



TC07919

INHERITANCE TAX – Business Property Relief – s 104 and s 105 of Inheritance Tax Act 1984 – furnished holiday letting business – whether relevant business property – whether business wholly or mainly of making or holding investments – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/07232

ETWEEN

**EXECUTORS OF THE LATE SHERIFF
GRAHAM LOUDON COX**

Appellants

-and-

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

Respondents

TRIBUNAL: JUDGE HEIDI POON

Sitting in public in public at Caledonian House, Dundee on 11-12 December 2019

Mrs Sandra Turnbull, Chartered Accountant and Executor, for the Appellants

Mr Jeremy Schryber, Litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns Inheritance Tax ('IHT') in relation to the deemed transfer of value on the death of Sheriff Graham Loudon Cox ('Sheriff Cox') on 27 December 2014.
2. The appealable decision is the notice of determination issued by HMRC on 21 June 2018 under s 221 of the Inheritance Tax Act 1984 ('the Notice'), which ruled that Sheriff Cox's furnished holiday letting business did not qualify for business property relief ('BPR').
3. The only issue for determination in this appeal is whether the furnished holiday property, known as Crail House, is eligible for BPR totalling £562,040. The IHT at stake is £224,816. The quantum is not in dispute.

REPRESENTATION

4. The s 221 Notice was issued to each of the three appellants; namely: Mr Edward F Bowen, Mrs Sandra Turnbull, and Mr Johnston P C Clark, who are the executors of Sheriff Cox's estate.
5. Mr Johnston Clark is a partner of Blackadders LLP, the firm of solicitors responsible for the administration of the estate, which represented the executry in relation to the submission to HMRC of the Inheritance Tax Account on form IHT400 dated 29 June 2016 and lodged the Notice of Appeal to the Tribunal.
6. According to Mrs Turnbull, the executors had sought the opinion of Senior Counsel in April 2016 and again in November 2017, but it would be 'cost prohibitive' to engage counsel to represent the appellants.
7. Blackadders LLP did not represent the appellants in these proceedings. It fell on Mrs Turnbull, as the eldest daughter of Sheriff Cox, and 'the family member with the greatest knowledge of the business' that was carried on by her father to represent the appellants in these proceedings. Mrs Turnbull is a chartered accountant by profession.

EVIDENCE

8. Mrs Turnbull said she was a frequent visitor to Crail House, but the fact remains that she was not involved in the running of the business at the relevant times. While I have no issue with Mrs Turnbull's credibility as a witness, I have given more weight to contemporaneous evidence emanating from the time when Sheriff Cox was running the business. The contemporaneity of the factual matrix is essential to making the relevant findings of fact as concerns the nature of the business for which BPR has been claimed.
9. Mrs Turnbull provided a witness statement and gave oral evidence for the appellants and was cross-examined. In terms of Mrs Turnbull's evidence, what were the facts as concerns the business, and what would be more accurately described as her views of the business, are intermingled. I have therefore summarised Mrs Turnbull's evidence as given, without necessarily accepting all her evidence as factual truth.
10. The parties provided documents in relation to the appeal which include the following:
 - (1) The course of correspondence between the parties from 29 June 2016 with the submission of form IHT400 to HMRC by Blackadders LLP, to 4 October 2018 when HMRC issued the review conclusion decision refusing the BPR claim.
 - (2) A detailed valuation report on Crail House as at 11 April 2016, prepared by the firm of chartered surveyors, Bidwells, for the executry of Sheriff Cox, with appendices to include location and site plans showing the curtilage of the subject matter;

photographs of the Crail House (exteriors and interiors); current planning permission affecting the subject matter; comparable evidence schedule in relation to valuation.

(3) In relation to the furnishing holiday business, documents such as invoices for expenses, booking forms, email communications with guests, certificates of relief from non-domestic rates from Fife Council; income and expenditure accounts for the business.

(4) As concerns the ‘services’ provided in connection with the holiday let business, the appellants provided schedules of job lists, printouts from the business website, statistics on the number of nights booked.

(5) At the hearing, Mrs Turnbull produced a schedule summarising the income and expenditure accounts for the business for the five years from 6 April 2010 to 27 December 2014.

RELEVANT LEGISLATION

11. The provisions under ss 104 and 105 of the Inheritance Tax Act 1984 (‘IHT’), so far as relevant to this decision, state as follows.

‘104 The relief

(1) Where the whole or part of the value transferred by a transfer of value is attributable to the value of any relevant business property, the whole or that part of the value transferred shall be treated as reduced–

(a) in the case of property falling within section 105(1)(a) (b) or (bb) below, by 100 per cent;

(b) in the case of other relevant business property, by 50 per cent; but subject to the following provisions of this Chapter.

[...]

105 Relevant business property

(1) Subject to the following provisions of this section and to sections 106, 108, 112(3) and 113 below, in this Chapter “relevant business property” means, in relation to any transfer of value–

(a) property consisting of a business or interest in a business;

[...]

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

106 Minimum period of ownership

(1) Property is not relevant business property in relation to a transfer of value unless it was owned by the transferor throughout the two years immediately preceding the transfer.’

CASE LAW

12. The meaning of ‘relevant business property’, and the application of s 105(3) relief have been considered in a number of cases. Authorities that are referred in this Decision are listed below in their chronological order.

(1) *Martin and another (executors of Moore deceased) v Commissioners of Inland Revenue* [1995] STC (SCD) 5 (‘*Martin*’)

- (2) *Commissioners of Inland Revenue v Philip William George and Ivor Bernard Loochin (executors of the Will of Elsie Fanny Stedman, deceased)* [2003] EWCA Civ 1763 ('George')
- (3) *Brander (representative of Earl of Balfour) v HMRC* [2009] UKFTT 101 (TC) ('Brander FTT'); and *HMRC v Brander (representative of Earl of Balfour)* [2010] UKUT 300 ('Brander'), upholding *Brander FTT*
- (4) *HMRC v the Personal Representatives of Nicolette Vivian Pawson* [2013] UKUT 050 (TCC) ('Pawson'), overruling *Pawson v HMRC* [2012] UKFTT (TC)
- (5) *Zetland Settlement v HMRC* [2013] UKFTT 284 (TC) ('Zetland')
- (6) *John Best (Executor of the Estate of Alfred William Buller) v HMRC* [2014] UKFTT 077 (TC) ('Best')
- (7) *Anne Christine Curtis Green v HMRC* [2015] UKFTT 0334 (TC) ('Green')
- (8) *Executors of the Estate of Marjorie Ross (deceased) v HMRC* [2017] UKFTT 0507 (TC) ('Ross')
- (9) *HMRC v the Personal Representatives of the Estate of Maureen M Vigne* [2018] UKUT 0357 (TCC) ('Vigne'), upholding *Vigne v HMRC* [2017] UKFTT 0632 (TC) ('Vigne FTT')
- (10) *The Personal Representatives of Grace Joyce Graham (deceased) v HMRC* [2018] UKFTT 0306 (TC) ('Graham')

THE FACTS

The property

13. Crail House was built in 1871, and a two-storey wing was added in 1937. It is referred to locally as 'the Castle' in the village of Crail, Fife. Sheriff Cox had known the village since he was a child, as Crail was a favourite family holiday destination of his parents. The manor house had been re-developed and subdivided into five flats, and over the years, four out of the five flats came to be owned by Sheriff Cox, with Flats 2, 3, and 4 being used for holiday let.

- (1) In 1971, Sheriff Cox purchased Flat 4 as a second home, and lived there during the summer months.
 - (2) In 1989, Sheriff Cox purchased Flat 1, which became his principal private residence. With this purchase, he started his rental business, letting Flat 4.
 - (3) In 1991, the letting business expanded with the purchase of Flat 3.
 - (4) In 1996, the business expanded again with the purchase of Flat 2.
 - (5) Flat 5 of Crail House remains owned by a third party.
14. The situation of the flats within the house, and surrounding grounds are as follows:
- (1) Flat 1 is on the ground floor with the basement of the original house.
 - (2) Flat 3 is above Flat 1.
 - (3) Flats 2 and 4 are in the newer wing, on the ground and upper floors respectively.
 - (4) Flat 2 being the ground floor flat, has its own garden area.
 - (5) Each flat has its own front door entrance but shares a communal entrance through a glass porch which gives access to the four flats.

- (6) Each flat has its dedicated parking space within the grounds.
- (7) The grounds extend to more than one acre in an elevated position overlooking the Crail harbour, the May Island and the sea beyond.

The furnished holiday let business

15. The business started in 1989 continued to be run by Sheriff Cox until his death on 27 December 2014 at the age of 81. Sheriff Cox lived in Flat 1, and ran the business of letting Flats 2, 3, and 4 as a sole trader at all relevant times, employing his wife Jean from his second marriage (in 1977) to assist him in the business. Mrs Jean Cox had no stake in the business

16. Mrs Turnbull took over the running after Sheriff Cox's death, since Mrs Cox wanted to retire. Mrs Cox passed away in January 2016. Mrs Turnbull moved into Flat 1 some time in 2017 to facilitate with the running of the business.

The business as advertised to the public

17. Advertisements of the holiday let business were placed in national newspapers. A receipt from The Scotsman Publications Limited for a card payment made on 1 April 2011 for £60 made in the Scotsman magazine (for 4 insertions), and The Scotsman Main (for 20 insertions) between 4 April 2011 to 7 May 2011. The classification of the advertisement on the receipt was described as: 'Self Catering'.

18. Annual mailshots were sent to guests who had subscribed to the mailing list. The January 2014 mailshot letter related that '2013 was a terrible year' due to 'computer problems' with the business website being hacked and guests' addresses being stolen, resulting in bogus letters being sent to guests. The second (and last) paragraph of the letter starts as follows:

'Anyhow we have survived and have pleasure in attaching our booking chart for this year along with details of our Winter Breaks which will be available from January through to the end of March. We have continued to include gas and electricity in our prices for the main season, but for Winter Breaks we have included an allowance of £5 per night towards fuel costs, consumption in excess of this will regrettably have to be paid for.

19. In terms of advertisements on the internet, Crail House paid for an entry on websites hosted by: (a) 'Visit Scotland' (b) 'The Holiday Cottages' (at £50 for two years), (c) 'We Accept Pets', and (d) 'RoomFinderScotland' (at £33 per annum).

20. In 2008, the business launched its own website. Archived pages from the periods in 2008, 2009, and 2011 were printed on 8 June 2019, and the pages provide a good description of the business as advertised to the public.

21. The *Home Page* starts with a short introduction of Crail House, and then it states:

'There are three self-contained flats available for letting. Flats 2 and 3 are rated 3 star and Flat 4 is rated 4 star by Visit Scotland (formerly the Scottish Tourist Board).

Out of season with the exception of Christmas and New Year, the flats can be rented for one or more nights.

From late March until the end of October and at Christmas and New Year they are let generally by the week usually commencing on a Saturday.

However if a flat is vacant within 7 days of the date you wish to rent it you may book it for a period shorter than [sic] 7 days (and at an attractive price) or for the whole week commencing on the Saturday at an attractive

discount.’ – [followed by a link to] ‘click on Prices and Availability/ Last Minute offers’

22. The Home Page continues to describe in some detail the facilities and accommodation offered by each flat, whereby:

(1) ‘Two of the flats (nos 2 and 4) are almost identical in layout each consisting of an L-shaped sitting room/dining room, a double bedroom, a twin bedded room, kitchen, bathroom and hall. Flat 4 has an additional shower room. The maximum occupancy is four persons’

(2) ‘Flat no 3 is the upper floor of the original house. It is very spacious and will accommodate six. The accommodation comprises 2 double rooms, a twin bedded room and a very small single bedroom entered from the sitting room.’ It continues to describe the furnishing of the single bedroom in some detail: ‘with a 5’6” single bed, chest of drawers with hanging space’, and that like the double room and the sitting room, it ‘looks straight out to sea!’

(3) The rest of the accommodation for Flat 3 is described as: ‘The hall is spacious and the dining room, kitchen and principal bathroom are all of good size. There is a separate shower room with an excellent shower unit, whb and wc.’

(4) The kitchens of all three flats are well equipped with full cooking facilities plus microwave, fridge/freezer, dishwasher, toaster etc.’

(5) ‘A washing machine and tumble dryer are available for the use of all three flats. All have gas central heating.’

(6) ‘Flat 4 is double glazed and so are significant parts of flat 3.’

(7) In bullet points the following facilities and amenities are listed:

- (i) An area of the garden is allocated for the exclusive use of each flat
- (ii) Private parking for one car per flat is available within the walls
- (iii) Additional parking is available on private grounds nearby
- (iv) Electricity and gas charges are included in the rent
- (v) The beds you request are made up prior to arrival. Towels are provided
- (vi) Pets and young children are most welcome in flats 2 & 3
- (vii) Smoking is strictly forbidden in all flats
- (viii) The nearest sandy beach is 200 yards away, shops and hotels etc are even nearer

23. The second tab ‘*About Crail*’ contains hyperlinks to direct viewers to other websites:

(1) Under the heading ‘What to do in and around Crail?’

‘If you are a golfer you will be in paradise.’ [links to Crail Golfing Society, Kingsbarns, St Andrews Bay Hotel]

(2) Under the heading ‘What to do if not a golfer?’

‘There are walks galore by the sea and inland too.’ [links to Kellie Castle, Scotland’s Secret Bunker, Fisherman’s Museum]

(3) Under the heading ‘MORE LOCAL INFORMATION’ would appear to be a link to direct viewers to further websites on places of interest such as two local potteries.

24. The third and fourth tabs on ‘*Crail House*’ and ‘*Photo & Virtual Tour*’ are essentially picture galleries to showcase the apartments and the grounds from different angles:

(1) The first gallery contains pictures with the captions: *The Entrance, The views on entering, The Gazebo close up, View to the East, View to the West, House and grounds from the air.*

(2) The gallery for Flat 2 contains seven photographs showing the hall, living room, dining area, double bedroom, twin bedroom, kitchen, view through the French window of the living room.

(3) The gallery for Flat 3 has eight photographs, six being on the accommodation, and two on the views from the living room and bedroom.

(4) The gallery for Flat 4 has ten photographs, four on the sitting room, four on the bedrooms, and one on the kitchen and one on the bathroom.

25. The fifth tab for ‘*Prices & Availability*’ succinctly captures the information as regards:

(1) The contact details of Mrs Jean Cox are listed for all booking purposes.

(2) The essential factors to choosing which flat to book are summarised in a table:

(i) Flats 2 and 4 each accommodate 4 in 2 bedrooms

(ii) Flat 3 accommodates 6 in 4 bedrooms

(iii) Flats 2 and 3 being 3 star – dog and children welcome

(iv) Flat 4 being 4 star – no pets and no children under 11

(v) All flats are strictly non smoking

(3) Availability and price are listed in a summary table with 8 columns; the page included shows the pricing for 2011.

(a) Columns 1 and 2 pertain to the week number (from 1 to 31), and the corresponding date of the week commencing on a Saturday (from 2 April to 29 October), and Christmas and New Year from 22 to 5 January following;

(b) Columns 3 and 4 pertain to Flat 2, with showing the weekly rental ranging from £375 in April to £500 in July and August; a column to indicate if ‘Booked’;

(c) Columns 5 and 6 pertain to Flat 3, with weekly rental ranging from £475 in April to £595 in July and August; a column to indicate if booked;

(d) Columns 7 and 8 pertain to Flat 4, with weekly rental ranging from £425 to £550, and next to the rental rate a column to indicate if booked.

(4) Further pages under this tab are headed as ‘Spring Breaks’, ‘Autumn Breaks’ where the pricing for bookings for less than a week is detailed (for 2009). The minimum stay was 2 nights for spring and autumn breaks, and the incremental rates of rentals for bookings from 3 to 7 nights are listed.

(5) On the page headed ‘Winter Breaks’ and Easter, where the pricing carries the differentials between booking just for 1 bedroom or 2 bedrooms, and the rates range from 1 to 7 nights; the page included shows pricing from 6 January to 29 March 2008.

(6) The last page under this tab provides information on discount relating to ‘Last Minute Offers’.

26. The last tab ‘How to Book’ contains the methods of booking (by email or telephone); the terms of booking (a deposit of £50 required on booking, with balance ‘payable four weeks before arrival date and may be paid in U.S dollars or Euros’). A booking form is available under this tab for submitting a booking. Guests also book by email or over the telephone.

Booking confirmations

27. On receiving the deposit to secure a booking, a confirmation was sent out to the guest in the form of a letter. A confirmation letter dated 2 December 2014 reads as follows.

‘We acknowledge receipt of your receipt of £50 and confirm having let to you the above flat [2] for a holiday. Details of our standard conditions are attached.

Please note carefully the paragraphs referring to *Cancellation, Smoking, Parking, Pets and Children*. *If any condition is unacceptable to you please let us know by return otherwise they will be deemed to have been accepted by you.*

1. The lease will run from 4pm on Saturday 15 August 2015 until 10am on Saturday 22 August 2015.
2. The rent is £550 which includes *bed linen, towels, gas and electricity*.
3. *The maximum permitted number of residents in this flat is 4.*
4. The balance of the rent amounting to £500 is payable on or before 18 July 2015. [methods of payment by cheque or interbank transfer]

When paying the balance we would be grateful if you would let us know your estimated time of arrival, the number of residents and the particular beds which you would like made up beforehand.’ (italics here is in bold typeface in the original letter)

28. A confirmation letter dated 2 April 2014 reads similar to the December one and suggests that the confirmation receipts were standard letters with particulars inserted for each booking.

29. A confirmation letter would be accompanied by a two-page leaflet. The first page sets out the ‘Directions to Crail House’, and the ‘Details of the accommodation’ of apartments 2 and 4, and apartment 3, followed by:

‘**Garden** – A separate area of garden is allocated to each apartment. In addition all residents, with a head for heights, may use the elevated seats which overlook the harbour.

Laundry – A clothes washer and tumble drier are provided for the convenience of the residents of the three flats. There is a drying green for communal use.

Shops etc – Shops, including post office, restaurants and bus stop are within 200 yards. There is a small supermarket usually open until 8:00pm. If you will be arriving after 8:00pm and would like provisions purchased to await your arrival then please list your requirements when sending the balance of the rent and we will shop for you.’

30. Overpage are the standard conditions which are set out under eight capitalised headings in bold: (i) Cancellation, (ii) Payment of balance of rent, (iii) When to arrive and when to leave, (iv) Parking, (v) Children, (vi) Smoking, (vii) Domestic pets, and lastly:

‘**CLEANING**

We do not expect you to spend your holiday doing housework, but we do ask that you leave the flat in a clean and tidy state with dishes put away and all bins emptied. Stripping the beds you have used is a real bonus – but certainly not “a condition”!’

Star award by Visit Scotland (formerly the Scottish Tourist Board)

31. For his letting business, Sheriff Cox had a subscription for an entry in: (a) Visit Scotland Regional Guide 'Where to Stay', and (b) Association of Scottish Self-Caterers (ASSC). Reliance was placed in witness evidence of the services that were offered, and of the high standard of housekeeping and maintenance for the let apartments, with reference to the inspection reports from Visit Scotland carried out on 5 March 2012.

(1) Flat 2 achieved the grading of '3 Star Self Catering' with an overall score of 123/175, which was 70%. The improvement advice included items such as: frayed arm covers on the suit; stained ceiling lampshade; light cover for cooker extractor to be screwed back. 'Housekeeping generally to a high standard' was noted.

(2) The scoresheet for Flat 2 from Visit Scotland from the visit in March 2012 included a category under the heading of 'Management Efficiency':

- (a) 'Pre-arrival guest information including brochure', the score was 3 out of 5;
- (b) 'Welcome and arrival procedures', the score was 3/5;
- (c) In-unit guest information and personal touches, the score was 4/5;
- (d) Overall score was 10/15 or 66%.

(3) Flat 3 achieved an overall score of 117/175, at 66%; the individual scores were similar or identical to those for Flat 2.

(4) Flat 4 achieved an overall score of 133/175, at 76%; the higher overall score would seem to be due to the 'facility requirements' as compared with Flats 2 and 3 – the apartment is 'self-contained' with 'extra WC and washbasin'.

(5) The improvement advice for Flat 4 was longer than Flats 2 and 3, and included: damage above the bath with plaster coming off; discolouring of the overspill of glue around a wardrobe area; marking to carpet.

(6) Flat 4 would have precluded the award of a 4 Star on account of the housekeeping but the accessor had overridden the award grading back to a 4 Star, accepting the explanation that the cleaning was not done by the usual cleaner.

MRS TURNBULL'S EVIDENCE

32. Mrs Turnbull worked full time, but she took over and continued with the running of the business on a similar basis after Sheriff Cox's death, with hired help. She supplemented the contemporaneous records with additional evidence in support of the appellants' case that the nature of the business under Sheriff Cox was more than the provision of furnished holiday accommodation.

The tasks in running the business

33. The administration tasks undertaken to run the business as summarised by Mrs Turnbull include: make up mail shots, booking sheets, reply slips, maintain database, print labels; take bookings by phone, mail or email. Check emails daily and respond to emails; send booking confirmations and Terms and Conditions; send deposits to bank; record bookings on sheet and email web host; purchase required ink, paper, envelopes and stamps; co-ordinate cleaners and arrange access and supervise work; arrange electric, gas and water suppliers; record gas and electric meter readings and submit to suppliers; placing adverts – Pets at Home, Holiday Cottages, Roomfinder, Scotsman, Visit Scotland (star rating); update visitor information; update terms and conditions; pay bills, bookkeeping; rates exemption application; post back any items left by guests.

34. Routine cleaning needs to be scheduled for each flat, the communal hall and entrance and laundry room, the summer house and outdoor seats. The laundry schedule includes tasks such as: strip beds, separate sheets and towels; whites and coloureds; treat soiled items before wash; hang out washing to dry or tumble dry; machine iron sheets and pillowcases and duvet covers; hang on airer before folding and storage; ensure all towels and bedding are named; wash tablecloths, oven gloves and tea towels separately and iron.

35. The general maintenance tasks undertaken by Sheriff Cox were summarised as: turn on heating for guests and adjust settings for season; check lights and replace bulbs; check smoke alarms and replace batteries; sort waste for recycling; inventory check and replace broken and old items; boiler and gas fire checks; annual roof check; gas safety check, aerial repairs; the bulk buying of toilet paper, washing powder, cleaning products, other consumables.

36. Garden maintenance needed to cover the main garden, guests lawn, drying green where the main tasks concern the lawns, which require cutting and edging the grass, aerating and scarifying. The main garden has a flower border, which involves bedding plants to give colour; pruning and applying fertiliser to rose borders. Weeding is required for all garden areas, with weedkillers to be applied to parking area, and paths; and rock salt if icy in winter.

37. Mrs Turnbull spoke specifically of Sheriff Cox taking ‘great pride in maintaining the “Castle grounds”’, being ‘in particular obsessed about his lawns’, ‘often found on his hands and knees hand weeding the grass’; and ‘often complimented on how well the grass looked’.

38. Mrs Turnbull described Sheriff Cox and his wife as being ‘available to guests 24/7 as they lived on site with guests passing their back door whenever entering or leaving the flat’.

The Annual Allocation of Time

39. Mrs Turnbull produced a schedule for the year 2013-14 to illustrate the allocation of time in running the business. The annual total of 1,260.75 hours from each month from April to March (plus 100 hours not assigned to any one month) was allocated to the categories:

- (1) Guests: 135.25 hours
- (2) Cleaning: 255.25 hours
- (3) Laundry: 258.50 hours
- (4) Garden: 371.25 hours
- (5) Maintenance: 89.50 hours
- (6) Admin: 151 hours

40. The first four categories are then grouped together as services, totalling 1,020.25 hours to be 80.92% of the overall time. When asked how these figures were arrived at, Mrs Turnbull said she had gone through purchase invoices, spoke to Sarah who helped with cleaning and laundry, and what Sarah did when Sheriff Cox was on holiday with the bookings, and that it was her ‘best guesstimate’.

Additional facilities

41. With photographs and invoices, Mrs Turnbull described what she considered to be the ‘additional’ facilities provided by Sheriff Cox in relation to the holiday letting business.

- (1) A bookcase stands at the communal hall for books, DVDs, and leaflets about local attractions for the guests to use.
- (2) Golf clubs, tennis and badminton racquets, beach balls, crab lines, fishing nets, frisbees and bucket and spades were kept in the porch area for guests to use, and later relocated to the summer house.

- (3) All guests have shared use of the former tennis court area, summer house, garden furniture, and barbeque facilities.
- (4) All flats are fully furnished and well-equipped for self-catering, with tea, coffee, basic foods such as oil, salt and pepper, being provided. Consumables like cling film, tin foil, kitchen roll, washing up liquid, dishwasher tablets and hand wash are also provided.
- (5) A Guest Information pack, a TV-DVD player, Wi-Fi, games and puzzles.
- (6) All bedding (with an option of allergy free bedding) and towels, dish cloths and tea towels were provided.
- (7) Soap and shower gel and toilet paper were provided in bathrooms.

Schedule of guests use of facilities

42. Mrs Turnbull lodged a three-page schedule to show the facilities used by guests during their stay at Crail House apartments, which are summarised below.

- (1) On arrival, welcome and assistance with luggage; shown to apartments and facilities; 'Guests told host on site to be of assistance at any time.'
- (2) In evening: cook meal using cooker, pots and pans and microwave; eat meal using crockery and cutlery; wash up dishes using cloth, washing up liquid and tea towels provided; sit on sofa and chairs provided; watch TV or DVD or play game or do puzzle.
- (3) Bedtime: 'Wash/shower using hot water, soap and shower gel and towels provided'; 'Sleep in beds using bedding provided'.
- (4) Next morning: repeat entries similar to cooking dinner for breakfast in terms of cooking and washing up; 'Interact with host seeking guidance on activities; e.g. arranging tee times etc if required'; 'pick a book to read'; 'play football, tennis, badminton on lawn using equipment provided'; 'go crabbing with crab lines and buckets provided'; visit tourist attractions recommended; 'walk the coastal path which surrounds the property'; 'enjoy the tranquillity and peace of the garden sitting on the garden furniture provided'.
- (5) Lunchtime: entries regarding cooking, eating, and washing up same as in evening (not repeated here); or 'visit one of the cafes or restaurants recommended'.
- (6) Afternoon: entries same as morning activities (not repeated here), plus 'Launder clothes using washing machine and drying facilities provided'.

The type of holiday offered

43. In evidence, Mrs Turnbull described the type of holiday Sheriff Cox offered as 'varied' but that it included the following:

- a) a relaxing atmosphere – scenic views and well maintained garden
- b) peaceful and private – secluded walled garden
- c) therapeutic – guests choose a Crail House holiday to recover post operations
- d) a reading holiday – books provided
- e) a painting holiday – scenic vantage points, Wild at Art
- f) a golfing holiday – booked tee times, leant golf clubs, provided transport
- g) a walking holiday – guidance and advice on coastal path walks
- h) a beach holiday – provided buckets and spades, crabbing lines, fishing nets

- i) a festival holiday – Crail Festival, East Neuk Festival, Pittenweem Arts Festival
- j) a sightseeing holiday – guidance on local attractions
- k) a food trail holiday – local knowledge of restaurants’

44. Mrs Turnbull elaborated on each aspect of the type of holiday offered by Crail House.

- (1) The scenery and landscape nearby were the most cited attractions for visiting Fife according to the Scotland Visitor Survey 2015 and 2016.
- (2) Staying in a Crail House apartment is ‘the equivalent of having a suite in an exclusive country hotel with a concierge on site and without the constraint of set mealtimes and the fear of a chambermaid disturbing you’.
- (3) Sheriff Cox ‘being a dog lover himself, welcomed pets and dogs in particular to Crail House and looked after their welfare also. They would also dog sit if required’.
- (4) Many of the guests were families with young children and my father and Jean used to babysit to allow the parents to enjoy a night out. An email from a guest dated 23 April 2019 was referred to, wherein Mrs Worrell stated:

‘I can certainly confirm that your father and Jean babysat for me, at least once and possibly twice. And I always knew the offer was there.

Jean also offered to let Bailey [the guest’s dog] out into the garden for me if I was going to be out for more than a couple of hours. [...]

More generally they were both incredible helpful regarding places to eat, and I’m pretty sure they booked us into [a restaurant] one time when our mobile signal was not too good. [...]

They were both terrific hosts, as evidenced by the fact that I rebooked more than 20 times, and definitely went above and beyond to ensure that guests had a wonderful holiday.’

(5) Sheriff Cox ‘would provide transport for those who did not have their own transport, meeting guests at the station and taking them to hospital if required’, stated Mrs Turnbull, and referring to a letter dated 5 October 2011 to Allianz Cornhill (Insurer), written by Sheriff Cox as proof. The letter was ‘in connection with an accident involving two of [his] holiday tenants on 1 September’, which was three pages long.

(a) The first page described the accident at 2300 hrs on 1 September 2011, in which a guest, Mrs Smith, had fallen in the garden and injured her shoulder and arm and was in great pain.

(b) Sheriff Cox was unable to summon an ambulance, and Mrs Smith’s partner was inebriated and could not drive. It fell upon Sheriff Cox to take Mrs Smith to the community hospital in St Andrews, Fife, which did not have the necessary X-ray facilities, causing a further journey to take Mrs Smith to Ninewells in Dundee.

(c) The second and third pages of the letter explained how the accident happened; Mrs Smith returned from a meal out to Crail House, and the outside lights had failed to activate as she walked through the gates when it was pitch dark.

(d) Sheriff Cox confirmed to the Insurer that the fuse had tripped, causing the outside lights to fail to activate via heat sensors; and that if he had known of the fault, he could have arranged to turn on the lights manually from nightfall, but:

‘Being elderly my wife and I are very rarely out after 9pm and I therefore had no reason to believe that the lights were not activating.’

(6) Another testimony from a guest (Martyn) was relied on in Mrs Turnbull’s evidence.

‘Graham and Jean acted as an outpost of Fife Tourist Information.

1. Informing us of pubs, restaurants and club houses ... which were worth a visit or should be avoided.
2. Local attractions new to Fife e.g Hidden Bunker, Cheese Factor, Distillery or Brewery

... provided practical help ... [with Jean picking them up at the train station and take them to the garage to pick up their hired car]

... when the heating/ hot water system broke down [in the flat they are staying] Jean invited us to take showers in their flat until the engineer managed to repair the boiler.’

(7) Mrs Turnbull said ‘other services provided included arranging golf for guests and booking tables at local restaurants’, and ‘on occasion guests were accommodated in Flat 1 and provided with breakfast and supper’. For these claims, Mrs Turnbull relied on a testimony from a guest Mr Lloyd, spoke of Sheriff Cox (Graham) and Jean as follows:

‘But the most important thing to us was that they treated us as good friends and I looked forward to my chats with Graham on a wide range of topics.

- Graham regularly booked tees for me ...
- On one occasion he booked a tee for us both at the New Couse ... joined later by Jean and [Mrs Lloyd] for lunch ... which Graham treated us to.
- Graham regularly booked tables for our evening meals at local eateries.
- On one occasion Graham and Jean put us up in their flat for 4 nights at a normal rate. They also provided breakfast and supper at no extra cost.
- On the days I played golf Jean would drive [Mrs Lloyd] down to St Andrews for a few hours shopping.’

45. These testimonies from former guests were produced during the Tribunal appeal process. HMRC had asked the appellants to provide full disclosure of all the correspondence with customers in relation to these comments from guests, but the appellants declined to do so. HMRC had asked if the appellants were going to call any of the guests as witnesses for them to be cross-examined and the appellants had confirmed that they would not.

Festival and wedding events

46. Mrs Turnbull related that in July 2014, as part of the Crail Festival, a jazz picnic was held on the guest lawn and guests were invited to participate as part of their holiday experience at no extra charge. In subsequent years, guests have been able to enjoy a performance of ‘A Midsummer Night’s Dream’, archery and falconry displays in the grounds of Crail House during the Crail Festival.

47. Mrs Turnbull said in evidence that in August 2013, ‘a very successful guest wedding took place on the former tennis court. Following the upload of the photographs of this wedding in September 2013, the business received a number of enquiries about hosting further weddings. However, due to Sheriff Cox’s ill health, these did not proceed. The

business has since engaged a wedding co-ordinator to look at developing this side of the business.

Accounts of the business

48. The relevant pages of Sheriff Cox’s self-assessment returns for the four years to 5 April 2014 and from 6 April to 27 December 2014 have been helpfully summarised to show the categories of expenditure

	Income	Expenses	Profit
2010-11	38,958	19,070	19,888
2011-12	28,893	20,987	7,906
2012-13	25,601	24,599	1,002
2013-14	29,639	24,085	5,554
6 April to 27/12/14	24,122	16,557	7,565

49. The expenditure was broken down under the headings of:

- (1) Water rates ranging from £1,242 in 2010-11 to £1,861 in 2012-13
- (2) Insurance from £1,104 in 2010-11 to £1,353 for period to 27 December 2017
- (3) Wages from £3,600 to £4,200 per annum
- (4) Cleaning from £1,585 in 2010-11 to £2,590 for period to 27 December 2017
- (5) Repairs and renewals ranging from £4,646 in 2010-11 to £10,162 in 2012-13
- (6) Garden from £1,180 in 2010-11 to £1,929 in 2013-14
- (7) Utilities from £2,162 (the lowest) in 2011-12 to £2,995 in 2012-13
- (8) IT costs from £205 in 2012-13 to £524 in 2013-14
- (9) Advertising from £359.52 in 2013-14 to £943 in 2010-11
- (10) Miscellaneous from £177 in 2011-12 to £1,678 in 2010-11.

50. Mrs Turnbull grouped certain headings of expenditure together to show four categories of expenditure; namely: *services, maintenance, garden and administration*. According to Mrs Turnbull’s categorisation, the expenditure for services for these periods averaged at 52% of all the expenditure. The point made by Mrs Turnbull here was that the average percentage was indicative of the significance of services being provided by the business.

51. It was also highlighted that the business received 100% Small Business Bonus relief from Fife Council against any non-domestic rates. The relief for the financial year 2014-15 was £621.72 per flat.

Comparative rentals from short-terms assured tenancy

52. An email dated 10 May 2019 from Stonehouse Lettings in St Andrews, Fife, addressed to Mrs Turnbull in relation to her enquiry states as follows.

‘From looking back [at] our records I can confirm that in 2014 a similar 2 bed flat in the location discussed would have been in the region of £500-525 per month, a 3 bed in the region of £600 per month.’

53. In evidence, Mrs Turnbull said that she have had to engage a furnished holiday lettings company to assist her in running the business, and:

‘in particular looking after the welfare of the guests as [she] simply did not have the time the business needed to provide the level of service to which past guests had become accustomed and for which they returned year on year.’

THE APPELLANTS’ CASE

54. Mrs Turnbull’s submissions overlapped with her witness evidence at several places. I summarise only what appears to be the legal submissions.

(1) The occupancy statistics for 2011 to 2014 illustrate that despite the change in the qualifying criteria for Furnished Holiday Let (‘FHL’) introduced by the Finance Act 2011, the business was a commercial lettings business of furnished holiday accommodation as defined by Part 3, Chapter 6 of the Income Tax (Trading and Other Income) Act 2005 (‘ITTOIA’).

(2) It is submitted that ‘it was never the intention of Parliament that the business assets of a business consisting of commercial lettings of qualifying furnished holiday accommodation be excluded from business property relief under s 105(3)’ of IHTA.

(3) In formulating legislation for commercial FHL to be treated as ‘earned income’, Parliament was recognising the distinction between the nature of activities carried out within the business of commercial FHL and other property businesses. Mr Ian Stewart, the Economic Secretary to the Treasury, was recorded to have stated: ‘The Financial Bill provides that receipts from furnished holiday lettings will generally be regarded as earned income’ (Hansard debate HC Deb 14 June 1984, vol 61 cc 1064-5).

(4) If receipts from FHL are generally regarded as earnings then a furnished holiday letting business cannot be an investment business.

(5) The explanation of what is meant by the commercial letting of furnished holiday accommodation contained in ITTOIA makes no reference to the provision of services.

(6) The provision of services in the commercial letting of furnished holiday accommodation is not required for such a business to be treated as a trade under s 127 ITA 2007.

(7) The specialist rules applicable to the treatment for the purposes of tax on chargeable gains of a commercial letting of furnished holiday accommodation are contained under s 241 of TCGA. An intelligent business man would find it illogical that HMRC insist the business assets which are an integral part of commercial letting of furnished holiday accommodation be treated so differently for capital taxes.

(8) An intelligent business man would look at legislation surrounding the various tax treatments of the commercial letting of furnished holiday accommodation and take it into consideration in deciding whether such a business was one of wholly or mainly holding investments.

(9) To an intelligent business man holding investments means holding securities, shares and money in bank accounts.

(10) Section 105(3) does not say wholly or mainly holding land and buildings as an investment and that an intelligent business man would not construct that meaning from the wording ‘holding investments’.

(11) Paragraph 63 of Mrs Turnbull’s skeleton argument is reproduced in full as follows.

‘Paragraph 25278 of HMRC’s Inheritance Tax Manual used to state:

“The Inland Revenue Solicitor has advised the office that in some instances the distinction between a business of furnished holiday lettings and say a business running a hotel or motel may be so minimal that the courts would not regard such a business as “wholly or mainly holding investments” for the purposes of section 105(3) Inheritance [Tax] Act 1984.

You should therefore normally allow relief where:

(i) The lettings are short term (for example weekly or fortnightly), and

(ii) The owner, either himself or through an agent such as a relative or housekeeper, was substantially involved with the holiday makers in terms of their activities on and from the premises even if the lettings were for part of the year only.”

(12) It is submitted that Sheriff Cox and Jean were substantially involved with the holidaymakers at Crail House in terms of their activities on and from the premises for the whole year.

55. In the hierarchy of cases, *George* is ‘pre-eminent’, being a decision of the Court of Appeal. In rebuttal to HMRC’s reliance of [27] in *George*, it is submitted that Carnwath LJ was speaking about a ‘building held for letting’ where ‘additional services or facilities provided to the occupants ... are unlikely to be material’.

56. The appellants’ position is that it is ‘pure and simple’ that Carnwath LJ’s conclusion ‘is not relevant to a furnished holiday letting operation carried out in a number of properties’. Instead, the appellants submit that *George* at [60] is directly relevant, where Carnwath LJ observed that:

‘It is difficult to see any reason why an active family business should be excluded from business property relief merely because a necessary component of its profit making activity is use of the land.’

57. The appellants relegate the importance of *Pawson* to be ‘the second case in the hierarchy’, being ‘a decision in an appeal to a single judge sitting as the Upper Tier Tribunal’. HMRC’s reliance of [42] in *Pawson* wherein it was stated that the judge took as ‘a starting point the proposition that the owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity’ is ‘flawed’.

(1) It is submitted that this proposition does not sit easily with what Carnwath LJ said in *George* about the holding of land being one component in the business.

(2) The appellants relied on what has been observed at [44] in *Vigne FTT*:

‘It is not correct to start with the preconceived idea that in any given situation, the business is wholly or mainly one of holding investments and then to ask whether there are factors that result in that preliminary view being altered. The proper starting point is to make no presumption one way or the other, but to establish the facts and then to determine whether, taken together, they indicate that the business is wholly or mainly one of holding investments.’

(3) On appeal by HMRC, the Upper Tribunal in *Vinge* has further commented at [28]:

‘This clearly overstates the position; *Pawson* makes it clear that such an assumption only applies to “owning and holding land in order to obtain an income from it”, a much more restricted proposition.’

(4) Further, the Upper Tribunal in *Vinge* has cited Birggs LJ in the Court of Appeal, in refusing permission to appeal in *Pawson*, said as follows:

‘I accept Mr Gordon’s submission [for the taxpayer] that there is no presumption that requires to be rebutted, that a business, which consists of the exploitation of land for profit, is an investment business. Of course it must be looked at in the round.’

(5) In *Brander FTT* at [42], where Judge Reid had said that in order to decide whether a business consisted ‘mainly’ of holding or making investments:

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

(6) A starting position as set out by the FTT in *Zetland* at [76] accords much more with the authorities:

‘The Tribunal must not start with the fact that the business consists entirely of the ownership of land giving rise to investment activity. It must be mindful of the broad spectrum of business and the fine distinctions between different businesses. The better approach is for the Tribunal to have an open mind and not to pre-judge the issue at the start.’

(7) The wrong test has been applied by the FTT in *Ross*.

58. It is submitted that unlike other sources of income relating to property, furnished holiday letting businesses are deemed to be trading for income tax and capital gains tax purposes as a trade, but that it is inconsistent that they are not generally regarded as a trading activity for inheritance tax purposes.

59. Finally, it is submitted that if the correct test is applied, then it is clear that Sheriff Cox and Jean Cox ‘devoted time and effort to providing a unique venue with exceptional grounds for their guests’, and that ‘their interest in their guests and the facilities and service provided all year’ meant that the business was not one which consisted wholly or mainly of holding investments; that the present case is to be distinguished from the facts in *Pawson* and *Green*, where the services provided were minor compared to those provided at Crail House.

HMRC’S CASE

60. For the respondents, Mr Schryber submits that the burden is on the appellants to prove that the s 221 Notice should be varied or quashed as provided by s 224:

‘If an appeal is notified to the tribunal, the tribunal must confirm the determination appealed against (or that determination as varied on a review under section 223E) unless the tribunal is satisfied that it ought to be varied (or further varied) or quashed.’

61. The statutory teste in this appeal is easily stated, namely whether the letting business consisted ‘wholly or mainly of ... making or holding investments’ as per s 105(3). There is no explicit statutory provision for a time or period for which this test has to be satisfied.

(1) HMRC submit that the time at which the test had to be satisfied was on the date of the deemed transfer of value. In deciding whether the test is met, one should look at an appropriate period leading up to the date of the transfer of value: *Martin* at [16].

(2) The decided cases on furnished holiday lettings in particular bear out the Court of Appeal’s view in *George* that additional services or facilities are unlikely to be enough to prevent the business from remaining mainly that of holding investments.

(3) The nature of the business is relevant in deciding what constitutes investment and non-investment activity: *George* at [30].

(4) Activities which are ancillary to an investment activity are not necessarily also investment activities: *George* at [60]. However, HMRC submit that activities such as provision of water, electricity and gas might properly be viewed differently in the context of a furnished holiday lettings business as compared to operating a caravan site.

(5) To determine the nature and extent of the activities, HMRC looked at the evidence:

(a) Provision of parking spaces, communal laundry facilities and drying green is all part of an investment activity;

(b) The provision of kitchen equipment, furniture, welcome pack, towels and consumables is ancillary to the investment activities.

(c) The provision of books, DVDs, leaflets, tennis racquets, crab lines etc was non-investment facility but this is immaterial, of only very minor significance.

(d) There is a substantial difference between Sheriff Cox living on site thus potentially being available to assist residents, and a genuine 24-hour reception and concierge service.

(e) Most activities mentioned are just normal holiday activities that are possible at most holiday accommodation and were not provided by the business; e.g there was no suggestion of any therapies being offered to make it a 'therapeutic' holiday. Nor can giving recommendations on where to eat be reasonably described as providing a food trail holiday.

(f) The comparison to a suite in an exclusive hotel is not realistic given that the facilities and services typically provided at an exclusive hotel were not available to a guest at Crail House.

(g) Dog-sitting, baby-sitting, making table and golf time bookings, offering transport, while these activities are non-investment activities, there is little evidence as to the extent of these activities.

(h) The breakfast and supper to a couple staying at Flat 1 appears to have been a one-off occurrence.

(i) The jazz picnic was a one-off event of little significance in terms of the business as a whole, while events in subsequent years are not relevant as these events happened after the date of transfer.

(j) The wedding was a one-off; the potential activity was not pursued by Sheriff Cox due to ill health.

62. The 2012 reports from Visit Scotland show that the business was run to a very good standard but ultimately unexceptional holiday lettings business like the one found in *Green*. Compared to *Ross*, the non-investment services and facilities provided in *Ross* were 'substantially greater' than those provided at Crail House, and the Tribunal still found that BPR was not due in *Ross*.

63. The Tribunal in *Graham* found that more was being offered to guests than in *Ross*. HMRC submit that the facts and circumstances in this appeal fall well short of those in *Graham* in terms of non-investment element.

DISCUSSION

The statutory test

64. Section 112 IHTA provides for BPR to be available on a ‘all or nothing basis’, whereby:

‘An asset is an excepted asset in relation to any business property if it was neither –

- (a) used wholly or mainly for the purposes of the business concerned throughout the whole or the last two years of the relevant period ..., nor
- (b) required at the time of the transfer for future use for those purposes...’

65. HMRC have not averred that the business in question was ‘wholly’ the holding of investments. The statutory test to be applied to determine the appeal concerns whether the Crail House letting business was ‘*mainly*’ the holding of investments..

66. The issue is a question of fact and degree, to be decided on the basis of the evidence, which is to be considered ‘in the round’ (*George* at [13]) and by establishing ‘where the preponderance of business activity lies’ (*Brander FTT* at [42]).

67. The appellants bear the burden of proving that the business was not ‘*mainly*’ the holding of investment, and the standard of proof is on the balance of probabilities.

The submission that FHL inconsistently treated for IHT purposes

68. I am conscious that Mrs Turnbull is not a legal representative, and there is no doubt that Mrs Turnbull has made a valiant effort in representing the appellants. The legal submissions, however, would seem to have come from senior counsel consulted by the appellants. The appeal is ultimately to be determined upon a finding of fact, and does not turn on a point of law. Of the legal arguments that have been advanced, however, I will address briefly as follows.

(1) Whether the legislation is inconsistent in the way it treated FHL businesses for IHT purposes as distinct from income and capital gains taxes is a matter for Parliament; see *Green* where the same argument was mooted.

(2) HMRC guidance and manuals have no force of law, and can change due to judicial rulings without a change in the legislation itself. They are for internal use by HMRC decision makers, but have to be published as a matter of public policy and transparency.

(3) The HMRC manual IHT25278 quoted in the appellants’ skeleton argument would appear to be a superseded version, and the copy included in the bundle was printed on 7 March 2012, in which HMRC’s position was inversed as compared with the citation in the appellants’ skeleton argument. The version of manual included in the bundle says quite the opposite to what the appellants have included, as quoted verbatim below.

‘In the past we have thought that business property relief would normally be available where:

- The lettings were short term, and
- The owner, either himself or through an agent such as a relative, was substantially involved with the holidaymakers in terms of their activities on and from the premises.

Recent advice from Solicitor's Office has caused us to reconsider our approach and it may well be that some cases that might have previously qualified should not have done so. In particular, we will be looking more closely at the level and type of services, rather than who provided them.'

The legal principles

69. The appellants' submissions seem to have taken a contentious stance against Henderson J's approach in *Pawson*, wherein was stated at [42] at the start of the 'Discussion' section that:

'I take as my starting point the proposition that the owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity.'

70. Henderson J's 'proposition' has been interpreted as 'to transpose the statutory test' in *Vinge FTT* at [44]. In the context of the decision proper in *Pawson*, I understand Henderson J as merely making a 'proposition' to be *his* starting point in considering the rival submissions. I do not propose to repeat a similar review of the authorities to follow the debate which seems to have been engendered by the (mis)interpretation that Henderson J's 'proposition' has in effect set up a legal 'presumption' to be rebutted by the taxpayer appellant.

71. I should cite instead the legal principles derived by Judge Cannan at [36] in *Best* to be applied in deciding whether or not a business consists wholly or mainly of holding investments:

(1) The various activities involved in operating a business relating to the exploitation of land may be allocated between "investment" and "non-investment" activities.

(2) In the light of that allocation the question is whether the investment element of the business is predominant (See *George* at [11]).

(3) The ultimate issue concerns the relative importance of non-investment activities to the business as a whole (See *George* at [51]).

(4) There is a wide spectrum involved in such businesses. At one end is the granting of a tenancy together with activities sufficient to make it a business. At the other end is the running of a hotel or shop on the land. The holding of land as an investment may be the very business carried on or it may be merely incidental to the business. It may also be one of a number of principal components of a composite business (See *George* at [12] and [16]).

(5) It is necessary to look at the business in the round. The relative income and profitability of the various activities is relevant but not determinative (See *George* at [13]).

(6) The exception in section 105(3) IHTA 1984 is not confined to purely passive property investment (See *George* at [18]).

(7) Property "management" is part of the business of holding property as an investment, including finding occupiers and maintaining the property as an investment. However that term does not extend to additional services or facilities provided to occupiers and it is irrelevant whether the provision of such additional services is included in the lease. The characterisation of such services depends on the nature and purpose of the activity and not on the terms of the lease (See *George* at [27] and [28]).

(8) The test to be applied is that of an intelligent businessman, concerned with the use to which the asset was being put and the way in which it was being turned to account (See *McCall* at [11]).

(9) The test involves a question of fact and degree as to where a particular business falls within the spectrum (See *McCall* at [18]).

The preponderance of business activity

72. In assessing the evidence, I have given more weight to the contemporaneous evidence. In particular, the business website speaks for the nature of the business as providing furnished accommodation for holidaymakers on a short-term basis for a rental. The Home Page gave details of the available accommodation, followed by local information on Crail to highlight the holiday attractions. The picture galleries were to showcase the beauty of the surroundings and the state of the accommodation. The website was designed to facilitate any browser to make a booking, with the pricing and availability readily visible. The accreditation by Visit Scotland was sought to enable the business to advertise more effectively to the public, with each apartment carrying its 3-star or 4-star label throughout the dedicated website.

73. While the business website contains hyperlinks of local information, there was no suggestion that any of these local amenities such as shops, cafes, or supermarkets were in any way an extension of the FHL business. No other services were mentioned on the website as being provided to guests at Crail House other than accommodation.

74. The advertisements were placed strategically with host websites, which would be viewed by prospective holidaymakers visiting Scotland, looking for a cottage type accommodation, wishing to bring a pet, and with newspapers under the category of ‘Self-Catering’.

75. The booking confirmation was the contract of the supply of accommodation; it states the terms and conditions of the lease (the start and end dates and times); the payment arrangements and what were included (bed linen and towels, gas and electricity); the maximum occupancy.

76. I find as a fact that the nature of the business at Crail House operated by Sheriff Cox and his wife was the letting of furnished holiday accommodation, pure and simple – it was not a business of a ‘hybrid’ nature as in *George* or *Brander*.

77. A furnished holiday letting business can be a composite business if, for instance, a complex of furnished holiday accommodation is built on a site with accompanying facilities, such as a swimming pool, a gym, with fitness and yoga classes on offer to residents, and a holiday club for children. Such a business model has a number of principal components and is a composite business. The activity of letting accommodation is one component which is investment activity for s 105(3) but is to be weighed against the other components which are non-investment activities. Depending on the relative proportion of non-investment against investment activities, the balance may be tilted in favour of the composite business being viewed in the round as not mainly one of holding investments.

78. The Crail House business under Sheriff Cox was not a composite business with a number of principal components that require me to examine the individual components to see which were investment and which were non-investment. From the obtainable facts, the predominant (if not the only) activity was to provide furnished accommodation to holidaymakers on a short-term basis. For this reason, I find the Crail House business ‘mainly’ one of holding the property as investments for the purposes of s105(3).

Were there non-investment activities to tilt the balance

79. To what extent has Mrs Turnbull’s evidence altered the nature of the business as evidenced by its contemporaneous records? I have related Mrs Turnbull’s evidence as reasonably fully as possible, for the sake of completeness, and to ascertain whether new

findings of fact can be made from her evidence that may tip the balance in favour of the appellants' case.

80. Broadly speaking, the activities that were covered in Mrs Turnbull's evidence fall into three categories.

(1) *Investment activities* include the provision of accommodation, parking spaces, fixtures and fittings, communal laundry facilities, repairs and maintenance of the buildings, gardens and grounds, and summer house, all such administration tasks as concerns dealing with bookings and advertising the apartments.

(2) *Incidental or ancillary activities* include the provision of electricity and other utilities, appliances and furniture, kitchen utensils and crockery, kitchen basics such as tea and coffee, consumables such as washing up liquid, and toilet paper, etc; cleaning the apartments and laundry of bed linen and towels between lets, welcoming guests.

(3) *Non-investment activities* include the provision of books, DVDs, information leaflets, use of tennis or badminton racquets, crab lines, frisbees or bucket and spades.

81. The ancillary activities were an integral part of the provision of the accommodation, and as such they are to be considered as part of the business of holding the property as an investment. The non-investment activities were so insignificant in scale as to be negligible.

82. As to the part of Mrs Turnbull's evidence which has relied on the testimonies of former guests, I accept the criticisms from HMRC that in the absence of full disclosure, and with no witnesses to be cross-examined, no weight should be accorded to these testimonies. Even if I were to take these testimonies at their highest, I still would not have been able to make any findings of fact that these services (dog sitting, child minding, transport, breakfast and supper) were rendered to guests with any regularity. These testimonies, if anything, point to the *ad hoc* nature of these 'extra' services. Mrs Worrell's family, for example, appeared to be regular visitors but in her 20 years as a guest, she could only recall one or perhaps two occasions when her child was being minded by Sheriff Cox and his wife. If such non-investment activities happened on a regular basis, there would have been external evidence to corroborate. For example, if the child minding service was offered in general to all visitors on a regular basis to merit the claim of being an extra service, there would have to exist certification from relevant authorities, such as Disclosure Scotland, for child protection purposes.

83. The same criticism applies to the offer of transport to take Mrs Smith to hospital. It seems to me from the correspondence with the insurer that Sheriff Cox had to be concerned with limiting the injury caused by the outside lights not being activated; the transport service provided was incidental to the provision of accommodation in 2011. Had Mrs Smith not been a guest staying at Crail House, had she not suffered injury due to the fault in the outside lighting system on the premises, Sheriff Cox would not have been called upon to deliver her to one hospital after another.

84. In terms of timing, I must consider the nature of the business as in December 2014. What was factually the nature of the business is evidenced by the contemporaneous records. Even if I had been able to find that any extra services could have rendered with any degree of regularity at some points of the business, Sheriff Cox's ability to offer these extra services would surely have been on the wane as to be close to non-existent in the two relevant years up to his date of death. In 2011, Sheriff Cox had said to the insurer that being elderly, he was 'very rarely out after 9pm'. Mrs Turnbull had said that her father was unable to follow up the wedding hosting enquiries in 2013 due to his ill health. I find it inherently implausible that in the relevant two-year period before his death, Sheriff Cox could have been running the

business with additional non-investment services with any degree of regularity that could have enabled the balance of the overall nature of the business to be tilted to such an extent that the non-investment activities would outweigh the investment activities for his overall business to qualify for BPR.

85. For the avoidance of doubt, I have no issue with Mrs Turnbull's credibility, in that I do not find her in any way set out to mislead the Tribunal, but I find her evidence to be strained, anecdotal, and at times contrived in the way that the generality of a state of affairs was suggested by implication from the particulars. For example, that Sheriff Cox was 24/7 on site to be available to the guests as suggestive of a concierge service. The description of staying in one of the apartments to be 'the equivalent of having a suite in an exclusive country hotel with a concierge on site' is an overstatement. Equally, to describe the holiday offered at Crail House to be a 'food trail' holiday when all that was provided by the business was local knowledge of where the restaurants are is overstating it. I do find Mrs Turnbull to be factually honest, and her facts were not overstated, but the implications she drew from those facts were overstated.

86. Finally, I do not find the accounting analysis of the different categories of expenditure, or the allocation of time spent across different activities, to be of any relevance in a case where the factual matrix does not point to a composite business with different components. I accept HMRC's criticisms of the unreliable bases of such allocations, but since I accord no relevance to them, I do not propose to analyse their merits further. Nor do I find it relevant to consider the rental equivalent as a comparison had the apartments been let on an assured tenancy basis, not least, as Judge Redston found in *Green* at [105]: 'the value of services cannot be established by subtracting the putative AST income from the actual income'.

87. HMRC have relied on the Visit Scotland reports on the apartments as evidence that the business was 'unexceptional' as a FHL business. I find that the business was run to a high standard for furnished holiday lettings, but there was nothing exceptional about the business to elevate it to the level of the business found in *Graham* which qualified for BPR. The non-investment activities in *Graham* were extensive: swimming pool, games room, sauna, fresh produce from the herb garden, greenhouse and fruit trees, 3 to 4 barbeques in each holiday season, receipt of grocery deliveries for guests, fresh seafood at cost price, event and party planning (3 or 4 a year), and 'prize-winning gardens. The Tribunal in *Graham* found the garden at Carnwethers was *exceptional*, and concluded at [92] that:

'Thus it will only be the exceptional letting business which falls on the non-investment side of the line. Overall we conclude that Carnwethers was an exceptional case which does, just, fall on the non-mainly-investment side of the line.'

88. Having examined Mrs Turnbull's evidence, I conclude that the Crail House letting business falls firmly on the investment side of the line. The business was therefore 'mainly' one of the holding of investments. As observed by Carnwarth LJ in *George* at [27], in the context of property management, the additional services that can be classified as non-investment activities are 'unlikely to be material' – the additional services 'will not be enough to prevent the business remaining "mainly" that of holding the property as an investment'. Similarly, Henderson J has made clear that the threshold is very high for a normal property letting business to qualify for BPR, as stated at [30] in *Pawson*:

'... The implication is in my judgment clear. In any normal property letting business, the provision of additional services or facilities of a non-investment nature will either be incidental to the business of holding the property as an investment, or at least will not predominate to such an extent

that the business ceases to be mainly one of the holding the property as an investment.’

DISPOSITION

89. I find that the business operated by Sheriff Cox consists ‘mainly of ... making or holding of investments’ for the purposes of s105(3) IHTA. The appeal is accordingly dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

90. 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.

DR HEIDI POON

TRIBUNAL JUDGE

RELEASE DATE: 3 NOVEMBER 2020