Neutral Citation Number: [2018] EWHC 160 (Ch)

Case No: HC-2017-001383

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (Ch Div)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/02/2018

Before :

THE HONOURABLE MR JUSTICE BARLING

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Between :

Vadim Maratovich Shulman	**Claimant**
- and -	
(1) Igor Valeryevich Kolomoisky	**First Defendant**
(2)Gennadiy Borisovich Bogolyubov	**Second Defendant**

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Mr Jonathan Crow QC & Mr Gregory Denton-Cox (instructed by **Hogan Lovells International LLP**) for the **Claimant**
Mr Ali Malek QC, Mr Conall Patton and Ms Pia Dutton (instructed by **Skadden, Arps, Slate, Meagher & Flom (UK) LLP**) for the **Second Defendant**

Hearing dates: 18 and 19 December 2017

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Judgment Approved

GLOSSARY OF DEFINED TERMS

TERM	PARA WHERE LISTED	DEFINITION
“D2”	1	Defendant 2 (Mr Gennadiy Bogolyubov)
“D1”	1	Defendant 1 (Mr Igor Kolomoisky)
“C”	2	Claimant (Mr Igor Kolomoisky)
"the Brussels I Regulation Recast"	9	Article 4(1) of the Brussels I Regulation (recast) (Reg (EU) No 1215/2012)
"TILR 1995”	22	Taxation of Income from

		Land (Non-residents) Regulations 1995
"the Q flat"	45	An apartment in Geneva at Quai de Seujet where defendant 2 claimed to have resided

MR JUSTICE BARLING:

Introduction

1. By this application, issued on 3 July 2017 by the second defendant, Mr Gennadiy Bogolyubov ("D2"), a declaration is sought that the court has no jurisdiction to try the underlying claim. The first defendant, Mr Igor Kolomoisky ("D1"), is not a party to the application.

2. The claim, brought by the claimant, Mr Vadim Shulman ("C"), was issued on 12 May 2017. The substantive allegations are not of direct relevance to the application. In brief, they arise out of a business partnership or joint venture carried on between C, D1, and D2 from 1999/2000, investing in and managing assets associated with the metallurgical and mining industries in the Ukraine, Russia and the United States. The parties made a number of such investments, and apparently developed a close business and personal relationship so that they and their families became close friends. The relationship broke down when C alleged that the defendants had failed to account to him for his share of the profits and/or proceeds of sale of various of the joint investments. In this claim, C seeks an account of the defendants' dealings with partnership property and their proceeds, and an order for payment to him of all sums found due on the taking of such account, together with damages or equitable compensation for breach of duty, and other related relief.

3. It is common ground that on 15 May 2017 the claim form (with the Particulars of Claim) was delivered by courier to 31 Belgrave Square, a substantial property in London which had admittedly been the family home of D2, his wife, and their four children since August 2010. The delivery was addressed to D2 and marked "private and confidential." It was accepted and signed for by a member of household staff. In addition, the claim form and Particulars of Claim were sent by first class post on 15 May 2017 to the same address.

4. It was common ground before me that the claim has no connection with this jurisdiction and that none of the events pleaded in the Particulars of Claim took place in England. The only basis on which this court is alleged to have jurisdiction is that at the date the claim form was issued, namely 12 May 2017, D2 was domiciled here, so that this court is bound, as a matter of EU law, to entertain the litigation. There is one other possibility, which was described in argument by Mr Ali Malek QC, who appeared for D2, as a "theoretical lacuna" which could arise if I found that D2 was not resident here and was not domiciled in Switzerland at the material time. I will refer to this point again in due course.

5. For the sake of completeness, I record that C contends that at the beginning of the parties' relationship an oral agreement was made between C and D1 to the effect that

any disputes should be resolved by the English courts applying English law. However, I was told that C accepts that this alleged agreement is ineffective for the purpose of Article 23 of the Lugano Convention. In this application Mr Jonathan Crow QC, who appeared for C, placed no reliance upon any such agreement. I therefore say no more about it.

The parties' respective positions and the main issue

6. D2's position in relation to jurisdiction is as follows: He accepts that from about 2010 he became resident and domiciled in England, but he contends that in April 2016 he had reached a settled decision to leave England and move to Switzerland. His evidence is that this decision was prompted in part because he had on two occasions been targeted as an anchor defendant for litigation that otherwise had nothing to do with England, and in part for tax reasons. Pursuant to his decision, D2 states that in the course of late 2016 and early 2017, he changed his official tax residence from England to Switzerland, moved out of the family home in Belgrave Square, London, loosened the ties with his life in the UK, obtained a Swiss residence permit, leased an apartment in Geneva, arranged for his personal assistant, Mr Vyacheslav Anishchenko, to move his own family home to Geneva, bought a car, joined a gym and engaged a personal trainer there, and joined the local synagogue. In addition, in February 2017 he entered into a formal separation agreement with his wife, Sofia. According to D2's evidence, their marriage had broken down as a result of Mrs Bogolyubova's reluctance to leave London.

7. In these circumstances D2 contends that well before the issue of the claim, he had effected a "distinct break" with, and ceased to be resident and domiciled in, England, and had become domiciled in Switzerland. He submits that in consequence, by virtue of Article 2 of the Lugano Convention 2007 (see footnote 1), he is entitled to insist on being sued in the Swiss Courts.

8. C does not dispute that D2 may have *intended* to achieve a "distinct break" with England, but contends that this aim had not in fact been achieved by the time the claim form was issued on 12 May 2017. C's case is that as of that date D2 was still resident in the jurisdiction, and was validly served at his "usual or last known residence". In this respect C refers to CPR 6.9(2) and CPR 6.3(1)(c), the latter providing that service may be effected by leaving the claim form at a place specified in CPR 6.9.

9. C also submits that D2 was still domiciled in this jurisdiction as at the relevant date. There is no dispute that *if* D2 was domiciled here at that time, the court has no discretion to decline jurisdiction. Article 4(1) of the Brussels I Regulation (recast) (Reg (EU) No 1215/2012) ("the Brussels I Regulation Recast") provides:[1]

[1] Article 2 of the Lugano Convention 2007 is to the same effect. That Convention applies as between the EU and Denmark, on the one hand, and each of Norway, Switzerland and Iceland on the other. It is relevant here because of D2's contention that he became domiciled in Switzerland.

> "Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."[2]

Article 62(1) provides:[3]

> "In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law."

10. Domicile is to be assessed, not by reference to the common law test, but by specific rules. By virtue of the applicable UK rules,[4] a person will be domiciled in the UK if (i) he is resident in the UK or a part of the UK (eg. in England); and (ii) the nature and circumstances of his residence indicate that he has a substantial connection with the UK or that part of the UK. Subject to proof to the contrary, the latter requirement is presumed to be fulfilled in the case of an individual who is resident in the UK or a particular part of the UK, and has been so resident for the last three months or more.

11. D2 accepts that if he was resident in this jurisdiction on 12 May 2017, then he would not be in a position to contest that he was also domiciled here then, as the requirement of "substantial connection" would be satisfied by virtue of the presumption.

12. Therefore, both parties accept that the key question on this application is whether D2 had ceased to be resident and domiciled in England and had become domiciled in Switzerland as at the date the claim form was issued. It is common ground that if the answer is in the affirmative, then this court lacks jurisdiction to hear the claim.

The applicable test and burden of proof

13. As seen, specific rules of English law are to be applied to determine whether D2 was domiciled in England on 12 May 2017. If he was not domiciled in England, then in order to determine whether he was domiciled in Switzerland, Swiss law is to be applied. I will refer to the applicable Swiss law later in this judgment.

Burden and standard of proof

14. The onus is on the claimant to show a good arguable case if he wishes to establish that a defendant is domiciled in a particular state or territory: *Chellaram v Chellaram* (No. 2) [2002] EWHC 632 (Ch), [2002] 3 All ER 17 at §23 (Lawrence Collins J). A good arguable case in this context has been said to mean showing that the claimant has a "much better argument on the material available": *Canada Trust v Stolzenberg (No. 2)* [1998] 1 WLR 547 (CA) at 555 (per Waller LJ).

15. Waller LJ's gloss on the "good arguable case" test has very recently been discussed by the Supreme Court in *Four Seasons Holdings Incorporated v Brownlie* [2018] 1 WLR 192, in which judgment was handed down on the second day of the hearing in the present application. Referring to Waller LJ's test, Lord Sumption said this, at paragraph 7:

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[2] See *Owusu v Jackson* [2005] Q.B. 801; see also *Lungowe v Vedanta Resources Plc* [2017] EWCA Civ 1528, per Simon LJ at [32-37].
[3] An identical rule applies under the Lugano Convention by virtue of Article 59.
[4] Paragraph 9 of Schedule 1 to the Civil Jurisdiction and Judgments Order 2001 and CPR 6.31(i)(ii).

> "In my opinion it is a serviceable test, provided that it is correctly understood. The reference to "a much better argument on the material available" is not a reversion to the civil burden of proof which the House of Lords had rejected in *Vitkovice*. What is meant is (i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the Court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it. I do not believe that anything is gained by the word "much", which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."

16. None of the other members of the Court said anything to the contrary, save that Lady Hale, at paragraph 33, said:

> "As we agree that this action cannot continue against the current defendant, everything which we say about jurisdiction is *obiter dicta* and should be treated with appropriate caution. For what it is worth, I agree …that the correct test is "a good arguable case" and glosses should be avoided; I do not read Lord Sumption's explication in para 7 as glossing the test…"

17. In the light of these principles, it is common ground that the onus in this application is on C to establish a "good arguable case" or, in the sense explained by Lord Sumption, a "much better argument" that (applying the relevant domestic rules) D2 was domiciled in England as at the date of the issue of the claim form.

18. If C fails to discharge that burden, the question arises whether as a matter of Swiss law D2 was domiciled in Switzerland as at that date. Here, too, the burden is on C to show by reference to the same standard, that D2 was not domiciled in Switzerland. Mr Malek stated (and Mr Crow did not demur) that this last issue was unlikely to detain me for long, as C has not advanced any positive case that, if D2 had achieved a "distinct break" from England, he had become domiciled somewhere other than Switzerland.

Residence

19. As explained above, given the statutory presumption, we are in practice more concerned with the question whether at the material time D2 was still resident in England, than with the question of his domicile here. The ordinary meaning of residence (as distinct from domicile) has been described as a "settled or usual place of abode", connoting "some degree of permanence or continuity": *Bank of Dubai Ltd v Fouad Haji Abbas* [1997] I.L.Pr. 308 (CA) at §§10-11 (Saville LJ), citing *Levene v Commissioners of Inland Revenue* [1928] AC 217. In the latter case Mr Crow emphasised other passages in the speech of Viscount Cave LC, including the following:

> "But a man may reside in more than one place. Just as a man may have two homes – one in London and the other in the country – so he may have a home in abroad and a home in the United Kingdom, and in that case he is held to reside in both places…"

20. *Levene* was concerned with tax residence. Until recently the same test for residence applied in both the tax and jurisdictional contexts, and in *Yugraneft v Abramovich and ors* [2008] EWHC 2613 (Comm) Christopher Clarke J (as he then was) stated, at paragraph 461:

"Resident for jurisdiction purposes but not resident for tax purposes is a distinction to be avoided if possible".

21. Whilst not disputing the relevance of earlier case law based on residence for tax purposes, Mr Crow pointed out that under UK domestic law the general test for tax residence is now that in s.218 of and Schedule 45 to the Finance Act 2013. The basic rule is that an individual is resident in the UK for tax purposes if they meet either (i) one of the "automatic UK tests" and none of the "automatic overseas tests", or (ii) the "sufficient ties" test.

22. Mr Crow also pointed out that the "Non-resident Landlord Scheme", on which some reliance has been placed by D2,[5] is an entirely separate and different tax scheme, governed by ss. 971 and 972 of the Income Tax Act 2007 and the Taxation of Income from Land (Non-residents) Regulations 1995 ("TILR 1995"). Under those provisions the test for being a "non-resident" landlord is whether a person "has his usual place of abode outside the United Kingdom".[6] "Usual place of abode" is not defined in the provisions, but the Non-resident Landlords Scheme Guidance Notes, published by HMRC, state at paragraph 2.3:

> "It is **usual place of abode** and not **non-residence** that determines whether a landlord is within the scheme or not. In the case of individuals, HMRC normally regard an absence from the UK of six months or more as meaning that a person has a usual place of abode outside the UK. It is therefore possible for a person to be resident in the UK yet, for the purposes of the scheme, to have a usual place of abode outside the UK" (original emphasis).

23. It is important to bear in mind, as Mr Malek emphasised, that the present case is mainly concerned with the question of whether and when an individual has *ceased* to be resident in England. In that regard, the Supreme Court has held, again in the tax context, that the question is whether there has been a "distinct break" in the pattern of the individual's life: *R (Davies) v Revenue and Customs Commissioners* [2011] UKSC 47, [2011] 1 WLR 2625. In that case Lord Wilson said, at paragraph 20:

> "It is therefore clear that, whether in order to become non-resident in the UK or whether at any rate to avoid being deemed by the statutory provision still to be resident in the UK, the ordinary law requires the UK resident to effect a distinct break in the pattern of his life in the UK. The requirement of a distinct break mandates a multifactorial inquiry. In my view however the controversial references in the judgment of Moses LJ in the decision under appeal to the need in law for "severance of social and family ties" pitch the requirement, at any rate by implication, at too high a level. The distinct break relates to the pattern of the taxpayer's life in the UK and no doubt it encompasses a substantial loosening of social and family ties; but the allowance, to which I will refer, of limited visits to the UK on the part of the taxpayer who has become non-resident, clearly foreshadows their continued existence in a loosened form. "Severance" of such ties is too strong a word in this context."

24. At paragraph 63, Lord Hope said:

> "But the underlying principle that the law has established is that it must be shown that there has been a distinct break in the pattern of the taxpayer's life in the UK. The inquiry that this principle indicates is essentially one of evaluation. It depends on the facts. It looks to what the taxpayer actually does or does not do to alter his life's pattern. His intention is, of course, relevant to the inquiry. But it is not determinative. All the circumstances have to be considered to see what light they can throw on the quality of the taxpayer's absence from the UK."

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[5] See paragraphs 61(7) and 72(5) of this judgment.
[6] TILR 1995, s. 2 and Income Tax Act 2007 s. 971(2).

25. In *Levene* (above) at pages 226-7, Viscount Cave LC stated that when considering the purpose of an individual's departure from the United Kingdom, and in particular whether the departure connoted a change of home, it was permissible to have regard to subsequent actions of the individual, if they threw light on the question.

26. Mr Malek referred to a decision which indicates that the motive for ceasing to be domiciled or resident will not affect the position. In *JSC BTA Bank v Ablyazov* [2016] EWHC 230 (Comm), [2017] QB 853, Mr Ablyazov, fearing with good reason that he was about to be imprisoned in England for contempt of court, fled the country for the south of France. Teare J held that, in doing so, Mr Ablyazov abandoned England as his country of residence and domicile from the time when his appeal against committal had been finally determined. On appeal[7] the Court of Appeal rejected the contention that this conclusion should not be applied because it would allow Mr Ablyazov to benefit from his own wrong. The Court held that the concept of residence was "reasonably clear and easy to check" and that this clarity would be undermined by the suggested approach.

27. In *Cherney v Deripaska* [2007] EWHC 965 (Comm), [2007] I.L.Pr. 49 Langley J was considering whether Mr Deripaska was domiciled in England. Having referred to case law indicating that a person may be resident in more than one place, he said at §19:

> "There is, I think, some risk of over analysis. The words are ordinary English words. The question is whether or not, on the evidence, Mr Deripaska "is resident" in England. The benefits of certainty and predictability in the interests of defendants… need to be kept in mind in addressing the question."

28. It follows from the case law to which I have referred, that in assessing whether or not an individual has ceased to be resident for jurisdiction purposes, the following principles apply:

i. The inquiry is a multi-factorial and fact-dependent evaluation, in which all relevant circumstances are considered in order to see what light they throw on the quality of the individual's absence from the UK:

ii. For residence to cease there should be a distinct break in the sense of an alteration in the pattern of the individual's life in the UK

iii. This may well encompass a substantial loosening of social and family ties, but does not require a severance of such ties

iv. The individual's intention to cease residing in the jurisdiction is relevant to the inquiry but not determinative

v. Actions of the individual after the material time (here, the issue of the claim form) may be relevant, if they throw light on the quality of the individual's absence from the UK

[7] [2017] EWCA Civ 40; [2017] QB 853.

vi. If the individual has in fact ceased to be resident according to the applicable criteria, the fact that his motive for doing so was unworthy or even unlawful will not affect the position

vii. One should be careful to avoid the risk of over-analysis in applying what are ordinary English words.

29. I was referred by both parties to a number of cases in recent years where the questions of residence and domicile have been considered in the context of very wealthy individuals, with multiple houses and business interests around the world. Mr Crow's legal team produced an impressive schedule of such cases. The schedule analysed each case, and compared it with the evidence in this case, by reference to specific features, such as time spent in and pattern of visits to the UK, family use of UK property, payment of council tax and utility bills, time spent in other properties, tax status etc. This is helpful to an extent, but ultimately the issue before me is fact-specific, and the assistance one derives from examining the circumstances of other cases, even when they superficially resemble this one, is necessarily limited.

The evidence

30. As usual in applications of this kind, the evidence has all been in writing, and there has therefore been no cross-examination. Before me are witness statements from D2, C, Mr Anishchenko, Mr David Edwards (D2's solicitor), and Mr Alexander Sciannaca (C's solicitor). In addition, there are expert reports on Swiss law by Professor Felix Dasser and Dr Urs Feller. More than 1,500 pages of documents are exhibited to the witness statements.

31. I have carefully considered all the witness statements, and the exhibits to which I have been referred by the parties. I will refer to such of these as it appears appropriate to mention in order to explain my decision. The fact that I do not refer to every point made, or every item of evidence, does not mean that I have not taken it into account.

32. Much of the evidence put before me (as distinct from the inferences I should draw from it) is not in dispute. I therefore set out, in as neutral a manner as possible, what I understand to be the basic facts. In doing so I will identify some of the aspects which have been the subject of particular argument before me.

33. D2 studied engineering in his home town in the Ukraine where he eventually ran his own business primarily in the extractive industries, banking and property. Although these business interests centred on the Ukraine, they have extended to Australia, Russia, Africa and many parts of Europe. D2's interests include assets owned directly (or via nominees) or held by discretionary trusts of which he is within a class of beneficiaries. He is, by any standards, an extremely wealthy individual.

34. In 2007 D2 divorced his first wife and began to live with Sofia. At about the time of the divorce, D2 and Sofia left the Ukraine and moved to Vienna, where the first two of their four children were born. In October 2009, at Sofia's suggestion, they moved to London for reasons of schooling and social life. It is accepted that D2 then became resident in England. From August 2010, he lived with Sofia and their four children at 31 Belgrave Square. The house was acquired that year for £62.5 million, by a trust of which D2 is one of a class of beneficiaries. In 2011 the couple were married.

35. D2 is a UK citizen (although never on an electoral register here), and has held Ukrainian, Cypriot, Israeli and UK passports. His business commitments have always meant that he has travelled frequently. According to the evidence, he has boarded an aeroplane between 10-15 times per month. He has typically spent the summer months on his yacht in various parts of the world. In view of this lifestyle the time spent in England "has always been commensurately limited".[8] At all material times D2 has also had an apartment in Kiev, a dacha (country home) in the Ukraine, and access to a villa in Vienna.

36. D2 is an observant Jew, who practises his faith as a member of the Chabad Lubavitch community. After coming to London, he established a Chabad community in Belgravia and, through a charitable foundation, has made donations amounting to £1.76 million to it over the years, most recently in July 2016.

37. In March 2013 a Mr Victor Pinchuk, a Ukrainian businessman, began proceedings in the Commercial Court, England against D1 and D2, claiming more than US$2 billion. The claim concerned assets in Ukraine and events in Ukraine, Switzerland and France, but not England. It is D2's evidence that his role in the case was relatively minor and that he was sued because he was residing in London, and this enabled Mr Pinchuk to use him as an anchor defendant to bring D1 before the English court. It is also his evidence which is not challenged, that he found the experience of defending the litigation "intensely demanding, emotionally gruelling and" enormously costly.[9]

38. The case was settled in January 2016, but D2 states that well before then, in October 2015 when preparing evidence for the trial, he began seriously to consider leaving London in order to avoid the fact of his residing there being once more used as a litigation tactic to sue him and others who are domiciled elsewhere. He says that he discussed a move away from England with Sofia at some point after October 2015, and later also with his Rabbi, but took no firm decision then in view of Sofia's strong opposition to moving home again.[10]

39. D2 states that his desire to move was also influenced by what he perceived to be a more hostile approach taken by the UK tax system to non-domiciled individuals. In that regard, he states he was aware that Geneva had a very favourable and stable tax environment, and was also familiar with the area, having spent time there as a result of the friends and business associates based in Geneva. D2 states that, as the prospect of leaving London became more serious, he considered that Geneva would be the natural choice for his relocation. There was no question of returning to the Ukraine, in view of the war there.

40. In March 2016, a Russian oil company, PJSC Tatneft, began proceedings in the Commercial Court, England against D1, D2 and others, obtaining a worldwide freezing order for up to US $400 million. Since he was still resident at 31 Belgrave Square, he did not dispute jurisdiction and defended the claim. D2's evidence is that yet again the dispute had nothing to do with England, and that he was the only

[8] D2's 1st WS, paragraph 24.
[9] D2's 1st WS, paragraph 34.
[10] D2's 1st WS, paragraph 40.

defendant with significant links to the jurisdiction, and was being used as an anchor defendant.

41. He states that he now resolved to leave England as soon as possible. According to his evidence, at that stage he had no specific expectation of any further litigation being brought against him in this jurisdiction, but he wanted to ensure that the Pinchuk and Tatneft experiences were not repeated. Having contacted his tax advisers on 13 April 2016, he was informed that he had missed the date to be treated as non-resident for the 2016/17 tax year. He states that nevertheless he decided to set the process of departure in train immediately, so that he would have left England by the start of the following tax year in April 2017.

42. Up to this point D2's account is not seriously challenged, although a question was raised in evidence as to whether D2's concern about being sued in England was general or specific to this case. Mr Crow accepted that nothing turned on that debate, but submitted that the more important point was that D2 anticipated being sued. Mr Crow said that the most likely source of a claim was in relation to the collapse of PrivatBank (a bank based in the Ukraine), which D1 and D2 had owned. He referred to press articles indicating that the bank was nationalised following the discovery that a large proportion of the loans made by the bank were to related companies of the owners.

43. A controversial aspect of D2's evidence concerned the effect of his decision to leave England on his relationship with Sofia, and in particular on what he claims to have been the resultant breakdown of their marriage. D2 states that Sofia could not be reconciled to his decision to leave, and that their relationship deteriorated to the point where Sofia instructed solicitors who informed D2 on 24 May 2016 that she would be remaining in London rather than moving with him to Geneva, and wished formally to separate from him.[11] He then instructed his own solicitors, who were informed by Sofia's solicitors on 29 June 2016 that Sofia wished to divorce D2. D2 states that following extensive negotiations Sofia and he entered into a formal separation agreement in February 2017 (the "Separation Agreement"), a first draft of which was provided to Sofia on 28 July 2016. The Separation Agreement records D2's decision to leave England, and that as at February 2017 he was in the process of "relocating to reside in Switzerland", and would "cease to be UK tax resident" as at 6 April 2017.

44. D2 does not appear to dispute that at the time of the Separation Agreement he was still residing, if only intermittently, at 31 Belgrave Square. That is the address attributed to him in the agreement itself. Further, Mr Crow emphasised a provision of the Separation Agreement which gave D2 the right to reside at the house for 180 days "following the Formal Ending of the Marriage". It was common ground that the effect is that D2 was entitled to live at the house until September 2017. Mr Malek drew attention to a further passage which records that this right "is not intended to imply that [D2] intends to or will stay [at the house] after the date of this Agreement." Under the terms of the Separation Agreement, D2's beneficial interest in the discretionary trust which owns 31 Belgrave Square (and pursuant to which D2 is one of a class of discretionary beneficiaries) will go to Sofia, as and when the Tatneft freezing order is lifted.

[11] D2's 1st WS, paragraphs 46-49.

45. D2's evidence is that during the second half of 2016, his relations with Sofia were very poor, but that for the sake of their four small children, he and his wife tried to maintain the *status quo* at 31 Belgrave Square as much as possible. In order to reduce tensions he spent more time out of England than previously, spending periods in (among other places) Africa, Ukraine, Israel, and Geneva. According to D2, his final contribution to the upkeep of 31 Belgrave Square was on 14 October 2016, as by that stage it was clear that he would no longer be living there. In his first witness statement D2 identifies the point of his actual departure from England in a permanent sense as falling sometime between the cesser of his contributions to 31 Belgrave Square in October 2016 and the date of the Separation Agreement, i.e. 20 February 2017. He states that he considered himself to be resident in Switzerland from 1 March 2017, that being the date when he signed a 5 year lease for an apartment in Geneva at Quai de Seujet ("the Q flat"), and when his Swiss residence permit was approved.[12]

46. Following the Separation Agreement, on 22 March 2017 Sofia issued a petition for judicial separation. On 5 April 2017, D2's solicitors filed an acknowledgment of service, giving D2's country of habitual residence as "Switzerland" and his country of domicile as the Ukraine.

47. A formal separation order and financial consent order were also said to have been agreed. However, Mr Crow indicated in the course of argument that this was not accurate. In any event, it appears that at the time of the hearing these had not yet been put before the court, possibly as a result of the continuance of the freezing order in the Tatneft claim which, although summarily dismissed by Picken J in November 2016, was restored on appeal, and is still on foot. D2 states (no doubt correctly) that the freezing order imposes extensive restrictions on his ability to dispose of or deal with property (whether owned legally or beneficially).

48. D2's solicitors have submitted fees of £67,845 in respect of the period June 2016 to July 2017 for acting on his behalf in the separation.

49. In his submissions Mr Crow sought to cast doubt on the genuineness of the separation between D2 and his wife. I will return to this point later.

50. I now outline the evidence about the steps taken to move D2's residence and domicile to Switzerland. I deal first with the evidence of D2's personal administrator, Mr Anishchenko.

51. In his witness statement of 16 November 2017, Mr Anishchenko, who holds Ukrainian and UK passports, states that he is an economist and had been employed as the personal administrator of D2 from about the beginning of 2008. In September 2008 he moved to London, where he lived and worked for D2 until moving to Geneva in 2017.

52. Mr Anishchenko's evidence is that from about January 2016 he was aware of D2's intention to move away from England. Mr Anishchenko describes his role in obtaining tax advice for D2's intended move. He states that by April 2016 the other residence contemplated by D2, namely New York, had been ruled out, D2 had invited Mr Anishchenko to move to Geneva with him (a place in which he, Mr Anishchenko,

[12] D2's 1st WS, paragraphs 10(f) and 52.

had never before contemplated living), and, Mr Anishchenko's wife being amenable to the proposed change, the joint move had been agreed. The process of arranging the relocation to Geneva of Mr Anishchenko, his wife and daughter began from mid-April 2016, with a view to Mr Anishchenko moving in March or April 2017 and his wife and daughter following him in the summer, after the end of the school year.

53. In his evidence, Mr Anishchenko describes various steps which he took to achieve his move:

- In mid-April 2016, he enlisted the assistance of a company called CAD COOL SA ("Cad Cool"), which had provided D2 with concierge services for many years, to help find a suitable Swiss school for Mr and Mrs Anishchenko's daughter.

- In April 2016, he obtained (also via Cad Cool) details of a Swiss lawyer who could assist in preparing Mr Anishchenko's residency application.

- In summer 2016, he researched schools suggested by Cad Cool, and travelled to Geneva to visit the schools.

- In November 2016, he contacted an estate agent in Geneva about suitable residential properties for his family, and received the answer that nothing suitable near the chosen school was available.

- In light of this, he enlisted Cad Cool's help to find accommodation.

- On 9 February 2017 a suitable property was identified, and on 22 February Mr Anishchenko travelled to Geneva to inspect it. He signed a lease on 7 March 2017 for a tenancy to begin on 1 May 2017. Mr Anishchenko explains that although he wished to move earlier in view of the time now being spent by D2 in Geneva, the property was not available till May, and D2 understood the problem and did not press him to move earlier.

- On about 7 March 2017, he obtained a Swiss mobile phone number and opened a local bank account.

- On 2 May 2017 Mr Anishchenko moved into the Geneva property, and lived there during the working week, travelling to London at weekends to be with his family, until they too moved to Geneva in July 2017.

54. I turn to D2's description of his own preparations to move from England. Again, I refer as briefly as possible to the main points in his evidence:

- In his first witness statement he states that from the time of his decision he reduced both the number of visits to England and the time spent on each visit. He has produced a table based on his flight records, which indicates that the number of nights spent in England between July and December 2016 was less than half the number spent here between January and June that year (55 versus 122). From January to 12 May 2017 the number was 33, and from April 2017 to 30 June 2017 the number is 3. It is not clear

whether the last-mentioned number should be 2, as in the text of the witness statement D2 says that "During the only visit to London I have made since April 2017, which was for 2 nights between 21 and 23 April 2017, I stayed at The Wellesley Hotel in London." The primary purpose of that visit was to meet his English lawyers in relation to the Tatneft litigation. He states that he also visited the Ukrainian consulate in connection with his relocation to Geneva.[13]

- In January 2017 D2 sent text messages to most of the contacts in his mobile phone, providing them with his new Swiss mobile phone number.

- With effect from October 2016 a direct debit at D2's account with Barclays Bank for Council Tax in respect of 31 Belgrave Square was cancelled; thenceforth that and other outgoings for the house were paid by Sofia.

- In about March 2017, Barclays were informed of D2's address in Geneva; bank account statements reflecting this are exhibited.

- In about April 2017 D2 applied to HMRC for non-resident landlord status in respect of the rent received from residential property owned by him in London. On 22 May 2017 his application was granted with effect from 1 January 2017.

- At about the beginning of October 2016, D2 applied in Geneva for a *forfait* or taxation agreement with the Swiss tax authorities, allowing him to reside (but not to work) in Switzerland subject to an annual tax payment to the Canton of Geneva. The agreement was entered into on 28 December 2016. (A second *forfait* was agreed on 18 January 2017 extending the applicable period by one year.)

- Once the first *forfait* was agreed, D2 applied on 11 January 2017 for a Swiss residence permit, which was approved with effect from 1 March 2017.

- In his first witness statement D2 states that he began to look for somewhere to buy and live in Geneva in October 2016, but that the "high-end" market was not fluid. While continuing to search for a villa in Geneva better suited to his "personal tastes and security requirements", on 1 March 2017 he signed a 5-year lease in respect of the Q flat, of which the sub-lessor was Cad Cool. An issue has arisen on the evidence as to the extent, if any, to which D2 ever personally occupied the Q flat. In response to the contents of Mr Sciannaca's evidence, D2 explained that when staying in Geneva prior to taking the lease of the Q flat, he had been allowed to live and keep his personal possessions in a guest apartment owned by the Chabad Geneva. D2 explains that part of the reason for leasing the Q flat was because he feared that if he continued to use his Geneva lawyer's address for the purposes of his application for a residence permit it would jeopardise that application, and the Chabad

[13] D2's 1st WS, paragraphs 57-61.

Geneva were unwilling to grant a lease of the guest apartment. D2 has produced utility bills in his name in respect of the Q flat, and he has paid the rent. D2's evidence gives the impression that he lived at the flat for at least some of the time from March 2017 up to "early June 2017",[14] when he states that he again occupied the Chabad apartment until he leased a much more suitable property. In regard to the latter, he instructed Cad Cool to sign a lease on 3 July 2017, and entered into a sub-lease with them on 1 September 2017. However, Mr Crow submits that it is clear on the evidence that he never laid his head in the Q flat at all, and that this is one of several untrue or misleading aspects of his evidence. I will return to this issue in due course.

- It is not in dispute that on 11 January 2017 D2 joined Pure Sports Club in Geneva. Nor does C challenge a schedule of D2's appointments with his personal trainer at the club, showing 10 visits between 17 January 2017 and 12 May 2017, and a further 19 visits from May until 13 November 2017.

- On 17 February 2017, D2 purchased a car in Geneva through Cad Cool.

- On a date prior to 21 June 2017, D2 purchased health insurance in Switzerland.

- Having been a strong supporter (financially and generally) of Chabad Belgravia, in February 2017 he made a first donation to Chabad Geneva, having made contact with the Rabbi attached to Chabad Geneva, with a view to becoming involved as a supporter there.

55. In addition, D2 points out that his close associate and friend, D1, has for many years been based in Geneva. Further, as already mentioned, Sofia has decided to move to Switzerland after all, albeit she and the children live separately from him and in a different Swiss canton.

C's submissions

56. In his skilful and comprehensive submissions Mr Crow contended that there was a good arguable case that by 12 May 2017 no "distinct break" had occurred, and therefore on that date D2 was, by concession, still resident and domiciled in England.

57. Mr Crow referred to a number of factors which were said to indicate the absence of a "distinct break", including the following: D2's UK passport; his admitted residence in the family home in London from 2010 until at least February 2017 when the Separation Agreement was made; his contractual entitlement under that agreement to continue in residence until September 2017; the absence of any explanation about where he had stayed on his visits to London between February 2017 and 12 May 2017 save for the 2 nights between 21 and 23 April 2017 (when he provided evidence that he stayed at the Wellesley Hotel); the vagueness of his evidence about when he surrendered his keys to the London house; the close similarity in the "day count" of

[14] D2's 2nd WS, paragraph 16: "After moving into the Quai de Seujet property in early March 2017, I found that I did not enjoy living there."

his London stays during the second half of 2016 (when he was admittedly resident in London) and those during the first half of 2017; the fact that he did not spend a single Shabbat in Geneva between 1 January 2017 and 20 May 2017, spending three of the ten in that period in England and the remainder in the Ukraine, Israel, France and Austria; that, in Mr Crow's submission, the evidence indicates that the children were unaware of the separation in July 2017; that D2 had not sent a change of address card or similar to his contacts informing them that he had moved to Geneva; that a member of the household staff at the Belgrave Square house signed for a package addressed to D2 on 15 May 2017, indicating that the staff did not know he had moved out.

58. Mr Crow then took me at some length through the evidence, including D2's answers to requests for further information, in order to establish that D2's evidence contained untruths and/or was misleading. The main points he relied upon in this respect were the following:

(1) *The lease of the Q flat*: Mr Crow submits that in his evidence, and in particular his first witness statement (which purported to be a "full account" of his move to Geneva), D2 sought to give the false impression that he had lived in the Q flat from early March 2017, whereas in fact he had not done so and the flat was never more than an address of convenience for the purpose of obtaining a residence permit, and generally to bolster the case that he was resident in Geneva. Mr Crow contends that it was only when D2 was caught out in the untruth by Mr Sciannaca's careful investigations (which showed that in fact D1's daughter, and later a Mr Tokarev and his family, were living in the flat), that D2 was compelled to explain, in his second witness statement, that in fact he had been living in the Chabad Geneva guest apartment for much of the time. The Chabad apartment was admittedly temporary, *ad hoc* accommodation. Mr Crow submits that D2's falsehood in failing to mention that he was living there, and pretending that he lived at the Q flat, shows that he was trying to create a paper trail to disguise the true nature of his supposed move from England, which was that he had not set up home in Geneva at all, and had not made a "distinct break".

(2) *5 year lease*: Similar "window dressing" could be seen from the fact that D2 chose to take a 5 year lease of a flat which was admittedly unsuitable for his needs, and in which he had no intention of living for any significant period.

(3) *Utility bills*: Mr Crow also pointed to D2's response of 14 August 2017 to a request for further information about D2's electricity bill and TV licence. D2's solicitors had enclosed an electricity bill addressed to D2 at the Q flat, described as "for [D2's] home in Geneva". In relation to the TV licence request, the response by D2's solicitors is: "A printout from the Swiss Collection Agency is attached stating that [D2] has a TV licence valid since 1st March. The licence, addressed to D2 at the Q flat, says: "The data was transmitted to us on 4th August 2017". Mr Crow submits that D2 was therefore generating evidence by applying to the licensing authority pretending he was still living at the Q flat.

(4) Mr Crow also submitted that D2 misled the court by not revealing in his first witness statement that he planned to move somewhere else. However, this point appears to be misconceived, as in paragraph 89 of that statement D2 makes clear that the Q flat was not suitable for him and that he was continuing the search for something better.

(5) *Cad Cool*: Mr Crow submits that D2 has not been frank in his evidence in describing Cad Cool as a concierge service, and that he should have explained at the outset that it is really D1's family business office, whose services are also made available to family and friends. He also prayed in aid the fact that all or most of the outgoings of the Q flat, the purchase and running costs of D2's car, and his mobile phone charges were paid by Cad Cool who were then reimbursed by D2. This was said to be part of the window dressing arranged by Cad Cool to make it look as though D2 was living there.

59. Mr Crow next referred to D2's reasons for moving his residence, namely (1) to avoid being sued/used as an anchor defendant in England, and (2) for tax purposes. Mr Crow does not question the genuineness of those reasons or criticise them. However, he pointed out that D2 was not moving to Geneva for work – indeed his permit did not allow him to do so. Nor was he moving to improve his lifestyle – D2 had not denied C's evidence that D2 told him he did not like Geneva and could not understand why D1 lived there. Finally, he was not moving for family or personal reasons, since on D2's own evidence the move had cost him his marriage.

60. It was, therefore, clear that D2 was moving simply so as not to be resident in England. In those circumstances, he submitted, one would expect the quality of D2's evidence to reflect the importance of establishing that he had indeed left England and moved to Geneva. In that context, Mr Crow made a number of points, in addition to those already noted, which he submitted undermined D2's evidential case:

(1) There was a distinct absence of evidence of D2 paying day to day living expenses by credit card. The only credit card statement provided was redacted other than in relation to D2's use of the gym he had joined in Geneva. In the absence of such evidence the court should infer that his day to day expenditure was being made elsewhere than in Geneva.

(2) As to the gym, although Mr Crow accepted that the schedule of visits included at least one month when he attended on 6 separate occasions, it was submitted that his visits tended to be in clusters, and that this did not show he was actually resident in Geneva. The same applied to his having taken out Swiss health insurance.

(3) Similarly, the fact that in January 2017, when he was still resident in England, he notified his friends and contacts of his new Swiss phone number, did not assist D2's case. In any event, he still had his UK mobile phone.

(4) The fact that his bank statements were sent to the Q flat simply meant that someone collected his mail and took it to the Chabad Geneva.

(5) Nor did the *forfaits* assist D2. They were simply agreements as to the basis of his taxation, should he become resident in Switzerland; they did not show he was so resident. In fact, in both *forfaits* the date of entry into Switzerland was left blank. On his own evidence he did not take up residence until 1 March 2017, so the fact that the *forfaits* were agreed earlier than that was not evidence of residence. Further he was expressly not allowed to work there.

(6) Similarly, the residence permit constituted only permission, and not evidence of actual residence at any particular time or at all. Further, as a UK citizen he was entitled to such a permit.

(7) The communication from HMRC dated 22 May 2017 approving with effect from 1 January 2017 D2's application under the non-resident landlord scheme to receive rental income without deduction of tax, did not represent a decision by HMRC that D2 was non-resident in the UK at any particular time. Its effect was much more limited – it simply dispensed with what would otherwise be a requirement (if D2 was a non-resident landlord within the meaning of the governing legislation) to deduct tax from rental income and pay it to HMRC. Under the TILR 1995 ""Non-resident" means a person who has his usual place of abode outside the United Kingdom". Section 971(2) of the Income Tax Act 2007 provides: "'Non-resident landlord income' means income of a person whose usual place of abode is outside the United Kingdom". The HMRC Guidance Notes (quoted at paragraph 22 above) state that it is possible for a person to be resident in the UK, yet, for the purposes of the scheme, to have a "usual place of abode" outside the UK. On this basis, Mr Crow submits that even if the letter from HMRC was written on the assumed basis that D2 qualified for the non-resident landlord scheme, that does not mean that he is not resident in the UK. Further, whatever HMRC thought to be D2's situation was based on what he himself had told them, and is therefore of no evidential value. HMRC were in no better, and probably in a far worse, position than am I to make an assessment of the location of his actual residence.

(8) No evidence had been adduced from the member of household staff who on 15 May 2017 accepted and signed for the claim form in the present case. That was significant, because the understanding of those who were living and working in the house could be expected to shed light on whether D2 had indeed given up his usual abode at 31 Belgrave Square.

(9) Nor was evidence adduced from D1, notwithstanding that D2 relied upon the fact that D1 has been resident in Geneva for many years as one of the reasons he had thought of moving there.

(10) Also, there was no evidence from Sofia to explain why she was so opposed to moving to Geneva that she was willing to enter into a formal separation agreement, but had now moved to Switzerland. It would, for example, have been interesting to have her evidence on a matter which was the subject of a request for information put to D2, viz when had his wife first made contact with potential schools in Switzerland. Given that

their relationship admittedly remained amicable, the absence of evidence from her was a matter of legitimate comment. This was particularly so where, as here, it was clear that D2 could and did procure evidence from his wife when it suited him.

61. As mentioned earlier, Mr Crow also sought to cast doubt on the genuineness of the separation between D2 and Sofia. Whilst accepting that in an interlocutory application of this kind he could not ask me to reach a conclusion that the separation was a sham, he submitted that there are peculiarities about the separation which should lead me to discount it in evaluating whether a "distinct break" had occurred by the material time. In support of this point he referred to a number of points, including: the relative rarity of such separation agreements; the amicable relations admittedly still existing between D2 and his wife (she was photographed wearing a ring on her wedding finger both before and after the separation); the fact (if such it be, which in my view is far from clear on the evidence) that as late as July 2017 the children were not aware of the separation; the fact that any council tax or other outgoings of Belgrave Square for which Sofia was responsible under the Separation Agreement, were paid using funds supplied by D2 for that purpose; and the fact that Sofia and the children did in fact eventually move to Switzerland to live (in a different canton - Vaud) in about August 2017.

62. In what he accepted was "deep speculation", Mr Crow suggested two possible motives for a sham separation: (1) D2 might have genuinely wanted to leave England, but they have 4 young children at school here. If he moved and she did not, and there was no formal separation, his case on a "distinct break" with England would be more difficult: he would still be married, the matrimonial home would still be in London, and the children would be at school in London; entering into the Separation Agreement would be a useful device by creating the appearance of his having severed ties with the jurisdiction; D2's wife may then have changed her mind at some point and moved to Switzerland anyway; and/or (2) D2 may have intended to ring fence some assets for her and the children, against the risk of substantial claims by the authorities in the Ukraine.

63. Finally, Mr Crow invited me to assess the credibility of D2's evidence not only by reference to the points summarised above, but also in the knowledge that a worldwide freezing order has been made against D2 in the Tatneft litigation on the basis of a good arguable case of fraud coupled with a risk of dissipation of assets, and of the fact that press reports put in evidence indicate that D2 will be facing not only civil claims but the risk of a criminal investigation in relation to the collapse of PrivatBank in the Ukraine.

Discussion and conclusions

64. There are two aspects of the evidence upon which Mr Crow barely touched in his detailed written and oral submissions: these are, first, the fact that there is overwhelming evidence that by April 2016 D2 had formed a clear intention to move his residence away from England. The second aspect is the uncontroverted evidence of D2's personal assistant, Mr Anishchenko, that as from April 2016 he began to make the necessary preparations to move himself and his family from London to Geneva, and actually moved there with effect from 2 May 2017. Mr Crow did not actively dispute that D2 had the intention to move, and went as far as to say that he

might have so intended. Mr Anishchenko's evidence has simply been left without challenge or comment so far as C's evidence and submissions are concerned.

65. It is, therefore, not C's case that all the steps taken by D2 to arrange his move from England to Geneva were part of an elaborate charade (although it is contended, as we have seen, that some steps amounted to window dressing and were fake). Rather, it is argued that, whatever the intention, a distinct break had not been achieved by 12 May 2017.

66. Despite the skill with which they were presented, in my view many of the points made in challenging the loosening of D2's ties with the UK and his residence in Geneva, lacked substance. I do not propose to refer to all of these points (although I have considered them) but will give some examples:

(1) Whilst it is correct that D2 has a UK passport, I note that he has also held 3 other passports.

(2) Similarly, little weight can be placed on the fact that the Separation Agreement entitled D2 to live at the Belgrave Square house for a period which happened to extend beyond the material time. Any intention to take advantage of this entitlement was expressly negated in the agreement itself. There is no evidence whatsoever that D2 resided there after the end of the 2016/17 tax year, and a good deal of evidence of his clear intention *not* to do so. I will comment on the separation itself later in the judgment, but I note that, if anything, the residence entitlement militates against C's suggestion of a collusive "separation". If the couple were going to such extreme lengths to bolster a possible jurisdiction argument, it is surprising that they would insert anything in the agreement which might detract from the object.

(3) Even if one could or should infer that on some of his visits to London between February 2017 and the end of March 2017 D2 stayed at the Belgrave Square house, it would be unwarranted to infer that he did so after March 2017: his evidence is that on his only visit to London between April and the end of June 2017 when he made his first witness statement (21-23 April), he stayed at the Wellesley Hotel. There is no evidence to suggest that he made any other visits in that period.

(4) Nor was I convinced by Mr Crow's interpretation of the "day count" of D2's stays in England set out in his first witness statement. To point to what is said to be the close similarity in the respective counts for the second half of 2016 (when he was admittedly resident in London) and for the first half of 2017 (55 and 33 nights respectively), but to ignore the fact that the count for the *first* half of 2016 was 122 nights – more than double the second half of 2016 – does not fairly reflect the fact that D2's time in England was, on that evidence, significantly diminishing after his firm decision to leave in April 2016.

(5) As to the points made on the basis of where D2 spent his weekly observance of Shabbat, the fact that 3 out of 10 Shabbats between 12 March and 20 May 2017 were spent in England is not inconsistent with a

significant loosening of ties having taken place. Only one of those 3 attendances appears to have occurred after the end of March 2017.

(6) Nor do I consider it of any assistance that D2 had not prior to 12 May 2017 sent a change of address card or similar to his friends and contacts, informing them that he had moved to Geneva. It is not disputed that he had provided his contacts with his new Swiss mobile phone number in January 2017. Further, as he states in paragraph 89 of his first witness statement, the Q flat which he had leased on 1 March 2017 was not regarded as suitable, and he was looking for a villa.

(7) I do not regard the fact that a member of the household staff at the Belgrave Square house signed for a package addressed to D2 on 15 May 2017, as indicating that the staff did not know he had moved out. I find it difficult to draw any conclusion from this, except that the staff member presumably recognised the name and address on the package.

(8) Nor do I regard D2's uncertainty as to when he surrendered his keys to the London house as in any way surprising. It is not contested that at all material times the house was fully staffed. There is no reason in those circumstances to doubt his evidence that he rarely had recourse to his house keys.

67. C is on firmer ground in relation to D2's acquisition of a 5 year lease of the Q flat. I consider it likely that this lease was acquired to ensure that he could point to a long-term residential address in Geneva for the purpose of obtaining a residence permit, and perhaps also for obtaining HMRC's approval of his application for non-resident landlord status. As D2 himself states in his evidence, it was clearly unsatisfactory to continue to use his lawyer's address in Geneva for such formalities.

68. I also consider there is considerable force in Mr Crow's submission that in his evidence (particularly in his first witness statement) D2 was not being entirely candid and was seeking to give the court the impression that he had lived in the Q flat from early March 2017, whereas in fact he has now explained that he lived for at least two periods at the Chabad guest apartment, accommodation which he did not even mention in his first statement. I accept that D2 only "came clean" on this because he was caught out to some extent by Mr Sciannaca's investigations in Geneva. Whether Mr Crow is correct in submitting that D2 did not spend a single night in what was admittedly wholly unsuitable accommodation for a man of D2's tastes and means, I do not know. On any view, it is doubtful that he spent many nights there.

69. There is also force in the submission that the use of D2's name in association with the address of the Q flat, in respect of utility bills, tax authorities and banking, was to provide the impression that D2 was living at the flat, rather than (as was the case) at the Chabad guest apartment.

70. On the other hand, I consider the submission that D2's description of Cad Cool as "a concierge service" without at the same time explaining the relationship of the company to D1's family business, was somehow misleading, to be without merit. D2 must have known that Cad Cool had also acted for C, and therefore that C would know precisely what Cad Cool was. In any event, I do not see what motive there

could have been for D2 to seek to hide Cad Cool's association with D1. There is nothing significant or relevant in the fact that D2 used Cad Cool to help arrange for his various needs in Geneva, such as accommodation, a car, utilities, mobile phone etc. It is wholly unsurprising that D2 would wish to engage a local company to perform this role, and natural for him to choose a company associated with his close friend.

71. As to C's various criticisms of the quality of D2's evidence, I comment as follows on some of the specific points raised by Mr Crow:

(1) There was no evidence about D2's historic practice in relation to his use of credit cards for payment of day-to-day expenses. It is therefore difficult to draw any conclusion from the fact that the only credit card statement provided to C was wholly redacted other than in relation to D2's use of the gym he had joined in Geneva. I certainly do not consider it justified to infer from this that his day-to-day expenditure was being made elsewhere than in Geneva. He may pay for items in cash and/or others may pay for him. Moreover, no matter where his settled or usual place of abode may be, this is a wealthy businessman with worldwide interests, who says that on average he boards a plane 10-15 times per month, and who holidays for two months on his yacht. It is inevitable that many of his expenses will be incurred elsewhere than at home.

(2) I accept that his visits to a gym in Geneva do not of themselves establish that he was actually resident in Geneva. On the other hand, given their regularity and number (eg. 6 separate visits in one particular month), they are indicative of a substantial presence there.

(3) I accept, too, that acquisition of a Swiss SIM card, and notification of his new Swiss mobile number to his friends and contacts does not show that D2 resided in Switzerland, but, again it is indicative. Had he failed to acquire a mobile number there, it would surely have been a matter of comment.

(4) In the same way, D2's obtaining the *forfaits* and the residence permit are not determinative of his residence in Geneva at any particular time or at all, but they do assist D2's case. Their acquisition shows that, having finally decided in April 2016 to move to Geneva, he immediately started taking appropriate steps to that end. It matters not that he was not permitted to work there. D2 appears to have no need to work there. Again, this is an extremely wealthy individual who regularly boards a plane 10-15 times a month. Nor does it detract from the evidential value of the residence permit that as a UK citizen he is entitled to one. The important point is that he *applied* for it following, and consistently with, his decision to leave England and move to Geneva to live. His evidence is that he made up his mind to have completed the relocation by the end of the 2016/17 tax year, as he was too late for the earlier tax year. That evidence has not been seriously challenged.

(5) In my view the communication from HMRC, approving with effect from 1 January 2017 D2's application under the non-resident landlord scheme

to receive rental income without deduction of tax, should be seen in the same light as the *forfaits* and the residence permit; it has the same evidential value. I accept Mr Crow's submission that HMRC's approval does not amount to a determination that D2 was non-resident in the UK at any particular time. Even if it did, it would not be binding on me. I also accept that the approval is almost certainly based on information provided to HMRC by D2 and/or his advisers, which is likely to be much less detailed than the information available to me. Nor, in my view, do I need to decide whether the test of "non-resident" under the non-resident landlord legislation is the same, similar to, or different from the test of residence which I must apply. The value to D2 of HMRC's approval, as I see it, is that it shows him taking active and appropriate steps, well before 12 May 2017, to take forward the decision which he says he made in April 2016 to leave and settle in Geneva before the end of the tax year.

(6) As regards the suggestion that D2's case is undermined by the absence of evidence from the member of household staff who signed for the claim form on 15 May, from D1, and from Sofia, there must always be a limit to the evidence provided. I do not regard the omission to enlist a member of staff as significant. That the package was received and signed for is common ground. Light might conceivably be thrown on whether D2 had given up his usual abode at 31 Belgrave Square by adducing evidence from any and all members of staff. That does not mean that it would be appropriate or necessary to do so. As to the suggestion that D1 should have provided a witness statement, no good reason has been identified for his doing so; nor can I see any. In relation to Sofia, the fact that her evidence on various issues would have been "interesting" (Mr Crow's word), is hardly a justification for criticising D2 for the absence of a witness statement from her.

(7) I will deal briefly with the issue concerning the genuineness of the separation between D2 and Sofia. I have considered the evidence, together with all the points made about it, including Mr Crow's "deep speculation" by which he sought to suggest possible motivation for a sham separation. It is, of course, common ground that on an interlocutory application I cannot make such a finding. What I can say is that, in my view, the evidence pointing to a genuine issue and separation between D2 and his wife is overwhelming, and the arguments to the contrary are very weak. As to the latter arguments: (a) There was no material before me enabling me to judge the correctness or otherwise of the assertion that separation agreements of this kind are "rare", whether here or in the Ukraine. Even if that were correct, it would not indicate a lack of authenticity. (b) I do not see why in all the circumstances it should be surprising that relations between D2 and his wife have remained amicable. (c) That Sofia was seen to be wearing a ring on her wedding finger after as well as before the separation is not a point worth making. (d) Nor is there real substance in the point made about whether or not the children were aware before their holiday in July 2017 of what had taken place between their parents. D2's staying in separate accommodation from his family during a holiday might well have prompted questions from small children which did not

> occur to them at other times, given that D2 was very often absent from home for periods on business trips. (e) Unless Sofia had substantial funds of her own at the time of the separation, it was inevitable that D2 would remain the ultimate source of monies for payment of council tax and other outgoings of Belgrave Square. (f) The fact that Sofia and the children eventually moved to Switzerland to live (in a different canton) is a neutral point. As against these very tenuous arguments, we have the fact that D2 spent nearly £70,000 on the fees of highly reputable lawyers to advise him on these issues and to negotiate the very detailed Separation Agreement over a period of several months, culminating in formal proceedings for judicial separation. The suggestion (as it must be) that, either the reputable lawyers acting on both sides were colluding with their clients and opposite number in a charade amounting ultimately to an abuse of process, or D2 and his wife had gone to extreme lengths successfully to convince their lawyers that they were serious, simply in order to bolster a future jurisdiction challenge to proceedings which had not yet materialised, is highly implausible. It is all the more so, given that all this deception, expense and effort would *ex hypothesi* have been undertaken by husband and wife in the knowledge that, at the end of the school year, they would all be together again in Switzerland.

72. I should say that, in evaluating the arguments, including the points referred to above, I have borne in mind the fact that a worldwide freezing order has been made against D2 in the Tatneft litigation on the basis of a good arguable case of fraud along with a risk of dissipation of assets. However, the alleged risk, based on press reports, of a criminal investigation in relation to the collapse of PrivatBank, is not something of which I can properly take account.

Conclusion on residence

73. I remind myself that the inquiry required in order to determine the issue at the heart of this application is a multi-factorial and fact-dependent evaluation, in which all relevant circumstances are considered in order to see what light they throw on the quality of the individual's absence (if such it be) from the UK. I have indicated my views on the main submissions. I therefore turn to consider the various factors in the case, in the light of my assessment of the evidence and of the parties' submissions, and having regard to the legal principles discussed.

74. As I said earlier, most of the basic facts are not in dispute. In particular, there is no dispute that, for reasons which are also unchallenged, in April 2016 D2 reached a firm decision to leave the jurisdiction of England before the end of that tax year. It is also clear that, although at some point he may have considered settling in New York, at an early stage he rejected that option and decided that he would live in Geneva. Whether he liked Geneva or not, that was clearly the choice he made. He has stated that he chose it for its favourable tax regime and also because he had friends there, in particular his close friend and business associate, D1.

75. I have already outlined the steps he took to leave England and move to Geneva, and the timing of those steps (paragraph 54 of this judgment). In summary: (1) In April 2016 D2 arranged for his personal assistant, Mr Anishchenko, to join him in moving. As a result, Mr Anishchenko immediately began to make all necessary preparations to

move to Geneva, including finding a school for his daughter and leasing a flat for his family. The aim was for the move to take place in March or April 2017, but in the event Mr Anishchenko moved to Geneva on 2 May, as his flat was not available until then. (2) In May and June 2016 D2 and Sofia each instructed family lawyers in respect of the proposed formal separation. (3) At about the beginning of October 2016, D2 applied to the Swiss tax authorities in Geneva for the first *forfait.* (4) In October 2016, D2 began to look for somewhere to buy and live in Geneva. (5) In October 2016, D2 terminated his direct debit for council tax and made the last direct payment towards the outgoings of the London house. (6) In January 2017 D2 sent text messages to most of the contacts in his mobile phone, providing them with his new Swiss mobile phone number. (7) In April 2017, he or his advisers appear to have applied to HMRC for non-resident landlord status. (8) In January 2017 D2 applied for a residence permit in Geneva (granted on 1 March 2017). (9) In January 2017 D2 joined Pure Sports Club in Geneva, and made 10 visits between 17 January 2017 and 12 May 2017, and a further 19 visits from May until 13 November 2017. (10) On 20 February 2017 D2 and Sofia entered into the Separation Agreement. (11) On 17 February 2017, D2 purchased a car in Geneva. (12) In February 2017 D2 made a first donation to Chabad Geneva. (13) On 1 March 2017 he signed the lease on the Q flat in Geneva, and acquired a residence permit. (14) In about March 2017, Barclays were informed of D2's address in Geneva. (15) On 5 April 2017, in acknowledging service of Sofia's petition for judicial separation, D2's lawyers described D2's country of habitual residence as "Switzerland". (16) On a date prior to 30 June 2017, D2 purchased health insurance in Switzerland. (17) It is clear from the table based on his flight records that from the time he made his decision to move D2 very significantly reduced both the number of visits to England and the time spent on each visit. (18) His aim was to have left the UK before the end of the 2016/17 tax year, and he appears to have made only one visit to England after the end of March 2017, which was between 21 and 23 April 2017, when he stayed at The Wellesley Hotel. (19) On 2 May 2017 Mr Anishchenko took up residence in Geneva, somewhat later than originally intended. (20) In early July 2017 D2 instructed Cad Cool to sign a lease on a more suitable property in Geneva. (21) In August 2017, Sofia moved home to Switzerland with their children.

76. I have accepted that D2 was guilty of a lack of candour in his evidence to this court about where he was living in Geneva. He also engaged in a certain amount of "window dressing" in his deployment of the fact that he had taken out a 5 year lease of that flat, when dealing with tax and other authorities, as well as in his evidence to this court. On the other hand, he had made clear in his first witness statement that the Q flat was never going to be anything other than temporary accommodation and that he was continuing the search for something more suitable.

77. Having carefully considered the available evidence, I do not consider that these actions alter the answers to either of the questions: (1) Had a distinct break with England been effected by 12 May 2017? (2) Was D2 resident in Geneva (as a matter of English law) at that time? In my view, Mr Malek was correct in submitting that it does not matter for the purposes of the English law concept of residence whether he was staying in the Q flat or the Chabad apartment or both. In either case they were obviously going to be only temporary, and he was looking for a better property in which to live. What is important in the circumstances is that both properties were in Geneva. As it happens, this point is one made by Professor Dasser, D2's expert, in

dealing with the relevant consideration for the purpose of determining Swiss domicile under Swiss law. Moreover, Dr. Feller, the expert instructed by C, does not appear to disagree in his reply report. In any event, the evidence shows that D2 was living in Geneva to stay, and I consider that he was resident there, as that concept is understood in English law.

78. In the light of the (mostly undisputed) facts summarised at paragraphs 75-6, I consider there to be overwhelming evidence that before 5 April 2017 (and therefore by 12 May 2017) D2 had ceased to live at the Belgrave Square house, and was living in Geneva, wholly or mainly at the Chabad apartment. Further, by that time he was formally (and genuinely) separated from his wife, who had decided to stay in London. In the light of the material before me there is, to put it at its lowest, a good arguable case that he had effected a distinct break, in the sense of an alteration in the pattern of his life in the UK, and was no longer resident in England. England, and in particular 31 Belgrave Square, was no longer his "settled or usual place of abode". This is not, on the available material, a case of an individual with a residence in England and another one abroad. By the end of the tax year, D2 had succeeded in substantially loosening (if not cutting) his social and family ties with this jurisdiction and had moved his residence to Geneva.

79. It follows that C has not, on the material before me, established a good arguable case (as that phrase is to be understood on the authorities) that as at 12 May 2017 D2 still resided in this jurisdiction (in practice, at 31 Belgrave Square, London). Putting the matter another way, C has not established a good arguable case that before 12 May 2017 D2 had not succeeded in effecting a "distinct break in the pattern of his life in the UK" so as to cease to reside here. Even if, in a case of this kind where residence has admittedly existed in the recent past, the burden of proof were reversed, so that D2 was required to establish a good arguable case that a distinct break had occurred, my conclusion would be that the burden had been discharged.

Conclusion on domicile

80. Having decided that D2 was not resident in England at the material time, the question arises whether he was at that time domiciled in Switzerland. If he was, then it is common ground that this court has no jurisdiction and he is entitled to be sued in Switzerland pursuant to Article 2 of the Lugano Convention. If he was not domiciled in Switzerland, then the point which Mr Malek described as theoretical would arise: whether, having left England, he might have become domiciled in some third country which is not subject to the Brussels/Lugano regimes. If that were the case, it would be open to C to argue that the jurisdiction of the English court could be established over him at common law, by virtue of the proceedings having been served on him at his usual or last known residence under CPR 6.9, namely 31 Belgrave Square.

81. On the question of Swiss domicile, Mr Malek submits that in the context of the present case this follows seamlessly from the conclusion that D2 ceased to be resident in England. For, while not conceding Swiss domicile, C has not made any positive case for D2 being resident or domiciled in a third country, or indeed anywhere other than England. If, as I have found, he is not so resident and domiciled in England, Mr Malek submits that the basis for that finding can only be that he made a distinct break with England in order to move to Geneva. There is not a shred of evidence that he moved from England in order to become domiciled anywhere but Switzerland.

82. In his oral submissions, Mr Crow did not positively dispute or indeed respond to these points. Prior to the start of the hearing I was told that I need not read the expert reports. However, in their skeleton argument Mr Crow and Mr Denton-Cox disputed Swiss domicile.

83. On the test of domicile under Swiss law, Mr Malek stated (and Mr Crow did not demur) that there is no very significant difference between the parties' experts. Mr Malek adopted the helpful summary of the position at paragraph 66 of the skeleton argument of Mr Crow and Mr Denton-Cox. I gratefully reproduce the key passages of that summary:

> "(a) The key provision of Swiss law is Article 20(1)(a) of the Private International Law Act ("PILA"): "Pursuant to this Act, a natural person… has his or her domicile in the state where he or she resides with the intention of establishing permanent residence".
>
> (b) Article 20(1)(a) contains two cumulative elements, both of which must be satisfied:
>
> i an objective element, being the factual residence of a person in a specific place; and
>
> ii a subjective element, being the intention of the person to settle permanently in that place. It is common ground that this is to be ascertained objectively, by the presence of external facts which are recognisable or apparent to third parties: "it is not the internal will of the individual concerned that mattes, but the outward manifestation of that will" …
>
> (c) Domicile under Article 20(1)(a) is ascertained by reference to the place where the person's "vital interests" are centred, i.e. "the place where they maintain the most intense family, societal and professional relations, where the gravitational centre of a person's existence can be located…"
>
> (d) Dr Feller considers, but Professor Dasser appears to disagree, that the establishment of domicile in Switzerland presupposes the relinquishment of the individual's previous place of domicile, although it appears to be common ground that an individual can only have one place of residence at any one time, consistent with the above principles…."

84. Therefore, in essence, a person is domiciled in Switzerland if he is factually resident there, with an intention to residing there permanently. "Permanently", according to Professor Dasser,[15] does not mean there must be an intention to settle there forever; it just requires an intention to establish one's residence there.

[15] Dasser, 1st report, paragraph 12.

85. There was a slight difference between the experts as to a presumption that arises under Swiss law from administrative documents. Both sides agree that the place identified in an administrative document, such as a residence permit or a *forfait,* gives rise to a rebuttable presumption of domicile. Professor Dasser's opinion is that the presumption reverses the burden of proof, whereas Dr Feller is of the view that it could be rebutted by merely creating doubt in the court's mind.

86. I have not found it necessary to resolve this difference of opinion between the experts, as my conclusion on Swiss domicile would be the same regardless of where the burden of proof lay. I have not relied upon the presumption based on administrative documents.

87. Just as there is overwhelming evidence that before 5 April 2017 D2 had ceased to be resident and domiciled in England, I consider that having regard to the same evidential material, and applying the test of Swiss law set out above, he had become domiciled in Switzerland as a matter of Swiss law by the same date. Both objective and subjective elements of the test were satisfied at that point; in the latter case there is abundant evidence, identified earlier in this judgment, of the presence of sufficient external and recognisable manifestations of D2's intention. Similarly, there is abundant evidence that by 5 April 2017 the "gravitational centre" of D2's existence was located in Geneva.

Other issues

88. In view of my conclusions on residence and domicile, this court has no jurisdiction to entertain the claim against D2, and it is unnecessary for me to determine whether D2 was served at his "usual or last known residence".

Conclusion on the application

89. It follows from the above that the application must succeed.

90. I invite the parties to agree the form of order reflecting this judgment and to submit a draft to me for approval.