[2016] UKFTT 342 (TC)

TC05100

Appeal number: TC/2014/05245

CAPITAL GAINS TAX - Business Asset Taper Relief - Northern Ireland - Land taken on 'conacre' arrangements - Whether occupied by the appellant landowner wholly or mainly for the purposes of husbandry? - Yes - Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MR JOHN CARLISLE ALLEN **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MS CELINE CORRIGAN

Sitting in public at the Tribunal Hearing Centre, Royal Courts of Justice, Chichester Street, Belfast BT1 3JF on 3 & 4 March 2016

Mr Terence Nesbitt, of Springmount Financial, for the Appellant

Mr Nicolas Hanna QC, instructed by the Crown Solicitor's Office, for the Respondents

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DECISION

Introduction

1. By his Notice of Appeal dated 23 September 2014, the appellant appeals against a Closure Notice dated 17 April 2014. That Closure Notice was the outcome of an inquiry which had begun on 8 April 2010. It amended the appellant's self-assessment return for the year ended 5 April 2007 in respect of capital gain so as to disallow Business Asset Taper Relief ('BATR') in the amount of £152,417.01.

2. The capital gain referred to arose upon the sale of a single parcel of agricultural land (coming to just under 4 hectares) of which the part co-owned by the appellant amounted to just under 2 hectares ('the Land') in Cookstown, Co Tyrone on or about 3 January 2007.

3. The appellant, with his brother Andrew, had inherited the Land from their grandmother, Lilian, on 24 May 1998 by virtue of her will dated 18 May 1997. The appellant and his brother were beneficial tenants-in-common in equal shares of the Land.

4. During the period of their ownership, the Land was being put out from year to year under 'conacre' arrangements of the sort more fully described below.

5. The principal reason given by HMRC in the Closure Notice in support of their decision to disallow BATR was that it was not accepted that the appellant was carrying out the trade of farming. Whilst HMRC accepted that the appellant may have carried out some work on the Land, HMRC's position was that the appellant was not carrying out sufficient acts of husbandry to be classed as farming within the meaning and effect of section 832(1) of the *Income and Corporation Taxes Act 1988*. Nor was it accepted that the appellant's profits arose from the occupation of land.

6. On 19 June 2014 the appellant's then-representatives requested a statutory review. That review was concluded on 29 August 2014. It upheld the decision in the Closure Notice.

Conacre

7. 'Conacre' is a method of farming land: see *Dease v O'Reilly* (1845) 8 Ir L R 52, per Crampton J. It is a method or system which had become well-established across the whole of the island of Ireland by the mid-19th-century at the latest, and which reflected the social and economic condition of the agricultural worker in Ireland at the time. In many cases, they were landless and living a hand-to-mouth existence close to the poverty line. A scholarly discussion of conacre's origins and survival may be found in David Moore's article *'From Potatoes and Peasants to Quotas and Squires: The Endurability of Conacre from 1845-1995'* in Dawson, Greer and Ingram 'One Hundred and Fifty Years of Irish Law' (1996).

8. One form of conacre was where the landowner made available a ploughed and manured strip of land to which the occupant was given access for the period

(ordinarily, 11 months) necessary to plant, cultivate, and harvest a crop (usually, potatoes). However, the occupant did not own the crop until, at the end of that period, he had paid for it, either in money, by a share of the crop, or in labour.

9. A second form of conacre is known as 'agistment'. Conacre and agistment are usually treated together in the authorities and academic commentary. It is not suggested that there is any significant jurisprudential difference between them. It is not suggested that the agistment (properly so-called) being exercised on the Land in this case was not properly regarded as a form of conacre.

10. In *O'Flaherty v Kelly* [1909] 1 IR 223 the old Irish Court of Appeal discussed the general nature of a contract of agistment. Holmes LJ stated (at p 230):

> "its legal characteristic is that it does not constitute a demise of land or a parting with the possession thereof, but it is a letting of a right in the nature of a profit-a-prendre, subject to which the occupation of the soil remains in the person who makes the letting ... the legal status of the agistor is that of a person who is entitled to the grazing of land which is in the possession of another."

11. FitzGibbon LJ remarked (at p 229):

> "A 'grazing letting' does not necessarily mean ... a letting of land for grazing; it meant the hire of the grass or 'vesture' of the land. Such a hiring, in law, is an agistment contract, and nothing more. The possession and occupation of every estate and interest in the land remained wholly and entirely in [the landowner]."

12. In *McKenna v Herlihy (Surveyor of Taxes)* (1920) 7 TC 620, Gibson J, sitting in the old King's Bench Division, remarked that the agistor, McKenna, was not the occupier. He was '*taking the grazing for a temporary purpose, measured by months'* and did not have '*such use of the lands as would make him constructively an occupier'* (at p 625). Whilst other remarks of Gibson J in *McKenna* were gently criticised by the Court of Appeal in 2009 (*McCall v HMRC*: [2009] NI 245 at [17]) the Court of Appeal nonetheless agreed with Gibson J's conclusion that the farmer did not occupy the land for income tax purposes.

13. It is especially important to note that, although terms such as 'landlord' and 'tenant' are often used, these are used only loosely since neither form of conacre (whether the taking of crops, or grazing) constitutes a lease. As far as we are aware, the law of England and Wales contains neither a precise equivalent to conacre, nor any equivalent sufficiently close in material regards to enable any meaningful jurisprudential guidance to be drawn from cases relating to land in the rest of the United Kingdom. The law in England and Wales recognises licences coupled with an interest, but those (at least in the view of the learned editors of Megarry and Wade, *The Law of Real Property*, 8th edition, 2010 §34-005 et seq) require compliance with the formalities appropriate for land. We do not understand it to be disputed, whether generally, or in this case in particular, that conacre usually arises orally, with terms arising by way of custom. There are no formality requirements.

14. Thus, conacre is a distinct legal institution, developed in response to distinct social and economic factors, and which continues to pertain on a substantial scale in Northern Ireland. The system has *'endured through the upheavals of land league, Land Act, land purchase, land commission and even partition of the land that is Ireland'*: see Moore, *op.cit,* at p 207.

15. The traditional view has been that the grantor of conacre remains in legal ownership and possession of the land, and that the conacre 'tenant' (sic) takes no estate in the land: see J C W Wylie, *Landlord and Tenant Law*, 2nd edition, §3-23.

16. Consistently with this, the traditional view, clearly and consistently expressed in the authorities, is that an agistor does not have possession of the land, but at most has only the right to graze. As Walker LC put it in *O'Flaherty v Kelly*, loc. cit., *'it is well settled that under such a contract no right to the soil, or right to the possession, passes'* (at p 228). The authorities cited by Professor Wylie are also clear that, since an agistment holder is entitled to the grazing of land only, and possession of the land remains with the landowner, it is the landowner who will usually be in rateable occupation: loc. cit., §3.35

17. The conacre tenant acquires, at most, a 'special' possession - that is, a mere right of use for limited purposes. Hence, as early as 1860, section 18 of the *Landlord and Tenant Amendment Act (Ireland)* drew a distinction between sub-letting and conacre. There are many reported decisions in the Irish courts, some of considerable antiquity, holding that letting in conacre does not involve any sub-letting or other disposition of the land sufficient (for example) to breach an anti-assignment covenant.

Legislative background

18. Section 832(1) of the *Income and Corporation Taxes Act 1988* reads as follows:

> **'Interpretation of the Tax Acts**
>
> In the Tax Acts, except in so far as the context otherwise requires -
>
> "farm land" means land in the United Kingdom **wholly or mainly occupied for the purposes of husbandry**, but excluding any dwelling or domestic offices, and excluding market garden land, and "farming" shall be construed accordingly': emphasis supplied

19. Section 996 of the *Income Tax Act 2007* reads as follows:

> **"Meaning of 'farming' and related expressions**
>
> (1) In the Income Tax Acts, "farming" means the occupation of land **wholly or mainly for the purposes of husbandry**, but does not include market gardening [...]
>
> (2) In subsection (1) "husbandry" includes-

(a) hop growing; and

(b) the breeding and rearing of horses and the grazing of horses in connection with those activities": emphasis supplied

5

The evidence and the facts

20. We heard evidence from the appellant's father, Mr Joseph Campbell Allen. He confirmed the truth of his witness statement, and gave further evidence in response to questions by way of supplementary evidence-in-chief. He was cross-examined by Mr Hanna QC, although this cross-examination was more in the nature of a courteous testing or teasing-out of that evidence, as opposed to any determined challenge to it.

21. We have no hesitation in accepting Mr Joseph Allen's evidence as accurate and truthful. It was entirely consistent with the details given in the documents, which in turn reassures us that we can safely rely on those documents. His oral evidence was forthright and detailed.

22. Moreover, in our view, his oral evidence goes to somewhat more than the facts and circumstances of this particular land. We consider that he could speak authoritatively of the general position as to conacre. This is because, on any view, he is an extremely experienced auctioneer and land agent, having been involved in the family business (founded in Cookstown by his father in the mid 1940s) from 1954 until the early 2000s. We do not consider that his evidence was affected by taint of self-serving.

23. His evidence, which we accept, founded on his experience managing large and small estates in mid-Ulster, is that probably half the land in mid-Ulster is let out in conacre. He explained that is the land in large estates often has an absent landlord. He also told us that conacre agreements were normally only oral, with nothing in writing, even for the biggest estates. The terms would be understood by him (usually acting as agent for the grantor) and the tenant.

24. We have also considered the witness statement of the Appellant, dated 20 August 2015. He did not give oral evidence. We were also referred to a letter from Mr Samuel Crooks dated 5 August 2015, and a witness statement from Terence Michael Nesbitt (the appellant's accountant, and his representative at the hearing). He did not give oral evidence. Neither the appellant, nor Mr Crooks, nor Mr Nesbitt were called for the purposes of cross-examination. We were not invited to disregard their statements, but we do consider that we should give those statements such weight as is appropriate.

25. The Appellant's witness statement was silent as to what activities had been conducted on the Land during the period of his ownership, except that he and his brother 'had carried out minor repairs to the hedges, etc'.

26. We acknowledge Mr Hanna QC's acceptance that this was not a case in which it was denied that the land had ever been let in conacre.

27. On the basis of the evidence which we heard and have read, we find as follows.

28. The Land had been in the Allen family for well over 100 years. It was originally formed of four small parcels, divided by fences and hedges, but those were removed (and not reinstated) by Mr Joseph Allen Sr (following his father's death in 1975) in the early 1980s. That left one larger piece of land without internal divisions which was adjacent to, and not divided from, another piece of land owned by the Allen family. Once the fences and hedges had been removed, a barley crop was planted in two successive seasons by a Mr Dixie McCaw, who himself had taken land in conacre, so as to 'clean up' the earth generally. Since then, the land has been down to grass. This has been for about 30 years. Therefore, at all times to this appeal, the Land was permanent pasture, in which the grass grew year on year, was grazed, and then recovered over the winter.

29. The Land was let out on conacre terms, year after year since the barley crops, to a Mr Samuel Crooks, a neighbouring livestock farmer. We have considered his statement (dated 5 August 2015). It was supported with a Statement of Truth. We give it some weight although he was not cross-examined on it. Crooks, who owned an adjacent field, could obtain access to the Land from his own farm. The Land was being 'outfarmed' by him.

30. We find that the terms of the conacre to Crooks included the terms recorded in the document termed 'Conacre Licence Agreement' dated 14 February 2001. We find that was entered into by Mr Joseph Allen as agent for the appellant. It describes him as such. He was acting for the appellant and his siblings. The terms were:

(1) A period of 7 1/2 months, from 17 March (St Patrick's Day) to 1 November (All Saints' Day);

(2) During this period, Crooks to have the grazing and the silage;

(3) £1000 per year, described as 'a licence fee' (as opposed to rent), payable in arrears, payable on 1 November (i.e., at the end of the period) but with 12 days' grace period;

(4) Crooks not allowed to slurry the land, but only to use farmyard manure. We accept Mr Crooks' evidence that he was not allowed to apply fertiliser to the Land, taking the reference to 'fertiliser' to mean nitrogenous fertiliser rather than to farmyard manure;

(5) When he was on the Land, Crooks was under an obligation to keep his animals under control, and he was under an obligation to repair minor damage, or damage caused by any failure to keep his animals under control (although this had never been a problem in practice).

31. We find that the conacre arrangement for other years was made orally, from year to year, but containing the same terms.

32. We find that the arrangement to Crooks, for 7 1/2 months a year, was a conventional and unremarkable conacre arrangement. It is possible that the reference to silage - that is, the right to cut and take a separate grass crop, over and above

grazing - shows that this arrangement in fact gave rise to rights of a slightly wider compass than the barest form of agistment. We do not know whether, in fact, any such grass crop was in fact taken in 2001, but we do accept Mr Allen's evidence that Mr Crooks did take silage. We also accept that Crooks would graze the Land with suckling calves and store cattle.

33. We find that the Allen family would occasionally supply fertiliser, for free, to Crooks, although this did not happen every season. This is consistent with Crooks' account that he was not allowed to apply fertiliser himself. We accept Mr Joseph Allen's evidence that this was fertiliser which was nitrogen free, and that it happened 'a few times' when he felt, for instance, '*that the grass was getting weak'*. That is an important piece of evidence. It shows an awareness of the Land, and its condition, and the need to maintain it. They are the words of someone acquainted with the Land and the use to which it was being put, being mainly grazed by cows (the contention was that Mr Crooks was grazing 30-60 animals) which tug at the grass and its roots rather than by sheep which nibble the tillers. They are not the words of a property investor. The provision and application of fertiliser to keep the grass healthy and strong was a means of keeping the Land in good condition. We find that this supply was done on behalf of the appellant and enured for his benefit insofar as it maintained the condition of the Land and also preserved the attractiveness of the Land for conacre in the subsequent year.

34. We recall that the conacre arrangements in this case were seasonal and from year to year. We also find as follows:

(1) Crooks would vacate the Land at the end of his agreement, on or about 1 November, and would have no access to the land thereafter, unless and until he was let back on in the following March. Hence, the Land would be entirely at the disposal of the appellant and his co-owner for 4 1/2 months between conacre lets. In reality, this meant that the Land was entirely at the disposal of the appellant and his co-owner for 4 1/2 months each and every year of their ownership;

(2) There was still some grazing in the winter, with 3 or 4 animals (whether those belonged to other members of the Allen family, other than the appellant, or belonged to the Company or the partnership) being on the Land, but this was not objected to by the appellant;

(3) Care was taken by Mr Allen Sr, on behalf of the owners, not to put too many animals on the Land in the winter, for fear of the Land becoming 'poached' (that is, trampled, muddy and wet);

(4) Water was supplied to the Land all year round, in a trough in the corner behind the house. Mr Allen Sr paid the water bill;

(5) The fences (a mixture of hawthorn and post and wire) were inspected on behalf of the owners and were maintained in a stock-proof condition, using sheep-wire and barbed wire, paid for by the owners; That maintenance was effective because there were no instances of animals breaking out onto the nearby roads;

(6) A contractor - a Mr Robert E Ferguson - was engaged to come and cut the hedges and weeds (and especially ragwort, which can poison cattle if ingested and which must therefore be controlled). Weed cutting was done in May, before cattle were turned onto the land;

(7) Hedges were cut annually. In some years, this was done by Mr Ferguson. We have seen and accept (as HMRC had done) invoices from him for the years 2005 and 2006 in relation to hedge-cutting;

(8) There are field drains. Liability to repair these would rest with the Appellant and his co-owners, but they had never caused any problems.

35. It is clear to us that the work being done on the Land (other than things being done by Crooks), even if it were not being done by the appellant personally, was being done on his behalf, and for his benefit. There was no evidence, or indeed even any suggestion, that the appellant ever sought to prevent or prohibit any of his co-owners from working on the Land, having work done, putting animals on it, or letting it out on conacre.

36. We do not disregard a further feature of this case, which is that other members of the Allen family and/or the company which ran the livestock mart and in which the appellant was a minority shareholder (Joseph Allen (Cookstown) Ltd - 'the Company') and a partnership (*'Allens of Cookstown'*) which succeeded that Company on 1 January 2003 used the Land for the temporary housing of animals ('lairage') which had been sold at the livestock mart, but which, for various reasons, could not immediately be removed by the buyers or slaughtered.

37. In that regard, we make the following findings:

(1) This practice happened all year round, that is, both during the periods of conacre to Crooks, and also over the winter when Crooks was off the Land;

(2) It was usually just overnight;

(3) It involved at most maybe up to a lorry load - 10 to 15 - cattle, needing to be held overnight, being housed on the Land once every 2 to 3 weeks;

(4) Crooks did complaint that the Company's animals were causing damage to the fencing, but that this was from scratching and was not damage which Crooks was required to repair.

38. The obvious effect of lairage is that Crooks did not have the Land entirely to himself. He would share the Land. We find that this did not give rise to any conflict or difficulty in practice.

39. As we understand it, it was on the basis of the lairage being exercised by the Company and subsequently the Partnership that HMRC was prepared to treat the Land, during two periods of its ownership by the appellant, as a business asset qualifying for BATR. We are not asked to disturb HMRC's allowance of BATR for those periods of the appellant's ownership. For the two other periods, HMRC regarded the Land, insofar as it was beneficially owned by the appellant (but not insofar as it

was beneficially owned by his co-owner) as a non-business asset, not qualifying for BATR.

Discussion

40. The first issue is whether the arrangements which we have found to have existed in this case fall within the definitions of 'farming' given by ICTA 1988 s 832(1) and ITA 2007 s 996(1) - namely, whether the Land was being occupied by the appellant wholly or mainly for the purposes of husbandry.

Occupation

41. In its letter of 16 September 2010, HMRC asserted: "*During the relevant period of ownership, that is 6 April 1998 up until February 2007, the land was being used in the trade of a local farmer Mr Samuel Crooks. Mr Crooks farmed the land and I consider that Mr Crooks alone was in occupation of the land'*.

42. In our view, that analysis was not correct. It is summarily put. As such, it does not engage with the distinctive legal character of conacre as recognised and conventionally practiced in Northern Ireland since (at the latest) the 1840s. The letter advances no authority in support of the two propositions (which were key to HMRC's analysis at that point) namely (i) that Mr Crooks was in occupation of the land; and (ii) that, if Mr Crooks was in occupation, Mr Allen could not be. That letter does not explain how, in the view of the writer, the long-standing judicial articulations as to the nature of conacre/agistment, and the analysis of the respective interests of the landowner/agistor, some of which are referred to above, were wrong in principle, or, if right in principle, nonetheless did not to apply to the circumstances of this case. HMRC sought to rely on its guidance in the Business Income Manual at BIM55055, being (according to its letter of 11 October 2011) 'derived from cases such as *Back v Daniels [1925] 1 KB 526* and *Dawson v Counsell (1938) 22 TC 149'*. But neither case deals with conacre, or Northern Ireland. Those cases both relate to land in England and Wales: *Back v Daniels* discusses a potato farm in Lincolnshire. *Dawson v Counsell* relates to a stud farm in Newmarket.

43. We find that Mr Allen was himself in occupation of the land for the whole of the period of his ownership, notwithstanding the conacre arrangements with Crooks. This is for the following reasons:

(1) We are strongly influenced by the traditional understanding, articulated by a succession of distinguished judges and commentators over the course of more than a century, that the grantor of an agistment licence himself remains in occupation, with the agistor having only some lesser interest. We see no reason to depart from the guidance advanced in those cases;

(2) Cases from England Wales and Scotland to which we were referred are not very helpful in this regard, since they are all decided against a lease/licence dichotomy which does not readily transfer to conacre/agistment;

(3) We do not regard Crooks as having been in occupation during his periods of conacre;

(4) Even if he were in occupation, so put, his occupation was not such that it ousted the appellant and his co-owner from occupation;

(5) In any event, Crooks was not in occupation for 4 1/2 months of the year.

Husbandry

44. We agree with Mr Hanna QC that mere occupation is not enough to satisfy the statutory test. It must be occupation *'wholly or mainly'* for the purposes of husbandry.

45. The test is not that the Land must be occupied wholly for the purposes of husbandry. The statutory language - 'wholly or mainly' - shows that land can still be occupied for the purposes of husbandry, even if it is occupied, to a certain degree, for other purposes.

46. The word 'husbandry' is not defined inclusively in the relevant tax legislation. The primary meanings in the Oxford English Dictionary relate to the management of an estate, a household or other resources so as to maintain their value. That underlying sense has long been applied to the management of agricultural produce, crops, or land: for example, Sir John Fortescue CJKB in his *Commendation of the Laws of England* (c.1470) referred to husbandry in relation to the grubbing up and staking out of trees and bushes.

47. Although there is no definition in the tax legislation, section 11 of the Agriculture Act 1947 (which section remains in force) gives useful guidance. It reads as follows:

> "11. Good husbandry.
>
> (1) For the purposes of this Act, the occupier of an agricultural unit shall be deemed to fulfil his responsibilities to farm it in accordance with the rules of good husbandry in so far as the extent to which and the manner in which the unit is being farmed (as respects both the kind of operations carried out and the way in which they are carried out) is such that, having regard to the character and situation of the unit, the standard of management thereof by the owner and other relevant circumstances, the occupier is maintaining a reasonable standard of efficient production, as respects both the kind of produce and the quality and quantity thereof, while keeping the unit in a condition to enable such a standard to be maintained in the future.
>
> (2) In determining whether the manner in which a unit is being farmed is such as aforesaid, regard shall be had, but without prejudice to the generality of the provisions of the last foregoing subsection, to the extent to which—
>
> (a) permanent pasture is being properly mown or grazed and maintained in a good state of cultivation and fertility and in good condition;
>
> (b) the manner in which arable land is being cropped is such as to maintain that land clean and in a good state of cultivation and fertility and in good condition;

(c) the unit is properly stocked where the system of farming practised requires the keeping of livestock, and an efficient standard of management of livestock is maintained where livestock are kept and of breeding where the breeding of livestock is carried out;

(d) the necessary steps are being taken to secure and maintain crops and livestock free from disease and from infestation by insects and other pests;

(e) the necessary steps are being taken for the protection and preservation of crops harvested or lifted, or in course of being harvested or lifted;

(f) the necessary work of maintenance and repair is being carried out.

48. In our view, the Agriculture Act provides a sound overview and cross-check of factors to consider. Tested against the Agriculture Act, Mr Allen, as the owner, was performing (or was having performed on his behalf) the following acts of husbandry:

(1) The Land was being kept in a condition to enable a reasonable standard of efficient production to be maintained in the future: section 11(1). In particular, it was being fertilised from time to time when the grass or sward was seen to be weakening;

(2) The pasture was being maintained in a good state of fertility and in good condition: section 11(2)(a). As well as fertilising (which could also fall under this head), weeds were being cleared, and care was being taken over the winter months to avoid the Land becoming poached, which would have damaged its condition, its attractiveness for future grazing, and its value;

(3) Necessary work of maintenance and repair was being carried out - section 11(2)(f) - both in terms of hedging, and the maintenance of stock-proof fencing.

49. We note HMRC's acceptance (contained in its letter of 21 June 2011) that the production of grass for grazing is husbandry. We also note its acceptance in its letter of 14 September 2010 that work done by Niall Allen to his neighbouring land, and supported by invoices, applied to all this Land. The invoices related to fencing and hedging.

50. This Land was back in the direct control of the owners for 4 1/2 months of the year, each and every year. It was not being left untended. Work had to be done on it and to it, in order to keep the Land in good heart as grazing land, and to make it attractive and available for conacre in the following year. We find as a fact that such work was being done.

51. We conclude that the Land was being occupied, and husbanded, by the owners, including the appellant, within the meaning of the primary legislation. The things which were being done to and on the Land by or on behalf of the owners were being done on behalf of the owners.

52. The appellant's occupation was therefore wholly or mainly for the purposes of husbandry.

53. As such, the Land was 'farm land' within the meaning of the primary legislation, and the appellant was 'farming' it, within the meaning of the primary legislation. Insofar as section 53 of the *Income and Corporation Taxes Act 1988* and section 9 of the *Income Tax (Trading and other Income) Act 2005* apply, this was a deemed trade.

54. The outcome of that reasoning is that BATR applies to the Land for the whole period of the appellant's ownership.

55. Occupation wholly or mainly for the purposes of husbandry is the primary test. In our view, that primary test is satisfied by the appellant in this case. But we consider it appropriate to test this conclusion against the argument that the Land was not farm land which was being husbanded by the appellant but rather was in fact being held by the appellant as an investment. As a cross-check, we do not consider that it was. This was land which had been in the Allen family for over a century. It had come to the appellant by way of inheritance. It was adjacent to (and not separated from) a somewhat larger piece of land which was being identically held and managed. Together, they made up one piece of land without sub-division. A fee of £1000 (equating to approximately £125 per year per acre) was being charged, and paid. The Land was being managed (on behalf of the Appellant, as a co-owner) on a commercial (albeit modest) basis with a view (whether achieved or not) to the realisation of income and profit through conacre. We do not consider the fact that the Land, being situated on the outskirts of a small country town, and thereby acquiring value as development land, sufficed to turn it into investment land during the period when it was being occupied by the appellant for the purposes of husbandry.

56. Whilst the 2001 Conacre Licence Agreement was drawn up on the footing that the 'Licensor Claims Entitlements', and hence was drawn clearly with an eye to the Basic Payment Scheme ('BPS') we do not consider it relevant that the Ministry (the Department of Agriculture and Rural Development: 'DARD') has latterly categorised the conacre holder as the 'active farmer' for the purposes of claiming entitlements and receiving payments under the Basic Payment Scheme. Regardless of whether that approach is right or wrong, it is a departmental decision which goes principally to determining who should be entitled to claim the 'entitlements' under the BPS. That departmental decision cannot and does not have any substantive bearing on our assessment as to who is in occupation wholly or mainly for the purposes of husbandry. Even if the position were reversed and the owner (and not the conacre holder) were regarded as the active farmer, that could not be determinative either since, as Mr Hanna QC pointed out to us, and we accept, the conacre holder and the grantor are still entirely free as between themselves to agree to transfer the money actually paid under the BPS Scheme from one to the other.

McCall v HMRC

57. We do not consider that the decision or reasoning in *McCall and Keenan (as personal representatives of Eileen McClean) v Revenue and Customs Commissioners*, whether at first instance (Special Commissioner Charles Hellier) [2008] STC (SCD) 752 or on appeal in the Court of Appeal in Northern Ireland (Girvan and Coghlin LJJ, Deeny J) [2009] NICA 12 dictate a different conclusion.

58. In *McCall* the Special Commissioner was asked to consider whether 6 grass pasture fields (amounting to 33 acres) in Co. Antrim, owned by Mrs McClean and let in conacre to local farmers for grazing, were relevant business property within the meaning of section 105 of the *Inheritance Tax Act 1984* ('IHTA 1984').

5 59. The Special Commissioner carefully set out the terms of those conacre lettings: Para [42]. Insofar as we consider to be material, these included the following:

> "(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
> 10 for the period of the letting, eating the grass and drinking the water
>
> [...]
>
> (v) that the owner would maintain the fencing and be responsible for weed control; and
>
> (vi) that the owner would not be required to, and the grazier
> 15 could, fertilise the land."

60. There are obvious differences between those terms and the terms which we have found in this appeal, in terms of (i), (ii) and (vi).

61. Mrs McClean's son in law, Mr Mitchell, tended the land all year round. It was found as a fact that he was probably spending about 100 hours a year 'seriously
20 tending the land' (which was about 5 times the area of the total land in this case, including the immediately adjacent land) including weed control, fence maintenance, litter and damage control (there were incursions from houses in nearby Ballyclare), drainage and water works. The Special Commissioner concluded that the work done by Mr Mitchell, on the facts as they appeared to the Special Commissioner, 'was - just
25 - a business': Para [53].

62. The Special Commissioner then went on to consider whether the business so found was one of wholly or mainly holding investment. If it were, then section 105(3) IHTA 1984 would disqualify the estate from any claim to business property relief. Having set out the parties' contentions, he analysed '*the features of the grazing*
30 *agreements entered into for the fields'*.

63. The Special Commissioner found that the business was wholly or mainly one of holding investments: Para [98]. He found that Mrs McClean did not use the fields for animal husbandry, but that such husbandry was exercised by the grazier, and that the fields were not used by Mrs McClean for any other purpose. Accordingly, he
35 dismissed the appeal.

64. In our view, and whilst affording respect to the decision of the learned Special Commissioner, it is clear to us that his decision concerns the particular arrangements in place in that case, as found on his assessment of the detailed evidence which he had heard over the course of several days. In Paragraph [85] of his decision the Special
40 Commissioner carefully refers to the features of the grazing agreements entered into

'*in relation to the particular six fields*'. We agree with Mr Hanna QC that this is one of the most important paragraphs in the case. The Special Commissioner had express regard to the terms which he had set out at Paragraph [42].

65. It seems to us that the terms which the Special Commissioner set out, and particularly those relating to the exclusivity enjoyed by the occupant - namely (i) that there would not be another grazier also grazing the land and (ii) that the owner would not let his own animals graze the land - were influential in his reasoning and conclusions (set out at Paragraph [85]) that the making of the conacre lettings in that case did not deprive Mrs McClean of possession of the fields, but that the rights given to the graziers in that case gave 'a measure of exclusive enjoyment' to the graziers, who could only exclude others with competing or interfering purposes. It seems to us that is distinguishable from the facts in this case.

66. The Special Commissioner was also obviously influenced by and took into account the decision of the Court of Appeal in Northern Ireland (Lowry LCJ and Gibson LJ) in *Maurice Taylor (Merchants) Limited v Commissioner of Valuation* [1981] NI 236. That was a rating case, and the facts were far removed from those in this appeal. The conacre tenant - which carried on business as a grower and shipper of seed and ware potatoes - was taking the land (which it was using to grow potatoes) under agreements which gave it exclusive occupation for 11 months, including the right to exclude the landlord: see p242A. The general account given by Gibson LJ refers to the landowner not providing manure and 'no longer reserving any right to exercise any control over or protection of the land': at p245A-B. In those important regards at least, the 'modern practice' which Gibson LJ describes was not the practice adopted in the conacre of the Land in the appeal before us.

67. Moreover, as the Lands Tribunal and the Court of Appeal both made clear in *Taylor*, the nature of the land in that case, the purposes for which possession had been given, and the operations which had to be carried out in order to grow and harvest the crop, as well as the fact that during the conacre 'take' no rival occupation could arise meant that no question of joint occupation could be mooted. The conacre taker had the exclusive right to use the land for its crop which meant that the 'paramount occupation' resided, on the facts of that case, with the conacre tenant and not with the landowner. However, we consider that the present appeal, even applying the analysis advanced by Gibson LJ, is one in which the appellant and his co-owning brother, and not Mr Crooks, had 'paramount occupation'. We do not consider that 'paramount occupation' resided with Mr Crooks.

68. The Special Commissioner found that Mrs McClean, on the facts which he found, was not husbanding the land. In contrast, we have found, for the reasons set out above, that Mr Allen was husbanding the Land. The Special Commissioner found, on the facts which he found, that any husbandry was being exercised by the grazier. In contrast, we have found that the owners were husbanding.

69. In *McCall* the personal representatives appealed. Their appeal was dismissed by the Court of Appeal in Northern Ireland: [2009] NICA 12. That appeal sought to challenge the Special Commissioner's analysis of the law. His findings of fact were

not challenged. The thrust of the appeal was directed to the issue of whether the business, conducted by Mr Mitchell on behalf of his mother-in-law, was wholly or mainly the business of holding an investment within the meaning of s 105(3) IHTA 1984.

5 70. Girvan LJ (with whom Coghlin LJ and - on this point - Deeny J agreed) remarked as follows (at Para [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
> 10 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.
> 15 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
> 20 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
> 25 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*
> 30 *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
> 35 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
> 40 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
> 45 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." - emphasis supplied.

71. Deeny J sounded a significant note of caution. He remarked (at Para [24]):

"These cases, as has been pointed out, must be decided on their own facts. For example, as Lord Justice Girvan has observed, the deceased did not provide a service to the graziers by fertilising the land but left that to them. Nor, I might add, did she provide a service of supervising the cattle for the agisters. *The provision of any such services, on the authorities, may very well have properly led to a different conclusion that than that arrived at by the Special Commisioner here."* - emphasis supplied.

72. We respectfully acknowledge the guidance of Deeny J. In our view, the decisions in *McCall* - both at first instance, and on appeal - must be regarded in the light of their individual facts found by the Special Commissioner and summarised by the Court of Appeal.

73. Consistently with the remarks of the Court of Appeal, we do not discern in *McCall* - whether at first instance, or in the Court of Appeal - any ratio or rule which must invariably apply to all land taken in conacre.

74. Both the Special Commissioner and Girvan LJ regarded it as important and material that the agisting farmer(s) in *McCall* had exclusive rights of grazing. The present appeal is different. It does not seem to us to matter that the non-exclusivity in the present appeal flows from lairage being exercised by persons other than the appellant (for example, the Company) as opposed to lairage of animals owned by the appellant. The result is the same. Mr Crooks did not enjoy exclusivity. Anyone else's animals on the Land were there either with the appellant's agreement or his approval, whether express or tacit. It has not been suggested to the contrary.

75. Moreover, *McCall* was a case in which the graziers, and the graziers alone, (rather than the owner Mrs McClean) fertilised the land maximising the growth of the grass. Both Girvan LJ and Deeny J regarded that as an important feature of the case. We give particular respect to the decisions of that constitution of the Court of Appeal, being decisions handed down by judges familiar with the distinct character and incidents of conacre. To Girvan LJ the fertilising arrangements *'[negatived] the suggestion that in some way the landowner was effectively carrying out a grass growing business'*. To Deeny J. that factor, had it been present, *'may well very properly have led to a different conclusion'*.

Evelyn v HMRC

76. Our attention was also drawn to the decision of this Tribunal in *Deborah N Evelyn v HMRC* [2011] UKFTT 121 (TC). That was an appeal against a discovery assessment which disallowed a claim for Business Asset Taper Relief in respect of a chargeable gain on a disposal of land previously let out by the taxpayer in conacre. HMRC had decided that the partnership in which the appellant was concerned was not carrying out the trade of farming. However, the appellant's representative conceded, at

the hearing, that the appellant was not challenging the correctness of HMRC's ruling disallowing relief: Para [4]. The Appellant in *Evelyn* accepted that the partnership did not occupy the land wholly or mainly for the purposes of husbandry: Para [30].

77. No such concession was made in this appeal. It is perhaps trite to say that we are not bound in our decision making by the appellant's acceptance of the point in *Evelyn*. Nor can we properly go behind it, since that would lead us to speculate, impermissibly, what the result of the appeal would have been had the point been argued and decided. As Tribunal Judge Tildesley OBE succinctly identified, the concession meant that the dispute was about whether the claim for relief (which, by virtue of the concession, it then had to be admitted was an error) was nonetheless in accordance with the prevailing practice at the time. The evidence which he heard went to that point. His findings as to HMRC's prevailing practice in relation to conacre do not bind us.

78. We note the reference in *Evelyn* (at Para. [29]) to 'real farmers'. In that passage, the Tribunal was setting out the evidence which it had received from an HMRC Technical Adviser responsible for giving specialist technical advice to Ministers and others on the application of income tax law to farming. In the present appeal, we were invited to ask, as a key question, whether the appellant would be regarded as a 'farmer' in everyday parlance. We do not consider that to be a helpful analysis. It appears to flow from a similar understanding or assumption to that expressed by HMRC in *Evelyn*. We note the reference (in HMRC's review letter of 29 August 2014) to 'hands on'. In our view, expressions such as 'real' farmer or 'hands on' farmer are not helpful. They introduce qualifications which are not present in the primary legislation. We do not need to find whether the appellant is a 'real' farmer or not. Nor do we need to find whether he is an 'active' farmer (being the expression adopted by the BPS). Neither are relevant. The appellant in this case is a farmer by virtue of the application of the primary legislation to the circumstances of this case; not as a reflection of whether he would or would not be regarded in everyday parlance as a farmer, 'real', 'active', 'hands on' or otherwise.

79. In short, in our respectful view, *Evelyn* does not provide any useful guidance.

Periods of disallowed BATR

80. We consider it appropriate to deal with a further argument at this point in case our conclusion on the issue of the appellant's occupation being wholly or mainly for the purpose of husbandry is subsequently disturbed.

81. It was conceded by HMRC that '*rather limited use of the land for the purposes of the livestock market did take place, and that it can be taken into account in considering entitlement to BATR, but only during any period when this is permitted by the application of the relevant legislative provisions to the facts pertaining at any individual time'*.

82. Lairage was the basis upon which HMRC had allowed BATR to the appellant's co-owner (and to the co-owners of the adjoining land, from which this land was not

separated, and which was sold together with it) and had allowed BATR to the appellant for two periods of his ownership. As we have already said, there is no appeal (unsurprisingly) against the allowance of BATR for those two periods.

83. HMRC identified two further periods in relation to which it disallowed BATR, even though there was still lairage.

84. In relation to the first of those periods, the lairage was on behalf of the mart operated by the Company. HMRC contended that the Company was not, during that period, a qualifying company with reference to the appellant.

85. In relation to the second of those periods, the lairage was on behalf of the mart operated by the partnership. HMRC contended that, during that period, the appellant was not a member of the partnership.

86. As for the first of those periods, Schedule A1 Paragraph 6(2) of the *Taxation of Chargeable Gains Act 1992* provides that a company is a qualifying company only if, with reference to an individual, both the following conditions are satisfied, namely (a) the company was trading and (b) the voting rights in that company were exercisable, as to not less than 25%, by the individual.

87. Those conditions are cumulative. The appellant did not meet the test during that first period. He had only 1.65% of the voting rights in the Company. We reject the appellant's argument that we can modify the percentages, or treat the appellant as if, in relation to him, the Company were a qualifying company. Such an approach is not permitted by the legislation. We have no discretion in relation to the matter. The Company was not, in that period, a qualifying company by reference to the appellant.

88. We are not persuaded that the significant relaxation in the rules with effect from 6 April 2000 (where the cumulative conditions were replaced by a condition which could be satisfied simply if the company was unlisted, without any need to refer to voting rights at all) assists the appellant in his argument on this point. However, as HMRC identified (and which seemed to be common ground before us) this had the perhaps curious effect that the Land (i) when it came to lairage alone (and not occupation for husbandry) (ii) during certain periods (iii) despite no material change in use and (iv) insofar as it affected the appellant, moved into and out of the scope of BATR.

89. During the second period in relation to which BATR was disallowed, the appellant, whilst involved in the rural estate agency business, was not a member of the partnership and hence did not fall within Paragraph 5(2) of Schedule A1 TCGA 1992.

Decision

90. For the above reasons, the Appeal is allowed.

91. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal)

(Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

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DR CHRISTOPHER MCNALL

TRIBUNAL JUDGE
RELEASE DATE: 11 MAY 2016

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