



Neutral Citation: [2022] UKFTT 219 (TC)

Case Number: TC08542

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal reference: TC/2018/06387

INHERITANCE TAX – business property relief – apart-hotel – whether business mainly holding investments – qualitative test – level of services provided – held – appeal dismissed

Heard on: 18-20 October 2021

Judgment date: 13 July 2022

Before

**TRIBUNAL JUDGE ANNE SCOTT
MEMBER JANE SHILLAKER**

Between

**MR BRUCE FIRTH AND MRS RITA FIRTH
AS THE TRUSTEES OF THE L BATLEY
1984 SETTLEMENT**

Appellants

and

THE COMMISSIONERS FOR HER MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: **Amanda Brown QC instructed by KPMG LLP**

For the Respondents: **Dr Christopher McNall, Counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs**

DECISION

INTRODUCTION

1. This appeal is brought by Mr and Mrs Firth, the appellants, in their capacity as Trustees of the Batley 1984 Settlement (“the Trust”) (also known to HMRC as the Lawrence Batley 1984 Settlement)..
2. The Trustees appeal against Notices of Determination (“the Notices”) issued to the Trustees by the respondents (“HMRC”) on 7 September 2018 refusing inheritance tax (“IHT”) Business Property Relief (“BPR”). They did so on the grounds that the interest of the Trustees in the business carried on by the Lawrance (Hotel Living) Limited (“The Lawrance”) consists mainly in the holding of investments and therefore is not a qualifying business for the purposes of BPR. That is the sole issue in this appeal.
3. The date of the ten year anniversary of the Trust was 14 November 2014 (the “relevant date”). On 28 May 2015, both Trustees notified HMRC of a discretionary trust ten year charge and asserted a claim to BPR on the Trust’s holding of 2,605,000 x 5p ordinary shares in The Lawrance stating a value (at 69p per share) of £1,797,450. The IHT declared in respect of that holding was stated to be zero due to a claim to 100% BPR.
4. There is no dispute as to the valuation and the appellants only ask the Tribunal to quash the Notices.

The hearing

5. For the appellants, we heard evidence from Yvonne White, General Manager, Anthony Booth, Finance Director and Simon Bullock, Managing Director. We also heard from Officer Shona Crump for HMRC. We had a hearing bundle extending to 536 pages and a bundle of authorities extending to 286 pages. Additional materials lodged by HMRC extended to 43 pages together with a copy of the refusal of leave to appeal to the Court of Appeal in *HMRC v Pawson*. Ms Brown latterly consented to admission thereof. We also had Skeleton Arguments for both parties. The appellants produced an Evidence Table referenced to the appellants’ Skeleton Argument. We had the benefit of a video of a few apartments in the Micklegate property in York and the Kings House property in Harrogate. Lastly, we had the benefit of transcripts.
6. We do not propose to narrate the procedural history since it is neither in dispute nor relevant.

The issue

7. Both parties agree that The Lawrance carries on a business and that the business carried on by the Lawrance is not of a type previously considered by the Courts and Tribunals.
8. By letter dated 23 May 2018, HMRC accepted that the nature of the business is that of an aparthotel and not furnished holiday letting. However, Dr McNall argued that it was the equivalent of furnished holiday letting. In essence, HMRC’s argument is that the business was that of primarily the provision of self-contained short term rental accommodation.
9. The burden of proof is with the appellants to displace the Notices. They can only do so by satisfying the Tribunal, on the balance of probabilities, that at the relevant date the business was not one of mainly holding investments.

The Law

10. Section 103 of the Inheritance Tax Act 1984 (“IHTA”) reads:-

“103.

(1) In this Chapter references to a transfer value include references to an occasion on which tax is chargeable under Chapter III of Part III of this Act (apart from Section 79), and

(a) references to the value transferred by a transfer of value include references to the amount on which tax is then chargeable, and

(b) references to the transferor include references to the trustees of the settlement concerned.

(2) For the purposes of this Chapter a company and all its subsidiaries are members of a group, and ‘holding company’ and ‘subsidiary’ have the meaning given by Section 1159 and of Schedule 6 to the Companies Act 2006.

(3) In this Chapter ‘business’ includes a business carried on in the exercise of a profession or vocation, but does not include a business carried on otherwise than for gain.”

11. Section 104 of IHTA reads:-

“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.

(2) For the purposes of this section, the value transfer by transfer of value shall be calculated as a value on which no tax is chargeable.”

12. Insofar as material, section 105 IHTA reads:-

“105 **Relevant business property**

(1) Subject to the following provisions of this section ...

...

(3) A business or interest in a business, or shares in or securities of a company, are not relevant business property if the business or, as the case may be, the business carried on by the company consists wholly or mainly of one or more of the following, that is to say, dealing in securities, stocks or shares, land or buildings, or making or holding investments.” (emphasis added)

The case law

13. We were referred to a number of authorities:

(1) *IRC v George* [2003] EWCA Civ 1763 (“George”) (caravan park)

(2) *McCall & another (personal representatives of McClean (deceased)) v HMRC* [2009] NICA 12 (“McCall) (seasonal grazing)

- (3) *HMRC v Lockyer & Robertson (Personal representatives of Pawson)* [2013] UKUT 50 (TCC) and the related Court of Appeal decision; [2013] EWCA Civ 1864 (“Pawson 1 and 2” respectively) (furnished holiday lets)
- (4) *The Trustees of David Zetland Settlement v HMRC* [2013] UKFTT 284 (TC) (“Zetland”) (office building)
- (5) *John Best (Executor of Alfred Buller) v HMRC* [2014] UKFTT 077 (TC) (“Best”) (business centre)
- (6) *Green v HMRC* [2015] UKFTT 0334 (TC) (“Green”) (self-contained holiday accommodation)
- (7) *Executors of Marjorie Ross v HMRC* [2017] UKFTT 0507 (TC) (“Ross”) (holiday cottages with staff accommodation)
- (8) *HMRC v The Personal Representatives of the Estate of Maureen M Vigne (Deceased)* [2018] UKUT 0357 (TCC) (“Vigne”)(livery)
- (9) *HMRC v 47 Park Street* [2019] EWCA Civ 849 (“Park Street”) (VAT and fractional interests in a property)
- (10) *Executors of the Late Sheriff Graham Loudon Cox v HMRC* [2020] UKFTT 0442 (TC) (“Cox”) (holiday apartments)
- (11) *HMRC v Andrew Michael Brander (as executor of the Will of the late fourth Earl of Balfour)* [2010] UKUT 300 (TCC) (“Brander”) (houses and cottages on a Scottish estate)
- (12) *The Personal Representatives of Grace Graham (Deceased) v HMRC* [2018] UKFTT 0306 (TC) (“Graham”)(holiday lets)

14. Both parties were agreed that the leading decision on section 105(3) is that of the Court of Appeal (Carnworth and Hale LJ as they then were) in *George*. That decision was explicitly approved in *Pawson 2* by Briggs LJ, as he then was, stating that it was a very clear analysis and particularly so at paragraphs 27 and 28.

15. Carnworth LJ said at paragraphs 27 and 28:-

“27. ... First, I agree in general terms that property ‘management’ is part of the business of ‘holding’ property as an investment ... In the case of a building held for letting, management no doubt includes the activity of finding tenants and arranging leases or licenses, and that of maintaining the property as an investment. But I would not extend that term to additional services or facilities provided to the occupants (such as those referred to by Slessor LJ), whether or not they are included in the lease and covered by the rent. In the case of a building for letting, it is unlikely to be material. That will not be enough to prevent the business remaining ‘mainly’ that of holding the properties as an investment.

28. Where it does matter, in my view, the characterisation of such services depends on the nature and purpose of the activity, not on the terms of the lease, (or, where relevant, a site licence). It is true that in *Fry*, Slessor LJ noted the fact that the particular services mentioned (cleaning, heating and lighting) were optional under the lease, and that a separate charge was made. That was treated as a reason for not regarding them as ‘mere incidents’ of the tenancy. However, the converse does not follow. There is nothing in that judgment to support the view that, merely because services or facilities are required

by the lease, and their cost is included in the rent, they lose their character as services, and become part of the 'holding' of the investment.”

16. Carnwarth LJ delivered the leading judgment and there are a number of other points that he made that are of note:

(a) His starting point at paragraph 3 was to point out that the statutory test was relatively imprecise and might depend on fine distinctions.

(b) There is a distinction between “investment” and “non-investment” activities and the task is to allocate those activities on either side of that line and then decide whether the “investment” element of the business was predominant. There is a wide spectrum. At one end there is the granting of a tenancy together with activities sufficient to make it a business and at the other end 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 (paragraphs 9, 11, 12 and 16).

(c) He approved the decision of Stephen Oliver QC, as he then was, in *Martin v IRC* [1995] STC (SCD) 5 (“Martin”) where he divided activities into three categories, namely “making” the investment by finding tenants and negotiating rents etc, “compliance” activities such as keeping the property painted and in good repair, and “management” activities such as day to day maintenance and ensuring tenants complied with their leases. He had found that although the owner was active in all of those activities, they were all associated with the investment and the third was not productive of income other than rent but rather kept up the standard of the investment (paragraphs 19-21).

(d) Maintenance can serve a dual function of maintaining the investment but also enhancing the enjoyment of the occupiers of the property (paragraph 30).

(e) The ultimate issue concerns the relative importance of non-investment activities to the business as a whole (paragraph 51).

(f) Section 105 does not require the opening of an “investment bag” and the placement into that bag of activities linked to the land (paragraph 60).

17. Ms Brown also relied on *McCall*:-

(a) at paragraph 11 where it was confirmed that the term “business of holding investments” is not a term of art but has the meaning an intelligent businessman would ascribe to it when looking at the use to which the asset was put and the way it was turned to account, and

(b) at paragraph 14 where it was confirmed that a property will still be an investment if the owner carries out incidental maintenance and management work.

18. We observe that at paragraph 14 of *Pawson 2* Briggs LJ, as he then was, pointed out that “Businessmen have widely different views of what constitutes investment business...” and pointed to the analysis in *George* as being the authority.

19. We note that at paragraph 18 of *McCall* the Court found that the statutory test involves a question of fact and degree as to where a particular business falls within the spectrum.

20. The Upper Tribunal has considered section 105, and therefore *George* and *McCall*, in *Pawson 1*, *Brander* and *Vigne*.

21. Dr McNall relied in particular on *Pawson 1* citing Henderson J, as he then was, at paragraphs 42 to 45 where he pointed out that:-

- (a) Owning and holding land in order to obtain an income from it is generally an investment activity,
- (b) An investment can be actively managed without losing its essential character as an investment,
- (c) One must consider whether expenditure is for the purpose of increasing income,
- (d) Additional services such as cleaning between lets, heating and hot water, televisions, welcome packs etc, whilst not part of the maintenance of the investment, would have to be of such a nature and extent that they prevent the business from being one of mainly holding an investment. The implication is that in most cases an actively managed property letting business will still be mainly one of investment business.

Summary of the applicable principles

22. There are numerous summaries of the factors to be considered when applying the statutory test.

23. Ms Brown urged the Tribunal to adopt the simply recited summary of the statutory test set out in *Ross* at paragraph 92 which reads:-

“Those principles derived from the authorities can be summarised as:

- (1) The owning and holding of land to earn rental income is generally to be treated as an investment activity.
- (2) The holding of land can include non-investment activities.
- (3) The test under s 105 IHTA 1984 requires a consideration of whether those non-investment activities are more significant than the investment activities.
- (4) The question of whether a business is mainly an investment business is a question of fact and degree.
- (5) The question of whether something is an investment activity is not limited to passive investment activities such as long leases managed by managing agents.
- (6) The holding of land may be incidental to the running of a business (as in a hotel or holiday camp) or may be the essence of the business.
- (7) Accounting evidence and the profits or expenses allocated to the investment and non-investment activities of the business is one factor but is not the decisive factor.
- (8) Additional services provided to a rental property are “unlikely to be material” and in a normal property rental business additional services will either be incidental or will not be sufficient to prevent the business being one of mainly holding investments.
- (9) The characterisation of any additional services provided depends on the nature and purpose of the activity and not on the terms of any lease.
- (10) To come to a conclusion the business must be looked at in the round.
- (11) The test to be applied is that of an intelligent business person concerned with the use to which an asset is put and the way it is turned to account.”

24. We find that to be a helpful summary, but of course, we have also had regard to all of the other cases.

Findings in Fact

The background

25. Lawrance Batley was born on 15 February 1911 and died on 23 August 2002. On 14 November 1984 the Trust was established by him. Prior to 2012, the Trust had been a 31.39% shareholder in L. Batley Holdings Limited (“LBHL”) and the principal activities of LBHL were the strategic investment of cash reserves that generate interest and dividends and target capital growth, property investment and the provision of serviced apartments.

26. Following the sale of Batley’s Cash & Carry Limited in 2005, LBHL purchased a number of residential properties in and around Harrogate. Some were refurbished, some were left as they were and some were demolished and rebuilt. A property in Kings Road in Harrogate came on the market and was purchased in 2008. It comprised retail units with some offices above and the original plan had been to develop a restaurant on the ground floor with serviced offices and some apartments above that. It was intended that it would form part of LBHL’s investment portfolio and that the apartments would be leased on Assured Shorthold Tenancies (“ASTs”). However, that then evolved into the idea of an aparthotel, ie the provision of serviced apartments.

27. LBHL was the holding company for a group of companies. On 2 October 2012, KPMG wrote to HMRC seeking clearance for a proposed transaction. The objective of the proposed transaction was to separate the trading activities (namely, the serviced apartments trade operating under the brand “the Lawrance”) away from the core investment business. The group was restructured to divide the business into its two core components. It was explained to HMRC that the intention was to expand the trading activities of the Lawrance brand with a more aggressive risk profile. The directors wished to separate that trade from what was perceived as a lower risk core investment business which included a portfolio of residential and commercial property. Effectively the aparthotel business was hived off into The Lawrance.

28. It has never been disputed that The Lawrance is and was a business. The description of that business in the Register at Companies House is “55100-Hotels and similar accommodation”.

Overview of the properties

Harrogate

29. King House (“Kings”) opened in 2009 having been refurbished. It is spread over three floors, with no lift, and comprises a reception area on the ground floor, five serviced apartments and a conference room seating a maximum of 12 with a small kitchen on the first floor and a further four serviced apartments on the second floor. There is no parking although two spaces are available for loading and unloading. Access to the apartments is by using a plastic key card. Guests are told that there is pay and display parking nearby or there is parking at Duchy Road which is a “5 to 10 minute walk” away.

30. Kings is opposite the Harrogate Convention Centre. Reception is open from 9am until 5.30pm every day of the week except Sunday when it is open from 10am until 2pm.

31. In 2009, two Victorian semi-detached houses in Duchy Road and York Road were purchased. They were already apartments so they were refurbished and opened in 2010.

32. At York Road (“York Road”), there are four apartments in the house plus the Coach House which is in the courtyard. Three are accessed from the front door, with one being on the ground floor and the other two on the first floor. The Coach House is self-contained and the last has its own external access. There is no reception and access is by use of a key held in a lock box at the front door. That can be opened using a four digit code which is emailed to the guest the day before arrival. Parking is only available for the five apartments.

33. At Duchy Road (“Duchy”), there are also five apartments and no reception. Access is also by key. The two apartments on the first floor, accessible by their staircases at the rear of the building, have a private patio area. There is also a communal patio area and a big garden. One apartment is separate from the main building and accessed by external stairs. The other two, being the basement and ground floor apartments, are accessed by the front door. Ms White said that there is parking space for between five and seven cars and Mr Bullock said there were “probably at least ten spaces”. Given that Mr Bullock visits far more rarely than Ms White, on the balance of probability, the former number is probably more accurate.

34. The Harrogate properties tend to have more corporate customers on weekdays.

35. In both cities there are mutual referral systems with local hotels.

36. Lastly, although it is after the period with which we are concerned, York was sold to LBHL in March 2021. The intention is that the apartments will be leased on ASTs. It was a strategic decision based on a perceived overcapacity of serviced apartments in Harrogate. LBHL had in 2014, and still has, other flats in its investment portfolio that are leased on 12 month ASTs.

York

37. In 2011, an opportunity arose to acquire a site in York which was an antiques business. Micklegate (“York”) was purchased with a view to expanding the aparthotel business. It took approximately a year for that refurbishment, at a cost of approximately £2 million, to be completed and it opened on 15 October 2012.

38. Entry is via Café 74 which is a small café seating approximately a dozen customers. Ms White stated that it is open from 8.30am until 4pm daily but when drafting this decision we noted that the Guest Directory states that it is open from 9.00am every day except Sunday when it opens at 10.00am. Trip Advisor in 2019 said that it was open from 8.30am so perhaps the opening hours changed latterly. It is not material.

39. Until April 2019 it was run and managed by The Lawrance. It offered a range of breakfast options, sandwiches and cakes, lunch platters and afternoon teas. Hot pies and quiches were served in the winter months. A takeaway service was available. Guests also had the option, on arrival, of ordering delivery of breakfast to the apartment. Alternatively they could contact reception in the morning to do so.

40. The café is on the ground floor because it was a planning requirement that there be a retail unit there. There are stairs leading down from the rear of the café to a kitchen, office and storage area. Also from the rear of the café there is access via a door to a staircase leading to the only three bed apartment which is set over three floors. Adjacent to that door is the reception where there is a guest computer. There is an additional charge for any printing. The reception area provides separate access to the apartments when the café is closed. Reception opening hours are the same as at Kings. Neither the café staff nor the reception staff covered for each other.

41. To the left of reception there is a door leading outside to the remaining nine one bed and four two bed apartments, a private courtyard and the housekeeping store room. Some of the apartments have wardrobes and some have wooden hooks with hangers.

42. There is no parking but guests can use the loading bay to load and unload luggage during office hours. It has space for two cars. The guest information states that:- “Any cars found to be parked in the Loading bay for longer than permitted will incur a minimum fine of £60.00 ...”. Guests are told to go to the nearby NCP car park which is a short walk away. If the parking ticket is validated by reception, guests receive a discounted rate of 37% at the NCP car park.

43. Together, the four properties with which we are concerned, having been refurbished by LBHL and all of the staff and other costs having been absorbed by LBHL, were ultimately transferred to The Lawrance in November 2012.

44. Although after the dates with which we are concerned, a property in Tanner Row, close to York, was purchased by The Lawrance on 9 December 2016 and subsequently refurbished to provide 13 one bedroom apartments, four of which are larger and are supplied with dressing gowns and slippers. It has no reception, parking or other facilities as those are shared with York.

The creation of The Lawrance

45. The aparthotel business was operating as a division of LBHL.

46. The properties in Harrogate had not been operating profitably so the decision was taken to hire a general manager. There were six applicants for the job, five of whom were experienced hotel managers but without any particular sales expertise. The sixth was Ms Yvonne White, the current general manager, who has a very strong background in sales and marketing and more than 25 years of experience in the hospitality business. She was hired by LBHL in August 2012 with a view to developing the aparthotel business.

47. A public relations company was also employed to actively market The Lawrance in the region.

48. At some stage in 2012, a booking system, used by many hotels, called Rezlynx was installed. It is integrated with the Sage accounting system.

49. In the letter seeking clearance for the proposed reconstruction carving out the aparthotel division, KPMG drew HMRC's attention to the fact that "by carving out the trading business, statutory tax relief such as inheritance tax, business property relief and capital gains tax entrepreneurs' relief may become available, subject to other conditions being met".

50. The detail of how the aparthotel business was hived across, thus ring fencing it from the rest of LBHL's activities, is not relevant. It suffices to note that on 2 November 2012, a company was incorporated and on 5 November 2012 the demerger was completed with the serviced apartment business, which had originally been a division of LBHL and, for a few days a division of LBH (2012) Limited, being transferred to the company which we define as "The Lawrance".

51. It is described in LBH (2012) Limited's accounts as:

"During the year the group paid a dividend of £9,500,000 to The Lawrance (Hotel Living) Limited which was satisfied by the transfer to that company of the assets and undertakings of the business in short term letting of serviced apartments, carried on under the name 'The Lawrance'."

The day to day operation of The Lawrance

52. We find as fact that there was very little difference in the guest experience from the time that Ms White was employed in mid-2012, and having implemented her changes swiftly thereafter, and 14 November 2014.

What was being sold?

53. The Lawrance's website in 2014 stated that:-

"The Lawrance Apart-hotel combines the comfort and quality of a luxury hotel with the space and flexibility of a well equipped apartment.

It's ideal for people who require greater flexibility, are frustrated by the standard hotel format or want more of a home from home for a day, week, month or more.

We have beautiful one, two and three bedroom fully serviced suites in Harrogate and York. Each suite has been individually designed and includes an LCD TV, DVD, free wi-fi, oven, fridge, dishwasher, bed linen and towels.”

54. The website also pointed out that The Lawrance also had a presence on both Facebook and Twitter. Trip Advisor and Booking.com categorise them as Luxury Hotel accommodation, although it is not clear to us when that commenced.

55. When Ms White was first employed, she contacted Visit England, explaining that they benchmarked themselves against three to five star hotels. They were assessed and achieved a four star gold grading for serviced apartments and were visible within the hotel sector as opposed to solely self-catering accommodation.

56. All apartments are provided with tea, coffee, hot chocolate, milk, biscuits etc as part of a welcome pack which is replenished, as requested. There are also black bin liners provided for refuse such as bottles, as the rooms are not serviced for stays that are less than a week; albeit guests can ask for a change of towels, the bins to be emptied or more shower gel etc.

57. Guests can request flowers, chocolates, birthday cakes, prosecco etc to be placed in the apartment. The Lawrance promotes a number of packages such as a Romance Pack. In Harrogate they offer a breakfast pack which includes all of the ingredients for either a cooked or continental breakfast. In Harrogate those are delivered to reception by either Weetons Food Hall or Bettys Café Tea Rooms and the receptionist takes it to the relevant apartment. Packed lunches can also be arranged. The food and other packages on offer account for only a tiny proportion of the turnover but the availability is there.

58. The Lawrance has negotiated discounts with a number of local restaurants and a number will deliver food to the apartments as with Bettys. Reservations can be made via reception or directly. As indicated above, in York, there is a significant discount available at the nearby NCP.

How to book, bookings generally and terms and conditions

59. The starting point for any guest would be booking online via the website or by phone. That was not as easy as the website, since the telephone would not be answered outside the reception hours, which are 9am to 5.30pm on Monday to Saturday and 10am until 2pm on a Sunday.

60. Alternatively, bookings could be made via third party companies such as Booking.com etc. Booking.com charged The Lawrance a non-negotiable commission of 18%. Obviously, The Lawrance prefers direct bookings and offers a discount of 10% to 15% to repeat guests who book direct.

61. Promotional offers and discounts are not available where a guest books through a third party.

62. On making a booking, the booking and payment are confirmed with the guest by email. Payment is only accepted by debit or credit card and a 20% deposit is required at the time of booking. The balance is payable one month before the stay. If a guest books less than a month before the stay then payment in full is required at the time of booking.

63. As far as the three properties in Harrogate are concerned, guests can only book a type of apartment eg studio or one or two bed. They cannot choose the property in which they wish to stay.

64. There is flexibility in terms of booking but the majority of guests stay for between one and three nights. The Lawrance requires a two night minimum stay at the weekend. From time to time, but not frequently, they had people staying for up to 30 or 60 days for a variety of reasons.

65. They have a mix of corporate and private customers. Ms White said that the occupancy rate in York was approximately 80 or 85% and in Harrogate it was approximately 70%. Mr Bullock said that it was in excess of 90% in York.

66. For corporate customers, in general, bookings are either made to The Lawrance direct or received via third party travel agents such as HRG, Expotel, BSI, Redfern and Silver who use the Global Distribution System ("GDS") which promote themselves as specifically sourcing reputable and quality hotel accommodation on behalf of corporate clients. The Lawrance is on the GDS preferred list of third-party suppliers and pays a commission to a third party agent for that. Conference facilities provided at Kings assist in marketing to corporate clients.

67. The Lawrance will allocate an apartment in one of the properties only on the day before arrival when emailing the guest with details of their arrival information. That email tells them the apartment number, address, check-in and access information, the opening hours for reception, what to do if reception is closed when they wish to check in, the codes for accessing the property and directions. The guest is also told about the Wi-Fi password, parking and the out of office service.

68. Reception also telephone the guest on the day of arrival to make sure that they have seen the arrival email, understand it, know the codes and know how to get to the relevant property.

69. The rates quoted are in sterling and are inclusive of VAT, quoted per apartment per night and subject to availability. The quoted rate is the best available rate on the day of booking but all prices are subject to change without prior notice. No reservation is confirmed until payment has been received and a confirmation email sent by The Lawrance. If a lower rate becomes available the reservation cannot be changed.

70. The Lawrance reserves the right to process a security deposit for all apartments at their discretion. For bookings of two or more apartments a mandatory security deposit is required one month prior to arrival. Those deposits range between £100 and £250 per apartment. The Lawrance reserves the right to charge additional monies in addition to the security deposit to cover any additional costs plus administration charges. If a security deposit is not paid at least one month prior to the arrival date, The Lawrance reserves the right to cancel the reservation and retain all deposits.

71. As far as cancellations are concerned, if a cancellation is made up until 21 days prior to arrival, the customer will be refunded in full. If the cancellation is made between 21 and 9 days (both inclusive) prior to the arrival date, 50% will be refunded and if it is less than that then nothing will be refunded. There are no refunds or alternate dates provided in respect of bookings on an Advance Purchase Rate.

72. Any guest who loses a key or key card and requires assistance in regaining entry to the apartment when reception is closed will be charged a call out fee of £100.

73. If an emergency key is not returned, a £50 replacement charge applies. Key cards that are not returned on checkout are subject to a £10 replacement charge per card. If the keys for either Duchy or York apartments are not returned to the key box on the day of departure there will be an automatic £100 fine which fine may be refunded if the key is returned to reception by 2.30pm at the latest, on the day of departure.

74. A guest can amend a booking to an alternative date, if it is not an Advance Purchase Rate booking, up until 21 days prior to the arrival date. Acceptance of an amendment is wholly at the management's discretion and if a guest wishes to amend a booking less than 21 days prior to the arrival date, not only is at the discretion of the management team but also an additional booking fee will apply.
75. If the reservation is outside of the cancellation terms and a modification or change of date or cancellation is made, then an administration charge of £65 will also be applied. Where an administration charge is applied then no further refund or cancellation is possible.
76. Dogs were permitted in the apartments subject to a payment of £5 per night per dog and a deposit of £50 to cover possible damage.
77. For those guests who have booked on a breakfast rate (York only) or pre-ordered any food or drink items, there is a minimum of 48 hours' notice which failing full payment will be retained.
78. Additional beds and cots are subject to availability but can be provided at an extra charge.
79. Guests are not permitted to sleep on the sofas and "Charges will apply for any misuse of the apartments and all contents".
80. Reservations for seven or more nights include a weekly service clean. That includes fresh bed linen and towels and emptying the rubbish bins. Additional cleaning or maid service is available on request at an additional charge.
81. All guests "causing a disturbance will incur a fine" or will be asked to leave the premises with no compensation or refund.
82. All public areas and apartments are non-smoking and "a minimum fine of £200" would be automatically charged for a breach of that rule.

Staff and Reception

83. The staff wore uniforms. However, housekeeping, maintenance and out of hours cover were outsourced to third parties. We have no details of the contracts with those parties. We do not know anything about the housekeeping arrangements beyond the fact that the apartments are cleaned following check out and otherwise on request.
84. Routine maintenance work is done on all of the properties by one individual on four days a week; he can elect whether to work on either a Tuesday or a Thursday. Only emergency maintenance is done at the weekends but we do not know how many hours are involved.
85. As at 14 November 2014, Mr Firth, Mr Bullock and Mr Booth were directors. Ms White was, and is, the General Manager. There was a financial accountant who worked for The Lawrance for 96 hours per month and she was Mr Firth's executive assistant for the remainder of her time. Although she periodically visited Harrogate and York, she was based elsewhere.
86. There were two full time, and one part-time, employees based in York and two full time employees in Harrogate. The café in York employed two managers for 120 hours per month and two assistants for 64 hours per month.
87. The full time employees covered for each other and for the part-time employee. The role was far wider than managing guests checking in and out. Confusingly, two of them are also described in Ms White's witness statement as being a Manager, who acts as her deputy, and an Operations supervisor.
88. There is a staffed reception throughout what the appellants describe as "normal business hours and more limited hours at the weekend". As indicated above it is more limited than that,

as reception is only open between 9am and 5.30pm six days a week and between 10am and 2pm on Sundays; a total of 55 hours per week. The telephone at reception has a voicemail facility for out of hours.

89. Reception in Harrogate was at Kings and the other two properties are approximately a ten minute walk away and serviced by those reception staff. In 2014, there was one full time receptionist in York and Harrogate and a part time receptionist also covering the two receptions. At busy times there would be two receptionists on duty interacting with customers.

90. Guests can check in after 3.00pm and must check out before 11.00am although alternative arrangements can be made through reception. An early check in costs £10 and a late check out is charged at £10 per hour.

91. Ms White is, and was, responsible for all aspects of the business and works closely with the receptionists. KPMG told HMRC that key performance indicators (“KPIs”) for the staff “are the ability to increase occupancy and rack rates whilst controlling overheads base”.

92. Reception staff are involved in setting room rates for bookings. They maintain a “Rate Plan Sheet” which itemises the Best Available Rate, long stay rates and corporate rates for the different types of apartments. They benchmark against competitors, for example in York they check the rates at the hotels that they consider to be competitors such as Hotel du Vin and Malmaison. They check the rates elsewhere three times every day except Sunday and adjust their rates accordingly.

93. Reception processes the bookings and payments. The Rezlynx system allows reception to manage room availability and allocation, customer arrivals and departures, payments of deposits and final payments and additional revenue earned.

94. Housekeeping and maintenance are contracted out but reception give information to both as to what is required to be done and when and where.

95. The receptionists deal with telephone calls and emails from and to guests and as indicated above they telephone guests on the day of arrival to confirm all of the arrangements. Obviously, they manage deliveries for guests such as food etc. They make arrangements and bookings for guests if requested. They cut keys, remove and place keys in the key boxes and deactivate the keys.

The out of hours service

96. The out of hours service is provided by a security company (who also provide the maintenance). In York they provide a security patrol at night on an as required basis. Occasionally there might be an issue in Harrogate.

97. In addition to the security officers employed by them, the security company, which is a husband and wife team, have tele-sales agents who man the mobile phone number. They have the mobile telephone number of the on call duty manager and can contact them if required.

98. Guests in York received a document entitled Arrival information (“Arrival”) and another document headed Terms & Conditions (“T&Cs”) and both reference the out of hours service but in slightly different terms. The key features are:

- (a) The out of hours service is in two parts namely from 6pm until 1.00am and then from 1.00am until 7.00am. Both are described as being available for use only in emergencies.
- (b) The out of hours service is described as being happy to assist guests over the phone but only in extreme cases will they come out to apartments.

(c) Queries such as taxi numbers, Wi-Fi code/issues, breakfast options and directions are not classed as an emergency and are classed as misuse of the service which would result in a charge of £100.

(d) The number should only be dialled for the following:-

- (i) Noise disturbance from other guests
- (ii) Loss of Power/Electricity
- (iii) Flooding
- (iv) Fire
- (v) Life or Death Situations

99. There is therefore a gap between 5.30pm and 6.00pm and 7.00am and 9.00am on six days in the week and between 7.00am and 10.00am and 2.00pm and 6.00pm on a Sunday. We observe from the reception checklist that if a receptionist takes a longer lunch hour they might stay until 6.00pm but that is not intimated to customers. We have no details as to the frequency in that regard.

100. The service is accessed by the telephone number given to guests with their keys and in these documents. There are also signs in the properties.

101. When called out they usually arrive on site within 15 or 20 minutes; sometimes more quickly.

Discussion

102. We deal firstly with financial information because we have surprisingly little.

103. The Lawrance has four principal cost centres, namely wages, cleaning, maintenance and what Mr Booth described as “commercial” which included for example commission paid to Booking.com etc. However, when writing this decision, we noted that in April 2018 KPMG sent HMRC a detailed breakdown of costs for the two years prior to November 2014. That itemised six categories being salaries, selling, property, office, house and finance.

104. As we have indicated, we have no details of hours expended or the hourly rate paid for the outsourced activities. We can make nothing meaningful of that breakdown since we cannot even reconcile the total salaries paid in the year to November 2014 with the schedule of employees and their salaries sent to HMRC by KPMG in October 2017.

105. Mr Booth confirmed that the total value of the properties was in excess of £9.43 million. Duchy was valued at approximately £2.1 million, York Road at approximately £1.8 million, Kings at approximately £2.1 million and York at approximately £3.43 million.

106. Officer Crump’s evidence, that was not challenged, was that Café 74 was not profitable, the conference room was rarely booked, and that HMRC’s calculation, based on the very limited information available to them, was that the provision of food was likely to make up only 3-4% of the turnover (and that included sales, unquantifiable, to the public).

107. Although Mr Booth told us about budgets and management accounts none have been provided.

108. Ms Shillaker put it to Mr Booth that no money was spent on refurbishing the Harrogate properties over the period of ownership whereas one would expect to see that, together with the costs of constantly refreshing the properties, if the business were to be considered to be like a boutique hotel. He confirmed that the refurbishment of Kings in 2019 was “largely cosmetic” and as far as Duchy and York Road were concerned, “It had been more a case of minor

maintenance to really remove the wear and tear..”. That does not sit well with our experience of boutique hotels.

109. In our view that maintenance falls on the investment side of the spectrum.

110. Unsurprisingly, the parties’ approach to the issues in this appeal are diametrically opposed. Dr McNall focused on what The Lawrance did not provide as opposed to what hotels in the 3 to 5 star band, with which they stated that they competed, did provide. By contrast, Ms Brown focussed on the breadth of the services that The Lawrance stated that they provided. The evidence in that regard was largely from Ms White although we were also referred to letters from KPMG. We do not know, but we assume that KPMG’s information was derived from Ms White’s instructions. An example is KPMG’s letter to HMRC referencing concierge staff.

111. We had some issues with the evidence of Ms White. We do not doubt that she believed what she said and, as she explained, she was passionate about The Lawrance. We understand why she kept arguing that the appellants were the equivalent of a boutique or up-market hotel but, bluntly, to use a colloquial expression she over-egged the pudding. The hyperbole about concierge services is an example of that.

112. In her witness statement she said that the appellants provided a concierge service when reception is closed which includes

“...but is not limited to guest queries and requests such as replacement key cards/keys, assistance with WIFI, leaks, lights, additional bed linen, towels or a cots etc.”

113. It was put to her that that did not square with the Arrival or T&Cs. All she could say was that they did encourage the out of hours service to assist or the duty manager would help if called in.

114. In a similar vein, she had argued, repeatedly, that out of hours would replenish, for example, shower gel. We put it to her that we could see from the video that the containers fixed to the showers were large and that that was inherently unlikely. She then suggested that that would happen “maybe two or three times a week” but when that was questioned she said it would happen on occasion.

115. Ms White focussed on what she described as the reception having a “continuous interaction and involvement with guests”. We observe that the reception in Harrogate is only at Kings and the other two properties are more than a five minute walk away.

116. Reception in both cities is only open for 168 hours per week which is 32.7% of the week. Therefore reception is closed for more than two thirds of the week.

117. The fact is that guests were very actively deterred from calling out of hours services. The appellants say that they have customers from all over the world and the lengthy Arrival and T&Cs are explicit in their terms in plain English. It is not small print. The prospect of a large fine for looking for help is explicit and that situation is not redeemed by Ms White saying that if a guest phoned the tele-sales agent would be helpful. In the face of the documentation, on the balance of probabilities, it seems unlikely that that agent would be phoned and given the opportunity to be helpful.

118. Quite apart from those issues, with what we find is not a concierge service, the out of hours service is not even available between 5.30pm and 6.00pm and 7.00am and 9.00am on six days of the week and on a Sunday it is not available from 7.00am until 10.00am and 2.00pm until 6.00pm.

119. There are other areas where we found that Ms White overstated her position. As examples, in her witness statement she said that:

(a) “At Harrogate, free guest parking is available off site”. There is in any city but it may not be anywhere near by! We put that to her because she had told Dr McNall that one of the interactions with reception at Kings was guests coming in and being told that they could leave their cars whilst they went shopping. Her response was that there was parking at Duchy and some space at York Road. Firstly, both are some distance from Kings and secondly, the parking is very limited at the latter and fairly limited at the former.

(b) “During weekends ESC [the out of hours service] patrols the premises at both sites...”. . Her oral evidence was that every hour at the weekends in York between 11.00pm and 4.00am they checked the courtyard, communal and reception areas. In Harrogate they patrolled Kings but only if there was a busy event in the location or on New Year’s Eve. She said that they would check on York Road and Duchy if present in Harrogate. It was put to her that those properties are in quiet residential areas so that seemed unlikely. Her response that it was in the contract and they should check all of the properties. We have seen no contracts. However, Mr Booth’s evidence, and we find him to be reliable, was that security was used only on a “selective basis”, because of cost. He said that it would probably be used on at least 16 or 20 nights a year in York and also on some other occasions. He said that Harrogate was a much lesser issue but did not say whether they employed security there or not. We say that because Officer Crump’s unchallenged evidence was that security was only provided in York and only when there was a deemed security or disturbance risk.

(c) “From my experience, the service received by guests of the Lawrance is more akin to that which hotel guests may expect to receive particularly with respect to the high levels of interaction with guests throughout their stay”. That interaction has already been discussed. Her experience is another matter. The job which she had had for the four years prior to this employment was group sales and marketing manager for hotels. It was not facilities management or hospitality “on the ground”. Mr Booth conceded that she had been recruited because of her ability to maximise sales. She repeatedly compared The Lawrance with Hotel du Vin, Malmaison and others yet she had to concede in cross-examination that she had not stayed in such a hotel for “numerous years”. It was at least 10 or 12 years since she had been to a Hotel du Vin.

120. We raise these issues because although we had a plethora of information, much of it was bald assertion, primarily from Ms White, unsupported by contemporaneous documentation. For these reasons we therefore approach her evidence with a degree of caution.

121. She is “selling”, and we use the word advisedly, the argument that The Lawrance can be differentiated from self-catered apartments and although, not a hotel, should be viewed as such because of the services that it provides.

122. That takes us neatly to *Ross*.

123. Of the 11 principles there enunciated, none are disputed by the parties. As we see it, obviously we must look at the business in the round, although Dr McNall urged us to look at the services individually, as we have done, and then take a step back and look at it holistically before arriving at our conclusions.

124. He is absolutely correct in stating that the Tribunal must decide what the real nature of the business is; is it investment in land with ancillary services or is it a service business with an ancillary investment in land.

125. We disregard the argument that because York Road was sold back to LBHL in 2021 at its property value that means that the matter is clear. That was 2021 and is not relevant to 2014. By any standards 2021 was a very difficult year for hospitality.

126. Obviously we are dealing with land, and that land was undoubtedly held as an investment, and by their own admission a poorly managed investment prior to Ms White's appointment in 2012.

127. The four properties were indeed acquired as part of an investment portfolio and the appellants freely admit that. They could have remained in that portfolio and been leased on ASTs but the fact is that they were not. The appellants have always argued that the issue for them was separating the business of The Lawrance from the investments. The motives for the demerger or living apart are irrelevant; the issue for the Tribunal is almost entirely the question of whether the ownership of the properties is incidental to the running of the business or whether it is the essence of the business.

128. We agree with Judge Short in *Ross* at paragraph 102 that the "test is a qualitative test of the nature of the business, not merely a quantitative test about the extent of the activities carried out by those who run it."

129. Sadly, we have had difficulties with both quantity and quality.

130. As examples, we have no evidence about how many calls there were to the out of hours service or how many requests there were for additional cleaning or towels etc. We know that there are guest feedback forms but we have only seen a blank specimen. There were four pages from a Guest Book but the majority of entries were in December 2018 but oddly on one of the pages a number of entries appeared to be from 2016 and then it suddenly changed to July 2018. We do not know which apartments were involved.

131. Although we were told that stays could be long or short, the very limited and almost illegible information we had for occupancy for April 2014, disclosed primarily short stays, and KPMG in their covering letter said that the majority of guests stay for one night during the week. Weekends must be for a minimum of two nights.

132. Ms Brown confirmed that 50% of the stays in Harrogate were for a single night, 30% for two nights, 13% for three nights, 4% for four nights and 3% for five nights or more including two 14 night stays. The figures for York were 45%, 40%, 11%, 2% and 2% and again including two 14 night stays. The respective occupancy rates were 72% and 90%.

133. We know from the analysis of turnover, that in the year ended 30 April 2015 in Harrogate, only £657 (0.13% of turnover) was raised from the sale of packages and extras and in York it was £1,912 (0.34% of turnover). Ms Brown argues that the point is that it was available, and it was. However, given that food was less than 4% of turnover (and that includes sales to the general public in the café) we agree with Dr McNall that food and extras were peripheral to the business.

134. The evidence in regard to what KPMG described as KPIs was telling. Maximising sales is key. We accept that that would be the case in any business but the point is that it underpins what reception, which the appellants argued was the customer and service focus, actually spent much of their time doing. Although we had a blank 2018 checklist for reception with a number of duties spanning a week enumerated, Ms White conceded in evidence that it could take up to three hours to do the benchmarking, checking hotel rates in the area three times per day. It was clearly a crucial part of every day and a significant focus of activity. It is all about maximisation of income from property. They need and want astute competitive pricing; that is what reception staff did. That also explains why reception staff were described as having differing roles. The

balance of the duties, apart from those relating to check in and check out were largely administrative.

135. We accept Officer Crump's evidence, which was not challenged, that reception acted as the administrative hub for the business. In particular, we find that the benchmarking has the features of managing an investment.

136. We say that because when we look at the guest experience, we simply cannot find that reception added a great deal for most of the guests. It is inherently unlikely that a guest would visit reception at Kings, if staying at Duchy or York Road. We accept that on a rare occasion it might happen and that guests might also telephone or email but the opening hours are such that quick responses must be very limited.

137. Effectively, the out of hours service is a call centre. We find that it is an outsourced bolt on service which does not even cover the gaps in reception service. It certainly is not a concierge service of any description.

138. We find that if, as the appellants deny, these were merely self-catering apartments, a disgruntled guest would still phone or email with complaints. We cannot see that the experience would be any different. We find that the out of hours service is similar to the caretaker service provided in *Green*.

139. It was argued that duty managers were on call in the evenings and at weekend but we had no evidence as to how often they would actually be called out. Staff complete time sheets but none were produced. The only evidence that we have as to the number of staff and the hours worked is the schedule provided to HMRC by KPMG in October 2017. That gave the average hours worked for each of the employees including Ms White. Excluding the café staff, since they also looked after the general public, the five full time employees were each described as working an average of 160 hours per month and the part time employee half of that. That does not suggest much out of hours work.

140. The fact that The Lawrance used third parties for cleaning etc is irrelevant for our purposes and, as Ms Brown correctly states, *McCall*, *Zetland* and *Ross* make that clear.

141. Our task is simply to ascertain what was provided. Ms Brown argued that in addition to the 880 hours from the employees, there was all of the work done by the out of hours service, the maintenance man and the providers of linen and cleaning.

142. Beyond knowing that the out of hours service existed on the basis described above, as we have said, we do not have any real detail as to what was actually provided. For the reasons given we do not accept Ms Brown's assertion that it was a wrap-around service.

143. We know that the maintenance man worked on four days a week but we do not know his hours. However, in any event, following *George* and *Pawson I* that would fall on the investment side of the line.

144. We know nothing about the cleaning contract beyond the fact that housekeeping was outsourced. What we do know is that it was minimalist in the sense that the rooms were cleaned on departure and, for an extra charge during a stay if requested. We know nothing of how, or if, that was monitored beyond Ms White stating that reception would check on the rooms. However, there is nothing in the reception checklist, and it is detailed, extending to in excess of 40 tasks, which says that. The only reference to staff going to the rooms is where they had what they describe as an "upsell" such as an extra bed or cot or breakfast and their task was to ensure that it was placed in the room and housekeeping advised. It seems unlikely that reception had any involvement beyond that unless there was a problem. We have no information as to the extent of such upsells; albeit we know that breakfasts were minimal

145. Mr Booth argued that whilst the majority of the guests enjoyed the facilities, which were very akin to what they would want in a hotel, it was very different to a holiday let where they would be letting a cottage for a minimum of a week, and not in a town centre; frequently in the middle of the country.

146. The distinction between town and country is not relevant; that is a matter of individual preference. From personal experience, we know that it is possible to hire a cottage in the country for a weekend.

147. Of course, The Lawrance is not a hotel and does not say that it is. However, we do not accept the argument that because of its price point, which competes with 3 to 5 star hotels, it follows that the same level of service would have to be offered.

148. Ms Shillaker put it to Mr Booth that The Lawrance apartments were micro-lets to suit the convenience of people who want to be able to stay in an apartment for one, two or three nights; those people were actually consciously choosing not to go to a hotel and were not looking for the hotel experience for whatever reason. There was no real response to that from Mr Booth.

149. Ms Brown argued that describing the apartments as micro-lets was no answer to the question to be determined because this case is fundamentally about customer service and experience. Of course she is right about the service and experience and we have focussed upon that. As Ms Brown states, the appellants' witnesses each stated with complete conviction that they considered that the business was comparable to a boutique hotel. It is what their website says. As we indicate at paragraph 108 we disagree and we do find that they were micro-lets.

150. We were perplexed by the argument that the fact that a customer could not choose the location of an apartment to be booked in Harrogate was a positive feature. On the contrary, we found that a customer attending a conference in the Harrogate Centre and denied Kings could well be, rightly, very irritated if allocated Duchy or York Road. Equally, a customer wishing onsite parking (eg Duchy) sent to Kings could be as disgruntled. This points to management of an investment and not a focus on customer service

151. We find that an intelligent businessman reading the Arrival and T&Cs would find that The Lawrance is maximising its return from its significant investment in four valuable properties. As Ms Shillaker, who knew the York serviced apartment market, put to Mr Booth, having secured the site there was minimal risk and a high level of occupancy would be more or less guaranteed.

152. In summary, we find that on the investment side of the spectrum are the activities such as marketing, benchmarking, pricing, bookings, making the apartments ready for guests, dealing with complaints and requests, maintenance, repairs, insurance, and business rates. On the non-investment side of the spectrum are the welcome pack, the provision of cleaning if requested, linen, towels, shower gel, furniture, white goods, DVD player and TV, Wi-Fi, food and the ability to purchase extra packages.

153. We accept that some aparthotels, and we have stayed in some such as Staybridge Suites, would be categorised as providing services with ancillary occupation of the accommodation.

154. However, looked at in the round, the non-investment activities of The Lawrance whether looked at individually or together, are not that. They do not take the business over the line into the non-investment side of the spectrum.

DECISION

155. For all these reasons the appeal fails. The Lawrance, was not relevant business property in terms of IHTA.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

156. 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.

**ANNE SCOTT
TRIBUNAL JUDGE**

Release date: 14 JULY 2022