

THE SPECIAL COMMISSIONERS

**PHILIP NORMAN McCALL
BERNARD JOSEPH ANTHONY KEENAN
(PERSONAL REPRESENTATIVES OF EILEEN McCLEAN (dec'd) Appellant**

and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS Respondents

Special Commissioner: CHARLES HELLIER

Sitting in public in Belfast on 8, 9, 10 and 11 January 2008

William Massey QC and Timothy Evans, instructed by J W McNinch & Son, for the Appellants

Nicolas Hanna QC, instructed by the solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Until her death in January 1999 Mrs McClean owned about 33 acres of farmland at Ballyclare in County Antrim. She had a house adjoining the land, and one of her two daughters, Mrs Mitchell, lived with her husband, Mr Mitchell, next door. Mrs McClean's other daughter lived in County Tipperary. Unfortunately the relationship between Mrs McClean's two daughters was somewhat strained.
2. Mrs McClean inherited the land from her husband on his death in 1983. She did not farm the land herself, but it was let under conacre (or more technically agistment) agreements to local farmers, and those farmers' beasts grazed the land during the months when the grass grew. Throughout this period Mr Mitchell tended the land as I shall explain later.
3. As Mrs McClean grew older her memory and mental capacity diminished. Prior to her husband's death she had been an active decisive woman, but thereafter there was a rapid decline. In 1986 or 1987 she started living with Mr and Mrs Mitchell for most of each day returning to her own house only for a couple of hours.
4. After her husband's death Mrs McClean used the services of local land agents to let the fields. As Mrs McClean's mind failed Mr Mitchell became more involved with the arrangements.
5. In 1992 Mrs McClean went to visit her daughter in Tipperary. She was taken there by neighbours in their car. Mr and Mrs Mitchell expected it to be a short visit but Mrs McClean remained in Tipperary until her death some 7 years later. Her mind continued to deteriorate during that time.
6. While Mrs McClean was away Mr Mitchell continued to tend the fields and also organised their letting usually through a land agent. The rents were paid into Mr and Mrs Mitchell's bank account and were not paid out to Mrs McClean. Mr and Mrs Mitchell continued to look after Mrs McClean's house.
7. The local council zoned land which included Mrs McClean's fields for development use. As a result at the time of her death the market value of the land was £5,800,000 whereas its agricultural value was only £165,000.

8. In this appeal Mrs McClean's personal representatives claim that the land is 'relevant business property' within section 105 Inheritance Tax Act 1984. If it is then the whole of the value of the land falls out of charge to IHT at her death; if it is not then only the agricultural value will fall out of charge.

The Legislative Provisions

9. Section 105(1) IHT provides that 'relevant business property' means:

... (a) property consisting of a business ...;

Subsection (3) provides that:

"A business ...[is] not relevant business property if the business ... consists wholly or mainly of ... making or holding investments."

Section 103(3) provides that a " 'business' includes a business carried on in the exercise of a profession or vocation, but does not include a business carried on otherwise than for gain".

10. Section 106 provides that 'Property is not relevant business property ... unless it was owned by the transferor throughout the two years immediately preceding the transfer'. The date of the transfer for these purposes was the date of Mrs McClean's death.
11. Section 104 provides that the transfer of value which occurred on Mrs McClean's death is to be treated as reduced by the value of any relevant business property falling within section 105(1)(a).
12. Section 110 provides that "the value of a business ... shall be taken to be its net value"; and "the net value of a business is the value of the assets used in the business (including goodwill)".
13. Therefore if Mrs McClean at the date of her death owned a business in which the land was used, had owned that business for at least 2 years prior to her death, and that business was not carried on otherwise than for gain and did not consist wholly or mainly of the making or holding of investment and was carried on for gain, then the value of her estate at death is to be reduced by £5.8m.
14. On 2 September 2005 the Respondents made a determination that the fields were not relevant business property. The Appellants appeal against that determination.
15. The issues before me were these:–
 - (i) Did Mrs McClean own a business (in which the land was used) at the date of her death? Under this heading two particular issues arise: (a) whether arrangements encompassing the letting of the land in agistment can properly be called a business; and (b) if it was a business whether the arrangement under which it was organised by Mr Mitchell after 1992 and Mrs McClean's mental state prior to her death permit the conclusion that the business was owned by Mrs McClean. I deal with the first issue under the heading 'A Business', and the second under the heading 'Whose Business?'
 - (ii) If Mrs McClean owned a business at the date of her death, had she owned it for a period of at least two years immediately preceding her death?

It was common ground before me that if Mrs McClean had at the date of her death owned a business in which the fields were used, then she had owned it for the two year period. Accordingly I shall have nothing further to say about this issue.

 - (iii) If there was a business, was it carried on "otherwise than for gain"?

The Respondents do not dispute that, if there was a business, it was not carried on otherwise than for gain. Accordingly I have nothing further to say about this issue.

(iv) Was the business within the proscribed categories in section 105(3) – namely was it a business which consisted wholly or mainly of the making or holding of investments?

The Respondents say that if there was a business then it did so consist.

I deal with this issue under the heading “Investment Business”.

The Evidence and the Facts

16. I heard oral evidence from Mr Tom Mitchell, who provided two witness statements, and from Michael McClelland a land agent (now retired) in Ballyclare who had acted in relation to the fields, and Phillip McCall one of the personal representatives of Mrs McClean both of whom provided witness statements. I also had a bundle of copy documents including plans of the fields. There was a statement of agreed facts, and of facts that were not admitted or which were disputed. From that evidence and those agreed facts I find as follows (in addition to those facts set in the Introduction to this decision).

The Land

17. The land has the approximate shape of a rectangle about 620 yards by 220 yards within which are some six fields. The short NE side of the rectangle abuts Mrs McClean’s house, Mr and Mrs Mitchell’s house, and a rugby pitch; beyond that is a road and the houses of Ballyclare. The long SE side of the rectangle lies for over half its length along a lane on the other side of which are housing estates. The other sides border other fields. The land is mainly level. At the NE end are watering troughs fed by mains water, and, towards the SW end, access to a sheugh at which animals may water. There are two drainage channels on the land. Around the perimeter is a stone wall from which well established vegetation grows. There is in addition barbed wire fencing along the SE side alongside the lane (some 450 yards) and along about 175 yards of the NW side.
18. The land is grass pasture and since at least 1983 has not been otherwise cultivated.

What Mr Mitchell did on the land

19. The land was owned by Mrs McClean’s husband prior to his death in 1983. Mr Mitchell became involved in activities on the land in the years before Mr McClean’s death. I find that shortly after Mr McClean’s death Mrs McClean asked Mr Mitchell to continue looking after the fields. After Mr McClean’s death the only work undertaken on the land was that done by Mr Mitchell or at his instigation or by the grazier. Mr Mitchell undertook this work voluntarily and was not paid.
20. Mr Mitchell said that he undertook the following work on the land:
 - (i) every week he spent 1½-2 hours (or longer if there were problems) inspecting the perimeter fencing, walls, gates, and water supply. He would remove rubbish, unblock drains, conduct emergency repairs to vandalised or damaged fencing and tend the drinking troughs. He would also let the grazier know of any problems with the animals.

I accept that Mr Mitchell did these things but I find his estimate of the time which he spent engaged in those activities somewhat generous. At 2 mph it would have taken about ½ hour to walk the perimeter. The proximity to the housing of Ballyclare, Mr McClean said, meant that there was damage caused by trespassers and vandals, and that litter was left. I accept that this was the case: Mr McClelland also indicated that the fact that the land bordered on Ballyclare would make it less attractive to a grazier. But I was not convinced that this, even with checking the water troughs, would have bought his time up to 2 hours per week: Mr Mitchell did not give the

impression that there was a vast cascade of rubbish: so to allow ½ hour for picking it up or replacing stones on walls would be fairly generous; and ½ hour for minor repairs to 625 yards of barbed wire fencing together with an inspection of two water troughs is also I believe generous. I find that it is more likely than not that on average no more than about 1 hour per week during April to November (the grazing season) and somewhat less outside that time was spent in earnestly pursuing the work which needed to be done to maintain the fields on weekly inspection. Mr Mitchell may have looked over the animals to note any problems and reported them to the grazier and he may have enjoyed a breath of fresh air but the time spent doing things which seriously needed to be done for the land and its letting was in my view likely to have been more limited than Mr Mitchell remembered.

(ii) In February and March in preparation for the grazing season he did general repairs to the fencing: replacing rotten posts and replacing rusted or failed wire. There were 625 yards of such fencing. This he said took between 20 and 50 hours. Again I suspect that this estimate is generous. If a livestock farmer with 300 acres laid out compactly in 50 acre fields worked at the same rate, his annual fencing repairs would take him some 35 days to 80 days (of 10 hours each) per year. Of course there may be economies of scale and such like which would reduce the time spent by the owner of a large farm.

Subject to the discussion in relation to 1994-1997 below, I accept that this work was done, but I conclude that it was unlikely that more than 20 hours per year was spent in this activity and likely that it was an average about 10 to 15 hours.

(iii) 2 or 3 hours were spent, again in preparation for the grazing season, in cleaning drinking troughs and general maintenance of the system.

I accept that the work was done. I think it more likely than not that such work would normally take 2 hours or less rather than 3 hours.

(iv) In Spring and Autumn the land drainage systems were cleared of mud and leaves. Mr Mitchell said this took 4 and 12 hours respectively. I accept that this work was done and Mr Mitchell's estimate of the time involved.

(v) Up to 20 hours per year were spent cutting and spraying weeds. Mr Mitchell owned a tractor and a reaper which he used to cut weeds and sprayed with a knapsack sprayer. In 1994 however the whole farm was sprayed for a charge of £300 by that season's grazier.

I accept that this work was done and that "up to 20 hours" was spent on it each year other than 1994.

(vi) In 1993 Mr Mitchell paid a contractor to replace 40 meters of vandalised fence and a gate and himself erected two new set of gates and gate posts. I accept that this was done.

21. Fertilising of the fields was carried out by the grazier. The tools Mr Mitchell used for the activities noted above were – apart from the tractor and the reaper-owned by Mrs McClean.
22. Until Mrs McClean left Ballyclare in 1992 she reimbursed the costs incurred in Mr Mitchell's activities. After she left they were paid by Mr Mitchell. Mr Mitchell sought no reimbursement for the running costs of his tractor. The normal expenses incurred related principally to fencing posts barbed wire and staples. Mr Mitchell said these were between £25 and £50 per year. That figure was not inconsistent with the invoices Mr Mitchell had obtained and I accept it.
23. Putting this together I find that Mr Mitchell probably spent about 100 hours a year seriously tending the land. Mr Mitchell retired in 1997 and, as I am becoming aware, as one gets older one gets slower, but given the size and layout of the land, and even taking into account the litter and damage caused by those living nearby and the fact that tasks done occasionally taken longer than

tasks done habitually, I think it is likely that the time spent in serious or necessary tasks did not normally greatly exceed 100 hours per year. Those tasks were weed control, fence maintenance, litter and damage control, and drainage and water works.

Mrs McClean's mental condition

24. I have noted above that Mrs McClean's mental capacity diminished after 1986. In his witness statement Mr Mitchell said that by June 1992 Mrs McClean was suffering from "serious memory loss and confusion; she was no longer able to manage her own affairs." For the period prior to 1992 Mr Mitchell gave examples of her difficulties: an intruder alarm had been fitted to her house with a memorable security number, sometimes Mrs McClean had no difficulty remembering it, at other times she could not do so; towards 1992 when payments by Mrs McClean were to be made by cheque Mrs Mitchell would have to write the cheque for her; towards 1992 conversational topics would be repeated within a few minutes of having been relinquished. It seemed to me from Mr Mitchell's evidence that by 1992 Mrs McClean had periods of understanding interspersed with periods of confusion, and that by 1992 the periods of confusion dominated.
25. When Mrs McClean went to Tipperary in 1992 Mrs Mitchell kept in contact with her by phone, but, Mr Mitchell said that after some months there came a time when it was no longer possible to have a telephone conversation with her: when "Ballyclare didn't register with her at all".
26. , I find that it is more likely than not that before 1992 Mrs McClean had at the least periods of lucidity in which she understood the interest she had in the fields and the arrangements for their tending and letting, but that within a couple of years thereafter – from 1995 at the latest – she no longer understood the nature of her interest in those fields and would not have been capable of understanding the nature of any contract or arrangement entered into in relation to them: it may have been that had she returned to living near them such understanding would have returned – at least intermittently, but she did not.

The Lettings of the Land

27. Before his death in 1983 Mr McClean had used agents to find graziers to whom the fields were let in agistment. Mrs McClean continued to use the same agents after his death, but in 1985/86 she became concerned that the return received was not what it might have been. From 1986 Mrs McClean retained Mr McClelland's firm to find graziers. That firm obtained graziers for the years 1986 to 1990. The graziers paid the firm and the firm accounted to Mrs McClean for the receipt after their commission.
28. Mr McClelland's firm was unable to find graziers for 1991 and 1992. Mr Mitchell's witness statement simply stated that fact. However, on the second day of the hearing he provided a second witness statement which indicated that he had found a grazier for part of 1991 and for 1992. He said in that statement that "this arrangement he made with my mother-in-law, not me", and that he believed that the rental was paid into Mrs McClean's account by Mrs Mitchell. He told me that the letting would have been discussed in his kitchen between the grazier, Mr and Mrs Mitchell and Mrs McClean and, in cross-examination, said that Mrs McClean would have been involved with the decision even if she had not fully understood it. Having heard Mr Mitchell I accept that the fields were let in 1991 and 1992. I believe that his statement that the arrangement was made with his mother-in-law, not him, was a bit of an exaggeration in the same vein as his estimates of hours spent tending the fields.
29. The fields were let through Mr McClelland's firm for the years 1993 to 1996 for some £1,800 p.a. In 1997 Mr Mitchell arranged the letting (through Mr McClelland's firm) to his cousin who had been told by Mr Mitchell that the land "belonging to Mrs Eileen McClean was available for grazing purposes".

30. In 1998 the fields were let through Mr McClelland's firm.

The dealings with Mr McClelland's firm

31. In the years up to 1992 Mr McClelland wrote to, and sent payments to Mrs McClean. He knew that Mrs McClean was getting on and that by 1991 that she was living with Mr and Mrs Mitchell. But from 1987 onwards his oral dealings had been with Mr Mitchell and he had had little contact with Mrs McClean.
32. After Mrs McClean's departure to Tipperary Mr Mitchell asked Mr McClelland to make the payment cheques out to him. That Mr McClelland did (seeing it as a fairly normal procedure in relation to an elderly relative), also addressing correspondence to Mr Mitchell in which he called the fields "your 30 acres". But Mr McClelland said in evidence, and I accept, that this was loose language and he still thought of the fields as Mrs McClean's land.
33. Mr McClelland, although he understood it to be, and acted as though it was the case, never received express confirmation from Mrs McClean that Mr Mitchell was acting as her agent; but there was no evidence that Mrs McClean repudiated any of the arrangements made through Mr Mitchell's contact with Mr McClelland in the period 1987 to 1992.
34. Mr McClelland was not in my view aware that Mrs McClean's mental state had so deteriorated by 1995 that she was unable to understand the nature of her interest in the fields and any dealings in relation to them.
35. I find that throughout the period 1987 to 1999 Mr Mitchell gave the impression to Mr McClelland that he was acting on behalf of Mrs McClean.

Mr Mitchell's other dealings

36. The moneys paid by Mr McClelland's firm to Mr Mitchell for the years 1993 onwards were paid into Mr and Mrs Mitchell's joint bank account. No onward payment to Mrs McClean was made of these receipts of any part of them (although they were accounted for to her personal representative several years after her death).
37. After Mrs McClean's departure in 1992 Mr and Mrs Mitchell looked after her house and kept her pet donkey fed and watered. The electricity, maintenance and donkey costs were met by them from their own funds.
38. Mr Mitchell also said that he kept Mrs McClean's house warm in the latter months of the year by keeping the coal stove (all night burner) alight and by lighting fires. He said that this was necessary because the house could become cold and damp. He says that he continued to do this from 1992 onwards.
39. Although there is something intrinsically unlikely in the idea that an empty house had coal fires made in it for 7 years, I accept that Mr Mitchell did keep the house aired in the winter months in this way and did expend money on the cost of coal to do so.
40. Neither the gross receipts of rent from the fields nor the net monies after any expenses incurred in relation to the fields or Mrs McClean's house were dealt with separately or transferred to a separate account by Mr and Mrs Mitchell. No contemporaneous account was made of income and expenditure. The balance on Mr and Mrs Mitchell's account was not maintained at a level above the net amount attributable to Mrs McClean: the moneys were dealt with in part of Mr and Mrs Mitchell's funds. Mr Mitchell said that he and his wife recognised that the money would be paid to Mrs McClean if she needed it or asked for it. I accept that Mr and Mrs Mitchell would have paid the moneys to or for the benefit of Mrs McClean if she needed it.

41. In 1993 damage was done to a gate by a van which was driven onto the fields and abandoned. Mr Mitchell instigated an application for a claim in Mrs McClean's name under the Criminal Damage (Compensation) (Northern Ireland) Order 1977.

The Terms of Conacre/agistment lettings

42. When Mr McClelland arranged conacre/agistment lettings the principal terms (the land in question, the period and the payment) would be agreed with the grazier orally and usually confirmed in writing. The price would generally be struck on the basis of so much 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 there would not be another grazier also grazing the land;
 - (ii) that the owner would not let his own animals graze the land;
 - (iii) that the grazier's animals could be accommodated on the land for the period of the letting, eating the grass and drinking the water;
 - (iv) that the grazier's vet would have access to see animals in the field;
 - (v) that the owner would maintain the fencing and be responsible for weed control;
 - (vi) that the owner would not be required to, and the grazier could, fertilise the land.

The lettings would normally 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.

43. Mr McClelland had experience of land being let for the taking of silage. The agreement in such a case would generally specify the number of cuts the "tenant" could take with a date by which the last cut would be taken. The "tenant" would have access to the land to fertilise, inspect and cut the grass for silage.

Fencing 1993-1996

44. In 1993 Mr McClelland's letter, confirming that letting had been arranged to a Mr McCammond, indicated that "the tenant is responsible for the fencing". In 1994 Mr McCammond was booked for the following three years but the correspondence between Mr McClelland and Mr Mitchell makes no reference to the fencing. Mr McClelland said, and I accept, that such a term would be unusual in such lettings. The correspondence does not make clear whether this unusual term also applied to the 1994, 1995 and 1996 lettings. Mr Mitchell was adamant in his evidence that no tenant ever undertook the care of the fences and that he always assumed that duty in each year.
45. Mr Mitchell's evidence of his work on the fencing is not irreconcilable with the possibility that the grazier was responsible for fencing repairs: the grazier was on the land only from April to late October; Mr Mitchell said he did his general repairs to the fencing in preparation for the grazing season (in February and March). These terms do not therefore cause me to doubt his evidence that he did general repairs in preparation for the grazing season. However the possibility that the grazier might have considered himself responsible for and thus occasionally undertaken perhaps minor repairs during the grazing season may have meant that there was a little less for Mr Mitchell to do on his weekly inspections. This and any liability of the grazier for damage caused by the straying of his animals confirm me in my view that the time spent each week in fencing repairs by Mr Mitchell was on average significantly less than ½ hour.

A Business

46. It is clear that ‘business’ as used in IHTA is a wider concept than trade (see section 103(2)). In *Town Investments v Depart of the Environment* [1977] 1 All ER 813 Lord Diplock said the word “business” is an etymological chameleon which suits its meaning to the context in which it found. I must thus be careful not to transpose meanings given to it in other statutory contexts to the context of IHTA; but, apart from the provisions in IHTA I have quoted above, the background against which the word there appears is fairly grey.

47. A year after *Town Investments*, in *American Leaf Blending Company Sdn Bhd v Director General of Inland Revenue* [1978] STC 561, the issue was whether income was ‘gains or profits from a business’. It was Lord Diplock who gave the opinion the Privy Council and indicated that there was no special meaning of “business” in that context. He said at p.565:

“In the case of a private individual it may well be that the mere receipt of rents from property which he owns raises no presumption that he is carrying on a business.”

Whereas, he said, in the case of a company incorporated to make profit it might. Later he continued:

“The carrying on of ‘business’, no doubt, usually calls for some activity on the part of whoever carries it on, though, depending on the nature of the business, the activity may be intermittent with long intervals of quiescence in between.”

48. It seems to me that there is nothing in the context of those statements or IHTA which suggest that these principles are not of relevance to IHTA. They raise the question as to whether there was sufficient activity in relation to Mrs McClean’s fields to be able to say that this was not the mere receipt of rents. The Respondents say that such activity as there was was so minor as to leave the whole activity on the non-business side of the line.

49. It was common ground that the approach outlined by Gibson J in *Commissioners of Customs and Excise v Lord Fisher* [1981] STC 238 and followed by the Special Commissioner in *Burkinyoung (Executor of the Burkinyoung (deceased) v IRC* [1995] STC (SCD) 29 was appropriate when determining whether an activity is a business. In *Lord Fisher* Gibson J accepted that six indicia formulated by counsel for the Crown and derived from previous cases plainly described the main attributes of any activity which would be regarded as falling within the concept of ‘business’ and ‘trade profession or vocation’, and accepted that those indicia were useful tools for the analysis and comparison of an activity; but he noted that the indicia did not substitute any test or phrase different from that in the statute. These were the indicia specifically referred to in *Burkinyoung* and I shall return to them later. Gibson J then continued with an analysis of the case law with an eye to those dicta which impinged particularly on the question of whether: a pleasure rather than an occupation, something carried on for pleasure and social enjoyment rather than by way of daily work, the activities of a man’s private life in his domestic surroundings rather than those activities with commercial involvement, were non-business rather than business activities. In this explanation I note his quotation of Lindley LJ in *Rolls v Miller* (1884) 27 ChD 71, who said, after remarking that dictionaries shed little light on the meaning of the word: “The word means almost anything which is an occupation, as distinguished from a pleasure – anything which is an occupation or a duty which requires attention is a business.”

50. The six indicia were these: (a) whether the activity is a serious undertaking earnestly pursued, or a serious occupation, not necessarily confined to commercial or profit making undertakings; (b) whether the activity is an occupation or function actively pursued with reasonable or recognisable continuity; (c) whether the activity has a measure of substance as measured by the quarterly or annual value of its outputs (the original words are “taxable supplies” but they derived from a VAT case); (d) whether the activity is conducted in a regular manner and on sound and recognised business principles; (e) whether the activity is predominantly concerned with making supplies (again the original words were “taxable supplies” but that was in a VAT context) to consumers for consideration; and (f) whether the supplies are of a kind which are commonly

made by those who seek to profit from them. Of these (b) to (f) derive from the judgments of the Court of Session in *Morrison's Academy Boarding Houses Association* [1978] STC 1, and I note that the reasoning of their Lordships in that case derives indicia (b), (c) (e) and (f) specifically from a consideration of the VAT legislation. Nevertheless they seem to me to be helpful criteria in the context of IHTA against which to examine an activity even if they are not conclusive.

51. In my judgment the activity of tending the land undertaken by Mr Mitchell coupled with the annual letting of the land was, just, enough to constitute a business. On its own I do not believe that the mere letting of the land under agistment arrangements for each season would constitute a business: it would I believe be no more of a business than depositing money with a bank and awaiting the interest (see *Jowett v O'Neill and Brennan Construction* 1998 STC 482 at 489d per Park J); it might have been a business if there were very many pieces of land to be let and many deals to be struck, but those are not the facts in this case. What to my mind just tips the scales in this appeal is the extra work done tending the land. Mr Mitchell, I have found, did that work. Some of that work may have been motivated by duty or enjoyment but nevertheless it was done. Some of the work (like fencing repairs) would have been necessary under the terms of the letting contract, and some may have been needed or would be helpful to ensure future lettings. There was some activity and the work was something which 'required attention'.
52. The letting of the land was earnestly pursued, the work tending the land was modest but serious, the letting and the tending were pursued with some continuity, the income was not insubstantial, the letting was conducted in a regular manner although the unpaid use of Mr Mitchell's time was something which is not a feature of an ordinary business, and the letting of land for profit is a common business. To my mind the *Lord Fisher* indicia point towards a business.
53. Mr Hanna says that the activity lacks real substance. 100 hours per annum he says is not serious: an individual investor on the stock market might spend 100 hours per annum over his portfolio. But, whilst such an investor is unlikely to be trading, it seems to me not inconceivable that his activity is enough to make it a business (albeit an investment business). If the land had been further from a town with fewer problems with trespass, and if the fencing or weed control have been carried out by the grazier only, then I doubt that there would have been sufficient activity to make this a business, but on the facts as they appear to me this was – just – a business.

Whose Business?

54. The Respondents contend that if any business activity involving the use of the land occurred between the beginning of 1993 and Mr McClean's death in January 1999, it was carried on, not by Mrs McClean, but by her son-in-law Mr Mitchell. They say he had been responsible for the making of the arrangements with the agents for the lettings and it was on his instruction that the rents were paid into his joint bank account with his wife. It was he who did the work on the land. They note that prior to Mrs McClean's death Mr and Mrs Mitchell neither paid nor accounted to Mrs McClean for those monies and that from 1993 Mrs McClean appears to have taken no part in any activity involving the use of the land. They say that any business was conducted and owned by Mr Mitchell only, and that Mrs McClean simply owned the land.
55. Mr Hanna does not dispute that Mr Mitchell was liable to account to Mrs McClean for the profits from the land, but he says that that is different from saying that any business belonged to Mr McClean. He says that prior to 1992 Mr McClean's own involvement meant that Mr Mitchell was not given any agency authority and that after 1992 Mrs McClean was not capable of conferring such authority on Mr Mitchell, or if she had, her later incapacity revoked it. Mr Mitchell could not therefore have been acting as her agent in the two years prior to her death. Mrs McClean could not therefore have been carrying on the business through an agent.
56. Mr Hanna says that from June 1992 Mrs McClean no longer had the mental capacity to authorise anything: she was unable to manage her own affairs. Her affairs could have been managed under the provisions of Part VIII Mental Health (NI) Order 1986/595: under Article 98 and 99 a Court

could have made an order for the management of Mrs McClean's property including the fields; but no application was made to the Court.

57. He suggests that the failure to go to Court for such an order and the way in which Mr Mitchell dealt with the income – paying it into his own bank account, failing to account for it, spending it – all pointed towards Mr Mitchell conducting any business for himself and for his own account and not for Mrs McClean.
58. Mr Massey says that Mr Mitchell carried on working the land after June 1992 as he had done previously; he did so on Mrs McClean's behalf and for her benefit. He says that Mr Mitchell acted as agent for Mrs McClean before her departure and did not cease to be her agent by virtue of her departure to Tipperary. Prior to the departure the business was hers: it was not transferred to Mr Mitchell on her departure. Mr Mitchell could not deny he was acting for Mrs McClean: and indeed he had held himself out thus to Mr McClelland. As an agent he stood in a fiduciary relationship to Mrs McClean in relation to the land. Even if Mrs McClean had ceased to have mental capacity to confer authority on Mr Mitchell, that loss of capacity would not confer the business on Mr Mitchell. He remained after 1992 in a fiduciary position and had management of the land in consequence of that position. The business still belonged to Mrs McClean. Nothing Mr Mitchell thought or did could change that.

DISCUSSION

59. A person ceases to have contractual capacity when he ceases to be capable of understanding the contract he is entering into. Such mental disorder will render a person incapable of appointing an agent; and if mental incapacity supervenes during the currency of an agency it terminates the contract of agency between the principal and the agent, although a third party without knowledge of the supervening incapacity may rely on the principal's previous representation of authority.
60. I have found that from at the latest 1995 Mrs McClean no longer understand the nature of her interest in the fields at Ballyclare and was not capable of understanding the effect or nature of any appointment of Mr Mitchell to act on her behalf or as her agent in relation to it. As a result any agency relationship between Mr Mitchell and Mrs McClean would have terminated by 1995.
61. However, it is clear to me that, whether or not Mr Mitchell was Mrs McClean's agent in the two years before her death, he was a fiduciary for her in relation to her property at Ballyclare. Mr Mitchell's dealings with Mr McClelland before 1992 were held out as being on behalf of Mrs McClean. Mrs McClean did not repudiate those dealings. It seems to me quite likely that in the relationship between an aging mother-in-law and her son-in-law living in close proximity that the son-in-law should act in certain matters for his mother-in-law. I find that while Mrs McClean had capacity Mr Mitchell acted as her agent in relation to the dealings he had concerning the land. As an agent Mr Mitchell was in a fiduciary capacity. In such circumstances Mr Mitchell was a constructive trustee for Mrs McClean of any profit made from the property.
62. After that agency was terminated by reason of Mrs McClean's lack of capacity, it seems to me that Mr Mitchell must have continued to be in a fiduciary capacity in relation to Mrs McClean and the land:–
 - (i) he continued to deal with Mr McClelland: such dealings could not equitably be treated as being for his own account;
 - (ii) he represented himself as acting on her behalf in relation to the damage claim;
 - (iii) he knew of her declining mental powers; and
 - (iv) he had had a close relationship with her.

To my mind these factors point clearly to a fiduciary relationship; the way in which Mr and Mrs Mitchell actually dealt with the profits from the land is to my mind irrelevant to the question of how or in what capacity they received those profits.

63. There is a difference between the duty of a fiduciary to account for a profit and the imposition of a constructive trust for a beneficiary. The former gives a right of the beneficiary against the fiduciary for an action only in debt; the latter gives to the beneficiary the equitable right to moneys as they arise and to remedies such as tracing.
64. The liability to account for a profit appears to arise where a fiduciary has used his position as such to obtain the profit, whereas a constructive trust arises where the profit derives from the use of property subject to a fiduciary relationship (the former exemplified in *Regal (Hastings) v Gulliver* (1967/2AC 134 and in *Lister & Co v Stubbs* (1890) 45 ChD1, and the latter in *Keech v Sandford* (1726) Sel Cas Ch 61). It seems to me that the rents from the letting of the fields derived from property which was being managed and looked after by Mr Mitchell and that the profit therefore falls to be regarded as held on constructive trust by Mr Mitchell for Mrs McClean.
65. As a result it seems to me that the income from the fields belonged to Mrs McClean as it arose, and that it was not income arising from her relationship with Mr Mitchell, but income from her land.
66. But the question for me is not merely whether the income from the land arose to Mrs McClean but whether the business belonged to her; and the business is more than the ownership of the land and the receipt of income therefrom.
67. Mr Massey took me to *Fry v Shiel's Trustees* 6 TC 583. There a business was carried on by testamentary trustees. The beneficiaries (the Misses Shiels) were not absolutely entitled and only became so on attaining majority. The issue was whether the income was subject to relief as the earned income of an individual, but in the course of his judgment Lord Skerrington said:

“I am of the opinion that the Appeal ought to be sustained on the ground that the business in question belongs to the testamentary trustees and not to the Misses Shiels, and that the former and not the latter are the persons who earned the profits. A more difficult question would have arisen if the trust had really been one of the simple character contended for by the Respondents. On that assumption, the Misses Shiels would have *been the beneficial owners of the business* and the profits derived therefrom.” (my emphasis)
68. Mr Massey says that any constructive trust would have been a bare trust of the simple character described and so the business conducted by Mr Mitchell would have thus belonged to Mrs McClean.
69. Mr Hanna says that if he sets up a fairground in my field he might be liable as a trespasser to account to me for his profits, but no one would say that I owned a fairground business: it is a step too far to attribute Mr Mitchell's activities to Mrs McClean. Mr Massey says that the difference lies in the fiduciary relationship: the fair is not carried on as a fiduciary but as a trespasser, Mr Mitchell, even if he was not an agent in any sense for Mrs McClean, was a fiduciary.
70. It seems to me that if the labour – the activities which transformed mere profitable ownership into a business – had been carried on by an employee paid by a fiduciary it would be natural to say that the activities were to be treated as those of the beneficiary. If I am right in finding that Mr Mitchell was a constructive trustee rather than simply required to account for his profit, I believe that the consequence is that his activities in making that profit are properly to be treated as those of Mrs Mitchell, and the business to be treated, as Lord Skerrington would have treated the business of the Misses Shiels' trustees, as belonging to Mrs McClean. I therefore find that Mrs

McClellan owned the business constituted by the activities of Mr Mitchell and the letting of the land throughout the two years prior to her death.

Wholly or mainly holding investments: s.105(3) IHTA

71. Mr Massey puts his case in outline, thus. The correct approach to section 105(3) is to consider the nature of the business and ask whether or to what extent it consists of holding investments. That, he says, means it is necessary to ask whether assets of the business are investments.
72. Where exclusive possession of land is granted for a fee (as in the case of a lease), that, he says, will generally mean that the land is an investment, but where a licence over land is granted to enable the licence to obtain a service or goods the land would not be regarded as an investment in a business sense.
73. The particular features of agistment he says mean that exclusive possession or occupation is not granted to the grazier: as a result Mrs McClellan's fields were not investments because the right granted was not to take possession but to consume the grass and water – a right similar to that granted to a customer placing a dog in a kennel: the right granted enables the grazier to partake of a service provided by the landowner, namely the provision of the grass and water.
74. But he says that even if the grazing letting granted occupation to the agister so that the fields might therefore be regarded as an investment, the element of occupation is so subservient to the dominant purpose of providing a service to the agister – the service of providing grass, water and fencing, that the main purpose of the business is not holding investments.
75. I shall start therefore by considering the nature of agistment, and then turn to the question of the business of holding investments.

CONACRE AND AGISTMENT

76. In the evidence before me the letting of fields to graziers was described as having been made in "conacre", but there is a technical distinction between conacre and agistment, and under that technical nomenclature the arrangements in relation to the fields would have been agistment rather than conacre.
77. Conacre letting is a system of agricultural land tenure which is peculiar to Ireland. In its original form the landowner would designate to each conacre tenant a strip of land to which the tenant was given access to plant and cultivate a crop, but the tenant did not own the crop until he had paid for it in money, labour or by a share of the crop. (*Maurice E Taylor (Merchants) Limited v Commissioner of Valuation* [1981] NI 236 per Gibson LJ).
78. It appears that a letting in conacre is not a demise of land but in the nature of the sale of a profit to be derived from the land, or a temporary easement creating a licence to use land (see *Landlord and Tenant Law Third Edition* section 3.2 by Professor J C W Wylie). But since the arrangement is created by contract, the nature of the incidents will depend upon the contract; in *Maurice E Taylor* the Court of Appeal recognised that the features of conacre letting have changed with the passage of time and depend upon the contract.
79. In *Maurice E Taylor* the question was whether a conacre tenant had rateable occupation of the land. The land was let in conacre for the growing of potatoes. Under the agreement the tenant had exclusive occupation of the land to grow the potatoes and the right to exclude all other persons. Gibson LJ applied the, then, 'new' test of rateable occupation: asking whether in the light of the nature and use of the land, the occupation of the relevant person was of value to him and exclusive in the sense that others could be excluded from using it for the same purpose; and that if another person had a competing use the rateable occupation was to be found in the person whose use was paramount i.e. who had overriding control and direction of the way the land was

used. On these tests he held that the conacre tenant had rateable occupation, although it did not have a tenancy. As Professor Wylie, however, notes (at 3.27 op cit) each case will depend on the terms of the contract.

80. Agistment by contrast is the letting of land for grazing. Holmes LJ in *O'Flaherty v Kelly* [[1909] IR 223 said at p.230:–

“...[A contract of agistment’s] legal characteristic is that it does not constitute a demise of the land or a parting with possession thereof, but is a letting in the nature of a profit à prendre, subject to which the occupation of the soil remains in the person who makes the letting ... The legal status of the agister is that of a person who is entitled to the grazing of land which is in the possession of another.”

Such contracts have also been described as: the hire of the “vesture” of the land rather than the “letting of land for grazing” (FitzGibbon LJ in *O'Flaherty*); a contract, not a tenancy, for grazing purposes (Mornaghan J in *Re Moore's Estates* [1944] IR 295; a licence to use the land for grazing purpose (Wylie at para 3.30 and O'Byrne J in *RE Moore*).

81. *McKenna v Herlihy* (1920) 7 TC 620, concerned whether or not Mr McKenna was in “occupation” of land for the purposes of Schedule E. Mr McKenna had a contract “only for agistment, grazing or temporary depasturage”. Gibson J said:

“McKenna was not occupier, having only the eatage of the pasture; he was not rateable. Taking the grazing for temporary purposes, measured by months, he had not such use of the land as would make him constructively an occupier within Schedule B and he never was, or could be assessed as an occupier ... He was not entitled to use the land as land. He only could take the herbage, his enjoyment of which, even if it could be protected by an action against wrongful interference, did not rest in McKenna legal occupation for rating [bearing in mind that this was before the ‘new’ approach referred to above] and Income Tax. Between *terra* and *vestura terrae* there is a marked distinction ...” [Mr Massey’s emphasis]

82. In *Carson v Jeffers* [1961] IR 44 Budd J held that a landowner who entered into “an ordinary agistment agreement, or licence to graze and conacre lands” did not thereby part with possession of the lands.
83. Mr Massey says that the agistment agreements did not give to the graziers the right to occupy or take possession of land, but merely to consume, through their cattle, the seasonal produce of the land, the grass, and the water provided. They did not allow the graziers to “use the land as land” in Gibson J’s words, but “only [to] take the herbage”.
84. Mr Hanna says that Gibson J’s words “not entitled to use the land as land” are difficult to understand: the grazier’s cattle are on the land, they live their lives there and eat the grass; the grazier is the only person who has any benefit from the land: if that is not “using the land as land”, what is? He finds the distinction between *terra* and *vestura terrae* obscure where animals must tread the ground in order to eat and sleep.
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 would by custom or necessary implication be included in the contract with the grazier. It seems to me that those terms and the guidance from the cases above 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 to 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 in *Maurice E Taylor*, for in that case the conacre tenant could exclude all others from the land, whereas in the case of the graziers their rights to exclude others relate only to others with competing or interfering purposes; and

(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 grazing of the land only, and possession remains with the landowner, it is the latter who will usually be in rateable occupation).

INVESTMENTS

86. I now turn to consider the authorities on the meaning of investment and upon the approach to be taken to determining whether a business consists wholly or mainly of holding investments.

87. In *Weston (executor of Weston, deceased) v Inland Revenue Commissioners* [2000] STC 1064, Lawrence Collins J considered whether a property right was to be regarded as an investment for the purposes of section 105(3) IHTA. From *IRC v Desoutter Bros Ltd* (1946) 29 TC 352 he derives the propositions:–

(i) that ‘investment’ is not a term of art but has the meaning an intelligent businessman would give to it; and

(ii) that property may be held as an investment even if the person holding it has to take active steps in connection with it (paragraph 19).

He quotes Lightman J’s comment in *Cook (Inspector of Taxes) v Medway Housing Society* [1977] STC 90 that the verb “investment” means “the laying out of moneys in the anticipation of a profitable capital or income return”; and concludes that land is generally held as an investment where gain is derived from payment to the owner for the use of the property.

88. In *Tootal* and *Desoulter* the question was whether patent royalties received in respect of patents used by the taxpayer but also licensed out were “income received from investments.” *Tootal* reached the House of Lords where the Court of Appeal decision in *Desoulter* was also considered. There are four points further I should make about their Lordships’ opinions:–

(i) Lord Simonds noted that the meaning [of investment] is limited by the context. The context was one in which a distinction was to be made between the income of investments and the other profit of a trade or business.

(ii) Lord Simonds offered the following test to apply to an asset: “Is this an asset which the company has acquired and holds for the purpose of earning profits in, or otherwise for the promotion of, its particular business or trade?” If the answer was yes it would not be an investment.

(iii) Lord Normand said he was unable to accede to the proposition that every item of the company’s property is an investment, and that while the company uses those assets itself the profit is a trading profit, but if it hands them over to others in return for payment it is not a trading profit.

(iv) Lord MacDermott suggested that the intelligent businessman might say “If in the course of carrying on my business, I make active use of a business asset – be it my factory building, a piece of machinery, a patent or my working capital – that asset is not an investment. Whatever also a business asset may have to be, it is an asset for the time being held – intentionally aloof from the active work of the business ... if it produces income that is income of the business. But I do not

earn that income by my business efforts. The part that I play there is essentially passive, I cannot of course afford to neglect my investment ... But normally I just hold it and receive whatever it brings in.”

89. I set out these points because during the hearing I was attracted to the proposition that any capital asset of a business might be called an investment, but the question of whether the business consisted wholly or mainly of holding investments depended upon the place in the spectrum of in which the balance of the activities of the business fall. Neither Mr Massey nor Mr Hanna were attracted to this approach and it now seems to me, having read *Tootal*, that it is one which is not open to me.

(I note that the word “business” has been used in their Lordships’ opinions as excluding the business of holding investments. It seems to me that this is because they are concerned with the composite phrase “trade or business” and that there is no implication that the use of an asset in a “business” as I understand that word in the context of IHTA necessarily means that the asset cannot be an investment.)

90. *IRC v George and another (executors of Stedman, dec’d)* [2004] STC 147 is the only case on the provision of section 105(3) which has been heard by the Court of Appeal. The case concerned a caravan park and it was common ground – unlike the present case – that the taxpayer’s business did include the holding of investments insofar as it received fees for the stationing of mobile homes and caravan storage. The question was whether its business was wholly or mainly such holding. However there were a number of aspects of Carnwath LJ’s judgment which were drawn to my attention by the parties in this case and which are of relevance to the investment question:–

(i) 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, 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 shop premises by a shop keeper. The land subject to the tenancy would generally be an investment and the business therefore include holding investments, but the shop would not be an investment (or the business not one wholly or mainly of holding investments). (See paragraph 12 and also the comment in paragraph 16 in relation to *Cook*);

(ii) the holding of property for letting is generally the holding of it for investment (paragraph 18);

(iii) the formulation adopted in *Weston* at paragraph 15 that ‘land is generally held as an investment where gain is derived from payment to the owner for the use of the property’ can be a helpful indication of when land may be an investment (paragraph 15).

(iv) 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 may earn additional fees (e.g. for cleaning and heating) whether or not included in the lease or covered by the rent (paragraph 23);

(v) where there is a composite business it is necessary to look at it in the round (paragraph 13);

(vi) 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 activities linked to an investment are placed (because they are ancillary to the investment) and weigh that against the remainder; instead one must look at the business as a whole (paragraph 60).

I also note that in *George* the letting of fields on grazing licences to a farmer was treated by the Special Commissioner as being investment activity (see paragraph 39 of the decision) and that no

adverse comment was made in the Court of Appeal on that treatment. But I accept that that was a minor point of the taxpayer's activities in that case and would not have received detailed consideration, and that the facts may have been very different (the detailed terms of the lettings are not recorded).

THE PARTIES' ARGUMENTS

91. Mr Massey's first point is that the cases where the letting of land has been held to betoken that the land is an investment have all been concerned with lettings which grant exclusive occupation possession to the tenant: the caravan pitches in *George*, the building units in *Burkinyoung*, the farm buildings in *Farmer (exors of Farmer dec'd v IRC)* [1999] STC (SCD) 321 all granted exclusive occupation and even security of tenure in some cases. By contrast the agistment agreements left the land owner in occupation and in possession.
92. To my mind the legal formulation of the nature of the rights granted does not affect the determination of whether or not an asset is held as an investment. The test to be applied is that of an intelligent businessman, not a land lawyer. Such a person would be concerned with the use to which the asset was put and the way it was turned to account. Where some substantial use of the property is given to another for payment and that is the principal way that the property is used by the owner, that would indicate that the property is held as an investment whether the use was exclusive or otherwise. What seems to me to be more relevant is the use made of the property by the owner of any rights he retains: the more substantial that residual use and the less it relates merely to granting rights over the property, the less likely that the property is an investment.
93. Next Mr Massey says that the letting made to the grazier was made in order that the grazier might obtain a service from the owner. Where a licence is granted for such a purpose (by a cinema, hotel, theatre, bed and breakfast establishment owner), the land over which it is granted is not an investment: the land is used for the purposes of providing the services and not simply exploited for payment. The owner of the fields provided a service to the grazier of providing grass, water and security for his cattle: his task was to ensure that there was a crop of grass in good condition and water to be provided to the cattle; his turnover is attributable to the provision of food and drink to the cattle. That indicates that either the land is not an investment or that if it is the business is not one of mainly holding investments.
94. Mr Hanna says that the core test is whether the business is receiving payment for the use of the assets themselves or for something different – services or other assets. If the core element of the payment is for the use of the asset then the asset is an investment. He says that the principal activity of this business was exploiting the land and that the service element provided was limited to the supply of water: all the other activities were maintenance or "management" activities as that term was used in *George* (see paragraph 90(iii) above). He says that this was not just a sale of the grass growing on the land, but the conferring of a right for the grazier's animals to live on the land: the *vestura terrae* was insufficient. He says that it is not insignificant that the grass is part of the land until bitten off. The main activity of this business was to get a return from the granting to another of the use of the land.
95. I am not persuaded by the argument that the owner was in the business of providing a service to the grazier by providing grass for his cattle or sheep. The effect of granting the 'conacre' right was to make such grass available: it became available as the result of the grant more than as the result of any activity carried out by the owner. The owner's activities in weed control may have improved what was available, but 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 was not something additional to or separate from the provision of the land (as a meal in a hotel might be) but was an integral part of the provision of the land to the grazier. Thus those activities do not indicate that the land was not being used as an investment.

96. The fields were let for the grazier's use for payment and the payment derived principally from the letting. Mrs McClean did not use the fields for animal husbandry; such husbandry was exercised by the grazier. The fields were not used by Mrs McClean for any other purpose. To my mind therefore they were investments of the business.

Conclusions

97. In my judgment the business was one which consisted wholly or mainly of the making of investments.
98. I say this first because the activities of the business consisted of the making available of its major asset to other persons for payment without the separate provision of any substantial other goods or services. Such a business is to my mind clearly one which satisfies the composite phrase "a business which consists of the holding of investments" without the need further to dissect that phrase. Mr Massey's submission that what is sold is the grass rather than exclusive possession does not deter me from this conclusion: the activities of the business do not involve the cutting of the grass and the feeding of it to the cattle but simply making the asset available so that the cattle may live and eat there: the income arises substantially from the making available of the asset not from other activity associated with it or from selling separately the fruits of the asset: that is the business of holding an investment, and it was the main activity of this business.
99. Second, if I am not permitted this broad approach to the legislation and am required to dissect it and to determine whether the land was an investment and if so whether holding it was the main part of the business, I come to the same conclusion.
100. The land was used not to make (part of) a living *on* it, but to make (part of) a living *from* it, it was used as an investment. The land was not used to create a product or to provide any service distinct from the use of the land (other than the provision of the water). The essence of the grazing agreement was to allow the grazier to use the land for payment; the grazier's use encompassed the taking of the eatage – if the grazier chose to put animals on the land and if they chose to eat it, but the eatage was not parcelled up and sold over the gate to the grazier; instead the grazier was given the right to use the land in a particular way for payment. That use may not have been exclusive but it seemed to me sufficiently exclusive to be clear that the land was being used as an investment.
101. The whole or almost the whole of the business consisted in the activities of the making available of the land: the inspection and repairs to fencing, the attention to the drains, the weed control and the finding of the grazier were all 'management' activities directly related to letting the land being; either necessary under its terms or desirable for further lettings, and the whole of the income came from the letting. Looked at in the round there was little else than the business of holding an investment.
102. The activities surrounding the letting (except perhaps the provision of water) were not so substantial as to constitute themselves a part of the business distinct from holding the land: this was not like a car hire business where income derives from the letting of a car but where the cleaning, servicing, insuring and dealing in the cars may be such a large part of what is done to say that it is not just a business of holding cars; instead the major part of what was done was letting the land and the other activities a necessary part of that or small in comparison.
103. I do not accept Mr Massey's attractively packaged argument that what was supplied by the business was akin to hotel accommodation for cattle or of kennelling for dogs and cats. In those cases the business provides a multitude of services as well as the ability to take advantage of the land, and as a result the business does not consist mainly of holding investments; in this case the dominant provision is of a right to use the land. Neither is it like a "pick your own" fruit farm where after months of weeding, fertilising, spraying and pruning, customers are licensed to enter to take the produce and pay by the pound for what they take away; in the business of letting the

fields there was less preparatory work, the fields were let for the accommodation of the cattle as well as for the grazing, and the rent was paid by the acre rather than by the ton of grass eaten: it was not a business consisting of the provision of the grass but of the provision of the (non-exclusive) use of the land.

Result

104. Although I find that Mrs McClean did own a business at the date of her death whose assets included the fields, I find that the business was one which consisted wholly or mainly of the holding of investments.
105. As a result I dismiss the appeal.

CHARLES HELLIER

SPECIAL COMMISSIONER

RELEASED: 7 April 2008

SC 3231/2005

Cases referred to in skeletons or in argument not referred to in decision:–

Crosby v Wadsworth (1805) 6 East 602

Commissioners of Inland Revenue v Forsyth Grant 25 TC 369

Mitchell v IRC 25 TC 380

Drammond v IRC 32 TC 263

Martin and another (executors of Moore dec'd) v IRC [1995] STC (SCD) 5

Furniss v IRC [1999] STC (SCD) 232

Powell and another (personal representatives of Pearce dec'd) v IRC [1997] STC (SCD) 181

Hall and another (executors of Hall dec'd) [1997] STC (SCD) 126

Salisbury House Estates Ltd v Fry [\[1930\] AC 432](#)

Fetherstumaugh and others v IRC [1984] STC 261

Donald v Thompson 8 TC 272

Winters v Owens [1954] IR 223

Malliyen v Adams (1845) 9 Ir L.R. 132

Booth v McManus (1861) 12 ICLR 418

Dease v O'Reilly 1845 8 Ir 52