964] 1 W.L.R. 451, 455: "**The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it**."*

This substantially accords with the approach adopted in authorities such as the well known judgment of Morris LJ in ***Hornal v. Neuberger Products Ltd****. [1957] QB 247.This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters."*

88. In essence there is no need for any higher standard of proof where more serious allegations are made in civil cases because the civil standard has the inbuilt flexibility to take the seriousness of an allegation into account. Accordingly the more serious an allegation the more substantial will need to be the evidence to prove it on a balance of probabilities.

89. That leaves the question whether there is any difference in the strength of the case which Mr Henwood must show if he acquired a domicile of choice in Mauritius without his domicile of origin reviving and the strength of the case which he must show if his domicile of origin revived. It would be odd to have two different approaches within the same case.

90. Thus it is necessary to examine the possible reasons for this difference. First, as Lord Macnaghten said in ***Winans,*** the courts should not too readily find that a person has lost his domicile of origin because a change of domicile affects a person's status. At 294, Lord Macnaghten quoted with approval observations of Lord Cranworth and Lord Wensleydale in ***Whicker v Hume*** (1858) 10 HLC 124 to the effect that "*in these days, when the tendency of the educated and leisured classes is to become cosmopolitan - if I may use the word- you must look very narrowly into the nature of the residence suggested as a domicil of choice before you deprive a private man of his native domicil.*"

91. It is difficult with respect to see why this reason does not equally apply to loss of a domicile of choice. In an increasingly cosmopolitan world, where migration is not confined to higher socio-economic groups and travel and communication is much easier, it is likely that many people will be as attached to a domicile of choice they have acquired as to a domicile of origin which they enjoyed originally. The law should reflect that fact.

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

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

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

94. It seems to me that as a general proposition the acquisition of any new domicile should in general always be treated as a serious allegation because of its serious consequences. None of the authorities cited to us preclude that approach, and such an approach ensures logical consistency between two situations where the policy interest to be protected is (as demonstrated above) the same. However, what evidence is required in a particular case will depend on the application of common sense to the particular circumstances. In this case, Mr Henwood had an aversion to England because of childhood memories. If his domicile of origin arose at all in this case, it arose only because of the default rule. In those circumstances, it is not improbable that he would wish to acquire a domicile

of choice elsewhere and accordingly there is no reason why the court should approach a case that he has done so with undue scepticism. There were of course other reasons why certain evidence adduced by Mr Henwood, namely that he had created, was to be approached with caution. But that was a wholly separate matter.

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

96. For the reasons given above, I would respectfully disagree with the following dictum of Longmore LJ in ***Agulian ,*** relied on by Mr Vos, in so far as it lays down any general rule of law: *"….it is easier to show a change from one domicile of choice to another domicile of choice than it is to show a change to a domicile of choice from a domicile of origin."* ([56])

Was the judge in error for not making a finding as to which of Mr Henwood's homes was his "chief residence"?

97. Since a person can only have one domicile, it is necessary to identify which of the countries in which he has a home, if he has more than one, is the country of his domicile. Mr Vos submits that the test is: in which country does the subject have his chief residence? Accordingly the judge has to make a finding as to chief residence, which the judge failed to do. For the reasons given below, this criticism in my judgment is misconceived.

98. Mr Vos relies on ***Udny*** at 458, where Lord Westbury held: *"Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or* ***chief*** *residence in a particular place, with an intention of continuing to reside there for an unlimited time."* (emphasis added)"

99. Again, in ***IRC v Bullock*** [1976] 1 WLR 1178 at 1184, Buckley LJ held obiter that the court had to decide which was his principal home: *"A man may have homes in more than one country, at one time. In such a case, for the purpose of determining his domicile, a further enquiry may have to be made to decide which, if any, should be regarded as his principal home."*

100. Determining which is the chief or principal residence involves considering the quality of the subject's residence. In ***IRC v Duchess of Portland*** [1982] Ch 314, where the taxpayer had residences in Canada and England, where she lived with her husband, Nourse J held (at 318 and 319) that the court had to consider of which country she was an inhabitant: *"The primary question therefore is whether the taxpayer actually ceased to reside here after January 1, 1974. Residence in a country for the purposes of the law of domicile is physical presence in that country as an inhabitant of it. If the necessary intention is also there, an existing domicile of choice can sometimes be abandoned and another domicile acquired or revived by a residence of short duration in a second country. But that state of affairs is inherently improbable in a case where the domiciliary divides his physical presence between two countries at a time. In that kind of case it is necessary to look at all the facts in order to decide which of the two countries is the one he inhabits."*

101. In ***Plummer v IRC*** [1988] 1 WLR 292, the appellant had a domicile of origin in England but her family had moved to Guernsey. She remained in England principally for the purpose of completing her education. She intended when she had finished her training and had some experience working in this country to return to Guernsey, where she spent part of her time. Hoffmann J held that the special commissioners were entitled to say that her chief residence was in England and that, as the appellant had her chief residence in England, which was her domicile of origin, she had not acquired a domicile of choice in Guernsey. It was premature to say that she was domiciled in Guernsey.

102. Hoffmann J was critical of the test formulated in *Portland* and preferred the test of chief residence. He quoted the passage from the judgment of Nourse J which I have already set out and continued (at 294 to 295):

"Speaking for myself, while I find the contrast between an inhabitant and a person casually present useful to describe the minimum quality of residence which must be taken up in a new country before a domicile there can be acquired, the concept of being an inhabitant seems to me less illuminating in cases of dual or multiple residence such as the present.

Clearer guidance is to be found in a well-known passage in the speech of Lord Westbury in ***Udny v Udny****:*

"Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time."

I infer from this sentence, which was quoted by the commissioners, that a person who retains a residence in his domicile of origin can acquire a domicile of choice in a new country only if the residence established in that country is his chief residence. The commissioners therefore asked themselves whether the taxpayer had made her grandmother's house in Guernsey ***'her chief place of residence'****. They regarded this question, in my judgment rightly, as being the same as whether* ***'in the sense in which the term is used in this context'*** *the taxpayer had become an inhabitant of Guernsey."*

103. This decision is criticised by Dicey, which seems to suggest that the decision overlooked the point that questions as to the quality of residence are primarily relevant to the question whether the person had the requisite intention of permanent or indefinite residence (see pages 133 to 134). For my part, I do not consider that this criticism is correct since it is clear that Hoffmann J recognised that the test of chief residence involved a consideration of factors throwing light on the subject's intention. He thus went on to reject the submission of counsel for the taxpayer that all the commissioners had done was to count the number of nights the taxpayer had spent in the United Kingdom rather than consider the quality of her residence. Hoffmann J rejected that argument, not on the

grounds that it was misconceived in law but on the grounds that the commissioners had indeed considered the quality of residence in Guernsey.

104. Inevitably, any test of chief residence is circular. It cannot simply be a reference to the main home in terms of size or amenities. Nor can it be a reference to the home in which the subject spends the most time. The court has to look at the quality of the residence in order to decide in which country the subject has an intention to reside permanently. Provided that task is carried out, the chief residence in the sense that term is used in this context has in fact been identified.

105. In fact, the judge in effect directed himself that he needed to ascertain the chief residence. Thus, at J[27], he stated that if he was satisfied that France was more of a home than Mauritius, Mr Henwood would fail to establish a domicile of choice in Mauritius. The judge was using the term "home" in the sense of a permanent home. This appears from J[51] where he says: *"In my view it is highly unlikely that any married couple would deliberately abandon the idea that they had a home where they were based or to which they would not wish ultimately to return*."

106. In ***Whicker v Hume*** 1858 7 HLC 124,160, Lord Cranworth said: *"By domicile we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it*."

107. Accordingly it was permissible for the judge to use the concept of home in this context.

Judge's alternative basis

108. The judge went on to hold that, even if he was incorrect, on his primary conclusion that Mauritius was a domicile of choice, Mr Henwood had always had an intention to return to the IOM, and thus never lost his domicile of choice there. Mr Vos submits that it was not open to the judge to make this finding because it was common ground between the parties that Mr Henwood lost his domicile of choice in IOM. The parties' cases were not, as I understand it, identical. The appellants' case was that Mr Henwood lost his domicile of choice in the IOM when he left there in 1992 as a result of ostracism. Mr Henwood made no positive case as to when he had abandoned his domicile of choice in the IOM but it was certainly his case that he must at some stage have done so as otherwise he could not have acquired a domicile of choice in Mauritius. Both parties accordingly said that the domicile of choice in the IOM was lost at some point.

109. However, the judge was not in my judgment precluded from making a finding that was inconsistent with the case which either or both of them put forward. The position would have been different if there had been any admission by Mr Henwood that he had lost his domicile of choice in the IOM: ***Urquhart v Butterfield*** (1887) 37 Ch D 37, 369 per Cotton LJ, with whom Sir James Hannen and Lopes LJ agreed.

110. The judge did not make any finding of fact that Mr Henwood intended to return to the IOM when the hue and cry had died down. In my judgment, he could not do that because it would have been inconsistent with his primary finding, which was that Mr Henwood acquired a domicile of choice in Mauritius either when he moved to the Villa in 1992 or at some intermediate date between that date and December 2005 (see J[61]). His conclusion was simply that, *if* his factual analysis was correct (that is, as I read it, that Mr Henwood intended to return to the Isle of Man when the hue and cry died down), then Mr Henwood had not abandoned his domicile of choice in the IOM.

111. In my judgment, the judge's alternative analysis proceeds on the basis that, if Mr Henwood did not form the necessary intention permanently or indefinitely to reside in Mauritius, his domicile of choice must have persisted as a matter of law. This is evident from certain passages in J[60] and J[61] of his judgment. I have already set out J[60] in [49] of this judgment. The relevant passage in that paragraph is the first sentence. In that first sentence the judge proceeds on the basis that, if the move to Mauritius was not with the requisite intention, Mr Henwood would not have abandoned his domicile of choice in the Isle of Man. The same line of thought can be found in J[61], which I now set out with the relevant passage italicised:

> *"61. In the result, however, for the reasons which I have set out above I am driven to the conclusion that when Mr Henwood moved with his wife to the Villa in 1992 he did so with the intention of permanently residing there. If, however, that conclusion is wrong it seems to me clear that he formed such an intention by the time the petition was presented* ***with the result that he then abandoned his domicile of choice in the IOM and established a new domicile of choice in Mauritius.*** *It seems to me very likely that the attractions of Mauritian bankruptcy law will have driven him to form this intention and that the last minute purchase by Mrs Henwood of a property in Mauritius which would confer on Mr Henwood a right permanently to reside in that country is strongly indicative that Mr Henwood had formed such an intention at least by this time."*

112. The provenance of this line of thought lies in the concluding sentences of [26] of the judge's judgment:

> *"26. A domicile of origin continues until a domicile of choice elsewhere is acquired see Dicey 6 R-017. Where a claimant leaves a domicile of origin without showing the necessary intention and residence to establish a domicile of choice in another country, his domicile of origin adheres to him see* ***Udny's*** *case at page 449. Where a domicile of choice is abandoned by a claimant but no new domicile of choice is established, the claimant's domicile of origin revives see* ***Udny's*** *case at page 452 and 460, but this requires proof of intention to abandon the domicile of choice. If all that is shown is movement accompanied by indecision as to whether the move is to be permanent or not the domicile of choice will not have been abandoned. See* ***Morgan v Cilento*** *ibid [[2004] WTLR 457] at para 74."*

113. In any particular case, it may of course be a correct conclusion as a matter of law that a domicile of choice is not lost if a person merely moves from the place of his domicile of choice without having decided whether to move permanently or not, but he would have to have retained an intention permanently or indefinitely to reside in that place: see, above, [8] (vi), (ix) and (x). It does not follow as a matter of law that if a person moves from the place of his domicile of choice without having decided whether to reside permanently or indefinitely elsewhere that he has retained his domicile of choice.

114. The judge took his proposition from ***Re Shaffer, Morgan v Cilento*** at [74], but I do not consider that that case supports his proposition. In that case, the issue was whether the deceased, the playwright Mr Peter Shaffer, had in November 2001 died domiciled in England or Australia. Mr Shaffer had an English domicile of origin but had acquired a domicile of choice in Australia. In the final months of his life, he came to London and entered an intimate relationship with a woman there. He was, however, married. His wife lived in Australia and she owned their home there. Lewison J held at [74] that Mr Shaffer had not made up his mind what to do. He also found, however, that Mr Shaffer regarded his place of residence in Australia as his home in the early summer of 2001 and that he was not then contemplating a return to England full time. At [75], Lewison J asked whether anything changed in the period June 2001 to November 2001, when Mr Shaffer died. He concluded that the facts did not show that Mr Shaffer had lost his intention to return to Australia. It was, therefore, not axiomatic in that case that, simply because Mr Shaffer had physically left Australia and came to London without making up his mind where he was going to reside in the future, he retained his domicile of choice in Australia.

115. In this case, the judge in my judgment did proceed on the basis that the domicile of choice would inevitably be retained during any period of indecision. The judge's assumption in this case that this was so was in my judgment an error of law. He would have to have made a finding of fact that Mr Henwood continued to have an intention permanently or indefinitely to reside in the IOM after he had left there in 1992. Before he could make that finding, he would have to have considered all the relevant circumstances which bore on his intention to reside, including the impact of Mr Henwood's residence in France. He did not follow these steps. The assumption which as I have described the judge made was the springboard for his alternative analysis, and thus for this further reason his alternative analysis cannot stand.

My evaluation of the evidence bearing on intention

116. As a result of the errors of principle on the part of the judge identified above, this court is entitled and required to intervene and reach its own conclusion on whether Mr Henwood had acquired a domicile of choice in Mauritius.

117. The main issue with which I am concerned is whether he had the requisite intention to reside permanently or indefinitely in Mauritius. The relevant date is 19 December 2005. I have held above that a change of domicile is in general a serious matter. However, Mr Henwood had no attachment to his domicile of origin and his case is that he had left the IOM in order to start a new life. In the circumstances of this case, therefore, it is not in any way improbable that he might acquire another new domicile of choice. I remind myself that the onus of proof is on Mr Henwood.

118. I start with the position immediately following Mr Henwood's departure from the IOM in 1992. There can be no doubt that he would in all the circumstances have abandoned his domicile of choice there. He himself asserted that he no longer had the intention to reside there permanently or indefinitely. The evidence was that he went to Mauritius in 1992 to take up an offer of employment (which was not long-lived) and that he leased a property on an experimental basis. It would be absurd to suggest that, immediately he left the IOM Mr Henwood acquired a domicile of choice in Mauritius. He could only have acquired the relevant intention at some later date. Accordingly, at that point, the default rule applied and Mr Henwood's domicile was, in law, his domicile of origin.

119. There are a number of circumstances to be considered. He was not able to live there on a permanent basis without the permission of the Mauritian government. His residence was until May 2006 in that sense precarious. This does not make it impossible for him to acquire a domicile of choice in Mauritius but makes it less likely that he did so. His evidence was that he would not have returned to live in England, but the revival of a domicile of origin in these circumstances does not depend on any intention to reside.

120. Apart from the facts considered by the judge under the passage headed "Conclusion", there were other relevant facts, particularly as to the amount of time spent in Mauritius and elsewhere, the interests of Mr and Mrs Henwood, their family connections, and so on. Island life was obviously not the only interest of Mr Henwood. He enjoyed living in his French property, where he had a collection of cars. He accepted in cross-examination that over the years he had spent more time at his French property than at the Villa.

121. In December 2005 he was only 57 years old and had an active business life. He is unlikely in reality to have been thinking of where he would wish to spend his last days. There was no evidence of ill health. But another test that can be applied is to ask where, if anywhere, he had settled. I say "*if anywhere*" because Mr Henwood travelled frequently. One year he took air flights on 150 days. In 2003, for instance, he was only in Mauritius for fifty-two days, and the greatest number of days he spent there in any one year was 120 days in 1993.

122. There were other factors that indicated that Mr Henwood did not intend to reside in Mauritius indefinitely which have to be brought into the balance. In particular, the desire to avoid bankruptcy was specific to the petition debt. (This apparently was the only debt which he wished to avoid paying). He was not therefore the sort of person who was perennially in debt. The desire to avoid bankruptcy would not persist longer than the enforceability of the petition debt. Then there is the evidence about the residence of Mrs Henwood. Mrs Henwood

clearly wished to be with her family in the IOM, and as the judge pointed out the Grange had been retained and was far too big for her parents alone. The Henwoods have substantial possessions in France, as well as a staff there. Mr Henwood's business was international and there was nothing in his business to keep him in Mauritius as opposed to Europe.

123. The judge found that Mr Henwood told untruths about various matters. These included the following:
(i) that he was retired (J[13] between italicised [53] and [54]);
(ii) about the long periods spent in France were substantially as a result of works of repair and improvement to the French property or because flooding had rendered the property uninhabitable or that his secretary working at the French property was his wife's personal assistant (J[13] between italicised [63] and [64] and J[33]);
(iii) that he did not have an office in France from which he conducted business (J[33]);
(iv) that the French property was up for sale (J[34]);
(v) that he was not an expert in asset protection or that he had not been able to put substantial assets beyond the reach of his creditors (J[57]);
(vi) that he had no continuing interest in OCRA.(J[30]).

124. It is necessary to consider the motivation for these lies. The untruths went to facts and matters that might have been inconsistent with the domicile in Mauritius or made it less likely. The lies were therefore relevant to evaluation of the evidence as to his intention as to permanent or indefinite residence. The lies diminish the likelihood of that intention in reality because if that intention really existed there would be no need to lie in what must have been a premeditated way and on this scale.

125. Account has to be taken of the work permit position in 2005. Mr Henwood described himself as a "*workaholic*" and he travelled much of the time. It was thus unrealistic to think that he intended to live in Mauritius indefinitely as he had had no work permit since 2002, and he was many thousands of miles away from parts of the world where he might be expected to find clients. There was no indication that he intended to retire from business.

126. So the question is whether Mr Henwood has established on a balance of probabilities that he has a domicile of choice in Mauritius. He has had a residence there for many years. But it is the quality of his residence that matters and thus he has in effect to show that he preferred Mauritius to any other place in the world. He said that was so, but then of course these were self-serving statements. He clearly had a very comfortable and convenient residence in France. He chose to say that France was not his domicile of choice, but in my judgment, he still had to provide a satisfactory answer to this further question: if France was not his domicile of choice, what did Mauritius have for him that France did not and that clearly enabled the court to say that he had chosen to settle in Mauritius in preference to any other place where he customarily resided? For my part, I would not accept as a reason that he liked island life. He also liked French wine and culture. I have considered the relevant factors above and none of them in my judgment provides an answer to the question I have posed. In reality, if he did not consider that France was his domicile of choice, it is unlikely that Mauritius was.

127. A person does not have to have a domicile of choice. In my judgment, Mr Henwood failed to establish on a balance of probabilities that his domicile of choice was Mauritius.

128. Since Mr Henwood did not establish a domicile of choice in Mauritius, and neither he nor the appellants sought to establish a domicile of choice elsewhere, the only conclusion can be that his domicile of origin revived. There is no provision in s 265 of the Insolvency Act 1986 to indicate that the ordinary principles of civil litigation do not apply to an application to dismiss a petition for lack of jurisdiction. That the usual principles of civil litigation apply is confirmed by the fact that proof of domicile in England and Wales for the purpose of s 265 is required only on a balance of probabilities, which is assessed by reference to the strength of the parties' respective cases at trial, and not to some absolute standard.

Disposition

129. In my judgment, therefore, the appeal must be allowed. Both the judge's primary conclusion that Mr Henwood had acquired a domicile of choice in Mauritius and his alternative conclusion that Mr Henwood had retained his domicile of choice in the IOM must be set aside, and an order dismissing Mr Henwood's application to set aside the petition must be substituted for the judge's order.

Lord Justice Moore-Bick:

130. I am grateful to Arden LJ for her description of the circumstances giving rise to this appeal and her exposition of the law relating to the acquisition and loss of domicile with which I agree and which I gratefully adopt. I agree that the appeal should be allowed, but since we are differing from the learned judge I propose to explain briefly in my own words why I have come to the conclusion, based on the judge's primary findings of fact, that Mr. Henwood was domiciled in this country at the time the bankruptcy petition against him was issued.

131. The judge's conclusion that Mr. Henwood had acquired a domicile of choice in Mauritius by December 2005 when the bankruptcy petition was issued is an inference drawn from his primary findings of fact. As such it is one with which this court can properly interfere if it is satisfied that in reaching his conclusion the judge failed to take into account of important facts established by the evidence before him. In fact, there was surprisingly little dispute about the main events of Mr. Henwood's life which it was accepted provided the basis for the court's decision, but, as the judge noted, there were some important questions, mainly concerning the French Property, on which Mr.

Henwood sought to mislead the court by giving false evidence and the very fact that he did so tends to suggest that he was seeking to paint a false picture of his connection with Mauritius and the location of his real home.

132. It was common ground before this court that Mr. Henwood's domicile of origin was in England and Wales and that he subsequently acquired a domicile of choice in the IOM. The critical questions for decision, as the judge's alternative finding makes clear, is whether he ever abandoned that domicile and if so, whether he acquired a new domicile of choice outside England and Wales prior to December 2005. In the light of the primary facts found by the judge I have come to the conclusion that he did abandon his domicile in the IOM when he left in 1992 but that he did not subsequently acquire a domicile of choice elsewhere, with the result that his domicile of origin revived.

133. The reasons for my decision lie partly in the events of Mr. Henwood's life prior to 1992, partly in the circumstances in which he came to leave the IOM and partly in the manner in which he has lived and occupied himself since that time. Mr. Henwood was born and grew up in England. He experienced a particularly unhappy childhood and early life, as the judge explains in paragraph 13 of his judgment. Between 1969 and 1971 he worked abroad, in part because he wanted to distance himself as much as he could from this country with its distressing associations. However, he returned to England in 1971 and tried to make a new life for himself. Unfortunately he was unsuccessful, both in his private life and in business. Following an unsuccessful marriage which ended in divorce he left England for the IOM in 1975 intending to make his home there. This early experience of leaving his country of origin in order to escape from unhappy associations is one element that must be borne in mind when seeking to determine his state of mind when he came to leave the IOM itself in the latter part of 1992.

134. Between 1975 and 1988 Mr. Henwood created and developed a thriving business as a financial adviser. The assets which he built up are held through offshore trusts established for the benefit of his wife and children, but as the judge found, the arrangements under which they are controlled leave it open to Mr. Henwood to obtain the appointment of himself as a beneficiary should he wish to do so. In the event the Henwoods did not have children and Mrs. Henwood is currently the sole beneficiary under those trusts. In 1988 Mr. and Mrs. Henwood purchased a substantial house in the Dordogne which has become known in these proceedings as *'the French Property'*.

135. The failure of Barlow Clowes occurred in June 1988 and gave rise to considerable media attention. Mr. Henwood and his firm were among those identified in the press as having been involved in the affair and that led to a significant change in his personal and business circumstances. The judge accepted his evidence that the publicity effectively made it impossible for him to continue in business in the IOM and also had a devastating effect on his own and his wife's social life, so much so that he described their position as intolerable. As a result they began looking for somewhere else to live and work. In my view one can see here a response on the part of Mr. Henwood to the collapse of his professional and social life similar to that which had led to his leaving England in 1975.

136. Mr. and Mrs. Henwood's discovery of the charms of Mauritius in the course of a round the world holiday in 1990 appears to have been purely fortuitous. Mr. Henwood, as the judge found, still had substantial business interests in the IOM and elsewhere, which presumably enabled him to afford a comfortable way of life. A second visit to Mauritius in 1991 led to his making business contacts as a result of which in September 1992 he was engaged to act for a local financial services company and was granted a work permit. One would expect that in those circumstances Mr. and Mrs. Henwood would require accommodation of some kind in Mauritius in connection with his work, though not necessarily of a permanent nature. At all events, in October 1992 they visited the island to look for property and decided to rent for an initial period of three months the villa which Mr. Henwood now says has become his real home. They left the IOM and occupied the property in December that year. Before leaving the IOM he and Mrs. Henwood granted a long lease of their matrimonial home to Mrs. Henwood's parents at a peppercorn rent.

137. According to Mr. Henwood, when he left the IOM in December 1992 he had no intention of ever returning. Although anything Mr. Henwood now says about his intentions at the time of leaving the IOM and thereafter must be treated with great caution (the judge having found him to be a thoroughly unreliable witness), I do not find that assertion implausible. For the second time his business and domestic life had been shattered and he now had the financial means to escape from an embarrassing and very disagreeable set of circumstances to a new life in more congenial surroundings. By 1992 Mr. Henwood could not only draw on happy memories of his life living and working abroad as a young man prior to his first marriage, but had become an experienced traveller and was able to view with relative equanimity the prospect of embarking on a new way of life in pleasant surroundings. What I find more difficult to determine is whether, as the judge ultimately found, he left the IOM intending at that stage to make his permanent home in Mauritius.

138. In my view the fact that the Henwoods initially rented the villa for a trial period of three months is in itself neither here nor there. What I think is more telling is the fact that they rented it, and continued to rent it, fully furnished (although it does contain some of their personal possessions), that they have continued to occupy it under a yearly lease which gives them no enforceable right to renew and therefore little real security and that they have spent only a small amount of time there by comparison with the amount of time they have spent at the French Property and that until 2006 they had no permanent right of residence in Mauritius. Mr. Henwood relied strongly on the fact that over the succeeding years he and his wife have spent a large amount of money carrying out major renovation works on the villa, including rebuilding the kitchen, building a swimming pool, installing a generator and landscaping the grounds, none of which, he says, they would have done if they did not regard it as a permanent home. There would no doubt be some force in that argument if the villa were the Henwoods' only

residence or even the place at which they spent most of their time, but it does not take one very far in the context of their ownership of a larger and much more luxurious house in France on which, as the judge found, they spent even larger sums of money, at which they kept the majority of their personal possessions, including their personal papers, where Mr. Henwood maintained an office and a secretary and at which they spent substantially greater periods of time than they did at the villa.

139. The French Property was acquired about four years before the Henwoods started renting the villa, so the attractions which have subsequently led to their spending the majority of their time there must already have been apparent at the time they left the IOM to start a new life. It could easily have become their new permanent home, but neither side in this case has suggested that it did so, either then or subsequently. However, the existence of the French Property is an important matter when it comes to deciding the state of Mr. Henwood's mind when he left the IOM for the last time. It would not be surprising for someone of his background and temperament, who had obtained employment in a country which he found congenial but who retained a substantial property elsewhere, to spend a period of time moving between locations until he had found a settled way of life. There is no reason to think that the peculiar attractions of the Mauritian bankruptcy laws had become apparent to Mr. Henwood at that time.

140. In my view the evidence in the present case points most strongly to that conclusion. Although I am satisfied that Mr. Henwood left the IOM intending never to live there again, I am not persuaded that at that time he had formed an intention to make his permanent home in Mauritius. The nature of his occupation of the French Property and the villa respectively strongly suggests that of the two the former approximated more to a real home and that the latter was a more in the nature of a secondary home at which he enjoyed spending time during certain seasons of the year as and when circumstances permitted. However, I am not persuaded that at that stage Mr. Henwood had any clear intention about where he would in due course make a permanent home. Rather, the evidence tends to suggest that he had not formed an intention to make a permanent home in any specific location. Accordingly, his English domicile of origin revived and persisted until he acquired a domicile of choice elsewhere. As Arden LJ has explained, the fact that Mr. Henwood had no intention of making his home in England ever again is irrelevant. It is necessary for the application of certain rules of law that a domicile be ascribed to every person and therefore the law provides that if a domicile of choice is abandoned in circumstances where no substitute domicile of choice is acquired the domicile of origin revives. That is so even though the person concerned has no intention of taking up residence in the country of his domicile of origin.

141. However, the fact that Mr. Henwood's English domicile revived when he left the IOM is not sufficient to determine the outcome of the present appeal, which depends on whether he was still domiciled in England at the date of the petition. It is quite possible, of course, for him to have acquired a domicile of choice in Mauritius and I agree with Arden LJ that the weight of evidence required to displace the domicile of origin where that has revived merely by operation of law is no greater than that which is required to displace an existing domicile of choice. Again, however, where a person maintains homes in more than one country the question must be decided by reference to the quality of residence in each of those countries, since it is only by considering the quality of residence that one can decide which is his real home.

142. During the period between December 1992 and December 2005 Mr. Henwood travelled extensively on business and for pleasure, often spending only short periods of time in any one location. However, the circumstances surrounding the Henwoods' occupation of the villa changed little apart from the fact that the purchase by Mrs Henwood of a parcel of land elsewhere on the island in enabled her and Mr. Henwood to obtain a right of permanent residence in Mauritius. Since the decision to acquire that property had been taken before December 2005, no doubt in the knowledge that it would bring with it that very benefit, it provides some evidence that the Henwoods had formed an intention to continue residing in Mauritius for the indefinite future. Mrs. Henwood's subsequent return to the IOM in 2006, probably precipitated as much as anything by illness, does not in my view detract significantly from it. However, I find it surprising that if Mr. Henwood had formed a definite intention to make his permanent home on Mauritius he continued to occupy the villa under a succession of 12-month leases, making no apparent attempt to secure his position by obtaining a long lease on the property or even a freehold title. In other circumstances that might not be of much significance, but since Mr. Henwood clearly had the necessary financial means to secure his right to occupy the villa, the fact that he made no attempt to do so tends to undermine the suggestion that he intended to make his permanent home in Mauritius.

143. More instructive, however, is to compare the way in which Mr. Henwood used the villa with the way in which he made use of the French Property during that period. Although the French Property was originally acquired as a holiday home at a time when Mr. Henwood was on any view domiciled in the IOM, the judge's findings about the use to which it was put during the years between December 1992 and December 2005 (to which I have already referred) support the conclusion that he treated that property as his principal home rather than the villa. That is not to say that Mr. Henwood was domiciled in France; simply that the nature of his residence at the villa was not consistent with its being his real home.

144. The judge found that since 1994 Mr. Henwood has referred to the villa in documents of various kinds in terms which would indicate that he regarded it as his home. Thus in his United Kingdom passports issued in September 1994 and February 2001 he entered the address of the villa as his home address and in his diary for 2000 he referred to the villa as "home" on a number of occasions. In a will made on 12th December 2005 he stated that he was domiciled in Mauritius and confirmed similar statements of his domicile said to have been made in earlier

wills made in September 1994 and August 1997, although those wills were not themselves in evidence. In the will of 12th December 2005 he expressed a wish to be buried in the graveyard of a local church.

145. In my view these references and statements must be approached with a degree of caution, not only because they emanate from Mr. Henwood himself, but also because as the prospect of bankruptcy proceedings became more real the incentive for him to take opportunities of bolstering his case that he had acquired a domicile of choice in Mauritius grew ever greater. I think it would be wrong, therefore, to attach much significance to statements in a will made only one week before the bankruptcy petition was presented.

146. In the period prior to December 2005 bankruptcy proceedings in this country had become an ever more present threat. At some point, therefore, Mr. Henwood must have realised that there were advantages in settling in Mauritius; he may even have been aware that it would be in his interests to establish a domicile of choice there. The benefits of doing so certainly provided an incentive to do so, but an intention to take advantage of immunity from bankruptcy (which was not in fact part of Mr. Henwood's case) is not enough by itself. It is necessary for him to satisfy the court that at the date of the petition he had made Mauritius his permanent home. In my view on the findings of fact made by the judge he has failed to do so.

Lord Justice Waller:

147. I agree that the appeal should be allowed for the reasons given by Arden LJ and by Moore-Bick LJ. I would summarise the position as follows. There is no issue that Mr Henwood had a domicile of origin in England. He then acquired a domicile of choice in the IOM. Unlike a domicile of origin, a domicile of choice can simply be abandoned by giving up residence and no longer having the requisite intention, or it can be abandoned by acquiring another domicile of choice. Mr Henwood's case was abandonment by acquisition of another domicile of choice in Mauritius in 1992, but the evidence did not establish the acquisition of a domicile of choice in Mauritius in 1992. The evidence did, however, establish abandonment of his domicile of choice in the IOM. Thus his domicile of origin revived. The evidence simply did not establish that Mr Henwood had ever finally made a choice as between France and Mauritius as to which, if either, was to be his permanent home.

148. In my view the key mistake made by the judge appears from his explanation of the alternative case. The first sentence of paragraph 60 reads "*If, as the respondents suggest, Mr Henwood and his wife moved to the Villa with the intention only of establishing a further holiday home, Mr Henwood was not abandoning his domicile of choice in the IOM.*" Arden LJ quotes further passages of the judge's judgment where he seems to be thinking that, unless another domicile of choice was acquired, the domicile of choice in the IOM persisted [see paragraphs 111 and 112 of Arden LJ's judgment]. In thinking that a domicile of choice can only be lost by the acquisition of another domicile of choice the judge was in error. A domicile of choice can be abandoned and, if abandoned, the domicile of origin revives.

149. It was, I suspect, this same error which led the judge to say that he felt "*driven*" to the conclusion that when Mr Henwood moved with his wife to the Villa in 1992 he did so *"with the intention of permanently residing there"* [see paragraph 61 of the judgment]. He would only be "*driven"* to that conclusion if his thought process was that unless Mr Henwood obtained a domicile of choice elsewhere he will not have lost his domicile of choice in the IOM. The correct thought process is that Mr Henwood abandoned his domicile of choice in the IOM by no longer having the intention to reside there permanently and thus that domicile of choice was lost in 1992. Because his domicile of origin revives, there is no compulsion to find the acquisition of another domicile of choice. The question then is whether the evidence ever established that Mr Henwood thereafter acquired a domicile of choice anywhere and in particular whether he could establish Mauritius as opposed to France. The evidence did not establish the requisite intention.

Mr Geoffrey Vos QC and Mr Andrew Ayres (instructed by Messrs Clifford Chance LLP) for the Appellants
Mr Anthony White QC and Miss Samantha Knights (instructed by Messrs Alan Taylor & Co) for the Respondent