[2009] NICA 12

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE SPECIAL COMMISSIONERS UNDER SECTION 225 INHERITANCE TAX ACT 1984

BETWEEN:

PHILIP NORMAN McCALL and BERNARD JOSEPH ANTHONY KEENAN (as Personal Representatives of Eileen McClean, deceased)

Appellants;

and
HER MAJESTY'S COMMISSIONERS OF REVENUE AND CUSTOMS

Defendant.

Before: Girvan LJ, Coghlin LJ and Deeny J

GIRVAN LJ

Introduction

[1] This matter comes before the court by way of an appeal from a decision of the Special Commissioner made on 7 April 2008 whereby he dismissed the appellants' appeal against a determination made by the respondents ("the Revenue") on 2 September 2005. The determination related to land comprising 33 acres of agricultural land at Ballyclare, County Antrim ("the relevant land"), the property of Mrs Eileen McClean ("the deceased") who died on 8 January 1999 ("the relevant date"). The appellants are the personal representatives of the deceased. The Revenue determined that for the purposes of inheritance tax payable on the death of the deceased no part of the value transferred on death was attributable to the value of any relevant business property for the purposes of Chapter 1 Part V of the Inheritance Tax Act 1984.

[2] The relevant land comprised a number of fields in grass. They originally belonged to the deceased's husband who died in 1983 when they passed to the deceased. The land prior to the deceased's death was zoned for development use. At the relevant date the land had been valued at £5.8 million far in excess of its purely agricultural value which was £165,000. If the Revenue's determination that business relief is not available the tax liability will amount to some £2.4 million. On the other hand if business relief is available the relief is 100%. The issue in this case is, accordingly of great financial significance to the parties.

The statutory context

[3] Under section 104 of the 1984 Act where the whole or part of the value transferred (inter alia) on death relates to *relevant business property* the value so transferred shall be treated as reduced by 100% in the case of property following within section 105(1)(a). For present purposes *relevant business property* means "(a) property consisting of a business or interest in a business." This is qualified by section 105(3) which provides:

"A business or interest in a business or share in or securities of a company are not relevant business property if the business or, as the case may be, the business carried on by the company 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*."

Before property qualifies for business relief it must have been owned by the transferor throughout the two years immediately preceding the transfer. The Revenue accepts that the land was held for the requisite period. It is also accepted by the Revenue that the land qualified for agricultural relief. Section 114 makes provision for the avoidance of double relief. The issue which falls to be determined in this case is whether the property is entitled to the full business relief or whether it fails to qualify as relevant business property because it consists wholly or mainly of the business of making or holding investments. Only the agricultural value will fall out of charge if it is not.

The Special Commissioner's key findings of fact

[4] The Special Commissioner heard the appeal against the determination between 8 to 11 January 2008. He heard evidence from a number of witnesses and also received in evidence agreed statements from some witnesses. In his decision he sets out the findings of fact that he reached. His key conclusions can be summarised thus:

(a) The land comprised six level fields in grass. At the north east there were watering troughs fed by mains water. At the south west end there is access to a sheugh at which animals might drink. There are two drainage channels on the land. Around the perimeter there is a stone wall for part of the parameter and there is a barbed wire fence along the south east side for 450 yards and along the north west side for 175 yards. The land is grass pasture and since 1983 at least it has not otherwise been cultivated.

(b) Shortly after Mr McClean's death the deceased asked her son in law, Mr Mitchell, to look after the fields. He undertook the work in a voluntary unpaid capacity. The only work done on the land was done by him or by graziers to whom the lands were "let" under seasonal grazing arrangements between 1 April and 1 November each year (described as conacre lettings though this were more correctly agistment arrangements.

(c) The work involved (i) inspection of the perimeter fencing and walls, gates and water supply. (ii) removal of rubbish, unblocking of drains, emergency repairs to vandalised or damaged fencing and tending the drinking troughs; and (iii) informing the grazier of any problems he observed in their animals.

(d) On average the work during the grazing season was about one hour per week and outside that period somewhat less. It was unlikely that more 20 hours per year and likely that between 10 and 15 hours per year on average were spent in repairing fences, posts and wire. Work in cleaning drinking troughs and maintenance of the water system would have been likely to have been 2 to 3 hours with work on land drainage and clearing leaves 4 and 12 hours respectively. Up to 20 hours were spent in cutting and spraying weeds. (In 1994 the whole farm was sprayed by a contractor for £300. In 1993 a contract was entered into to replace 40 meters of vandalised fence.) The Special Commission concluded that Mr Mitchell probably spent about 100 hours a year "tending" the land (by which he clearly meant looking after and maintaining it).

(e) Mr Mitchell did not fertilise the land. That work was done by the graziers to whom the lands were let under the agistment arrangements.

(f) Before his death in 1983 Mr McClean used agents to find graziers for the agistment arrangements. The deceased continued to use the same agents. From 1986 she retained Mr McClelland as her agent. He obtained graziers for 1986 to 1990 and they paid their dues to the agent who accounted to the deceased. Mr Mitchell found graziers to take the land in 1991 to 1992. Mr McClelland again let the lands from 1993 to 1996 for some £1,800 per annum. In 1997

Mr Mitchell arranged for the letting of the lands to his cousin and in 1998 Mr McClelland let the lands.

(g) Up to 1992 Mr McClelland wrote to and sent payments to the deceased. The deceased went to stay with her other daughter in Co Tipperary in 1992 and remained there. Her mental capacity diminished from 1986 onwards and by 1992 she was confused and no longer able to manage her own affairs. From 1995 the deceased no longer understood the nature of her interest in the land. Any agency relationship between Mr Mitchell and the deceased would have terminated by 1995. Mr Mitchell became a constructive trustee for the deceased. His activities in making profits from the land fell to be treated as those of the deceased.

(h) The relevant arrangements with graziers were agreed orally and usually confirmed in writing. A price was generally agreed at a rate per acre. Other terms for grazing "lettings" would be generally understood to be applicable unless there was express agreement to the contrary. These terms included:

(i) that no other grazier would be permitted to graze the land, and the owner would not let his own animals graze the land

(ii) that the grazier's animals could be kept on the land for the period of the letting, eating the grass, drinking the water and being accommodated on the land;

(iii) that the grazier's vet would have access to see animals in the field;

(iv) that the owner would maintain the fencing and be responsible for weed control; and

(v) that the owner would not be required to fertilise the land and the graziers could fertilise it.

The seasonal lettings would be for the period during which the grass was growing (1 April to 1 November). After 1 November the land would become wet and would be damaged by the feet of too many animals. They were thus unsuitable for grazing until the next season.

[5] Before a claim for business relief could arise the appellants has to establish that the deceased had conducted a *business* for the requisite statutory period. The Commissioner concluded that Mr Mitchell's activities on the land coupled with the annual letting of the land to graziers was just enough to constitute a business. He considered that if the deceased had merely to let the lands to graziers with no regular preparatory activity that would have been insufficient to give rise to a business within section 105 of the 1984 Act. However, the work involved in tending the land (deemed to be done by the deceased) tipped the scales in favour of the conclusion that a business was being carried on in respect of the lettings of the lands. In this appeal no challenge was made to the Special Commissioner's finding of the existence of a business or to his finding that the deceased fell to be treated as the owner of that business.

The Special Commissioner's conclusions

[6] The Special Commissioner concluded that the business was one which consisted wholly or mainly of the holding of investments and that, accordingly, the estate was not entitled to business relief. He thus upheld the Revenue's determination and dismissed the appeal. The Special Commissioner's conclusions are set out in paragraphs 95 to 105 of his decision and may be summarised thus:

(i) He rejected the argument that the deceased was in the business of providing a service to the graziers in providing grass for their animals. The effect of entering into the agistment arrangements was to make grass on the land available to the graziers. The grass was not made available principally through the tending of the land by Mr Mitchell but by virtue of the letting.

The work done by Mr Mitchell was not something additional to or separate from the provision of the land for grazing.

(ii) The deceased did not use the land for animal husbandry.

(iii) The activities of the business consisted of the making available of the land without the separate provision of any substantial other goods or services. The activities of the business did not involve the cutting of the grass or the feeding of the cattle but simply making the asset available for a financial return so that the cattle of the graziers might live and eat there. This was the business of holding an investment.

(iv) The land was used as an investment to make part of a living from it. The use of land by the graziers may not have been exclusive but it was sufficiently exclusive to be clear that the land was being used as an investment.

(v) The deceased's activities were all management activities directly relating to the letting of the lands to the graziers and the whole of the income came from the letting. The activities were not so substantial as to constitute themselves a part of a business.

(vi) The way in which the land was managed and let out to graziers could not be equated with the provision of hotel accommodation the provision of kennelling for cats and dogs or the running of a "pick your own fruit" farm.

[7] One particular passage in the decision of the Special Commissioner was much debated in the course of the argument on the appeal. This is set out in paragraph 85 of the decision –

"85. What then were the features of the grazing agreements entered into for the fields? I record at paragraph 42 above Mr McClelland's evidence of the terms which would generally be understood to be applicable and I find that those terms by custom or necessary implication would be included in the contract with the grazier. It seems to me that those terms and the guidance in the cases permit the following conclusions:–

(i) The making of the conacre lettings did not deprive Mrs McClean of possession of the fields or of her right to occupy the fields save to the extent that any element of that occupation would interfere with the grazier's right to graze his cattle or sheep.

(ii) The grazier obtained a right as against Mrs McClean to accommodate his animals on the fields for them to graze the fields and be the only person whose animals were to be grazed on the fields. These rights gave a measure of exclusive enjoyment to the grazier. That was not exclusive occupation as it was it was *Maurice E Taylor* for in that case the conacre tenant could exclude all others from the land, whereas in the case of graziers their rights to exclude others relate only to others with competing or interfering purposes.

(iii) It seems to me that the grazier would not be in paramount occupation (see also Wylie op. cit. at 3.35). Since an agistment holder is entitled to the grazing of the land only, and possession remains with the owner, it is the latter who will usually be in rateable occupation)."

The appellant's contentions

[8] Mr Massey QC who appeared with Mr Evans on behalf of the appellants calling in aid *Edwards v. Bairstow* [1956] AC 14 argued that the Special Commissioner was erroneous in point of law in his decision. The true and only proper conclusion to be drawn from the facts as found was that the business was not wholly or mainly the business of holding investments. The found facts contradicted the determination. The Special Commissioner was wrong to conclude that the owner was not in the business of providing a service to the graziers by providing grass for their cattle or sheep. His conclusion that the grass became available as a result of the grant of the grazing

licence more than as a result of any activity carried out by the owner was contrary to the facts that the grass was grown on the farmland through the conscious decision of the landowner. In the absence of her decision to cultivate grass and of the steps taken on her behalf to grow grass as opposed to some other crop no grass would have been available. The conclusion that the grass was not made available principally through the tending of the land by Mr Mitchell but by virtue of the letting was contrary to the facts found confusing the grass pasture with the manner of its marketing. The cultivation of grass land for the seasonal grassland for the seasonal grazing of the grass by a grazier's cattle is an operation of husbandry. The landowner was using the fields in her own husbandry operations. The Special Commissioner was wrong to conclude that the making available of a major asset for payment without the separate provision of any substantial other goods or services was contrary to the facts found. There is no distinction in principle between a business which involved the growing of grass for cutting and silage and the business of growing grass for consumption by cattle in situ under grazing licences. The Special Commissioner's conclusion that the deceased was in paramount occupation was a key finding and it contradicted the Commissioner's conclusion that the land was used not to make (part of) a living on it but to make (part of) a living from it. The only thing which the graziers were entitled to do was to bring their cattle on to the owner's land for a limited part of the year for the purpose of the safe accommodation of the cattle on the owner's land and the consumption by the cattle of the owner's grass and water in situ. The Special Commissioner had misdirected himself in treating the agistment arrangements as equivalent to a letting of the land. The fact that the land is managed to produce a crop is not an indication of management of an investment but a service provided to effect the secure accommodation of the grazier's cattle. The true and proper way to view the situation was to interpret the relationship between the deceased and the grazier as much more akin to a relationship between a hotelier and a guest or between a pick your own fruit farmer and customers who pick the fruit than to the relationship between a landlord and tenant where the landlord merely maintains the land to enable him to receive a rent from a tenant as a return on his capital asset. Counsel contended that the Special Commissioner failed to properly understand and apply the law as established in cases such as *Tootal Broadhurst Lee Co Limited v. Inland Revenue Commissioners* [1949] 1 All ER 261 ("*Tootal*") and *IRC v. Desoutter Brothers Limited* [1946] 1 All ER 58 ("*Desoutter*") and failed to apply the reasoning in *IRC v George* [2004] STC 147 ("*George*").

Analysis and conclusions

[9] For the appellants to succeed in this appeal they must establish in accordance with *Edwards v. Bairstow* that the Special Commissioner either misapprehended the law and thereby misdirected himself or that his factual findings irresistibly led to a contradictory conclusion. (As Viscount Simonds put it in *Edwards v. Bairstow*:

"It is a case of whether it be said of the Commissioners that their finding is perverse or that they misdirected themselves in law by a misunderstanding of the statutory language."

[10] In deciding whether the relevant business fell within the exclusion from relief because it was the business of making or holding investments the Commissioner was of course bound to understand and apply the law in relation to the definition of a business of holding and making investments. The question is to whether the business of the deceased consisted of the *holding* of an investment since no question arises of *making* an investment. Since the plural includes the singular the question can be further refined to whether the business consisted of holding an investment. We conclude that the Special Commissioner properly apprehended the law and that his ultimate conclusion was one that he was entitled to reach having regard to the evidence and to his findings of fact.

[11] The term "business of holding investments" is not a term of art. The Commissioner concluded correctly that the test to be applied is that of an intelligent businessman who would be concerned with the use to which the asset was being put and the way it was being turned to account. He stated at paragraph 52 of his decision that such a person would be concerned with the use to

which the asset was put and the way it was turned to account. He bore in mind what was said in *Weston v. IRC* [2000] STC 1064 by Lawrence Collins J who derived from *Desoutter* the proposition that "investment" has the meaning which an intelligent businessman would give it and that an investment can be such even if the person holding it has to take active steps in connection with it. Lawrence Collins J drew assistance from what Lightman J stated in *Cooke (Inspector of Taxes) v. Medway Housing Society* [1977] STC 90 namely that land is generally held as an investment where gain is derived from payment to the owner for the use of the property.

[12] The cases of *Tootal* and *Desoutter* were much debated in the argument both before the Commissioner and on this appeal. The parties sought to draw different conclusions from those authorities as to the proper approach to the question of when a business can properly be regarded as the business of making or holding investments. The cases dealt with rather different legislation relating to the taxing of excess profits. In those cases the taxpayers were seeking to show that royalties from patents were income from investments and thus did not fall within the profits of the companies' respective trade or business. Lord Greene in *Desoutter* stressed that it is undesirable to seek to formulate a general definition or test for the purpose of solving the question of whether some asset should be regarded as an investment. The question falls to be decided on the facts of the individual case. An asset may in relation to one person be considered an investment (for example an patent held by a barrister as the passive owner of a monopoly right who is receiving royalties as income for the asset) whereas in the case of a manufacturing company a patent held by it may properly be regarded not as an investment held aloof from the active work of the business but as part of the business's active assets. In *Tootal* Lord MacDermott rejected the argument that income from the company's patents fell to be treated as income from an investment because it arose from the active prosecution of Tootal's overall trade and business. There is nothing in the Commissioner's decision that indicates any misapprehension on his part on the proper import of the decisions in *Desoutter* and *Tootal*.

[13] The appellants also relied heavily on the decision of the Court of Appeal in *George* [2004] STC 147 and argued that if the Special Commissioner had properly understood and applied that decision he should have concluded that the true nature of the business was not that of holding an investment. In that case a company owned a caravan site and carried on various activities. These included letting out sites for caravans to residents who paid site fees and received connections to services from which the company earned a profit. The company also earned profit from selling caravans. It operated a club for residents and non residents, stored caravans not in use, let out a warehouse and shop and let out fields for grazing together with operating an insurance agency for profit and receiving income on cash balances. The deceased owned 85% of the shares of the company. The Revenue determined that the deceased's property was an interest in a business of making or holding investments. The Special Commissioner in that case held that the business should be considered as primarily one providing services and not merely the business of holding investments. On appeal to the High Court Laddie J concluded that it was an investment business. He treated the main activity as earning a return from the caravan sites thus an investment business and that the other activities were incidental to that primary rise. On appeal the Court of Appeal reinstated the Special Commissioner's decision. The court concluded that the holding of property as an investment was only one component of the caravan park business and was not the main component. The holding of investments was neither incidental to nor the very business. It was simply one of a number of principal components of a composite business. Carnwath LJ pointed out that a caravan park business is a hybrid, making it more difficult to draw a clear line between investment and non investment activities. Maintenance of the amenity areas of the park is in part designed to maintain the investment but is also in part a service provided to the residential occupiers for the enjoyment of their mobile homes. The facts in *George* and the nature of the business were very different from the situation arising in the present case and that decision does not lead to the conclusion that in the present instance the business carried out by the landowner fell to be considered as a kind of composite grass production business.

[14] What is clear from the authorities is that a landowner who derives income from land or a building will be treated as having a business of holding an investment notwithstanding that in order to obtain the income he carries out incidental maintenance and management work, finds tenants and grants leases (see for example *Marsh v. Inland Revenue Commissioners* [1995] STC 5 and *Burkinyoung v. IRC* [1995] STC 29. Lawrence Collins J in *Weston deceased v. Inland Revenue Commissioners* [2000] STC 1064 put the matter thus:

"Thus land is generally held as an investment where gain is derived from payment to the owner from the use of the property and so a landlord will normally hold his property as an investment even if the landlord has to engage in activities of maintenance and management which are required by the lease or incidental to the letting."

[15] The appellants' central proposition is that the agistment arrangements under the seasonal lettings cannot be viewed as analogous to a lease of premises in respect of which the landowner carries out work of an essentially maintenance nature. Rather they should be viewed as being in the nature of a composite grass provision business with the landowner retaining paramount occupation and control of the asset. The finding by the Special Commissioner that the deceased retained paramount occupation was relied on by Mr Massey as being of great significance in this context.

[16] The use by Northern Ireland landowners of conacre and agistment arrangements with other farmers is common even though such arrangements have been criticised as unsatisfactory arrangements which do not assist in good land management practices. The fact that such arrangements are common is in part due to their traditional use in Northern Ireland, in part due to a fear on the part of both landowners and graziers and conacre tenants of creating agricultural tenancies with potential adverse legal consequences and in part due to the desire of landowners to retain a degree of control over the land during the period of the contract. What appears clear from the old Irish authorities is that an agistment contract confers on the grazier only a right to graze and not possession of the land in law. They do not create a tenancy. Such an arrangement partakes of the quality of a profit à prendre but one which by way of exception to the normal rule does not require to be created by deed. Such an arrangement bears a close comparison to a contractual licence. Such arrangements can occur where an active farmer has some surplus land from which he wishes to derive an additional income. They commonly occur where an elderly farmer who no longer wishes to actively farm wants to earn an income from his land without losing control of his property.

[17] Mr Massey referred to *McKenna v. Herlihy* 17 TC 620 and in particular on a sentence from the judgment of Gibson J stating that in the case of the agisting farmer in that instance:

"*He was not entitled to the use of the land as land*. He could only take the herbage, the enjoyment of which even if it could be protected by action against wrongful interference did not vest in McKenna legal occupation for rating or income tax purposes. Between *terra* and *vestura terrae* there is a marked distinction."

In that case what was in issue was whether McKenna was liable under Schedule B of the Income Tax Acts in respect of his occupation of the land or under Schedule 4 in respect of profits from grazing cattle. The context of the issue made it necessary to distinguish between tax under two different Schedules and in particular required proof that the grazer occupied the land if liability was to arise under Schedule B. The contract in that instance between the farmer and the landowner, Lord Cloncurry, specifically provided that the lands were to continue in Lord Cloncurry's occupation. The conclusion that the farmer did not occupy the land for income tax purposes was in accordance with the accepted case law. Gibson J may have gone somewhat too far in the opening sentence of the quotation (italicised above) for a grazier does have the benefit not merely of the grass but of the space provided for the accommodation of his cattle. The case does not, however, establish that the deceased in this case was not in receipt of an income in the nature of an income from an investment. Nor does the conclusion by the Special Commissioner

that the deceased was in paramount occupation (a rating concept) if correct advance the appellant's case since one must focus on the question whether looking at the business of the creating of agistment arrangements in its full context it falls to be treated as an investment business. The present case does not turn on any special peculiarities of the Irish law relating to conacre or agistments. Rather it turns on an analysis of what was happening on and in relation to the land with a view to ascertaining whether, viewed as a whole, the business fell on the investment or non investment side.

[18] In *George* Carnwath LJ cited with approval what the Special Commissioner said at first instance in that case at (2002) STC (SCD) 358:

"There is a spectrum at one end of which is the exploitation of land by granting a tenancy coupled with sufficient activity to make it a business, which may be activity in granting tenancies rather than activity in relation to the tenancy once granted. At the other end of the spectrum while land is being exploited, the element of services means that there is a trade such as running a hotel or a shop from premises owned by the trade."

This helpful reference to a spectrum shows that it is necessary to decide where a particular business falls within the spectrum. This necessarily involves a question of fact and degree. It requires a judgment to be made in the light of established facts. Having analysed the evidence and made his findings the Special Commissioner concluded that the arrangement fell towards the lease end of the spectrum not at the hotel or shop premises end. He was fully entitled to do so on the evidence.

[19] While the appellants valiantly attempted to argue that the deceased's business was akin to that of a grass disposal business, a hotel, a dog kennelling business or a pick your own fruit business such analogies were not apt. As found by the Special Commissioner on the evidence the land was not cultivated. The grass was not sown or grown in the manner of a crop. The activities of the deceased were considered by the Special Commissioners to be in the nature of maintenance work necessary to enable the deceased to successfully let the grazing in the growing season. This was a view that he was entitled to form in the light of the evidence. Before letting the lands the deceased did the necessary maintenance work of preparing and maintaining fences, watercourses and so forth. She could alternatively have employed a third party to do so (thereby effectively reducing her net return from the land) or indeed she could have attempted to let the grazing of the lands as they stood (in which case the grazier would be likely to have demanded a reduction in rent to take account of work that he would have to carry out to secure the grazing area). Whichever approach was adopted affected the return from the land. But the work done was aimed at maximising the return from the grazing which represented income of the deceased by way of a return from the land. The graziers rather than the deceased fertilised the land maximising the growth of the grass negativing the suggestion that in some way the landowner was effectively carrying out a grass growing business. The deceased provided the use of grassland to the grazier and the grazier took the necessary steps to maximise the value of the grazing by feeding the grass himself. The absence of a full and exclusive right of occupation of the land for the grazier and the existence of a right by the owner to enter the land during the period of the agistment does not prevent the business being regarded as an investment business. The Special Commissioner correctly concluded that the use by the graziers was sufficiently exclusive for the land to be shown to be used as an investment. The agisting farmer had exclusive rights of grazing; he was entitled to exclude other graziers including the deceased; the deceased could not use the land for any purpose that interfered with the grazing and the letting for grazing was the way in which the deceased decided that the grasslands could be used and exploited as uncultivated grassland short of the creation of a lease. The deceased's business consisted of earning a return from grassland whose real and effective value lay in its grazing potential. The activities which were regarded as just sufficient to lead to the lettings of the land being regarded as a business were all related to enabling that potential value to be released. The Special Commissioner was fully entitled to conclude that this was not to be viewed as a business of providing grass but rather as a business of holding an investment

[20] Accordingly we conclude that the Special Commissioner's decision must be affirmed and that the appeal dismissed.