



**TC06536**

**Appeal number: TC/2016/3766**

***INHERITANCE TAX – Business Property relief – whether holiday letting arrangements were mainly a business of holding investments – s 105(3) IHTA***

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**THE PERSONAL REPRESENTATIVES OF  
GRACE JOYCE GRAHAM (DECEASED)  
- and -**

**Appellants**

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

**Respondents**

**TRIBUNAL: JUDGE CHARLES HELLIER  
WILLIAM HAARER**

**Sitting in public at Bodmin County Court on 13 and 14 February 2018**

**Louise Graham for the Appellants**

**Simon Bracegirdle for the Respondents**

## DECISION

### Introduction

1. Carnwethers is an enlarged old farmhouse standing in grounds of about an acre  
5 some five minutes walk from the coast in St Mary's in the Isles of Scilly. It was  
owned at the time of her death on 6 November 2012 by Grace Joyce Graham ("Mrs  
Graham") and was her residence.

2. Up to the time of her death Mrs Graham ran a business at Carnwethers which  
involved the provision of accommodation in four self contained self-catering flats or  
10 cottages which were part of the building at Carnwethers.

3. On submitting the IHT account for Mrs Graham's estate her personal  
representatives claimed a deduction in the computation of the value of her estate on  
the basis that part of her interest in Carnwethers was, by virtue of the business she ran  
there, relevant business property within section 103 to 114 Inheritance Act 1984  
15 ("IHTA"). After some correspondence HMRC issued a notice of determination on 24  
March 2015 setting out their view that none of Mrs Graham's interest in Carnwethers  
was relevant business property. Her personal representatives, represented before us by  
her daughter Louise Graham, appeal against that determination.

4. Section 104 and 105 IHTA provide that where part of the value transferred by a  
20 transfer value (such as that which occurs on death) is attributable to the value of  
relevant business property, the value transferred shall, where the property consists of  
an interest in the business, be reduced by the value of the property. But section 105  
(3) provides that:

25 "(3) A business or an interest in the business [is] not relevant business property  
if the business ... consists wholly or mainly of one of the following, that is to  
say, dealing in securities, stocks or shares, land or buildings or making or  
holding investments"

5. HMRC do not dispute that Mrs Graham conducted a business at Carnwethers at  
the time of her death but it is their case that that business consisted mainly in the  
30 holding of an investment, namely her interest in Carnwethers, and was therefore not  
relevant business property by virtue of section 105(3).

6. The notice of appeal was received by the tribunal on 12 July 2016. HMRC had  
conducted a review of the determination and given notice of their conclusions on 14  
April 2016. The appeal should have been notified to the tribunal within 30 days of  
35 that date, that is to say by 14 May 2016. But April, May and June were the busiest  
days of the year at Carnwethers and that year Louise Graham was beset by problems  
which caused delay in giving formal notification of the appeal. HMRC did not object  
to the application that the appeal be heard out of time, and we thought it just in the  
circumstances to permit the appeal to be brought out of time.

40

## **The evidence.**

7. We heard oral evidence from: Louise Graham; Paul Harris, an accountant practising in Redruth who had acted for the Graham family since 1990 and Mr Guthrie who ran a property letting agency in the Isles of Scilly. We also had copies of  
5 correspondence between the parties. We find as follows.

## **Findings of fact.**

### *(i) A brief history.*

8. Mrs Graham and her husband Roy Graham bought Carnwethers in 1972. It was then a dilapidated three-bedroom farmhouse. Mr and Mrs Graham renovated and  
10 extended it, and between 1972 and 2003 ran first, a bed-and-breakfast business there, and then, a country house hotel. In 2003 they recognised the increasing demand for self catering holiday accommodation outweighed the waning demand for bed-and-breakfast or hotel accommodation and created three self-contained flats in and adjoining the main building - leaving part of it as the family home (together with a  
15 laundry, guest sitting room and office). In 2005 a further flat was created as a part extension of the house.

9. Mr Graham died in 2007, and in 2008 Louise Graham returned to the Isles of Scilly eventually to work with (and for) her mother in the business at Carnwethers. Mrs Graham continued to participate in the running of the business but a stroke in  
20 2010 limited her ability to do so. (So when we refer below to the activities undertaken after 2010 by Louise Graham, we include those undertaken by her mother).

10. Mr Graham had been particularly concerned with environmental matters. This concern was continued by Mrs Graham. In 2007 Carnwethers received a gold award from the Green Tourism Business scheme. The pool was solar heated, rainwater was  
25 harvested and recycling and composting taken seriously.

11. We obtained the impression that Mr and Mrs Graham had devoted time and effort to providing a unique venue for their guests when they ran Carnwethers as a hotel and that their interest in their guests and the facilities and service they provided was carried after Mr Graham's death on at first by Mrs Graham, and then by Louise  
30 Graham with her. Mrs Graham's presence in the house and then later that of Louise Graham meant that they could be involved with their guests; and they chose to be.

### *(ii) The accommodation and its setting.*

12. We describe here the position as it was in the year or so prior to Mrs Graham's death.

35 13. Carnwethers' 2012 marketing material described it as

"Carnwethers Country House Holiday Flats".

There were four flats (or ‘cottages’) each of which had its own kitchen and dining/living area.: (1) Dove Lawn, which was at the back of the house facing the croquet lawn, slept four and had its own utility room; (2) Rowan Tree, adjoining Dove Lawn, which slept two and was adjacent to a decked small garden area; (3) Secret Garden, close to a secluded garden area and sleeping two and (4) Poolside, which overlooked the pool and slept four.

14. In addition there were two guest bedrooms within the house which were used occasionally for the provision of bed and breakfast accommodation. After Mrs Graham’s death they were used more frequently, but in the period with which we are concerned, namely the period before her death, they were made available when guests’ flights were delayed and on occasion to members of the extended family (e.g. parents or grandparents) of guests who were staying in the holiday flats and who (generally) had stayed at Carnwethers before and were known to Louise Graham..

15. One brochure that described Carnwethers as "set in about one acre with a croquet lawn, prize-winning gardens with the secluded corners for relaxing and sunbathing and a swimming pool". In the pictures we saw the gardens appeared to be lush and exceptionally well designed and maintained.

16. There was a games room with a snooker table, table tennis, board games and videos; a sauna and a laundry room and a barbecue area.

17. There was a swimming pool which was some 30' x 15'. This was a conspicuous feature in the advertising literature. It was heated by solar thermal means to about 75°F during the high season. It was surrounded by paving on which there were half a dozen or so cloth covered sun loungers and a plastic table and chairs.

18. The sauna, barbecue area, games room and laundry were located at one end of the pool.

19. Covered areas housed a golf buggy and bicycles which were made available to guests for payment.

20. Inside the house was a separate guest lounge with a collection of books and an open fire (in season). Here guests were received at the beginning of their stay and might linger at the end of their stay while waiting for transport. Also in the porch of the house was a notice board with leaflets about matters of potential interest to guests.

21. The 2012 Quality in Tourism report, which awarded Carnwethers 4 stars, described the Highlights of Carnwethers thus:

“A peaceful, rural location, benefitting from a solar heated swimming pool, sun loungers, sauna, games room with a range of activities, barbeque area and bike shed with cycles available for hire”

And referred to the gardens surrounding the property. The 2007 Quality Tourism report described the grounds as “very well kept, attractive with colourful flower and plant arrangements.” The 2009 report described them as “well tended and presented”.

We thought these to be accurate descriptions.

*(iii) The services provided to guests.*

- 5 22. On arrival at Carnwethers guests were offered tea, coffee and biscuits and sometimes cake; they were helped to their accommodation and given a welcome pack which included a "what's on" guide to the week printed out from the Isle of Scilly tourism office website.
- 10 23. Inside each flat there was furniture: TV, beds, chairs tables, lamps etc, bed linen, crockery, cooking utensils, and towels; washing machines; fridge and a microwave oven. Additional towels were provided for use at the pool.
24. Each flat was provided with electricity and water. Waste water drained to a septic tank.
- 15 25. At the start of each visit each flat was supplied with flowers, home-made marmalade, sometimes a bottle of wine and on special occasions a bottle of champagne, home-made bread, milk, tea, coffee, sugar, toilet rolls, soaps and shampoos, washing-up liquid and lavatory bleach.
26. Guests were told they could take herbs for cooking from the herb garden when in season, tomatoes from the greenhouse and fruit from the garden trees.
- 20 27. Guests could hire the electric golf buggy (which had originally been brought for Mrs Graham's use after a stroke in about 2010). Four adult size and two childrens' bicycles (which had been acquired in 2007) were available to guests.
28. Three or Four barbecues for the guests were organised in each main holiday season. When barbecues were organised by guests Louise Graham would participate.
- 25 29. Louise Graham lived at Carnwethers and was assiduous in making herself available to guests. She told us of the help and advice she provided to guests: help and suggestions as to what to do with the children; advice on where to find what; ideas as to where to walk and when the boats ran. On rare occasions she had even been called upon for emergencies in the middle of the night. She provided the occasional taxi service to rescue guests lost on the island.
- 30 30. Groceries bought by guests from the Co-op while they were out and about would be delivered by the Co-op to Carnwethers, taken into the house by Louise Graham or other members of staff and put in the fridge to await the guests' return.
- 35 31. Louise Graham regularly obtained fresh crab (and also, when in season and caught, fresh fish) from the quay. Before going to collect she would ask guests if they wished for some for their own use; if they did they would reimburse the cost.
32. Louise Graham and her staff would also help with the organisation of events and parties such as those for weddings and anniversaries. There were 3 or 4 of these

events a year. On occasion cakes were baked for guests' birthdays. Five or six times a year cream teas were provided to returning guests.

33. It was clear to us from the Tripadvisor comments (both before and after 2012) that Louise Graham's welcome, help and availability was a significant part of guests' enjoyment of their stay. Mr Harris noted that since Carnwethers was at some distance from the shops and other facilities the attention which Louise Graham paid to her guests was particularly important.

34. The 2012 Tourism report noted "Well structured arrival procedures and hands-on service that encourages repeat business." Louise Graham told us, and we accept, that the quality and level of service ensured that many customers returned annually and in some cases for generations. Whilst we do not accept that this would have been the only reason for their return, we do accept that it would have played a material role in the decision to return.

35. On some of the occasions when the two guest bedrooms were used as spillover accommodation for the outliers of a family staying in one of the flats, toast and cereal were provided for breakfast to those staying in the house.

36. In the later part of 2012 Louise Graham started planning a writers' course at Carnwethers. It was held in 2013 after Mrs Graham's death, when eight people came and were accommodated in the apartments. They were provided with coffee, tea, lunch and dinner in the house as part of the course. We take the business at Carnwethers at the time of Mrs Graham's death to include the activity of preparation for this course but not its fruition.

*(iv) The work involved in running the business*

37. The boat to St Mary's stops running between November and the end of March. In this period the business takes no guests. Thus the cottages are occupied by guests only between about April and October.

38. Over the 25 week letting periods in 2009 to 2012 the occupancy rate was between 83 and 94%. More than one third of the visitors were repeat visitors. We accept that a material reason for a return visit was the welcome and help provided at Carnwethers.

Out of season

39. This was the principle time for advertising and taking bookings. Some booking started in November but it sped up in late January. Those working at Carnwethers including Louise Graham generally took holidays in December or early in January.

40. Between November and January the Gardens were tended: hedges cut, beds weeded, garden and pool furniture put into store. The paths, gutters and dovecotes were cleaned and the septic tank emptied. The cottages were deep cleaned; repairs were done. The furniture, soft furnishings and fittings were cleaned, washed and put away. The games room, the laundry, the sauna, the greenhouse, recycling area and the

bike sheds are cleaned (and repaired as necessary); the bikes were serviced. The plans for the following season were prepared; staff were organised. Advertising and accounting were done.

5 41. Between January and the end of March this work continued. There was maintenance of the garden buildings: paths and pavings were pressure washed, outside furniture washed and the swimming pool prepared; furniture coverings were washed and prepared. Advertising and bookings continued. New staff were given training at the end of March.

In season.

10 42. When guests arrived some 30 minutes was spent welcoming them: showing them the location, the facilities and talking about how to get around the islands. Some time would also be spent with guests as they left.

15 43. The change over dates for each flat were staggered throughout the week. The linen and towels were washed, dried and ironed in corresponding sequence throughout the week.

44. Every day:

20 (1) the pool was uncovered and skimmed in the morning and covered again at night. PH levels were checked and adjusted accordingly. The cloth covers of the loungers/sunbeds around the pool were taken in at night and washed twice weekly in summer. This all took about 10 hours per week;

(2) garden and pool furniture was wiped clean;

(3) there was be some gardening – mowing, weeding or path cleaning and edging; and

(4) The games room was tidied.

25 45. Once a week the sauna, games room, laundry, barbecue area, visitors lounge and bike shed were cleaned. Once a week the pool was cleaned (a fairly complex process).

30 46. On the changeover day for each flat, the flat was serviced – floors, surfaces, cupboards, tables were cleaned; furniture was hoovered; pictures, curtain poles, tables and surfaces were dusted; the fridge, dishwasher, Hoover, waste bins and recycling were emptied; the bedding clothes and towels were changed; toilet paper was restocked; and tea, coffee, milk, marmalade, kitchen roll, soaps and flowers were provided.

35 47. These activities during the season required in total about 200 hours work per week. This was provided by Louise Graham herself with such assistance as she was able to give from her mother, and with the help of a variety of other people: a former chef provided 10 hours work per week in the garden in return for accommodation;, there was local help with gardening and servicing the flats on changeover days. Staff were fed and watered. Other people helped under the ‘workaway scheme’ under

which one or two people came from abroad to work for a period and were given accommodation in the house in return; the first time this was in operation was in 2009, people did not come every year thereafter under the scheme because sometimes those who said that they were intending to come let Louise Graham down.

5 48. When Carnwethers had been run as a hotel Louise Graham estimated that the amount of hours spent in the business was not significantly more than it was in the period with which we are concerned. When it had been run as a hotel Carnwethers had employed a chef and waiting staff; if Louise Graham was correct in her estimation the reduction in the hours spent preparing food and in daily chamber  
10 maiding – which were no longer carried on - had to be matched broadly by the extra time spent cleaning kitchens and living rooms in the flats (since those were not present when it was a hotel). Although we accept that guests would stay longer in the flats than they would in the bedrooms and therefore make them messier we thought overall that there must have been some reduction in the time consumed, but we accept  
15 it was not particularly large.

49. Louise Graham provided a break down of the 200 hours per week: 30 hours gardening, 80 hours for cottage maids, and her own time (and that of her mother) of 80 to 90 hours. It seemed likely to us that the time of the cottage maids would not be required out of season and that work in the garden out of season would be less. Thus  
20 for a full year we estimated some 7,200 hours were involved, being:

- (1) 30hr x 25 weeks + 15 hours x 27 weeks  $\approx$  1,155 hours gardening
- (2) 80 hours x 25 weeks cottage maids  $\approx$  2,000 hours cottage maiding
- (3) 80 hours x 50 weeks  $\approx$  4,000 of Louise Graham's time.

*(iv) Income and profits.*

25 50. In the year ending the 31 March 2012 the gross income of the business was £74,000, having risen each year from £50,000 for the year to 31 March 2008.

51. The pattern of expenditure had remained roughly the same from 2009 when Louise Graham came to work full-time at Carnwethers and took a salary from the business. The main expenses (which amounted in total to between some £35k and  
30 £50k) were described in the accounts as wages, premises costs and repairs. We saw no breakdown of these costs between those solely applicable to the tending of the property and those applicable to tending chattels or the provision of other services. Nor was it clear to us how the costs of the 'workaway' people were accounted for.

52. Mr Guthrie told us that had Carnwethers been let on a shorthold tenancy an  
35 annual rent of some £27,600 could have been expected. Mr Guthrie managed 55 holiday cottages (owned by his clients) in the Isles of Scilly and 6 shorthold tenancy lettings. He had recent experience of the letting Market in the islands. We accept his opinion as good (expert) evidence of the approximate rental that would be obtained.

**The parties' arguments.**



53. Louise Graham makes the following points:

(1) In an attractive phrase she says that something is an investment if your money works *for* you, whereas a non-investment business is one in which *you work* to produce income. Carnwethers she said was the latter.

5 Appealing though this formulation is to the ear, it seems to us only to assist in identifying the ends of the spectrum and leaves unanswered the question of how to classify the nature of a business whose returns depend not only upon making assets available but also the work of those involved in the business.

10 (2) The test to be applied in deciding whether or not a business is wholly or mainly one of holding investments is that of the intelligent businessman. She offered us the evidence of Mr Guthrie and Mr Harris: both businessmen, both aware of the activity and nature of the business, and both of whom did not view Carnwethers as an investment business.

15 (3) She notes the spectrum described by Carnwath LJ in *HMRC v George* [2004]STC 147. Within the holiday accommodation industry she says that that spectrum stretches from a luxurious hotel run by a multinational at one end to a property in a holiday location let out with little or no input from its owners. Carnwethers she argues lies towards the hotel end of that spectrum.

20 (4) That the tribunal is required to look at the business in the round over a period of time and to form a view as to the relative importance to the business as a whole of the investment and non investment activities and business (citing *HMRC v Brander* 80 TC 300 at paragraph [73]). In doing so she says the tribunal should note the Upper Tribunal's warning in *Brander* that "it is not appropriate in every case to compartmentalise the business and attribute management and maintenance activity to either investment or non-investment".

25 (5) That in *HMRC v Pawson* [2013] UKUT 50(TCC), Henderson J, went too far and was inconsistent with the judgement of the Court of Appeal in *George*, when, in rejecting the proposition that a holiday letting business was inherently outside the scope of a "normal" letting business, he said "on the contrary I consider such a business to be a typical example of a property letting business [and therefore of an investment business] albeit of a fairly specialist nature".

54. Mr Bracegirdle says:

(1) HMRC do not dispute that Carnwethers is a commercially run business in which the owner and employees spent a lot of time and worked hard;

35 (2) *Martin (Executors of Moore deceased) v IRC* 1995 STC (SCD) 5 (para [25]) showed that it was not Parliament's intention that the relief should apply to a landlord letting land;

40 (3) HMRC accepted that there was a spectrum at one end of which there was the grant of a bare tenancy which was just sufficient activity to be a 'business' and which was fairly clearly a business consisting wholly or manly of holding investments, and, at the other, a hotel or shop, which was not;

(4) what mattered was the nature of the business;

(5) as Henderson J said at 45 in *Pawson*, Carnwath LJ had made it clear in *George* that in the case of the business of letting a building, the provision of additional services is unlikely to be material because they will not be enough to prevent the business being mainly one of property investment;

5 (6) in the case of *Carnwethers* the provision of the swimming pool, the garden and the croquet lawn were all part of the provision of property amenities. They were part of turning the property investment to account rather than part of the rendering of a service; redecoration, refurbishing and marketing, taking  
10 bookings, caring for the grounds and winter maintenance were likewise all part of obtaining a return from an investment rather than the provision of additional services. What was provided to guests on top of the use of the land was minor or ancillary.

## Discussion

### *The Legal Principles*

15 55. The legal principles applicable to the construction of section 105(3) have been considered twice by the Court of Appeal. The first was in *George*, and the second in *Philip Norman McCall and others v HMRC* [2009] NICA 12.

56. We derive the following principles for *McCall* and *George* as to the proper construction of section 105(3)::

20 (1) investment is not a term of art but has meaning an intelligent businessman would give to it; such a person would be concerned with the use to which the asset was being put and the way it was being turned to account. *McCall* [10]

(2) a property may be held as an investment even if the person holding it has to take active steps in connection with it: *McCall* [14] Girvan LJ said in that  
25 case that what was clear from the authorities is that a landowner who derives income from land or buildings will be treated as having a business of holding an investment notwithstanding that in order to obtain the income he carries out incidental management and maintenance work, finds tenants and grants leases;

30 (3) land is generally held as an investment where gain is derived from payments to the owner for the use of the property *McCall* [11] *George* [15];

(4) thus the exploitation of a proprietary interest in land for profit is capable of being an investment activity so that the land is an investment, and part of the business is holding it: the holding of property for letting is generally the holding of it for investment (*George* [18]);

35 (5) but there is a wide spectrum at one end of which is the exploitation of land by the granting of a tenancy and at the other end of which is the exploitation of premises as a hotel or by a shopkeeper. The land subject to tenancy would generally be an investment and any business encompassing it would therefore include holding investments, but the business conducted at a shop or hotel  
40 would not be one wholly or mainly of holding investments: *George* [12]

5 (6) property management is part of the business of holding property as an investment. To this extent investment business activity is not limited to purely passive business. "Management" for these purposes includes the activity of finding tenants and maintaining the property as an investment but does not extend to providing additional facilities whereby the landlord might earn additional fees (e.g. for cleaning and heating) whether or not included in the lease or covered by the rent: *George* [23];

(7) where there is a composite business it is necessary to look at it in the round (*George*[13]);

10 (8) where there is a composite business the statutory words must be applied as a whole to all the activities: one is not required to open an investment "bag" into which all the activities linked to an investment are placed (because they are ancillary to the investment) and weigh that against the remainder; instead one looks at the business as a whole (*George* [60]).

15 57. *George* had concerned a caravan park. In *McCall at [13]*, Girvan LJ noted that in that case Carnwath LJ had said that "maintenance of the amenity areas of the park [was] in part designed to maintain the investment but [was] also in part a service provided to the residential occupiers for the enjoyment of their mobile homes".

20 58. There have also been two cases heard by the Upper Tribunal in which section 105(3) was considered.. The first of these was *HMRC v Personal representatives of Pawson* [2013] UKUT 50 (TCC), and the second *HMRC v Brander* 80 TC 163.

25 59. In *Pawson*, the deceased owned an interest in a large bungalow, Fairhaven, overlooking the sea in Suffolk. The bungalow had been used for the two years preceding Mrs Pawson's death for the purposes of a holiday letting business. The question was whether this business was prevented from being relevant business property by section 105(3). The First-tier tribunal found that it was not so prevented but, on appeal to the Upper Tribunal, Henderson J found that the First-tier Tribunal ("FTT") had erred and that the business did consist mainly of the holding of investments. In coming to this conclusion he said:

30 "[42] In considering these rival submissions, 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 ... accordingly the fact  
35 that the Pawsons carried on an active business of letting Fairhaven to holidaymakers does not detract from the point that, to this extent at least, the business was basically one of an investment nature.

40 60. Louise Graham takes issue with Henderson J's statement at [42] that he took as his starting point that the owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity. She says that this is inconsistent with Carnwath LJ's statement in *George* at [12] that although the exploitation of a proprietary interest is "in principle" an investment activity, there is a

wide spectrum involved. She says that Henderson J fails to recognise that the spectrum is of equal if not more importance as "in principle".

61. We do not think that the appellants have any need to seek to dilute the effect of Henderson J's statement. He makes it clear what he describes is "generally" the case -  
5 leaving room for exceptions; and he defines the cases he is dealing with as those where the owning and holding of land is "in order to obtain an income from it", but the essence of the Appellants' argument is that the activities of the business at Carnwethers are such that it is used in major part for the provision of other activities and the income is derived as much from those activities as from the supply of land.  
10 Nevertheless we accept that we must be vigilant in having in mind the spectrum and assessing where business lies on that spectrum; and we agree that there is no presumption which requires rebuttal that a business which involves the exploitation of land for profit is mainly an investment business: the facts must be looked at in the round.

15 62. Henderson J continued:

“[43] 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  
20 redecoration and improvement of the property, maintenance of the garden and grounds in a tidy condition and keeping the property insured. All of these were directed to maintaining or enhancing the capital value of the property, and obtaining a regular income from its letting...

[44] As part of the holiday letting business certain services were provided to the  
25 occupants ... Those consisted of: (a) provision of the services of a cleaner/caretaker who cleaned the property between each letting carried out regular inspections of the property; (b) the provision of space heating and hot water; (c) the provision of telephone television and telephone at the property ...  
30 (d) being on call to deal with queries and emergencies; and (e) more minor matters such as the replacement of cleaning materials as and when necessary and the provision of an up-to-date welcome pack.

63. Henderson J said it was clear from *George* that the provision of those additional services was not to be regarded as part of the maintenance of the property as an investment and that their characterisation was unaffected by whether there were  
35 separate charges made for them. The critical question he said was whether they were of such a nature and extent that they prevented the business from being mainly one of holding the property as an investment.

64. He noted that Carnwath LJ had made it clear in [27] of *George* that in the case of a business of letting a building the provision of such services is "unlikely to be  
40 material " because they will not be enough to prevent the business remaining mainly one property investment. The implication, he said, was that any "normal" actively managed property letting business would fall within the exception in section 105(3)

because the "mainly" condition would still be satisfied. On that basis he held that the business conducted by Mrs Pawson was within the restriction in section 105(3).

65. *Brandon* concerned a Scottish estate. One of the issues is whether the composite business of the estate was mainly holding investments. The FTT considered it necessary to establish what the preponderance of business activity was. That could be looked at from the point of view of a variety of factors to attempt to create an overall picture. The factors included turnover, profits, expenditure and time spent. In the round the FTT considered that preponderance of activity and effort lay in trading activity [42]. The Upper Tribunal held that this approach contained no error of law (Upper Tribunal [82]).

66. *In McCall Deeny J* although agreeing with Girvan LJ said at [3] in relation to the words in section 105(3) which dealt in particular with dealings in shares and securities said:

"...However, if one applies the maxim *noscitur a sociis* then one can see the possibility that Parliament intended a business more akin to one dealing in and holding securities, shares or properties in a portfolio to be excluded from this form of business relief rather than as here, the management by a widow with a single farm business, which might otherwise be inherited intact by a daughter or son. Paying inheritance tax on a farm which had development value because of its location may well lead to a breakup in the farm unit by the necessity to sell the land to pay the tax. Taking a purposive approach to the provision might therefore yield a different outcome from a literal approach. The point was not argued ... before us, in the circumstances I would like to reserve my position on this issue.

67. This was not referred to in either *Pawson* or *Brandon*, but in *Vigne v HMRC* [2017] UK FTT 632 (TC), the FTT, referring to this passage said that section 105(3) had to be read as a whole because it informs its own statutory construction. The intention of the provision was to exclude from the relief property where "the underlying intention" was to hold it as an investment rather than as a component of and integral to some other business activity. For that reason the FTT identified intention as a relevant consideration in determining whether the "mainly" investment test was satisfied [19].

68. We asked Mr Bracegirdle about this passage. He said that he did not know what arguments could be have been made but there was no need to take a purposive approach to the construction of the section, or alternatively the language did not admit of such an interpretation: it was a catch all provision.

69. To our minds a purposive approach to the construction of any statutory provision is always required, but the purpose must be drawn from the statutory context: some provisions are so prescriptively drafted that they have little purpose but their mechanism although even then particular words may have meanings illuminated by the overall statutory purpose. To our minds the context of "mainly holding investments" is that it sits alongside "dealing in securities...shares land or buildings" which indicates that holding investments is something different from dealing in them

but to our minds this looks not to intention but to the objective pattern of use of an investment..

70. *Vigne* is also of note for the FTT Judge's criticism at [44] of Henderson J's approach in *Pawson*. Henderson J had asked whether the additional services that had  
5 been provided in that case were of such a nature and extent that they prevented the business from being mainly one of holding investments. The Judge in *Vigne* considered that this transposed the statutory test which properly read was "was the business mainly one of holding investments?"; it was not correct to start with the  
10 preconceived idea that it was such a business and then to ask whether that preliminary view should be altered.

71. We agree with the test proposed by the Judge in *Vigne*: namely, that one must ask is the business mainly one of holding investments, but we think that his criticism of the approach of Henderson J is misplaced. If one looks at the components of a  
15 business and asks "is this mainly holding investments?" The answer to that question is obtained first by looking at the components and asking in relation to each whether any part of them is the holding of investments or not holding investments, and then secondly by stepping back to look at the whole picture. If at the first stage one identifies an element which has a substantial investment component, the next question is do the other non-investment components outweigh it?. What one is not entitled to  
20 do (and was a mistake that Laddie J made in *George*:[60]), is to identify one component - an investment component - and lump with it everything ancillary or incidental to it and then compare that agglomeration with what is left. Each part must be viewed separately and then as part of the whole.

*The Application of those principles in this appeal*

72. Whilst the test of what is an investment is that of an intelligent businessman, the intellect of that businessman, whose embodiment is the tribunal, has to be applied in the context of the current appeal not to the question "Is this an investment business?" but "Is this *mainly* the holding of investments?". In their evidence Mr Harris and Mr  
25 Guthrie, both, we accept, intelligent businessmen, answered the first of those questions, not the second.  
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73. Some aspects of the business were in our view if considered on their own fairly clearly those of holding investments. There were other aspects which also fairly clearly did not fall into that category. And there were some which partook in various proportions of both descriptions. Our task is to look at the business in the round and to  
35 determine which aspects predominate.

74. It was clear that part of the business at Carnwethers consisted of using the interest in Carnwethers to gain payments from guests. This was the exploitation of land for profit and so, looked at on its own, was capable of being a business consisting of the holding of an investment. This business would encompass all the activities of  
40 advertising, taking bookings, repairing and maintaining the buildings. The fact that these activities occupied a lot of time and effort does not affect this conclusion: the

active management of an investment does not prevent the business of holding it from being one of holding investments.

75. It was also clear that the activities of providing homemade and purchased food, drink and household goods, bikes, games, books, fish and extensive help and assistance were not, on their own, the exploitation of an investment.

76. Nor in our view was the provision of furniture, clean linen and towels the exploitation of an investment for profit. Whilst they might be regarded as capital assets of a business they were rapidly depreciating assets which would not be called investments. The time spent washing, cleaning and repairing those items or making beds was not a component which, on its own, could be regarded as a business of holding investments<sup>1</sup>.

77. There were other less infrequent activities which were not those of the management of the property: the provision of B&B accommodation for guests' extended families, organisation of and participation in barbeques, cream teas, and help in the organisation of events. Although individually the infrequency of these activities had little weight, taken together they were not immaterial.

78. Other aspects involved both an element of investment business and the provision of additional services:

(1) The provision of the pool involved the licensing of a right to use land which must be taken to have been in part for the payment made by the guest. But it also involved in our view to a more substantial extent the provision of the service of providing a heated, cleaned pool and the furniture associated with it. In our view the latter predominated so that by far the larger part of this provision, seen on its own, was not in the nature of a business of holding investments;

(2) The provision of the sauna and games room also involved a licensing of the right to use land. They involved a lesser provision of services but, on their own, we would not regard their provision as comprising a business consisting mainly of the holding of investments.

(3) The provision of the gardens. For a basic garden - a lawn and a few shrubs – attached to a let dwelling we would hesitate to say that the activity of maintaining and providing it was anything other than exploiting the land for payment. In *Pawson* Henderson J spoke of the “maintenance of the garden and grounds in a tidy condition” as being an activity directed at maintaining the capital value and obtaining a regular income from the letting of the property. But the garden at Carnwethers was exceptional and its maintenance provided something over and above the simple licensing of land and keeping it in a “tidy” condition – it was a service provided to those who were staying and could see and use it. We would not classify a business which charged for admission to a

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<sup>1</sup> See also the distinction drawn in *George* [29] between rent for a building and rent for furniture.

botanic garden as one consisting mainly of the holding of investments. Whilst providing a service of an outstanding garden was not a large part of what was provided it was not a negligible part. It shared some similarity with the maintenance of the park in *George* (see[30] “the service provided to residential occupiers for the enjoyment of their homes”).

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79. There are various perspectives from which to appraise the business carried on at Carnwethers. In so doing it is the nature and extent of the activities rather than their intensity which is relevant. Thus the intensity of property management activity cannot turn it into non investment activity, but the extent of additional services can be such that the preponderance of activity is not investment activity.

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80. From the point of view of time spent by those working at Carnwethers it was clear to us that a substantial part of their time involved the provision of services to guests: welcoming, assisting, cleaning the furniture and apparatus in the cottages, laundering the towels and bedclothes, maintaining the pool and providing supplies; but a substantial part of the time was also spent on maintaining the building - cleaning gutters, repainting, repairing the fabric etc.

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81. We set out at [49] above an estimation of the times involved in running Carnwethers. We use those figures in the table below to produce a very rough division of time spent between activities which were maintenance and management and those which related to “additional services”.

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	Maintenance of the building and management of letting	Additional services	Basis of division
Gardening	900	200	Mainly maintenance
Cottage maiding	200	1,800	Mainly cleaning furniture kitchen beds
Louise Graham	2,200	1,800	Winter time mainly maintenance (but some furniture cleaning etc); summer: mainly additional - tending to guests, laundry, pool and letting admin.
Total	3,300	3,800	



82. This is very rough. We rely on it only to this extent: it suggests that the division of effort and activity was not seriously skewed to one end of the spectrum.

83. From the point of view of the guest, the receipt of the ability to use a cottage for particular period was a significant part of what was received. But the receipt of the use of the beds, the furniture, linen and kitchen equipment, electricity, the use of the pool, games room, bicycles, the provision of flowers and food and drink items, and Louise Graham's help and assistance was also significant. It is true that without the use of the cottage the other receipts would have been useless, but the test is not what is necessary to the supply - for if it were then any hotel, shop or restaurant would be mainly an investment holding business – but what the predominant nature of the supply is.

84. We have accepted that the rent which could be obtained for a shorthold tenancy of Carnwethers was £27,500 p.a. The average income from guests was about £60,000 over a 25week season. Together those figures may suggest that the value of the additional services provided by the business is just over half the total value. However, a more relevant comparison would have been between the total rent which could have been expected from an austere equipped but well maintained set of cottages let without any assistance, without any cleaning or tending of the pool, with minimal garden attention, no linen or food, with receipts at Carnwethers. Such a comparison would have acknowledged the effect of any premium which would have been attributable to the ability to take a cottage for a week or two rather than for a much longer period. The lack of evidence to make such a comparison made us unwilling to ascribe great weight to the comparison offered, although it did not point the business at Carnwethers being mainly that of letting.

85. We have already referred to the passage in *George* at [12] where Carnwath LJ cited with approval a passage from the Special Commissioner's decision in which he had said that there was a spectrum at one end of which there was little more than granting a tenancy and at the other the case where land was still being exploited, but the element of services meant that there is a trade "such as running a hotel" or a shop.

86. In their statement of case HMRC accepted that the main difference between the business of Carnwethers as a country house hotel and its business after the creation of the flats was that fewer guests could be accommodated and meals were no longer provided. Mr Bracegirdle discussed with Mr Harris a comparison which Mr Harris had made between the business of a guesthouse or family hotel and that of Carnwethers. Mr Harris had drawn on his experiences of such businesses on the islands. From that discussion we conclude that generally:

(i) the provision of the following services and the conduct of the following activities are found both in a normal small hotel or guesthouse and at Carnwethers:

- (a) a room or a small set of rooms for the guests' sole occupation for a period
- (b) towels and linen

- (c) tea, coffee, milk
- (d) tourist information,
- (e) a reception,
- (f) a communal sitting room,
- 5 (g) maintenance of the premises,
- (h) cleaning,
- (i) electricity and heating.

(ii) The following provisions and activities were found at Carnwethers and are not generally found at a hotel (although at least some of them might be found at  
10 larger hotels):

- (j) a swimming pool;
- (k) a sauna;
- (l) bikes to hire;
- (m) games;
- 15 (n) a large ornate garden;
- (o) a barbecue area;
- (p) a kitchen and kitchen equipment;
- (q) marmalade and other provisions;
- (r) the particular welcome and attention which Louise Graham  
20 provided.

(iii) and the following would normally be provided at a hotel or guesthouse and were not provided at Carnwethers:

- (s) meals, in particular breakfast (save on infrequent occasion for guests  
staying in the guest rooms) and dinner;
- 25 (t) in larger hotels, a bar;
- (u) the *daily* making of beds, cleaning and tidying;
- (v) room service in larger hotels.

87. Taking these differences and similarities together did not in our view point to a  
30 clear conclusion that Carnwethers lay at the hotel end of the spectrum but neither did they suggest that there was such an absence of the services one might expect at a hotel that Carnwethers' business lay clearly at the other end of the spectrum.

88. We were referred to three cases involving holiday cottages. In each case the tribunal found that the business was one which consisted mainly of the holding of investments.:

35 (1) The first was *Pawson*. The services provided in addition to the right to use the house in *Pawson* are described in Henderson J's judgment cited at [62]

above. All of those were provided in some form at Carnwethers but in addition there was the provision of the pool, of towels and bed linen, the availability of the buggy and bicycles, the more extensive supply of provisions and the significantly greater level of welcome and assistance provided by Louise Graham.

(2) *Ann Green v HMRC*[2015] UKFTT 334 related to a business which comprise the letting of five units of self-contained holiday accommodation in one building on the coast in Norfolk. The tribunal found that the business was marketed by brochure and on a website and that Mrs Green dealt with the bookings and correspondence.. The price paid included linen, towels, electricity, kitchen equipment, household furniture and WiFi. A welcome pack was provided and a caretaker could be contacted in emergencies. There was expenditure on repairs, maintenance and cleaning. But guests rarely contacted the caretaker and were "left almost entirely to their own devices once they came".

On these findings the tribunal concluded that the extra services - those in addition to the provision of the use of the premises - were "relatively minor and ancillary to the provision of accommodation". The accounts confirmed that picture. The tribunal said that the only difference between the provision made to guests in *Pawson* and that made by Mrs Green's business was that the latter provided bed linen.

(3) *Executors of Marjorie Ross v HMRC* [2017] UKFTT 507 (TC) concerned a business of running eight holiday cottages and two staff flats in Cornwall. The tribunal found that the services provided to guests were above the standard level for self-catering cottages ([90]) and included arrangements with a nearby hotel and an on site caretaker; it accepted that the level of service was more extensive than that in *Green* ([104]). But it rejected the argument that the extent of the the services provided changed the nature of what was being carried on from something which was the mere renting of land to something like a hotel ([112]). The tribunal concluded ([120]) that what guests wanted was access to a property to call their own in a beautiful part of Cornwall to enjoy for a specific period. The essence of that was the renting of land.

89. In *Ross* more was provided than in *Green*, and more was provided in *Green* than in *Pawson*, yet in none of those cases did the tribunal find that the preponderance of activity and effort lay otherwise than in the letting of the investment, the land.

90. But in the case of Carnwethers yet more was provided by way of additional services than in any of those cases: the pool, the sauna, the games room, the bikes, the food, the personal help and assistance. We did not regard these services as merely ancillary to the use of the flat.

91. In *George Carnwath* LJ said that in the case of a business of letting a building the additional services provided by the business were "unlikely to be material" because they would not be enough to prevent the business being one of investment. In *Pawson* Henderson J drew from this the implication that "in any normal case an actively managed property letting business" would be mainly holding investment.

92. Thus it will only be the exceptional letting business which falls on the non-investment side of the line.

93. Overall we conclude that Carnwethers was an exceptional case which does, just, fall on the non-mainly-investment side of the line. The pool, the sauna, the bikes, and in particular the personal care lavished upon guests by Louise Graham distinguished it from other “normal” actively managed holiday letting businesses; and the services provided in the package more than balanced the mere provision of a place to stay. An intelligent businessman would in our view regard it as more like a family run hotel than a second home let out in the holidays.

10 **Conclusion**

94. We conclude that the business was not one which consisted wholly or mainly of holding investments, and therefore allow the appeal.

**Rights of Appeal**

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

**CHARLES HELLIER**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 16 APRIL 2018**