TC04519

Appeal number: TC/2014/01907

INHERITANCE TAX – whether appeal automatically struck out – whether Appellant should be permitted to give oral evidence – Appellant's lifetime transfers to a settlement – furnished holiday letting business – whether relevant business property – whether business consisted mainly of the making and/or holding of investments – yes – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANNE CHRISTINE CURTIS GREEN **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at the Royal Courts of Justice, London on 10 March 2015

Grahame Miller FCA, Managing Director of Argents Chartered Accountants Limited, for the Appellant

Christopher McNall of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mrs Green runs a business called Flagstaff Holidays ("the Business"), which lets five units of self-contained holiday accommodation in a property called Flagstaff House, Burnham Overy Staithe, King's Lynn, Norfolk ("the Property").

2. Mrs Green's case was that she had transferred 85% of the Business to a settlement called the Mrs ACC Green Settlement ("the Trust ") in two tranches, and that both transfers qualified for 100% Business Property Relief ("BPR") under the Inheritance Tax Act 1984, Part V, Chapter 1 as being "relevant business property." The parties agreed that the value transferred by the first transfer was £583,300 and that transferred by the second transfer was £1,060,200.

3. HM Revenue & Customs ("HMRC") accepted that Mrs Green was carrying on a business, but decided that the transfers did not qualify for BPR because the Business consisted "mainly" of "making or holding investments." Mrs Green appealed that decision and subsequently notified her appeal to the Tribunal.

4. The only substantive issue before the Tribunal was whether HMRC's decision to deny BPR was correct. I decided that BPR was not due because the Business consisted "mainly" of "making or holding investments" and dismissed the appeal.

Preliminary issues

5. Two preliminary issues arose from Directions previously given by Judge Berner, being (a) a strike-out application by HMRC and (b) whether Mrs Green should be allowed to give oral evidence at the hearing.

The Directions

6. On 9 June 2014, HMRC filed their Statement of Case. This included, *inter alia*, the statement that:

> "The Appellant bears the burden of demonstrating that, looked at in the round, the Firm's exploitation of a proprietary interest in land is a non-investment activity (and hence outside the scope of BPR)."

7. HMRC went on to specify certain factual matters which they required Mrs Green to prove.

8. On 24 June 2014, the Tribunal gave what are known as "standard" Directions for the conduct of the hearing. Direction 2 was as follows:

> "not later than 29 August 2014, the parties shall send or deliver to the other party, statements from all witnesses on whose evidence they intend to rely at the hearing, setting out what that evidence is ('witness statements') and shall notify the tribunal that they have done so."

9. On 10 July 2014, HMRC applied for the standard Directions to be amended in a number of respects, including asking that the parties' witness statements be filed and served sequentially, with the Appellant providing her statements first.

10. HMRC's application went on to say that:

> "…it has been specifically put to the Appellant (by HMRC in their Statement of Case) that there are points that the Appellant will be required to prove at the hearing of this appeal and it is appropriate therefore that the Appellant produces that evidence through the witness statements so that HMRC can, if necessary, respond."

11. On 5 August 2014, Judge Berner issued revised Directions, acceding to the application for sequential witness statements. Direction 3 read:

> "not later than 29 August 2014, the Appellant shall send or deliver to the Respondent, statements from all witnesses on whose evidence they intend to rely at the hearing, setting out what that evidence is ('witness statements') and shall notify the tribunal that they have done so."

12. Direction 4 required HMRC to send or deliver their witness statements to the Appellant no later than 12 September 2014. Direction 5 was that the parties' witness statements "shall stand as evidence-in-chief and be subject to such cross-examination as the other party shall require."

13. At the end of the Directions, Judge Berner added a Judge's Note, which said:

> "it is appropriate in this case, where issues of fact arise, for the Appellant to produce its witness statement first, and for HMRC then to consider what witness evidence it requires."

14. The Appellant did not comply with the Directions, and on 16 September 2014, Judge Berner issued an "unless order" which read (emphasis in original):

> "Not later than 30 September 2014 the Appellant shall comply with Directions 1 and 2 (list and copies of documents) and Direction 3 (witness statements) of the Directions released by the Tribunal on 5 August 2014. **Failure to comply will result in this appeal being struck out**."

15. On 25 September 2014, Mr Miller wrote to the Tribunal on behalf of Mrs Green, saying that Directions 1 and 2 had previously been complied with and continuing: "in accordance with Direction 3, no witnesses are to be called and no statements are therefore applicable."

Had the case been struck out?

16. For HMRC, Dr McNall submitted that Direction 3 required Mrs Green to "send or deliver to the Respondent, statements from all witnesses on whose evidence they intend to rely at the hearing." As she had not filed any witness statements, there had been no compliance with that Direction. As a result, her appeal had been automatically struck out by virtue of Judge Berner's unless order.

17. Mr Miller made the following points:

(1) this was the first time he had represented a client in Tribunal proceedings, and he had thought he was complying with Direction 3 when he informed the Tribunal that Mrs Green would not be putting forward any witness evidence;

(2) the Tribunal had responded by listing the case, so there had been no indication from the Tribunal that the case had been automatically struck out;

(3) HMRC had not informed Mrs Green, until the day of the hearing, that they considered the appeal to have been struck out. For example, this was not mentioned in Dr McNall's skeleton argument, which had been filed and served on 3 March 2015; and

(4) there had already been significant correspondence between the parties, and a number of documents were in evidence. Mr Miller had thought that Mrs Green could rely on that correspondence and didn't consider witness evidence to be necessary.

18. After a short adjournment to consider the submissions made by the parties, I decided that there had been no failure to comply with Direction 3. Neither that Direction, nor the standard Direction which uses very similar words, is a direction that the parties *must* provide witness evidence. All that the Direction required was that any witness evidence be filed and served by the date specified. Mr Miller had informed the Tribunal, by the date specified in the unless order, that no witnesses were to be called. As a result, Mrs Green's appeal had not been automatically struck out for failure to comply with the unless order.

Whether Mrs Green should be allowed to give oral evidence

19. Mr Miller said that, having spoken to Dr McNall shortly before the hearing commenced, he now realised that it might be helpful if Mrs Green gave witness evidence. He had not realised that assertions made in the course of correspondence between HMRC and Mrs Green's representatives would be insufficient to prove disputed points of fact. However, he recognised that he had told HMRC and the Tribunal that no witness evidence would be provided, and said he was not now asking the Tribunal to allow Mrs Green to give evidence.

20. Dr McNall said that it was in any event too late for Mr Miller to make such an application, and submitted that the Tribunal should not allow Mrs Green to give oral evidence. He said that HMRC had clearly stated that they did not accept the assertions made in correspondence to be facts, and had done their best to point out that Mrs Green's case would require evidence which would need to be provided via witness statements and proved at the hearing. Judge Berner had issued amended Directions in order to allow HMRC time to consider that witness evidence. Moreover, Direction 5 was that the witness statements would stand as evidence-in-chief. It would be unfair to HMRC if Mrs Green was allowed to give oral evidence now; this would put them at a disadvantage as they had not had time to consider her evidence before the hearing.

21. Although Mr Miller had not made a formal application that the Tribunal should allow Mrs Green to give oral evidence, I nevertheless thought it right to consider whether I should allow her to do so.

22. Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") requires the Tribunal to deal with cases "fairly and justly," which includes:

> "(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues."

23. On the one hand, allowing Mrs Green to give evidence would ensure that she was able to participate fully in the hearing and would demonstrate a flexible and informal approach to the proceedings.

24. On the other hand, I agreed with Dr McNall that it would be unfair to HMRC if Mrs Green gave oral evidence without any previous witness statement having been filed and served. The purpose of witness statements is to allow both parties to understand the evidence and to prepare properly for the hearing. HMRC had specifically requested, and been granted, sequential directions so that they would not be surprised by new evidence at the hearing. Rule 2 requires that the Tribunal avoid only *unnecessary* formality. The advance provision of witness statements was not unnecessary; that is why they had been directed.

25. It seemed to me that I had two options. One was to adjourn the appeal and refresh the directions about witness statements, with a costs order in favour of HMRC. The other was to refuse to allow Mrs Green to give oral evidence.

26. With some difficulty I decided that the second option was the fairer and more just course of action. In coming to my decision I took into account the following factors.

(1) HMRC had repeatedly pointed out that there were contested points of fact in issue, and that these needed to be proved by witness evidence, and they had applied for amended Directions with that evidence in mind.

(2) Judge Berner had given Mrs Green a clear explanation of the reason why sequential witness statements had been directed: his Note had said that "it is appropriate in this case, where issues of fact arise, for the Appellant to produce its witness statement first." Mrs Green had then been reminded of Direction 3 by the unless Order.

(3) Mr Miller had not made an application to admit oral evidence or asked for an adjournment, but had accepted the position.

(4) Continuing with the hearing would avoid delay, and as there was other factual material in the Bundle, the absence of Mrs Green's evidence was unlikely to mean that the issues could not be properly considered.

The evidence

27. The Appellant had provided a helpful bundle of documents which included:

(1) the correspondence between the parties and between the parties and the Tribunal;

(2) the register of Title for the Property, dated 24 December 2007;

(3) two Declarations of Trust made by Mrs Green;

(4) a Partnership Deed between Mrs Green and the Trustees of the Trust;

(5) unaudited accounts for the Business for the years ended 31 March 2009 through to 31 March 2012;

(6) a valuation of the Property dated 2 February 2010;

(7) a report by Pointen, a firm of estate agents ("the Pointen Report") giving an estimated rent if the Property were to have been let under assured shorthold tenancies;

(8) summaries of bookings for the Property for 2009 to 2012;

(9) Booking Forms for the Property for the same period;

(10) a Welcome Pack for the Property;

(11) a report by "VisitEngland" about the Property, dated 22 April 2010;

(12) various brochures and internet printouts relating to the Property (together, "the Brochures").

28. From that evidence, I found the following facts, which were not in dispute. As Mrs Green did not give evidence at the hearing, I have not included as facts any points which were simply asserted in correspondence from her representatives to HMRC, unless supported by other documents, such as the Booking Forms or the Brochures. I make further findings of fact at §82-83.

The facts

The Property

29. On 18 November 2003, Mrs Green purchased the Property for £900,000 with the aid of a mortgage. It was formerly the home of Captain Woodget, of the Cutty Sark. The Property is on the water's edge with uninterrupted views over the sea and the marshes. The Booklets describe it as located on "one of the most beautiful stretches of the UK's coastline" and as providing "the ideal destination for a traditional family holiday or a perfect peaceful retreat." The North Norfolk coast is

referred to as "a birdwatchers' paradise" and "an area of outstanding natural beauty…famed for long white sandy beaches."

30. The Property is divided into five units, each of which is available for holiday letting on a self-catering basis. Two units are in the main house, and three – Flagstaff Cottage, the Garden House and the Boat House – are within the curtilage of the main house. Each unit has a well-equipped kitchen with a dishwasher, freezer, fridge , microwave and cooker, as well as crockery, cutlery, glassware, pans and utensils. The units share an outside laundry room with a washing machine, tumble drier and ironing board. The Property has wifi but only a weak mobile phone signal.

31. At all relevant times, Mrs Green lived in Woodbridge, Suffolk. The Business has a website through which bookings can be made. If a person wishes to stay at the Property, but does not use the website, he telephones Mrs Green in Woodbridge to see if the unit is available, and then completes a Booking Form and sends it to Mrs Green. For the years 2009-2012, the Booking Form states that the price included "linen and towels, electricity and cots/highchairs" and went on to say "Please call our caretaker, Glenda Sturman, on [number] if you have any queries regarding your holiday arrangements."

32. Guests are given a "Welcome Pack" which contains telephone numbers for emergencies; information relating to activities, shops and markets and two pages of Tide Tables. It also includes the following information:

(1) The rubbish is collected early on Monday morning. The caretaker will put out the rubbish on Sunday night.

(2) The iron and ironing board are stored in the utility room.

(3) The heating can be controlled by using the thermostats

(4) If you do break, damage, lose something or spot a maintenance problem please do not hesitate to call us on [Mrs Green's Woodbridge number], so we can arrange for repairs or replacements as soon as possible.

(5) Before departure, close the front door and make sure all windows are shut, empty the fridge and check that the cooker and microwave are left clean, ensure that all cooking and eating utensils are clean and placed in cupboards ready for the next guests, and leave the keys in the door where found.

(6) The cottage is cleaned between guests but if it requires additional cleaning beyond the normal changeover clean we will need to make a charge from your housekeeping deposit.

(7) In emergencies, if you have a property related problem, your first point of contact is Glenda Sturman on [number].

(8) If the lights go off, it could be that a light bulb has blown and tripped the fuse box. A torch and spare light bulb are stored in the hall."

33. During the period 2009-2012, the five units in the Property were let for a total of between 650 and 700 nights a year.

34. On 2 February 2010, Bedfords Limited, a firm of estate agents in Kings Lynn, valued the Property at £1.9m on a vacant possession basis.

The Trust and the First Transfer

35. On 5 April 2010 Mrs Green settled 23% of the Property into the Trust, with herself, Mr Miller and Ms Dennis, a solicitor at Ashton Graham, as the trustees ("the Trustees"). The Trust Deed stated that the remaining 77% was held by Mrs Green, subject to the mortgage of £250,000.

36. On 22 November 2010, Ashton Graham filed an Inheritance Tax Account Form (IHT100) on behalf of Mrs Green. The IHT100 said that Mrs Green had made a chargeable transfer of £341,550, consisting of an interest in a business, and that this sum had been calculated as follows:

(1) the total equity in the property was £1,650k (£1,900k - £250k);

(2) the first transfer was 23% of that figure, being £379,500;

(3) because the Trustees owned only part of the Property, the £379,500 was further reduced by 10% to arrive at the £341,550 included on the IHT100.

37. Mrs Green claimed BPR at 100% on the basis that the Business was one of:

> "short term holiday lettings involving management of bookings and preparation of units for weekly and short term lets. Interest comprises 23% interest in Flagstaff House…"

38. She later accepted that the transfer value had been understated because it did not take account of the fact that she had retained responsibility for the whole of the mortgage. Furthermore, it had not been valued on the "loss to the estate" principle: in other words, the value of the remaining 77% must be further reduced because ownership of the Property is now shared. The parties subsequently agreed that the value transferred on the First Transfer was £583,000 rather than the £341,550 included on the IHT100.

The Partnership is set up

39. On 12 August 2010 Mrs Green entered into a Deed of Partnership ("the Partnership Deed") with the Trustees. The Recital said:

> "Mrs Green has heretofore carried on business letting the premises known as Flagstaff House…('the Property') on short term holiday lets ('the Business') and has determined to take the Trustees hereto into partnership with her in the said business."

40. Clause 1 of the Partnership Deed provided that:

> "with effect from 1 July 2010, the parties hereto ('the Partners') shall be and become partners in the Business."

41. Clause 4 said that the "original capital" of the partnership was (a) the existing assets of Flagstaff Holidays and (b) the value of the Property, of which 77% was to be credited to Mrs Green and 23% to the Trustees.

42. By Clause 11, the accounts of the partnership were to be prepared by a qualified accountant, and signed by the partners, and "when so signed shall be conclusive as to the facts stated therein unless some manifest error shall be discovered within two months after signature."

The Second Transfer

43. On 2 April 2012, Mrs Green transferred a further 62% of the Property to the Trust. Mrs Green retained responsibility for the mortgage. The Deed transferring the Property said that the Trustees now owned 85% of the Property and Mrs Green 15%, subject to the mortgage.

44. On 2 September 2012, a further IHT100 was filed on Mrs Green's behalf, declaring a chargeable transfer of £1,060,200 (£1,900,000 x 62% x 90%) – in other words, taking into account (a) the fact that the mortgage had remained with Mrs Green and (b) applying a 10% discount to the value transferred. BPR was claimed at 100% on the same basis as before.

The accounts

45. Taking the four years together, the accounts show that the total income of the Business was £291,236, or an average of £72,809. When VAT is added, the average income each year was £87,371.

46. Total expenses (excluding VAT) were £223,325. Of those expenses, repairs and maintenance are £59,258 (27%), depreciation of furniture, fixtures and equipment £35,209 (16%) and depreciation on property improvements (separately identified for the first two years only) £5,339 (2%). Rates were £15,601 (7%); bank interest and charges £31,600 (14%); cleaning £24,122 (11%); light and heat £18,937 (8%); postage, sundries, insurance and accountancy were all around 2%, with advertising and professional fees each being 1%.

47. In the years ending 31 March 2009 and 2010, Mrs Green is shown as the sole proprietor of the business, with the entire profit being allocated to her. The Property itself is not shown as an asset of the Business.

48. Despite this, for the year ended 31 March 2011 the accounts show a brought forward figure of £1.9m relating to the Property. Note 2 says that at 31 March 2011, the "property capital account" was divided between Mrs Green and the Trust, with the former owning £1,463,000 (77%) and the latter £437,000 (23%) with the two together totalling £1.9m

49. These figures are unchanged in the following year's accounts. The Tribunal was not provided with the accounts for the year ending 31 March 2013.

The Transfers and the Partnership

50. I drew the attention of the parties to the following facts: (a) the Property was not a business asset until July 2010; (b) Mrs Green continued to run the Business as a sole trader after disposing of 23% of the Property; and (c) she then went into partnership

with the Trustees and subsequently made the Second Transfer. I asked if they had any related submissions.

51. Both Mr Miller and Dr McNall asked the Tribunal to decide the case on the basis that 85% of the Business had been transferred to the Trust in two tranches, and to decide whether or not those transfers satisfied the requirement for BPR, as that was the approach both parties had taken.

52. However, had I found that the Business did not consist "mainly" of "the making or holding investments," I would have adjourned the appeal and asked for further evidence and submissions on the transfers of value and the position of the Partnership. Given my decision, that was unnecessary.

The legislation

53. By IHTA s 2, inheritance tax is charged on chargeable transfers which are not exempt transfers.

54. IHTA s 104(1) provides that:

> "Where the whole or part of the value transferred by a transfer of value is attributable to the value of any relevant business property, the whole or that part of the value transferred shall be treated as reduced–
>
> (a) in the case of property falling within section 105(1)(a) (b) or (bb) below, by 100 per cent;
>
> (b) in the case of other relevant business property, by 50 per cent;
>
> but subject to the following provisions of this Chapter."

55. IHTA s 105, so far as relevant to this decision, reads:

> "(1) Subject to the following provisions of this section and to sections 106, 108, 112(3) and 113 below, in this Chapter 'relevant business property' means, in relation to any transfer of value–
>
> (a) property consisting of a business or interest in a business;
>
> (b)-(cc)
>
> (d) any land or building, machinery or plant which, immediately before the transfer, was used wholly or mainly for the purposes of a business carried on…by a partnership of which he then was a partner...
>
> …
>
> (3) A business or interest in a business…are not relevant business property if the business…consists wholly or mainly of one or more of the following, that is to say, dealing in securities, stocks or shares, land or buildings or making or holding investments."

Principles established by recent case law

56. The meaning of "relevant business property" has been considered in a number of recent cases, in particular *HMRC v George* [2003] EWCA Civ 1763, ("*George*") *Weston v HMRC* [2000] STC 1064 ("*Weston*") and *HMRC v Pawson* [2013] UKUT

050 (TCC) ("*Pawson*"), which overruled *Pawson v HMRC* [2012] UKFTT (TC) ("*Pawson FTT*").

57. Other relevant authorities are *Martin v HMRC* [1995] STC (SCD) 5 ("*Martin*"), a decision of Sir Stephen Oliver, and *McCall v HMRC* [2009] NICA 12, [2009] STC 990 ("*McCall*") a decision of the Northern Ireland Court of Appeal, both of which were cited and followed in *Pawson.*

58. In *Best v HMRC* [2014] UKFTT 077(TC) ("*Best*") (Judge Cannan and Mr Moore) at [36] the Tribunal helpfully summarised the main principles as follows:

> "(1) The various activities involved in operating a business relating to the exploitation of land may be allocated between 'investment' and 'non-investment' activities.
>
> (2) In the light of that allocation the question is whether the investment element of the business is predominant (See *George* at [11]).
>
> (3) The ultimate issue concerns the relative importance of non-investment activities to the business as a whole (See *George* at [51].
>
> (4) There is a wide spectrum involved in such businesses. At one end is the granting of a tenancy together with activities sufficient to make it a business. At the other end is the running of a hotel or shop on the land. The holding of land as an investment may be the very business carried on or it may be merely incidental to the business. It may also be one of a number of principal components of a composite business (See *George* at [12] and [16]).
>
> (5) It is necessary to look at the business in the round. The relative income and profitability of the various activities is relevant but not determinative (See *George* at [13]).
>
> (6) The exception in section 105(3) IHTA 1984 is not confined to purely passive property investment (See *George* at [18]).
>
> (7) Property 'management' is part of the business of holding property as an investment, including finding occupiers and maintaining the property as an investment. However that term does not extend to additional services or facilities provided to occupiers and it is irrelevant whether the provision of such additional services is included in the lease. The characterisation of such services depends on the nature and purpose of the activity and not on the terms of the lease (See *George* at [27] and [28]).
>
> (8) The test to be applied is that of an intelligent businessman, concerned with the use to which the asset was being put and the way in which it was being turned to account (See *McCall* at [11]).
>
> (9) The test involves a question of fact and degree as to where a particular business falls within the spectrum (See *McCall* at [18]).

59. At [29] of *Pawson,* Henderson J first considered the principle in *George* which is summarised at (7) in the above list. He went on to say at [30]:

> "…where the business is one of letting a building, the provision of additional services or facilities to the occupants is 'unlikely to be material' because they will not be enough to prevent the business remaining 'mainly' one of holding the property as an investment. The implication is in my judgment clear. In any normal property letting business, the provision of additional services or facilities of a non-investment nature will either be incidental to the business of holding the property as an investment, or at least will not predominate to such an extent that the business ceases to be mainly one of holding the property as an investment."

60. At [31] he warned that "the imprecision of the statutory test is such that no test can be applied in a mechanical fashion" and emphasised the importance given in *George* to the facts of the particular case, see Carnwarth LJ at [58]-[61] of that judgment and Hale LJ at [63]. Nevertheless, when Henderson J came to apply the legislation to the facts in *Pawson*, he began by saying at [42]:

> "I take as my starting point the proposition that the owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity. Further, it is clear from the authorities that such an investment may be actively managed without losing its essential character as an investment: see *Martin*, *Weston* at paragraphs 18 to 19 and *George* at paragraphs [18] and [27]."

The parties' submissions

Mr Miller's submissions on behalf of Mrs Green

61. Mr Miller said it was clear from the case law that a wide spectrum of businesses involved the use of property. At one end was the granting of a tenancy, together with activities sufficient for there to be a business, and at the other end was the running of a hotel or shop.

62. In his submission, the Business fells on the "hotel side" of the line because:

(1) the units in the Property were not let under tenancy agreements;

(2) the income arising was therefore not rent, so there was no "investment income";

(3) the services and facilities supplied by the Business were similar to, and sometimes better than, those provided by budget hotels; and

(4) tenanted properties are commercially less risky than the Business, which offered self-catering holidays.

63. Mr Miller said that there was a difference between the Business and an "investment" such as shares, bank deposits or tenanted properties. In each case, income arose without any action by the investor.

64. He referred to *Brander v HMRC* [2009] UKFTT 101 (TC) ("*Brander FTT*") (Judge Reid QC) at [39] where a similar point is made. In contrast to the relatively passive flow of income arising from an investment, there was no guaranteed flow of income arising from the Business.

65. At [42] of *Brander FTT* Judge Reid had said that in order to decide whether a business consisted "mainly" of holding or making investments:

> "…it is necessary to establish what the preponderance of business activity is. This can be looked at from the point of view of a variety of relevant factors in an attempt to create an overall picture, to see whether that picture shows that the business activities on the estate consisted mainly of making or holding investments. These factors include turnover, profit, expenditure and time spent by everyone involved in the carrying on of the various business activities."

66. Judge Reid's decision that the business was the right side of the investment line had been upheld by the Upper Tribunal as *HMRC v Brander* [2010] UKUT 300 ("*Brander*") (Lord Hodge and Judge Oliver QC). Mr Miller said that the Tribunal should take the same approach of considering the overall picture. When that exercise was carried out, it would be clear that the Business was not "mainly" the holding of investments.

67. In order to run a successful holiday lettings business, a person had to manage the marketing, pricing, bookings, arrange regular cleaning, contents and public liability insurance, supervise refurbishments and deal with requests and complaints from guests. Mr Miller invited the Tribunal to infer from the documents that these services had been provided by Mrs Green. Given that there were five units in the Property, it followed that the above activities involved a significant amount of work.

68. He accepted that the issue in *Pawson* was whether a self-catering holiday business operated from a property known as "Fairhaven" was relevant business property. Mr Miller sought to distinguish the position of the Business from that in *Pawson* for the following reasons:

(1) the level of activity and income of the Business is higher, with more units: an average annual income of £87,000 compared to £6,178 from Fairhaven, see *Pawson FTT* at [24]; as a result, the Business had to pay business rates and VAT, and was charged for the removal of refuse;

(2) in contrast to the Business, Fairhaven appeared to have no website presence or marketing strategy;

(3) the services and facilities at the Property were superior to those at Fairhaven, and were kept up to date;

(4) the Pointen Report estimated that the units in the main house could be let on an assured shorthold tenancy ("AST") for £700 a month, and that the other units could be let for £750 a month. This would total £35,000 a year, compared with £12,000 for Fairhaven, see [35] of *Pawson FTT*.

69. That final point was important, Mr Miller said, because the annual income of the Business was around £87,000. The Pointen Report showed that the value of the Property, when let on ASTs, was only £35,000. The difference was £52,000, an "additional sum of nearly 150%" when compared with the £35,000 attributable to letting the units as ASTs. It was logical to assume that this £52,000 attached to the

extra services etc provided by the Business, over and above the renting out of the units. As a result, the Business was not "mainly" the making or holding of investments.

70. Mr Miller also submitted that the same distinction between furnished holiday lets and other types of rental income is recognised and accepted in income tax and capital gains tax legislation, and that the principle behind that differentiation is that running a furnished holiday let is not an investment activity.

Dr McNall's submissions on behalf of HMRC

71. Dr McNall said that HMRC were not arguing that the business was "wholly" on the investment side of the line; the issue was whether it was "mainly" investment. In answering that question, the Tribunal had to begin from the same point as Henderson J, namely that "that the owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity" see §61 above.

72. From that starting point, it was for Mrs Green to establish the facts to support her contention that the Business was on the "non-investment" side of the line, as she had the burden of proof. Mr Miller's statements about the work done by Mrs Green did not constitute evidence. As she had not given a witness statement, the facts could only be established from the documents in the Bundle, namely that the Business supplied linen and towels, furniture and equipment, wifi, high chairs, pots and pans, a caretaker, and a welcome pack. It was clear from the documents that the guests did their own laundry and had to leave the premises clean and tidy before they left, so there was nothing special in the way of extra services.

73. He said that even if it was accepted that work was carried out by Mrs Green on the basis put forward by Mr Miller, the Business is still on the "investment" side of the line. Most of the activities are general tasks associated with maintenance and upkeep of the Property, and only a few could be classified as non-investment – cleaning, the welcome pack, linen and towels, furniture and equipment, the occasional assistance of a caretaker.

74. The facts are, Dr McNall said, very different from those in *Brander*, which involved a large Scottish estate of over 2,000 acres. Rather, Mrs Green's case was similar to *Pawson* in all material respects, other than that the Property contains five units and its turnover is higher.

75. He asked the Tribunal to dismiss the following points made by Mr Miller on the basis that they were irrelevant to the issue under appeal:

(1) whether the tax system was inconsistent in the way it treated furnished holiday lets. That was a matter for Parliament, not the Tribunal;

(2) whether the Business was registered for VAT or paid business rates: these were different taxes and had their own rules. In any event, HMRC had accepted that this was a business;

(3) the lack of tenancy agreements, and the consequential absence of "rent" and presence of more commercial risk. The subject matter of *Pawson* was the

letting of a holiday property, so there was also no "rent" in that case and the risks were similar to those faced by the Business;

(4) whether the Business was similar to a budget hotel. The Tribunal's task was to assess the facts of this case, in the light of the case law, and must not "short-circuit" that process by making this sort of comparison;

(5) the fact that this Business involved more units, and more income, than Fairfield: the law as set out in *Pawson* applied irrespective of the number of units or the income.

76. Dr McNall rejected Mr Miller's submission that the value of the non-investment services could be found by comparing the actual income with that which would allegedly be received if the units in the Property were instead to be let on ASTs, for two reasons:

(1) the Tribunal should not rely on the Pointen Report. It was not expert evidence, and the Tribunal had not been provided with the instructions which had been given to Pointen; and

(2) if Mr Miller were correct, 60% of the price paid by guests would be attributed to the services provided, with only the balance being paid for the right to stay in an attractive seaside property. That was at odds with the reality, which was that guests paid a premium for the right to stay in "a pearl of a property in a beautiful location." In other words, the premium was paid because of "the location of the property, the season, supply and demand."

77. Mr Miller's deductive approach was flawed and should not be followed.

Discussion

78. I agree with Dr McNall that, like Henderson J, I must start from the proposition that "the owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity." But that proposition should not "deflect from the ultimate issue we have to decide which…is a question of fact and degree, to be decided on the basis of the evidence," as the Tribunal said in *Best* at [39].

79. My task is to decide whether the Business is "mainly" investment. I have to consider it "in the round" (*George* at [13]) and must establish the "preponderance of business activity" as Judge Reid put it in *Brander FTT*.

What activities are carried on?

80. I have found as facts, based on the documents provided, that the business is marketed via brochures and the website, that Mrs Green books the accommodation via the website, correspondence and telephone; that the price paid by guests for the Property includes the use of linen and towels, electricity, various kitchen equipment and other household furniture and wifi. A welcome pack is provided, the units are cleaned between guests, and a caretaker is available for emergencies. There is expenditure on repairs and maintenance, the Property is liable for business rates, and the Business pays an accountant and a secretary. None of this was in dispute

81. In reliance in particular on the Welcome Pack, I also find as facts that the guests do their own laundry and cooking, clean the cooker, microwave, cooking equipment and eating utensils before departure, change lightbulbs if required, set the heating thermostat and rarely contact the caretaker (the Welcome Pack invites contact only if there is a property-related emergency). I find that the guests are left almost entirely to their own devices once they arrive.

82. Mr Miller describes the work carried out by Mrs Green as marketing; pricing; organising bookings, regular cleaning, and insurance (contents and public liability); supervising refurbishments and dealing with requests and complaints from guests. I agree with Mr Miller that these activities can be inferred from the documents in the Bundle, without needing to make reference to the correspondence.

Which of these activities are "investment"?

83. In *George*, Carnwarth LJ held at [27] that property "management" is part of the business of 'holding' property as an investment" and that the term "management" includes "the activity of finding tenants and arranging leases or licences, and that of maintaining the property as an investment." However, the term did not extend to "additional services or facilities provided to the occupants" such as cleaning, lighting or heating.

84. In *Pawson* at [43] Henderson J said:

> "The business activities carried on in relation to Fairhaven which would naturally fall on the investment side of the line included the taking of active steps to find occupants, making the necessary arrangements with them, collecting payment of the rent, the incurring of expenditure on repairs, redecoration and improvement of the property, maintenance of the garden and grounds in a tidy condition, and keeping the property insured."

85. It follows from *George* and *Pawson* that the following activities fall on the investment side of the line: marketing, pricing, booking accommodation, dealing with complaints and requests, insurance, repairs and maintenance. By analogy with those activities, I find that business rates are also part of the costs of managing the investment. On the non-investment side are: electricity, the welcome pack, the provision of linen, towels furniture, equipment and wifi as well as cleaning.

86. That analysis indicates that the extra services provided are both relatively minor and are ancillary to the provision of the accommodation.

The accounts

87. That conclusion is confirmed when the accounts are considered. Although these are "no more than an imperfect guide to one part of the overall picture," see *George* at [13] and [52], they are nevertheless of some relevance when considering the position "in the round."

88. Here, cleaning, light and heat and depreciation of furniture and equipment represent "additional services," while bank interest/charges, repairs, insurance,

advertising, secretarial services, postage, business rates, and the depreciation of the property and its fittings are all part of the "management" of the Property. Accountancy and professional fees may be apportionable but are *de minimis.*

89. The figures set out at §46 show that the property management costs are least 60% of the total expenses. The real figure is higher, but would require a further split of depreciation between that for fixtures and fittings (which are part of the building) and that for furniture and equipment.

The "irrelevant" submissions

90. Dr McNall invited me to reject certain of Mr Miller's submissions as "irrelevant" to the issue I have to decide, see §76. I agree with him for the reasons he gave.

91. I merely add that, despite Mr Miller's valiant efforts to distinguish the Property from Fairhaven, I agree with Dr McNall that the two businesses are similar. In *Pawson FTT* at [22] the Tribunal described that property as follows:

> "Fairhaven is situated on the Suffolk Heritage Coast near Aldeburgh, Snape and the Suffolk Heaths Area of Outstanding Natural Beauty. It is therefore in a holiday area. The property, which is a large bungalow, overlooks the sea and has direct access onto the beach…"

92. Fairhaven was fully furnished and equipped, and had a telephone, television heating and hot water. Mrs Pawson arranged the bookings and a cleaner cleaned the bungalow between lettings, see [29]-[32] of that decision. The only difference between the type of services provided at Fairhaven, and those provided at the Property, appears to be that the former did not provide linen, see [28].

93. I accept that, as Mr Miller says, there is a difference in scale. The Property consists of five units, while Fairhaven was a single bungalow. But scale is not a relevant factor: the number of units and the amount of income derived from a property does not change the statutory analysis. As Henderson J says in *Pawson* at [48], "the relevant test is not the degree or level of activity, but rather the nature of the activities which are carried out."

The Brander *comparison*

94. The Property can, however, easily be distinguished from the landed estate at issue in *Brander*. Judge Reid concluded at [42] that:

> "the management of a landed estate such as Whittingehame Estate even where a significant amount of the income is derived from letting income is, overall, mainly a trading activity. That is where the preponderance of activity and effort lies. Bidwells were engaged as estate managers; most estates of the type under discussion are heavily based on farming and to some extent on forestry and woodland management and related shooting interests. The letting side was ancillary to the farming, forestry, woodland and sporting activities. The farming activities, albeit they include agricultural tenancies, occupied by far the greater area of the estate."

95. There is no farming, no forestry, no woodland or sporting activities in the Business; the letting of units in the Property is not ancillary to other activities. On the contrary, the other activities (cleaning, provision of equipment etc) are ancillary to the property letting.

The Pointen Report

96. Finally, I considered Mr Miller's submission that the £52,000 difference between (a) the income derived from the units as short-term holiday lets, and (b) the income which would be earned if the units were let on ASTs, could reasonably be assumed to derive from the extra services provided by the Business.

97. I begin by observing that Mr Miller's numerical comparison is not accurate. He is comparing £87,000 of income (including VAT) with the AST figure provided by Pointen of £35,000 (which does not include VAT). The true difference of £37,809 is arrived at by comparing the net of VAT income of £72,809 (see §45) with the AST figure of £35,000. In other words, even if Mr Miller's approach were sound, the difference is not 150% of the putative AST income, as he suggests, but closer to 100%.

98. However, I agree with Dr McNall that the approach is not sound, for two reasons. First, the evidence on which Mr Miller is inviting the Tribunal to rely is the Pointen Report, which sets out that firm's view as to the AST rental value of the Property. This is opinion evidence in a specialist area. As Judge Mosedale said in *Chandamal and others v HMRC* [2012] UKFTT 188 (TC):

> "[8] It is part of the role of the court or Tribunal to ascertain the reliability of evidence of fact: where opinion evidence is being expressed in a specialist area it may not be as easy for a court or Tribunal to assess the reliability of that evidence. It is likely to be for that reason that the courts have detailed rules, such as CPR 35 for the High Court, which seek to ensure the reliability of expert evidence.
>
> [9] CPR practice direction 35 at 2 requires an expert witness to give an independent view. At 3.2 it requires the expert witness to state his expertise, disclose his sources, make clear if anyone helped him with the report, summarise the range of opinions on the matter and give reasons for his own opinion, and state that he has complied with his duty to the court."

99. Judge Mosedale went on to say, at [10] that, while CPR 35 is not binding on the Tribunal, there was no good reason to diverge from its requirements, because:

> "A Tribunal as much as a court is concerned with the reliability of expert evidence. It is right and in the interests of justice that the only opinions of witnesses relied on by the Tribunal are witnesses who are both expert in the specialist area on which they give their opinion and who are impartial between the parties."

100. The same approach was taken by the Tribunal (Judge Brooks and Ms Hunter) in *JDI Trading v HMRC* [2012] UKFTT 642 (TC) and I respectfully concur.

101. For the Pointen Report to be accepted as evidence in this Tribunal, Pointen would need to have complied with the requirements of CPR 35, and I agree with Dr McNall that this has not happened. The instructions given to Pointen have not been provided; there was no agreement of those instructions beforehand with HMRC; any sources used have not been disclosed; there is no summary of the range of possible opinions on the matter; there is no indication that Pointen knew that the Tribunal was going to be asked to rely on their report, or that the firm was aware of the duty owed to the court by experts.

102. Second, even if the valuation given in the Pointen Report were to be reliable, so that the income given in that report would be achieved if the units were let on ASTs, I agree with Dr McNall that the difference between that value, and the income actually achieved, does not fall to be attributed to the extra services provided by the Business.

103. Dr McNall said that the price of holiday lets is attributable to " the location of the property, the season, to supply and demand." Although that statement was not based on expert evidence, I find that it is nevertheless a reasonable inference from the facts. It is simply not credible that over 50% (72,908/37,809) of the total charge for a unit was paid for heating and lighting, the use of linen, towels, furniture and equipment, the availability of a caretaker in emergencies, a welcome pack and the cleaning of the property before and after the visit. Although some part of the price paid by the guests can reasonably be attributed to extra services, that percentage must be relatively small, given the scale and nature of those services.

104. By far the greater part of the difference in price between the putative AST income and the actual income has be attributed to market forces. The Property provides holiday accommodation on the very edge of "one of the most beautiful stretches of the UK's coastline," with the added attraction of a historical connection to the Cutty Sark. As Dr McNall says, guests are essentially paying for the right to stay in "a pearl of a property in a beautiful location."

105. I find that the value of the services cannot be established by subtracting the putative AST income from the actual income.

Conclusion

106. It is clear from my analysis above that the extra services provided are insufficient to demonstrate that the Business is other than "mainly" one of holding the Property as an investment.

107. This finding is consistent with Carnwarth LJ's statement in *George* at [27] that the additional services provided in let properties are:

> "…unlikely to be material. They will not be enough to prevent the business remaining 'mainly' that of holding the property as an investment."

108. In *Pawson*, Henderson J made a similar observation at]30]:

> "In any normal property letting business, the provision of additional services or facilities of a non-investment nature will either be

> incidental to the business of holding the property as an investment, or at least will not predominate to such an extent that the business ceases to be mainly one of holding the property as an investment."

Decision and appeal rights

109. I find that the Business consists "mainly of…making or holding of investments" and I refuse Mrs Green's appeal.

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

ANNE REDSTON

TRIBUNAL JUDGE
RELEASE DATE: 21 May 2015

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 7 June 2015