Neutral Citation: [2024] UKFTT 00706 (TC)

Case Number: TC09253

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

Taylor House, London

Appeal reference: TC/2019/01394 and TC/2021/03095

*INHERITANCE TAX – whether the conditions of Schedule 1A IHTA were fulfilled so that the charitable giving condition was met and the rate of IHT reduced to 36% - business property relief – whether a holiday letting business consisted mainly of holding an investment – both appeals dismissed*

**Heard on:** 11- 14 December 2023
**Judgment date:** 23 July 2024

**Before**

**JUDGE VIMAL TILAKAPALA**
**MEMBER JO NEILL**

**Between**

**DAVID MARKS (EXECUTOR OF HILDA MARKS)**

**Appellant**

**and**

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

**Respondents**

**Representation:**

For the Appellant: David Marks

For the Respondents: Simon Bracegirdle, litigator of HM Revenue and Customs' Solicitor's Office

# DECISION

## INTRODUCTION

1. This is an appeal against 10 Notices of Determination issued under s.221 of the Inheritance Tax Act 1984 ("IHTA"). The notices were issued to the executors of Mrs Hilda Marks deceased and relate to matters contained in her Inheritance Tax Account submitted following her death on 1 October 2015.

2. There are two issues for determination. These are:

   (1) Whether the charitable giving condition in Schedule 1A, IHTA applies so as to reduce the rate of inheritance tax ("IHT") payable by the estate from 40% to 36% (the "Lower Rate Issue"); and

   (2) Whether a property at 2 Dorchester Mansions, Manor Road, Bournemouth which is included in the estate qualifies for business property relief under s.104 IHTA (the "BPR Issue").

3. We were provided with a hearing bundle of 1075 pages and an authorities bundle of 657 pages. Each party also provided skeleton arguments.

4. We also heard witness evidence from David Marks, Gillian Marks, Rochelle Selby, Julian Dabek, Marcelle Palmer, Ashley Marks and Philip Selby.

### Structure of this judgment

5. The Lower Rate Issue and the BPR Issue are largely distinct and we were provided with a significant amount of information in respect of each. For the sake of clarity, we have divided this judgment into two parts, each dealing with one issue. In each part we set out a summary of the background to the issue, the relevant facts found or information provided in relation thereto and the relevant legislation. We refer to "information provided" in addition to "facts found" as there is, in relation to the BPR Issue, very little factual evidence available and most of the purported facts are largely unsupported assertions. The same point arises, although to a lesser extent in relation to the Lower Rate Issue. We discuss this issue in more detail in the relevant parts of our judgment.

### Preliminary Issues

6. The Appellant ("Mr Marks") included a significant amount of information in the hearing bundle which related to an unsuccessful alternative dispute resolution ("ADR") process that the parties attempted prior to the hearing. Aspects of the ADR process were also referred to in his skeleton argument. Mr Marks said at the start of the hearing that he wanted all references to the ADR process and to certain documents that he considered subject to legal professional privilege to be disregarded if he would be prejudiced if they were not. We explained to him the difficulties of adopting this approach given the multiple references to the ADR process and to specific legal advice in the Hearing Bundle and in his Skeleton Argument. Mr Marks dropped the point but sought to reserve his right to raise it again during the hearing if he considered it appropriate. The point was not raised again.

7. Mr Marks also sought to introduce a new document at the start of the hearing. This was an additional letter from Rev. Barry Sklan, a witness who was unable to attend. We explained to Mr Marks that the submission of new material at such a late stage was not generally permitted unless there were good reasons for it to be admitted, it being a key principle of the justice system that the parties had in advance all the material intended to be relied on in the hearing. Given that the matters in question had been the subject of several years of discussion between the parties we did not think that it would be in accordance with the Tribunal's

overriding objective, which is to deal with cases fairly and justly, to admit any new material at such a late stage.

**BACKGROUND, FACTS FOUND AND MATERIAL INFORMATION PROVIDED**

8. Samuel Marks ("SM") and Hilda Marks ("HM") were husband and wife. Both are now deceased. SM died on 8 April 2014 and HM on 1 October 2015.

9. Under the terms of SM's will dated 1 March 2011 (the "SM Will") his executors and trustees (the "SM Executors" or as the context requires the "Trustees") were HM, his daughter Rochelle Selby ("Ms Selby") and his son David Marks ("Mr Marks").

10. The SM Will was drafted by Mr Graham Shindler of Lane-Smith & Shindler Solicitors.

11. The SM Will provided for certain pecuniary legacies with the residue of SM's estate (the "Residuary Estate") to be held on trust (the "Will Trust").

12. The main assets of the Will Trust were (i) cash, listed shares and a holding of unlisted shares in Mutley Properties Holdings Ltd. ("Mutley Properties"), and (ii) a leasehold flat at 54 Monarch Court, London, N2 0RA ("Monarch Court").

13. The key terms of the SM Will were as follows:

> Clause 7 MY TRUSTEES shall stand possessed of the residue of the said monies and of the Investments for the time being representing the same or such part of my estate as shall for the time being remain unsold and unconverted (all which premises are herein referred to as "my Residuary Estate") upon trust
>
> (a) to pay the income therefrom to my said wife HILDA MARKS ("my wife") during her lifetime
>
> (b) My Trustees may, at any time during the lifetime of my Wife pay or apply the whole or any part of my Residuary Estate in which my Wife is then entitled to an interest in possession to or for her advancement or otherwise for her benefit in such manner as the Trustees shall in their discretion think fit. In exercising the powers conferred by this sub-clause, my Trustees shall be entitled to have regard solely to the interests of my Wife and to disregard all other interests or potential interests under my Will.
>
> (c) Subject thereto, my Trustees shall divide the capital and income of my Residuary Estate into the following fractions and hold the same upon and with and subject to the following trusts and powers and provisions:
>
> i. As to a three-eights [sic] share ("Rochelle's Children's Share) on trust to pay the capital and income thereof to such of the children of my said daughter Rochelle Deborah Selby ("Rochelle") as shall survive me and of more than one in equal shares absolutely
>
> PROVIDED THAT if any one or more of Rochelle's children shall predecease me leaving a child or children him her or them surviving such child or children shall take and if more than one in equal shares the share of Rochelle's Children's Share which his her or their parent would have taken if his her or their parent would have taken if she or they would have taken if they had survived me

ii. As to a three-eighths share ("David's Childrens' Share") on trust to pay pay the capital and income thereof to such of the children of my said son David Leonard Marks ("David") as shall survive me and of more than one in equal shares absolutely

PROVIDED THAT if any one or more of David's children shall predecease me leaving a child or children him her or them surviving such child or children shall take and if more than one in equal shares the share of David's Children's Share which his her or their parent would have taken if his her or their parent would have taken if she or they would have taken if they had survived me

iii. As to a one quarter share on trust to pay the capital and income thereof to the Trustees of the HILDA AND SAMUEL MARKS FOUNDATION (Registered Charity No. 245208) for its general charitable purposes absolutely

AND I DECLARE that if the trusts of either Rochelle's Children's Share or David's Childrens' Share shall fail by reason of no person attaining a vested interest therein then I DIRECT that (subject to the trusts and powers and provisions herein contained or which may be applicable thereto by statute( the said share shall accrue and be held as an accretion to the other share the trusts whereof shall not at the time of such accrue have failed and upon the trusts and powers and provisions applicable thereto accordingly.

Clause 8

(a) Notwithstanding the provisions of clause 7 my Trustees shall have power to appoint the whole or any part of the capital and/or income of my Residuary Estate in which my Wife has a subsisting interest in possession upon trust for or for the benefit of any one or more of my grandchildren and great grandchildren (the "Residuary beneficiaries") as such ages or times, in such shares, upon such trusts (which may include discretionary or protective powers or trusts) and in such manner generally as my Trustees shall in their discretion think fit. Any such appointment may include such powers and provisions for the maintenance, education or other benefit of the Residuary Beneficiaries or for the accumulation of income, and such administrative powers and provisions as my Trustees think fit.

(b) No exercise of the power conferred by sub-clause 8(a) shall invalidate any prior payment or application of all or any part of the capital or income of my Residuary Estate made under the trusts of my Will or under any power conferred by my Will or by law.

14. Clause 9 incorporated the standard provisions of the Society of Trust and Estate Practitioners into the Will with s.32 of the Trustee Act 1925 amended so that any advancement to a beneficiary is not limited to its presumptive share, and the consent of the life tenant with a prior interest is not required.

15. The Hilda and Samuel Marks Foundation was wound up and its assets transferred to two other registered charities, the Mutley Foundation and the Thorne Lodge Charitable trust, the trustees of each being members of the Marks' family. There is no dispute as the nature of these charities.

16. Following SM's death, HM and the SM Executors consulted OGR Stock Denton LLP ("OGR") for advice in connection with its administration. This included seeking advice as to the Trustee's obligations under the Will Trust.

17. Following those consultations, four Deeds of Appointment (the "Deeds of Appointment") were drafted by OGR and entered into by the Trustees and HM. These were as follows:

*A Deed of Appointment dated 11 July 2014 ("Deed 1")*

18. This deed was signed by HM and by Mr Marks and Ms Selby as Trustees. It stated that the Trustees were acting in accordance with the powers vested in them by Clause 8(a) of the SM Will.

19. Deed 1 identified six "Specified Beneficiaries" who were potential beneficiaries of the Will Trust. These were SM and HM's grandchildren – Estelle Isaacson, Philip Selby, Zara Brooks, Gillian Marks, Ashley Marks and Marcelle Palmer (the "Grandchildren").

20. Deed 1 appointed part of the Will Trust fund to a "Specified Fund" (as that term was used in the SM Will) for the benefit of the Specified Beneficiaries absolutely.

21. The amount appointed to the specified fund was £300,000 to be held in equal shares for the Specified Beneficiaries.

22. On 14 July each of the Specified Beneficiaries received a cheque. Each cheque was sent with a message from Mr Marks. Each message was headed "gift" and each stated;

> "… I now enclose a cheque in the sum of £50,000 being the promised monies which Grandma has passed to you out of Grandpa's estate."

*A first Deed of Appointment dated 1 December 2014 ("Deed 2")*

23. As with Deed 1, this deed was also signed by HM and by Mr Marks and Ms Selby as Trustees. This deed stated that the Trustees were acting in accordance with the powers vested in them by Clause 7(b) of the SM Will.

24. Deed 2 identified HM as the Life Tenant of the Will Trust and again appointed part of the Will Trust fund to a "Specified Fund" for the benefit of the Life Tenant absolutely.

25. The property appointed to the Specified Fund under Deed 2 consisted of 8 shares in Mutley Properties and £72,000 in cash.

*A second Deed of Appointment dated 1 December 2014 ("Deed 3")*

26. As with Deeds 1 and 2, this deed was signed by HM and by Mr Marks and Ms Selby as Trustees. As with Deed 1, this deed stated that the Trustees were acting in accordance with the powers vested in them by Clause 8(a) of the SM Will.

27. As with Deed 1, Deed 3 identified six "Specified Beneficiaries" who were potential beneficiaries of the Will Trust. These were again the Grandchildren. The Deed then again appointed part of the Will Trust fund to a Specified Fund for the benefit of the Specified Beneficiaries absolutely.

28. The property appointed to the Specified Fund consisted of 3900 shares in Mutley Properties to be held in equal shares for the Specified Beneficiaries.

*A Deed of Appointment dated 2 April 2015 ("Deed 4")*

29. As with Deeds 1, 2 and 3 this deed was signed by HM and by Mr Marks and Ms Selby as Trustees. This deed stated that the Trustees were acting in accordance with the powers vested in them by Clause 8(a) of the SM Will.

30. As with Deeds 1 and 3, Deed 4 identified six "Specified Beneficiaries" who were potential beneficiaries of the Will Trust. These were again the Grandchildren.

31. The Deed then appointed part of the Will Trust fund to a Specified Fund for the benefit of the Specified Beneficiaries absolutely.

32. Under this Deed the property appointed to the Specified Fund consisted of the leasehold interest in Monarch Court to be held in equal shares for the Specified Beneficiaries.

33. On 2 April 2015, a Land Registry Form TR1 was completed showing the transfer of the tile in Monarch Court from HM and the Trustees to the Trustees to hold on trust for the Grandchildren as tenants in common in equal shares absolutely.

34. Monarch Court was subsequently sold at some time in 2015 and the proceeds of that sale distributed in cash to the Grandchildren.

*HM's death*

35. HM died on 1 October 2015. The executors of her will were Mr Marks, Ms Selby and Philip Klinger (the "Executors").

36. Her will provided for several pecuniary legacies with the residue held in trust for the Grandchildren

*The Initial Approach to the IHT computation*

37. The Executors submitted to HMRC the IHT account IHT400 and supporting schedules. The form (signed by the Executors on 31/3/2016) showed the following values:

| | | |
|---|---|---|
| - Free Estate | - 1,259,059 | - |
| - Will Trust | - 116,251 | Less charitable gift of £29,063 |
| - Lifetime Transfers | - 1,651,264 | - |

38. The Free Estate was reduced by a claim to £410,000 for Business Property relief in respect of Flat 2 Dorchester Mansions (the "Flat").

39. The Lifetime Transfers included the property transferred to the Grandchildren under Deeds of Appointment 1,3 and 4 together with some smaller transfers to HM's children and her daughter in law.

40. For convenience we refer to this approach to determining the IHT the "Initial Approach".

41. In November 2016 HMRC commenced a review of HM's IHT account, initially as part of the process for reviewing the Business Property Relief claim and the valuation of the shares and properties in HM's estate.

*The Revised Approach to the IHT Computation*

42. In June 2018, following an ADR process the full details of which remain confidential, the Executors advanced the view that the SM Will had been incorrectly interpreted. This was raised by Brian White ("Mr White"), an adviser to the HM Executors who subsequently submitted to HMRC on a without prejudice basis a revised IHT Form 400 and a revised IHT

Form 418. IHT Form 418 being a form providing details of a deceased persons interest in a trust.

43. On 26 June 2018 IHT Form 430 was submitted to HMRC. IHT Form 430 being a form for claiming a reduced rate of IHT were at least 10% of a person's net estate has been left to charity. The form was signed by all the Executors and the Grandchildren (in their capacity as Beneficiaries).

44. On the IHT Form 430 the Executors elected to merge the two components of HM's estate (the Free Estate and the Will Trust) and to claim the reduced rate of IHT for the property in both components.

45. For convenience we refer to this approach to determining the IHT as the "Revised Approach".

46. The basis of the Revised Approach was understood by HMRC to have been as follows:

(1) That under the terms of the Will Trust the 25% of the estate payable to charity should be computed by reference to the value of the property in the Will Trust as at the time of creation of the Will Trust and not by reference to the residue after the transfers pursuant to the Deeds of Appointments had been made from that property.

(2) That by making Appointments out of the Will Trust which left insufficient funds in the Will Trust to discharge the 25% charitable payment requirement at (1), the Trustees had exceeded their power and the shortfall should therefore be made from HM's Free Estate.

(3) The Free Estate should be reduced by £964,257 with a corresponding amount being credited to the Will Trust.

(4) The charitable contribution from the Will Trust should be recomputed by reference to the assets of the Will Trust as at the time of its creation.

(5) As the recomputed charitable contribution would exceed 10% of both components of HM's estate, the reduced rate of IHT should apply across both components in accordance with the election made in IHT Form 430.

*The Determinations*

47. HMRC disagreed with this position and after lengthy discussion and an unsuccessful ADR process issued three Notices of Determinations pursuant to s 221 IHTA, as follows:

(1) On 15 July 2020 a determination to the Executors of HM's estate. This stated that the value attributable to the Free Estate was £1,245,685 and that the IHT chargeable at the standard rate of 40% was £498,274.

(2) Also on 15 July 2020 a determination to the Trustees of the Will Trust stating that the transfer of value on HM's death attributable to her life interest in possession was £107,124. Exemption under s.23 IHTA for charitable gifts was available for 25% of that amount and so the amount subject to IHT on that transfer was £80,343. Given the charitable donation, IHT was chargeable on that amount at 36% amounting to £28,923.

(3) On 16 July 2020 a determination to the Trustees of the Will Trust relating to the transfer of value on HM's death on the end of her interest in possession in Monarch Court on 2 April 2015 and her death on 1 October 2015. The value transferred and the amount of the chargeable transfer was stated to be £325,000 with IHT at 40% amounting to £130,000.

48. In broad terms the effect of HMRC's determinations was to restate the method of IHT calculation set out in the original IHT account in line with the Original Approach.

49. The three determinations were appealed pursuant to s.222 IHTA on 27 July 2020 and under s 223A IHTA HMRC offered and the Appellant accepted the offer of an independent review of the determinations.

50. The results of the review conclusion were issued on 19 August 2021 to the Appellant and the other Executors, all of the determinations were upheld.

51. Mr Marks is now appealing those determinations to the Tribunal.

52. It is only the determinations which are being appealed. The appeal does not extend to the amount of tax which may be due as a result of the determination being found to be correct or incorrect.

*The Burden of proof*

53. The burden of proof in this appeal lies with Mr Marks and the standard of proof is the usual civil standard, being the balance of probabilities. It is therefore for Mr Marks to persuade us that his approach is the correct one.

54. This is an important point. One of Mr Marks' complaints which has been made several times throughout the history of this dispute and raised during the course of the hearing was that HMRC had failed to produce legal authority or evidence to disprove his various contentions.

55. Part of the issue arises we find because of Mr Marks' understandable lack of familiarity with the judicial process as he is not legally qualified nor is he legally represented. We explained to Mr Marks that HMRC had set out their basic case in their Statement of Case and would expand that in their submissions and that it was not necessary for them to produce authority or evidence to disprove every point made by him. It was then for the Tribunal to weigh up the evidence presented and to then decide whether Mr Marks had, on the balance of probabilities made his case. Although there are circumstances where the burden of proof is reversed and lies with HMRC and not the taxpayer this is not the case in these Appeals.

## PART 1

### THE LOWER RATE ISSUE

#### THE APPLICABLE LEGISLATION

56. S.4 IHTA is the basic IHT charging provision which provides for tax to be charged on the death of a person as if, immediately before their death, they had made a transfer of value and the value transferred had been equal to the value of their estate immediately before death.

57. S.5 IHTA sets out the liabilities to be taken into account when determining the estate value.

58. S.23 IHTA exempts transfers of value which are attributable to property given to charities.

59. Sch.1A IHTA provides that a lower rate of IHT is payable if there are defined charitable donations from defined components of an estate.

60. Para. 2, Sch.1A IHTA provides that where the charitable giving condition is met and the donated amount from any component of a person's estate is at least 10% of the baseline amount of that component then IHT is payable at the lower rate of 36% on all of the property in that component.

61. Para. 3(1), Sch.1A IHTA provides that there are 3 components of an estate: (a) the survivorship component, (b) the settled property component, and (c) the general component.

62. Para. 5, Sch.1A IHTA sets out how the baseline amount is to be computed.

63. Para. 7, Sch.1A IHTA provides that an election can be made where the donated amount is at least 10% of the base line amount of a component, for that component to be combined with other components of the estate so that they are treated for IHT purposes as a single component.

64. If the donated amount for that deemed single component is at least 10% of the baseline amount for it then all of the property in that component qualifies for the lower rate of IHT.

65. Para 9, Sch 1A IHTA sets out the procedure for making the election for combination. The election must be in writing and made no later than 2 years and one month of the date of death. The date can be extended by HMRC under para. 9(3) Sch.1A IHTA in a particular case by such period as the HMRC officer may allow.

**DISCUSSION**

66. HM's estate had two relevant components, her Free Estate and the Will Trust, the Will Trust containing the provision for the charitable contribution.

67. The Trustees made an election made for the Will Trust and Free Estate to be combined and a claim to the reduced rate of IHT was made.

68. Mr Marks contends that the terms of the SM Will provide for the charitable contribution to be 25% of SM's Residuary Estate as at the time of creation of the Will Trust. If this is the case, the contribution to charity would be in the region of £250,000 and would amount to at least 10% of the combined Will Trust and Free Estate. This would result in the lower rate of IHT applying to the entire estate.

69. HMRC contend that the terms of the SM Will provide for the charitable contribution to be 25% of SM's Residuary Estate as at the death of HM. If this is the case then the various payments made by the Trustees to the Grandchildren during HM's lifetime will have depleted the Residuary Estate to a level such that the charitable contribution of 25% will be in the region of £29,000. This would not amount to 10% of the combined Will Trust and Free Estate and therefore the lower rate of IHT would not be available across the entire estate.

70. The central issue is the interpretation of the terms of the SM Will in respect of the donation to charity (the "Charity Share").

71. The first question for us to determine is therefore the correct interpretation of the SM Will as it applies to the Charity Share (the "Will Interpretation Issue")

72. Once that question has been determined we then need to determine how the Deeds of Appointment are to be interpreted. The Appellants argue that if they are correct on interpretation of the SM Will, the appointments made under the Deeds of Appointment to the Grandchildren should be treated not as absolute appointments of trust property but as "advances" to the Grandchildren in respect of their entitlement to the Residuary Estate. The consequence of this is that if the payments are advances they would not deplete the Residuary Estate, so enabling the Charity Share to still be computed by reference to the intact Residuary Property (the "Deed Interpretation Issue").

*The Will Interpretation Issue*

73. SM's Will provided (whilst the Grandchildren were alive), for the following "default" allocations:

(1) An allocation to HM for her lifetime of the entire income from the Residuary Estate (Clause 7(a)),

> 7(a) "to pay the income therefrom to my said wife HILDA MARKS ("my wife") during her lifetime.

(2) An allocation on HM''s death of the Residuary Estate remaining (capital and income) to the two sets of Grandchildren as to 3/8 each (7(c) and 7(d)) and the remaining 2/8 to the Charity

> 7(c) "Subject thereto, my Trustees shall divide the capital and income of my Residuary Estate into the following fractions and hold the same upon and with and subject to the following trusts and powers and provisions:
>
> i. As to a three-eights [sic] share ("Rochelle's Childrens' Share) on trust to pay the capital and income thereof to such of the children of my said daughter Rochelle Deborah Selby ("Rochelle") as shall survive me and of more than one in equal shares absolutely
>
> ii. As to a three-eighths share ("David's Childrens' Share") on trust to pay pay the capital and income thereof to such of the children of my said son David Leonard Marks ("David") as shall survive me and of more than one in equal shares absolutely
>
> iii. As to a one quarter share on trust to pay the capital and income thereof to the Trustees of the HILDA AND SAMUEL MARKS FOUNDATION (Registered Charity No. 245208) for its general charitable purposes absolutely.

74. We refer to these as "default" allocations as there were two provisions under which the Trustees were able to vary the allocations.

75. The first provision was Clause 7(b) and the second Clause 8(b).

76. Clause 7(b) allowed the Trustees, during HM's life, to apply the whole or any part of the Residuary Estate for HM's benefit as they thought fit, in their discretion, irrespective of the interests of the Grandchildren or the Charity. This is why Clause 7(c) is "subject to" clauses 7(a) and (b).

> 7(b) My Trustees may, at any time during the lifetime of my Wife pay or apply the whole or any part of my Residuary Estate in which my Wife is then entitled to an interest in possession to or for her advancement or otherwise for her benefit in such manner as the Trustees shall in their discretion think fit. In exercising the powers conferred by this sub-clause, my Trustees shall be entitled to have regard solely to the interests of my Wife and to disregard all other interests or potential interests under my Will.

77. Clause 8(a) (together with 8(b)) allowed the Trustees to disregard the default allocations under clause 7 and, subject only to any prior payments or applications already made, to appoint the whole or any part of the capital or income to the Grandchildren or great grandchildren:

> 8(a) Notwithstanding the provisions of clause 7 my Trustees shall have power to appoint the whole or any part of the capital and/or income of my Residuary Estate in which my Wife has a

> subsisting interest in possession upon trust for or for the benefit of any one or more of my grandchildren and great grandchildren (the "Residuary Beneficiaries") as such ages or times, in such shares, upon such trusts (which may include discretionary or protective powers or trusts) and in such manner generally as my Trustees shall in their discretion think fit. Any such appointment may include such powers and provisions for the maintenance, education or other benefit of the Residuary Beneficiaries or for the accumulation of income, and such administrative powers and provisions as my Trustees think fit."

78. This is our natural reading of the relevant provision which follows the plain language used. Our interpretation is not a strained one.

79. Our initial view is, therefore, consistent with HMRC's interpretation.

80. We go on, however, to examine Mr Marks' submissions to see if they are sufficient to displace our initial reading of the SM Will.

81. Mr Marks' argument hinges on there being ambiguity in the drafting of the SM Will.

*Mr Richard Chapman KC's submissions*

82. He included in his evidence, a document headed "Submissions on behalf of the Appellant" drafted by Richard Chapman QC (now KC) dated 19 June 2022.

83. Mr Chapman was not called to give evidence at the hearing. However, Mr Marks' was clear that his submissions were based on the submissions made by Mr Chapman in this document. For convenience and clarity we refer to Mr Chapman's submissions as they are set out in his submissions document and we refer to them as his "submissions".

84. Mr Chapman's submissions address a number of issues, one of which is headed "the proper construction of the SM Will".

85. Here he considered how the SM Will should be interpreted, having identified what he saw as "an inherent consistency" within it.

86. His reasoning was as follows:

> "On one level, clause 7(c) provides for an interest in the SM Residue in the full amount of the respective shares (effectively calculating the Charities' share as 25% of the whole SM Residue upon Mr Samuel Marks' death, subject to any fluctuations in market value) whereas clause 8(a) allows for those shares to be ignored at the expense of the Charities (effectively calculating the Charities' share as 25% of the unappointed residue following Mrs Marks' death). It is submitted that the second of these would be a capricious outcome in circumstances in which no such capricious intention appears from the SM Will. The presumption against a capricious intention is set as out as follows in *Williams on Wills* at paragraph 51.8:
>
> > Presumption in ambiguous cases. Without some clear intention on the part of the testator, however, the court does not attribute to him a capricious intention, or a whimsical or harsh result to his dispositions, where the words of the will can be read otherwise, Accordingly, if the language used in a will admits of two constructions, according to one of which the property will go in a rational, convenient and ordinary succession, and according to another in an irrational and inconvenient course, such that the court is driven to the conclusion that the testator is acting capriciously, without any intelligible motive, and contrary to the ordinary mode in which men act in similar cases, the court leans towards

> the former as what was intended, although a meaning is thereby given to words different from their ordinary meaning.

87. He went on to cite s.21 of the Administration of Justice Act 1982 ("AJA 1982") which provides as follows:

> (1) This section applies to a will –
>
> (a) in so far as any part of it is meaningless;
>
> (b) in so far as the language used in any part of it is ambiguous on the face of it;
>
> (c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of the surrounding circumstances.
>
> (2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention may be admitted to assist in its interpretation.

88. In essence his submission was that, on the basis of (a) what he identified as the ambiguity in the SM Will and (b) what he understood to be SM's intentions, it was correct to interpret the SM Will as providing for the Charity Share to be computed as 25% of the whole Residuary Estate upon SM's death rather than the unappointed Residuary Estate following HM's death.

89. He then submitted, in line with that analysis and based on his understanding of the intention and understanding of the Trustees and Grandchildren, that the Deeds of Appointment should be construed as "advances" that went towards satisfaction of their shares in the SM Residual Estate rather than absolute "appointments" and that, under the principle of "hotchpot", the amounts advanced were to be added back to the Residuary Estate when determining the amount payable to charity. The effect of this would be that the Charity Share would be an amount determined by reference to Residuary Estate disregarding the transfers to the Grandchildren.

90. There are several layers of analysis underpinning Mr Chapman's submissions.

91. The core of his analysis is the identification of ambiguity in the SM Will by reference to its terms and by reference to what he understood to be SM's intention.

92. As we outline above, our reading of the terms is that they provide for the Residuary Estate to be applied, during HM's lifetime, by the Trustees in favour of HM, or the Grandchildren/great grandchildren as the Trustees think fit, and for the Charity Share to be determined by reference to what is left. We do not regard this as "irrational and inconvenient" as per *Williams on Wills*.

93. It follows that we do not find the terms of the SM Will to be "meaningless" nor do we find them to ambiguous either on their face or in the circumstances of this appeal. We do not therefore see the AJA 1982 as having any application.

94. Further, we do not regard consequence of the provisions to be "capricious" as that term is used by Mr Chapman and referenced in *Williams on Wills* as cited by Mr Chapman.

*The view of the will's author*

95. Our finding as to the lack of ambiguity in the SM Will and the interpretation that we have applied to it is consistent with a summary of the provisions of the will provided by its author, Geoffrey Schindler, to HMRC in an email dated 3 December 2019.

96. In his email, Mr Schindler stated the following:

> "As the author of the Will who took direct instructions from Mr Marks before preparing the document I have no doubt what he intended and I have equally no doubt that the words of clause 7 set out clearly and unambiguously the intentions of the testator.
>
> a. In the first instance the income from the whole of the residue was to be paid to his widow.
>
> b. Sub-clause (b) gives a discretionary power to the executors of the will to appoint capital to Mrs Marks or for her benefit, Mrs Marks has no rights to capital and, as the provisions of the sub-clause makes clear, the power was vested in the Trustees of the will to exercise in "their discretion … think fit". Therefore it is clear that Mrs Marks, during her widowhood, did not have any vested interest in the capital of the residue of Mr Mark's estate.
>
> c. After the death of Mrs Marks (who did survive her husband) the capital and income provisions are set out clearly and, as stated, in my view unambiguously. One quarter share of the capital of the residue is held on trust to pay to the Hilda and Samuel Marks Foundation whose charitable number is set out in the Will.
>
> As stated the intention of the testator was clear. Initially Mrs Marks received all the income from the estate. After her death the capital of the estate was then divided as set out in sub-clause (c); this gave one quarter of the capital to the family charity.
>
> There is no ambiguity in the drafting of the Will and the residuary dispositions are set out clearly.
>
> At the sake of repetition I confirm that the provisions relating to capital during the widowhood of Mrs Mark's were entirely at the discretion of the Trustees. The Will set out the intention of the testator which was to give Mrs Marks a vested interest in income, a discretionary provision that might lead to her receiving capital; but there was no guarantee of this and nor could she enforce any provision for capital; and ultimately a disposition of the residue after the death of Mrs Marks."

97. Although Mr Schindler refers only to clause 7 – and the Trustee's discretion in 7(b) in respect of HM, his analysis should in our view, logically, extend to the Trustees discretion in 8(b) – with references to HM being references to the Grandchildren (and great grandchildren) as those provisions operate on the same principle. In short, following the death of HM it would be the remaining property in the Will Trust that would be divided in the stated proportions.

98. We note also that Mr Chapman's understanding of SM's intention, which he relies on to underpin his interpretation, is stated to be drawn from three sources (via the statement of Mr Marks). These are:

(1) a letter of wishes signed by SM and HM referring to the distribution of funds on their death;

(2) the fact that SM and HM "were charitable and philanthropic during their lifetimes"

(3) the fact that HM did not leave any charitable bequests of her own.

99. We do not find any of these sources to provide sufficient support for Mr Chapman's submission as to SM's intention in respect of the charitable donation.

100. Specifically, the letter of wishes (from SM and HM dated 30 June 1999) is addressed to the Trustees of the Hilda and Samuel Marks Foundation – it does not relate at all to the Will Trust. Further, the statement at (2) is simply a general statement not related to the Will Trust.

101. At best both (1) and (2) are simply indications of Mr and Mrs Marks' general charitable inclinations.

102. The statement at (3) is also not related directly to the Will Trust – it relates to HM's will and requires additional assumptions to be made as to HM's reasoning.

103. Mr Chapman refers also to Mr Marks' view that the draftsman of the SM Will "understood that the charities would receive 25% of the SM Residue". Given our earlier observations as to Mr Schindler's comments on the will, we find this view to be misleading.

104. For the reasons given, we are not persuaded by Mr Chapman's submissions.

105. We do not intend any disrespect to Mr Chapman. We have not had sight of his instructions nor do we know anything about the consultation that led to production of his submissions. Further a submission is not an opinion and of course we have not had the opportunity to hear directly from Mr Chapman.

***Conclusion on the Will Interpretation Issue***

106. We do not find the provisions of the SM Will as they relate to the Charity Share to be ambiguous or to lack clarity.

107. The interpretation that Mr Marks' seeks to place on the SM Will terms disregards the clear ability of the Trustees to appoint sums as they saw fit during HM's lifetime – either for HM's benefit or for the Grandchildren's benefit.

108. There is also no requirement in the SM Will for any regard to be paid to maintaining the quantum of the contribution to charity.

109. It is in fact the opposite – as clause 7(c) which provides for division of the Residuary Estate is expressly subject to clause 7(a) and (b) – under which the Trustees can allocate to HM as they see fit, and the Trustee's power under clause 8(a) under which they can allocate direct to the Grandchildren or great grandchildren as they see fit, is expressly stated to be "notwithstanding the provisions of Clause 7".

110. In short, the Will Trust provides for the charity to receive 25% of the remaining Residual Estate on HM's death – but it also provides for the Trustees to be able to appoint any amount of the Residual Estate to HM during her life time and for the Trustees to appoint any amount of the Residual Estate to the Grandchildren (or great grandchildren) during HM's life time, the consequence of this being that the Residual Estate at the time of HM's death would not necessarily be the same as the Residual Estate as at inception of the Will Trust.

111. Accordingly, we find that Mr Marks' contention that the SM Will required the Charity Share to be 25% of the Residuary Estate computed by reference to that estate *as at the time of the trust's creation* is not correct.

***The Deed Interpretation Issue***

112. It follows from our dismissal of Mr Marks' contention on interpretation of the SM Will terms that his consequential submission that the transfers to the Grandchildren pursuant to the Deeds of Appointment should be treated as advances (and that the principle of "hotch pot" applies) also falls away.

113. However, for completeness we go on to consider what the position would be if our conclusion on the terms of the SM Will are not correct.

114. We also do so in recognition of the lack of clarity in the grounds of appeal (the notice of appeal simply states that "it is the conditions for the 36% rate which are in dispute") as we note that in his various witness statements Mr Marks also argues that on their true construction the transactions under the Deeds of Appointment are payments from HM's estate which needed to be funded from the liquid cash available in SM's Will Trust.

115. Both that argument and the submission based on Mr Chapman's analysis require a determination of the effect of the transactions effected by the Deeds of Appointment.

116. We start by noting that the Deeds of Appointment are short, clear documents.

117. Each Deed is headed "Deed of Appointment", is stated to relate to the "Samuel Marks Will Trust" (which is defined as the "Will") and each contains similar operative wording

118. Clause 2 of each deed provides that the Trustees are exercising their powers under either Clause 7(b) of the Will – in the case of Deed 2 transferring property to HM or Clause 8(a) of the Will in the case of Deeds 1, 3 and 4 transferring property to the Grandchildren

119. We set out extracts of the operative wording below:

Deed 2

Clause 2

"2.1 The Trustees exercise their power as set out in clause 7(b) of the Will to appoint the Specified Fund as set out in clause 2.2"

"2.2 Beginning on the date of this deed the Trustees hold the Specified Fund on trust for the Life Tenant absolutely"

Deeds 1, 3 and 4

Clause 2

"2.1 The Trustees exercise their power as set out in clause 8(a) of the Will to appoint the Specified Fund as set out in clause 2.2"

"2.2 Beginning on the date of this deed the Trustees hold the Specified Fund on trust for the Specified Beneficiaries in equal shares absolutely"

120. On their face the Deeds seem therefore to transfer property from the Will Trust to the beneficiaries and to transfer that property absolutely.

121. It is clear that any argument for interpreting the Deeds of Appointment other than in accordance with their terms relies on the Trustees being able to show clearly that they intended something other than what those documents provided for and, as per Mr Chapman's submissions for the Grandchildren to have shared that intention.

122. The evidence provided by Mr Marks on this issue consisted primarily of witness evidence from the Trustees and the Grandchildren.

*Mr Marks' witness evidence*

123. We start with Mr Marks' evidence as he took the lead in determining the arrangements in relation to the SM Will.

124. He provided three documents each described as his witness statements. The first dated 14 June 2019, the second 22 July 2020 and the third 28 October 2020.

125. In his statements both written and oral he emphasised to us the deeply held commitment that his parents had to charitable causes. That was very clear and we do not dispute it.

126. However, the explanations he provided as to why he regarded the transfers to the Grandchildren to be anything other than absolute transfers of their entitlement under the SM Will were confusing and inconsistent.

127. In his first witness statement he stated that:

> "(9) These appointments were made … to give Mrs Marks' grandchildren an advance on their capital as they were the residuary beneficiaries of Mrs Marks' estate in any event. It was understood that post this action, there would still be sufficient assets in the Estate to make the Charitable Donation required under Mr Marks' will in respect of the other residuary beneficiaries"

128. He then went on to say:

> "(10) It is not disputed that monies from the SM Estate were paid to Mrs Marks … as Mrs Marks own funds were primarily in fixed term investments. This was not intended to reduce the funds available for the Charity but was merely a best utilisation of "free cash" resources."

129. Later in the statement he said:

> " … whilst the appointments referred to in paragraphs 6-8 above [these were the payments to the Grandchildren] were treated as PET's in Mrs Marks estate as they were "advance distributions" of the recipients entitlement as beneficiaries the funding of this should have been treated as a liability of Mrs Marks estate to ensure that Mr Marks estate was distributed in accordance with his wishes"

130. In short we find that he is saying here that the payments were intended to be from HM's estate but as her cash was on fixed term deposit there was, in effect, a borrowing, from SM's estate. He also suggests that a borrowing arrangement should have been recognised between the two estates to reflect this. We assume that this is what led to the revised schedule submitted to HMRC in 2018 for the HM estate showing as a deduction from HM's estate "funds borrowed from life interest" and a corresponding increase to the Will Trust.

*Mr Marks' second witness statement*

131. In his second witness statement Mr Marks acknowledges that he based his conclusions;

> " (4) … on the assumption that professional advisers would make it clear any adverse implication to either the family's overall IHT position and, in particular, where the clear and unambiguous requirements of Mr Marks's Will would be adversely affected."

132. Here he refers at (10) to his "lay understanding" being that the value of the payments from HM's estate would be deducted from her estate and not the Will Trust. However he also states at (8) that;

> "the Executors' assumption at the time was that these appointments were merely an advancement of the 75% Residuary Beneficiaries eventual entitlement in a tax efficient manner"

133. These statements appear inconsistent with his first statement - the reference to the 75% Residuary Beneficiaries being to SM's estate and not HM's Estate. There is also no longer

any reference to the purported indebtedness between HM and SM's estate. He also begins to indicate in this statement that his views are influenced by an assumption that what was being done would not have affected the IHT position as that would otherwise have been pointed out by the advisers.

*Mr Marks' third witness statement*

134. In his third witness statement Mr Marks states that he considers that his view (and the view of the other Trustees and the Grandchildren) to be entirely consistent with Mr Chapman's submission as to the payments being advances.

135. He states again that the reason for using funds from SM's estate for the payments was the fact that HM's cash was primarily in fixed term deposits.

136. The inconsistency between the "borrowing" explanation and the "advance" explanation is still present.

137. He also seeks to rely on Mr Chapman's legal analysis as support for what he states to be his (and the other Trustees and the Grandchildrens') actual intentions. This neglects the fact that Mr Chapman relies on there being evidence of those intentions as support for his legal analysis.

138. Mr Marks' oral explanation did not make the position much clearer.

139. We accept entirely that Mr Marks' is not a tax or legal expert and we also accept that Mr Marks is describing events that occurred several years ago and at an emotional time. However we find his explanation of his understanding to be implausible.

140. This is for a number of reasons, in addition to the inconsistency within his statements. These include the following:

*The inconsistent memos to the Grandchildren*

141. First, his initial explanation that the payments transferred to the Grandchildren were advances from HM's estate "funded" by liquid cash in SM's estate is not consistent with the message that he sent to each of the Grandchildren in memos accompanying the initial payments of £50,000 to them.

142. These memos (each dated 24 July 2014) were each headed "Gift" and stated the following:

> "Further to the discussions with Grandma in Bournemouth I now enclose a cheque in the sum of £50,000 being the promised monies which Grandma has passed to you out of Grandpa's estate.
>
> Shabbat Shalom."

*The advice received from OGR*

143. Second, as Mr Marks' acknowledged in his second and third witness statements, and as we can glean from the limited information in the Hearing Bundle, the Trustees sought and received detailed advice from OGR as to the rights of the Trustees and their obligations towards the charity as "remainder man". Mr Marks has provided us only with selected extracts of the correspondence with OGR – but from what we can establish, the Trustees were advised on their ability to transfer property direct to HM and to the Grandchildren from the Will Trust. It was that advice which was put directly into action by the Trustees – led by Mr Marks.

144. We note in this regard advice from Priti Shah of OGR to HM, Mr Marks and Ms Selby dated 21 May 2013 which acknowledges a meeting between them at which they raised the

question "of whether the executors/trustees of the Will Trust owe a duty to the trustees of the charity who has a remainder interest under Samuel's estate". In answer to that question she set out in full the provisions of Clause 7(b) of the SM Will, answering the question in the following terms:

> "Whilst I appreciate that the trustees are under a duty to balance the interests of the life tenant to that of the remainderman, in my opinion the second part of this clause appears to entitle the trustees to disregard the interests or potential interests of anyone other than Samuel's wife, Hilda. It is arguable therefore that, if criticised, the trustees can rely on this should they decide to advance the Residuary Estate to Hilda absolutely."

145. We note also a subsequent email from Priti Shah dated 15 May 2014 and headed "Clearance from HMRC" which refers to clearance being received in respect of SM's estate and then goes on to confirm that when they met previously they discussed:

> "Whether the life interest for Hilda should be appointed out to her absolutely so that the remainder interest in favour of the charity would not come into effect after Hilda's passing"

146. We then note an email from Mr Marks to Hilda Marks and Ms Selby copied to Priti Shah dated 6 July 2014, with the subject "Dad's Estate" and headed "Prepared prior to the weekend but adapted to reflect the discussions regarding payment of monies to the grandchildren". This is the email under which Mr Marks instructed Priti Shah to make the transfers the Grandchildren.

147. In this message he refers specifically to his understanding that the Executors could "make any Appointment to any of the Beneficiaries … under the Will". This indicates to us that he had by then received advice on the effect of both Clause 7(b) and 8(a) of the SM Will. Pursuant to that he said that he wanted to make payments direct to the Grandchildren and by copy of the email instructed Priti Shah to:

> "appoint those monies direct to them so the payments can be made out of the cash resources collected to date".

148. He noted also in this email that a transfer direct to the Grandchildren would form a potentially exempt transfer for HM's estate.

149. We next note an email (dated 25/11/14) from Mr Marks to Priti Shah and others as to the arrangements being put in place to transfer Monarch Court from SM's estate. In this email Mr Marks refers to an initial discussion about transferring the property first to HM and then from HM to Mr Marks and Ms Selby. This was because under the terms of the SM Will it could not be transferred directly to them. He then makes the observation that it may be better to transfer the property directly to the Grandchildren "on the basis that the grandchildren are the residuary beneficiaries".

150. In this email there is also an acknowledgement that appears to indicate awareness of the consequent reduction in the Charity Share. Specifically, Mr Marks asks the question

> "As we are appointing direct to the children, should a donation be made to the Foundation to "match"? If this is the case, we can considered whether there should be any nomination of these monies (i.e. between the two family Charitable Trusts or a specific one)."

151. Leaving aside the question of whether any donation was made (it seems that it was not) this indicates to us that Mr Marks was aware that the transfers would deplete the Residuary Estate.

152. We note also that the Hearing Bundle includes only selected items of correspondence with OGR – although it is clear that there were several meetings and more advice provided over the course of the administration of the SM Will. This was a point that Mr Bracegirdle mentioned several times. We do not therefore know the full extent of the advice provided.

153. What these emails do indicate is that a considerable amount of advice was given in respect of the SM Will and the ability of the Trustees to make payments under its terms. We can also see that there was some thought given to IHT planning which led to the desire to structure those payments as potentially exempt transfers for IHT purposes. We find it likely therefore from reviewing the content of the correspondence provided that Mr Marks understood the legal consequence of what was being done. We accept however that what was not known at the time was the consequence of that depletion on the overall IHT rate for the joint estates.

*The Charity Share actually paid and the IHT forms submitted*

154. Third, it is a fact that the Charity Share was actually computed by reference to the remainder of the Residuary Estate and a payment of 25% of that amount, being £29,063 was made.

155. The IHT forms were submitted to HMRC on this basis and were approved and signed by Mr Marks and Ms Selby as the executors.

156. When questioned by Mr Bracegirdle as to why he had signed off on a payment of £29,063 to Charity when he had expected it to be around £250,000, Mr Marks' answer was that he had been assured by OGR that it was correct. He added that he thought he had said to OGR that he was surprised but that he could not recall the precise conversation. He also mentioned that at the time he was struggling with certain personal matters and was in the process of moving from Manchester to London.

157. Given what we have seen to be Mr Marks' close focus on the financial aspects of the administration of SM's estate and the value of the Residuary Estate – for example his close monitoring of the value of Monarch Court (as shown in his emails to OGR), the attention paid to the fluctuations in value of the listed share component and his discussions in relation to agreeing the value of the Mutley shares, we find Mr Marks's explanation difficult to accept.

158. It is also inconsistent with his fundamental argument that the payment was always intended to be 25% of the intact Residuary Estate.

*The additional witness evidence on the Lower Rate Issue*

159. Given our findings in relation to Mr Mark's intention as regards the Deeds of Appointment and our finding that he was the main driver of the arrangements in relation to the administration of SM's estate the witness evidence of Ms Selby, the Grandchildren or Mr Dabek on the Lower Rate Issue is of less significance.

160. However, again for the sake of completeness we set out below our findings in respect of the evidence that was given.

*The Grandchildren's evidence*

161. We heard evidence from Gillian Marks, Marcelle Palmer, Ashley Marks and Philip Selby. There was a high degree of overlap in the evidence provided and the following are our aggregated findings (we refer to these witnesses collectively as the Grandchildren):

(1) Each witness statement contained very similar paragraphs in respect of it being made clear to them that the payments they received were an "advance" on their

eventual inheritance, the witness' understanding of what would happen in the event of there being a shortfall in the SM Estate and the witness' understanding of their grandparents' intention not to reduce the Charity Share.

These paragraphs appear to have been drafted by Mr Marks or at the very least based on a draft provided by him. Although the Grandchildren gave evidence that the sentiments expressed in their statements were their own they each acknowledged Mr Marks' involvement in their preparation. This is a material factor in assessing the weight that we were able to give to them.

(2) None of the Grandchildren appreciated the technical differences between an advance and an appointment and none of them had actually seen any of the Deeds of Appointment pursuant to which they received their payments.

(3) None of the Grandchildren could recall specifically when they were told that the payments were in fact advances. Each witness referred generally to discussions with Mr Marks but there was no mention of a specific discussion before payment was made outlining the basis on which the payments were being made.

(4) None of the Grandchildren were aware of the details of the discussions between the Trustees and OGR.

(5) None of the Grandchildren knew how much money had actually been given to charity – although each expected it to have been a substantial sum.

(6) All of the Grandchildren were consistent in describing the dedication of their grandparents to charity and they were all very confident that their grandparents would not have done anything that would reduce their planned contribution to charity.

162. We did not find the evidence to materially assist Mr Marks' contention. Although the Grandchildren that gave evidence each confirmed that they would be prepared to return the monies received if by not doing so their grandparents' planned contribution to charity would be reduced, we are not persuaded that this was made clear to them at the time the payments were received. We are also not persuaded that there was any detailed discussion of the terms on which the payments were being made or any sharing of the Deeds of Appointment prior to those payments being made.

*Ms Selby's evidence*

163. We set out below our findings from Ms Selby's evidence:

(1) Ms Selby acknowledged that she did not know the difference between an advance and an appointment – nor could she remember it being discussed with OGR. She said that she would not have expected her mother to understand the distinction either.

(2) She was certain that her mother would not have wanted to diminish the payment to Charity.

(3) She understood that the donation to Charity was expected to be in the region of £250,000. She accepted that she had signed the IHT account which showed that the contribution was only £29,063 but said that this was a misunderstanding and that she had assumed that the payment would be "topped up" from her mother's estate.

(4) She also accepted that she had signed the Deeds of Appointment – but explained that her husband was suffering from cancer at the time and so she might not have understood fully what was being signed. It was arranged by Mr Marks.

164. Ms Selby's evidence did not materially impact our assessment of Mr Marks' case. We did note however the inconsistency between her explanation for signing off on the £29,000 charity donation and Mr Marks' explanation.

*Mr Dabek's evidence*

165. We set out below our findings from Mr Dabek's evidence:

(1) Mr Dabek was not involved in the drafting of the SM Will or the Deeds of Appointment, he did however attend some of the meetings with HM and OGR and had been looking after HM's tax affairs

(2) Although Mr Dabek's firm was involved in the provision of tax advice to HM this was related primarily to her income tax position and was in his capacity as an accountant. Neither he nor his firm were advising HM or the Trustees in relation to inheritance tax – this advice was provided solely by OGR.

(3) Mr Dabek thought that the Trustees and HM had been badly advised by OGR as to the IHT consequences of what was being proposed.

(4) Mr Dabek accepted that the Deeds of Appointment were likely to be deeds of appointment but said that the real question was whether they should have been deeds of appointment.

166. Mr Dabek's evidence was of limited assistance given his restricted role in relation to the arrangements. Again it did not materially impact our assessment of Mr Marks' contentions.

***Conclusion on the Deed of Appointment Issue***

167. We find that the Deeds of Appointment should be interpreted in accordance with their terms. This means that they operated to appoint to the beneficiaries the property specified in them. As the property appointed was from the Residuary Estate the appointments depleted or reduced the Residuary Estate accordingly.

**DETERMINATION ON THE LOWER RATE ISSUE**

168. The consequence of our conclusions on the Will Interpretation Issue and Deed Appointment Issue is that the lower rate does not apply to the Estate as the conditions are not satisfied.

169. This is a consequence of the legal effect of the arrangements entered into by the Trustees.

170. We accept that the Trustees did not appreciate the IHT consequences of making the appointments. We also understand from the comments made by Mr Marks during the hearing that he was very dissatisfied that OGR had not provided advice on the full IHT consequences of depleting the Residuary Estate and they ceased to be instructed as a consequence.

171. We also accept that the Trustees would not have taken the steps they took had they understood the full IHT consequences of doing do, Mr Marks has made that clear to us.

172. However it is simply not possible to alter the legal consequences of the steps that were taken by seeking to recharacterize them by reference to what would have been done had the IHT consequences been appreciated. Not intending the eventual tax result of a transaction is distinct from not intending its legal consequences.

173. We therefore uphold the Determinations as to the condition in Schedule 1A IHTA not being satisfied with the consequence that the lower rate of IHT does not apply to the combined estate.

174. We make no findings in this judgment about whether the Trustees intended to reduce the amount payable from SM's estate to charity.

175. We should add that throughout the course of the hearing we heard much about the strength of Samuel and Hilda Marks' commitment to charitable causes and the many contributions to charity that they made throughout their lives. We found the description of Mr Marks' war time experiences very moving and were very impressed by his dedication to multiple causes. We also accept that they were very much a team. We have no doubt at all as to Samuel and Hilda Marks' values and their commitment to charity. This decision reflects what we find to be the tax and legal consequences of the transactions entered into by the Trustees.

## PART 2

### THE BPR ISSUE

#### ADDITIONAL BACKGROUND, FACTS FOUND AND MATERIAL INFORMATION PROVIDED IN RELATION TO THE BPR ISSUE

176. 2 Dorchester Mansions is a ground floor flat comprising an entrance hallway, three bedrooms, a kitchen, a bathroom, a utility room and an ensuite shower room. It is in a five storey block and has unallocated parking to the front and a communal garden to the rear.

177. HM'S business was described as holiday lets.

178. Limited records were provided in respect of this business. The records provided were:

(1) Letting accounts for 4 years – 2011/12, 2012/13, 2013/14 and 2014/15

(2) An "inheritance tax valuation" of the property as at 1 October 2015 dated 29 March 2016. The valuation noted that the property had been used as a holiday letting business but did not provide any information in relation to the business.

179. On 14 February 2017 HMRC wrote to OGR regarding the BPR claim and requested further information to support it stating that on the basis of the information provided so far they regarded it as an investment property not eligible for BPR. Seven specific questions were asked in relation to: the time at which the property was available for letting, the rental rates, the cleaning arrangements, the arrangements for admittance to the property, how guests' problems were dealt with during their stay, whether there was contact between the owner and the guests and whether any other services were provided. Copies of sample invoices were also requested.

180. On 23 March 2017 OGR Provided the following information to HMRC:

(1) The property was available as a "Kosher Flat" throughout the year and was first made available in 2009/10.

(2) Access was arranged by the building caretaker or via HM.

(3) HM was usually in direct contact with the guests.

(4) Furniture linen, crockery, cooking utensils, television, religious candles, tea & coffee, wi-fi and a telephone were provided.

(5) In response to HMRC's request for rental rates a simple spreadsheet was provided showing the periods of letting by month for each of the four years

originally specified and OGR suggested that HMRC should review the accounts that had previously been submitted. The schedule provided showed that the property was let for 158 nights in 2012/13, 99 in 2013/14 and 109 in 2014/15.

(6) In reply to HMRC's request for sample invoices, OGR's response was

> "Whilst that the executors did not submit invoices separately the management of the property was dealt with by a separate bank account. Details have been provided for cleaning arrangements at the beginning and end of any rental utilising mainly a self employed caretaker for Dorchester Mansions (who assisted other residents in the Block) or other casual labour. Where necessary, additional provisions were made for visitors during their period of occupation on the basis that the holiday maker paid for this direct."

181. The source of the information provided by OGR was not specified.

182. No invoices or copies of bank statements or other supporting records were provided by OGR or the Executors.

183. On 11 April 2017 HMRC wrote again to OGR stating that in their view the property did not qualify for BPR. In this letter HMRC set out the tests that it thought should be applied, with focus on the Upper Tribunal's decision in *HMRC v The Personal Representatives of Pawson* [2013] UKUT 50. They concluded that having considered the services listed they did not fall outside the general scope covered by the decision in *Pawson* and were either incidental to the business of holding the property as an investment or did not predominate to such an extent that the business ceased to be mainly one of holding the property as an investment.

184. On 15 June 2017 OGR replied to HMRC, disputing HMRC's interpretation and application of the principles in *Pawson* and providing further details in relation to the business. These details included the following:

(1) That HM provided a welcome pack or other food to the guests.

(2) Cleaning and refuse collection arrangements were made by HM. Cleaning was always done between lets and customers could ask for additional cleaning during a let which would be done for an extra charge.

(3) HM arranged the provision of linen and laundry.

(4) Ancillary services were provided as part of the whole package.

(5) A statement that HM was not an "armchair investor but was actively involved in the flat operation".

(6) That some additional services were provided that were not specifically carried out under the holiday letting contract and which were not "incidental" to holding the property as an investment.

(7) The property was let at daily rates and weekly rates. The figures given were £75 per night or £500 per week prior to 2013/14 and an average of £500 per week for subsequent years. (No evidence was given as to the comparability of these rates and HMRC noted that they were also not supported by the figures provided for 2012/13).

(8) Invoices were not provided to guests unless specifically requested because of HM's close involvement. (No explanation of why her involvement negated the usual paperwork associated with running a business.)

(9) Access was arranged via the caretaker or if necessary by HM.

(10) HM greeted every guest face to face.

(11) HM was the first point of contact if guests needed anything and personally went out of her way to source guests' requirements.

(12) The property was let exclusively to members of the Orthodox Jewish faith.

(13) Only Kosher food was allowed on the premises and HM as a separate service arranged for food to be delivered from the local Kosher shop if requested on advance of arrival.

185. As with the information provided to HMRC in March 2017, no indication of the source of the information was provided nor were any supporting records provided.

186. The matter then became part of the unsuccessful ADR process between the parties following which HMRC wrote to Mr Marks on 2 October 2018 setting out their view of the matter and enclosing their determination that BPR was not available.

187. On 20 November 2018 Mr Marks requested a statutory review under s 223(a) IHTA which was accepted by HMRC on 14 December 2018.

188. The review commenced on 10 January 2019 and the reviewing officer asked for additional information.

189. On 21 January 2019, Brian White, who was representing Mr Marks provided what was referred to as a "BPR analysis".

190. On 15 February 2019 Ms Selby wrote to HMRC providing further information.

191. On 28 February 2019 HMRC issued their review conclusion upholding the determination of 2 October 2018 which is the subject of this Appeal.

*The Witness Evidence*

192. We heard witness evidence on the BPR Issue from Ms Selby, Mr Marks, each of whom had also provided witness statements that were included in the bundle. We were due to hear evidence from Rev. Barry Sklan but he was unable to attend the hearing due to illness.

*Ms Selby's evidence*

193. We found the following from Ms Selby's evidence (primarily her witness statement dated 15 June 2019 and her oral evidence):

(1) Since HM's death she had taken over the running of the business.

(2) She confirmed that HM had been directly and personally involved in the running of the business. This included:

(1) HM personally choosing the furniture and décor of the flat.

(2) HM regularly checking to see if anything needed to replaced or repaired in the flat and HM ensuring that it would be dealt with the help of Ms Selby, HM's personal assistant (Rosamunde Bloom) or the caretaker of the flat (Mr Robertson). No specific examples were provided.

(3) HM was involved in the screening of potential guests to ensure that she was comfortable that they would keep the Kosher nature of the flat intact. The nature of the checks was not disclosed.

(4) For one particular guest (Mrs Judy Meshulam) HM had arranged for the caretaker to take delivery of medical equipment and had instructed the caretaker to give the guest all the help that she required.

(5) She was aware that HM would assist guests to contact the local Synagogue shop who supplied Kosher provisions. Ms Selby added that HM would, if asked by the guests, contact the shop herself and order provisions for the guests. She could not say how often this happened – and added that guests didn't always use the Synagogue shop as they would being their own food with them.

(6) Ms Selby was aware that HM had asked guests to visit her home for a drink or for supper. There was no suggestion that this was offered to all guests nor was any indication given of how often it had occurred.

(3) The flat was offered exclusively as a Kosher holiday rental.

(4) The flat was not widely marketed. It was marketed in the Orthodox Jewish press although most bookings were via personal recommendation. Ms Selby acknowledged that no copies of any adverts had been provided and that the advertising was infrequent. In this regard we noted that an email from HM containing discussions as to the insertion of an advert in the Hamodia Newspaper together with a copy of the proposed advert was included in the bundle.

(5) All the dishes/utensils in the flat had to be suitable for Kosher use. Kosher wine, candles and spices were provided if required for religious ceremonies. Utensils had to be separated so that there was no mixing of those used for milk and those used for meat.

(6) The Flat was equipped with Shabbat compliant time switches for lighting and power. The switches were on a specific circuit for the flat alone and not the whole block. Ms Selby confirmed that HM had arranged for these switches to be installed when she acquired the flat.

(7) The flat also included a Shabbat kettle. This was described an urn which switches on from the time Shabbat comes in on Friday evening and stays on until Shabbat goes out on Saturday evening. It is designed to ensure the availability of hot drinks over the Shabbat period. A Shabbat compliant hot plate that operated on a timer was also provided.

(8) HM provided a Kosher welcome pack – which was not charged for. The pack included various Kosher essentials including Kosher toilet paper. Special paper was required as guests would not be able to use standard toilet paper during Shabbat (as they would be unable to tear off sheets).

(9) Rev. Barry Sklan the former Assistant Minister of the Bournemouth Hebrew Congregation helped her mother to set up and maintain the Kosher nature of the flat.

(10) Part of Rev. Sklan's role was to arrange for the utensils that were to be used in the flat to be ritually "dipped and blessed" before their first use. If any of those utensils broke he would have to repeat this process for their replacements. Ms Selby did not say how often this occurred.

(11) Ms Selby mentioned that she was aware of some guests being "Ultra Orthodox" with very specific requirements. Details of these specific requirements were not however provided.

(12) Ms Selby emphasised the importance of the flat being a Kosher holiday let. She referred to an email sent by John Feinstein, a regular guest at 2 Dorchester Mansions, to Mr Marks. She said that this email referred to the significance of the

Kosher nature of the accommodation. It was not clear whether Ms Selby had personally had any dealings with Mr Feinstein.

(13) Ms Selby referred to a note sent to Mr Marks by Judy Meshulam which included comments on the extra steps that needed to be taken at the flat to ensure that her disabled foster children could stay with her. When asked about the arrangements that had been made, Ms Selby said that she was aware that Mrs Meshulam had contacted HM and had arranged for the NHS to deliver specialist equipment to the flat – including wheelchairs and ramps. She said that HM had made arrangements for the caretaker to take delivery of the items and to ensure that they were ready for use.

(14) Ms Selby also referred to a letter sent to her brother by Rosamunde Bloom who was HM's secretary/personal assistant. She said that it provided further information as to the extent of the activities undertaken by her mother.

(15) Ms Selby also referred to the memo from the caretaker (Richard Robertson) to Mr Marks and said that she noted its comments. She acknowledged that Mr Robertson had helped her mother with her holiday let business and that this was on a specific basis – rather than as part of his job looking after all of the other flat owners.

(16) Ms Selby acknowledged that the information she had provided to HMRC and in her evidence was by reference to her HM's records as well as to her own knowledge. When asked to explain what records there were, Ms Selby referred to a calendar and diary as well as a list of phone numbers. These had not been put before the Tribunal or produced to HMRC. She could not explain why this was.

*Mr Marks witness evidence*

194. Mr Marks' witness evidence both oral and written (primarily his witness statement "no.13" dated 28 October 2020) on the BPR issue consisted largely of his analysis as to why 2 Dorchester Mansions should be eligible for BPR. We did not find any material facts in it.

*Rev Barry Sklan's witness evidence*

195. The following information was provided in Rev Sklan's witness statement dated 12 September 2022 and his letter to Mr Marks of 15 March 2022:

(1) He was at the relevant time the Assistant Minister of the Bournemouth Hebrew Congregation.

(2) He was responsible for the upkeep of "Kashrut" within the synagogue and the various outlets supervised by it. Kashrut being the body of Jewish religious rules dealing with what foods can and cannot be eaten, which he described as the "Kosher provision". (In accordance with the terminology used by Rev. Sklan and the Appellants we have used the term "Kosher" in this judgment to indicate compliance with Kashrut).

(3) He was personally involved in establishing and maintaining the flat as a Kosher flat.

(4) He would arrange for any newly purchased items that were to be used in relation to food to be taken to the Mikveh (the ritual bath) in the synagogue and immersed in the water and washed. The preparations for doing this were supervised by HM. This process would have to be repeated for any replacement items.

(5) He would return the items to the flat, wash and place them in their relevant cupboards and drawers. This included separating items for meat, milk and Parve (neutral) areas.

(6) Attendance at the flat after each letting was necessary in order to check that all items had been placed in the correct storage areas. If not they would need to be replaced or re-immersed in the ritual bath.

(7) The flat was equipped with time switches, "Sabbath kettle", and "Sabbath" hotplate and "all the necessary requirements for daily Orthodox Jewish life". No explanation was given of what the necessary requirements were – although he added that HM also supplied "candles and wine for the requisite prayers on both the Sabbath and Festivals".

(8) A non-Kosher flat could be used by a Kosher guest although significant actions would need to be taken to make the kitchen Kosher compliant unless the guest brought their own crockery, cutlery, cooking utensils and food. Even if disposable items were used there would still be a need to cover up work surface and other activities undertaken to make the flat suitable for Kosher use. The full extent of the activities was not described.

(9) Making a non-Kosher flat sufficiently kosher would in his view be very time consuming and inconvenient for an Orthodox Jew who wanted a holiday let.

(10) Dorchester Mansions had some general systems which catered for Orthodox Jewish people, the Flat however had additional systems.

196. We note that in his letter dated 15 March 2022 to Mr Marks, Rev. Sklan said that he would deliver supplies of Kosher bread and milk to the Flat and ensure that there were sufficient dry foods in the cupboards and that he would provide fresh food as advised by HM. There was however no mention of this in his witness statement.

*Mr Robertson's memo*

197. The following information was contained in two "memos" from Richard Robertson dated 24 June and 9 September 2022 and addressed to Mr Marks.

(1) Mr Robertson was the caretaker of Dorchester Mansions.

(2) All of the flats in Dorchester Mansions are owned by and occupied by Jewish residents.

(3) One other flat was operated as a holiday let.

(4) He let guests into the Flat and gave them assistance where required (no indication of the assistance given was provided).

(5) He undertook minor repairs and would liaise with contractors when needed.

(6) HM was more "hands on" than the owner of the other holiday let (No indication was given as to the nature or level of the other owner's involvement).

(7) HM insisted on dealing with matters personally (No indication was given of what these matters were).

(8) HM supervised cleaning including laundry between guests to ensure that everything had been correctly prepared.

(9) He was also asked to collect Kosher provisions from her house or shop and to leave them in the flat and to ensure that meat and milk items were not mixed.

(10) He recalled a particular family with disabled foster children who stayed several times. Here he was required by HM to give them assistance when they required it and to also ensure that the flat was adequately prepared to receive the special medical equipment when it was delivered.

*Rosamunde Bloom's letter*

198. The following information was provided in a letter dated 17 March 2022 from Rosamunde Bloom to Mr Marks. Ms Bloome has been described as HM's personal assistant or secretary):

(1) HM was personally involved with the rental of the Flat and approved all lettings to ensure that the Kosher integrity of the flat was preserved.

(2) Some of the tenants would collect keys from HM.

(3) HM received some payments not made via the bank.

(4) HM was involved with the finances for the Flat and would go to the bank regularly to pay in income and withdraw cash for expenditure on items such as light bulbs, cleaning materials which she instructed the caretaker to purchase.

(5) HM also signed cheques for payments of invoices received and checked bank statements with Ms Bloom.

*Initial comments on the evidence provided*

199. The factual evidence provided in respect of HM's business is extremely limited.

200. The contemporaneous evidence is in effect simply the set of letting account schedules for four years and a copy of a valuation report prepared shortly after HM's death. No contemporaneous evidence has been provided of the way in which the business was run. In addition no copies of letting contracts or standard letting terms have been provided and no receipts or invoices have been provided.

201. In terms of witness evidence we have three witness statements and two witnesses. We have Ms Selby's witness evidence which was based primarily on her recollection of the way in which HM carried on the business. We note that Ms Selby referred to some of the information she provided as being based on HM's "records" – which she has described as a note-book and diaries. However these were not provided to HMRC despite the dispute having gone on for several years nor were they provided to the Tribunal.

202. We have the signed witness statement of Rev. Barry Sklan – who was unable to attend the hearing and an earlier letter from him to Mr Marks containing some information which is not in his witness statement.

203. We also have the witness statement of Mr Marks – although that is more of an analysis as to why the Flat should qualify for BPR than witness evidence.

204. In addition to these items we have two memos sent to Mr Marks from Richard Robertson, the caretaker of 2 Dorchester Mansions, a letter from Rosamunde Bloom also addressed to Mr Marks in which she describes her relationship with HM and the way in which HM ran the business, a letter from John Finestein explaining how important the Kosher aspects of the flat were and how HM helped with access to other kosher facilities and a letter from Judy Meshulam stating how HM accommodated the needs of her disabled children. Each of these letters appear to have been solicited by Mr Marks to assist with the appeal.

205. In addition to those letters we have the series of factual responses from OGR to queries raised by HMRC which again contain information relating to the business. We have set out

the content of those letters in our summary of the background to the appeal. The source of the information provided to OGR is presumably the executors although that has not been made clear.

206. The content of the various letters sent to Mr Marks and the responses provided by OGR to HMRC's queries are not evidence of facts for the purpose of the hearing. They are simply assertions. Their content has not been proven and the writers are not available to question.

207. We cannot therefore give them the status of facts in our determination and the weight we place on them is correspondingly limited.

208. The weight we put on the content of Rev. Sklar's witness statement is also limited as he was unable to attend the hearing and so was not available for cross examination.

*The Burden of proof*

209. As with the Lower Rate Issue the burden of proof is on the Appellant to demonstrate that HMRC's determination is incorrect.

210. The standard of proof is the ordinary civil standard being the balance of probabilities.

**THE RELEVANT LAW**

211. S.1 IHTA provides for IHT to be charged in value transferred by a chargeable transfer.

212. S.104 IHTA provides for relief for that part of value transferred which is attributable to relevant business property.

213. S.105 IHTA defines "relevant business property". The provisions of s.105 IHTA relevant to the appeal are:

> s. 105(1) … "relevant business property means …
>
> (a) property consisting of a business or interest in a business
>
> s. 105(3) A business or interest in a business … are not relevant business property if the business consists wholly or mainly of … making or holding investments.

214. S.103(3) IHTA provides that "business" does not include a business carried on otherwise than for gain.

215. S.106 IHTA provides that property is not business property unless it was owned by the transferor throughout the two years immediately preceding the transfer.

216. HMRC have accepted that the holiday let was a "business". They have also accepted that the ownership requirement in s.106 IHTA is satisfied and that despite the business incurring losses for the years show it they will regard it as carried on for gain for the purpose of s.103(3) IHTA.

217. The only issue for the Tribunal to determine is, therefore, whether the business consisted wholly or mainly of making investments in which case it would be excluded from BPR under s.105(3) IHTA.

**The parties' submissions**

218. HMRC submit that the business was one which consisted of mainly holding investments as the services provided to guests and HM's personal involvement were not sufficient to take it outside that category.

219. HMRC also note the lack of evidence in this case, the majority of the information from the Appellant being provided being by way of unproven assertion.

220. Mr Marks submits that on a proper evaluation of the facts, HM's personal involvement in the business and the nature of the services provided to guests – in particular those required for the business to cater for Orthodox Jewish guests are such that the business is more than one of merely holding investments.

*Wholly or mainly holding investments*

221. There is no statutory definition of what is meant by a business of "wholly or mainly holding investments" for the purposes of BPR.

222. There is, however, a significant amount of case law that considers the meaning of the term and how it should be approached by a tribunal.

223. We have been referred to key cases include the Court of Appeal decision in *George v IRC* [2003] EWCA Civ 1763, and the Court of Appeal of Northern Ireland's decision in *McCall and others v HMRC* [2009] NICA 12 and the Upper Tribunal ("UT") decisions in: *Pawson*, *Brander* v HMRC [2010] UKUT 300 (TCC) and *HMRC v Personal representatives of Vigne* [2018] UKUT 357 (TCC). These decisions are binding on the Tribunal.

224. We have also been referred to several First Tier Tribunal decisions and Special Commissioners judgments which are relevant as they demonstrate the application of the principles derived from the Court of Appeal and Upper Tribunal in circumstances which may be of relevance to the facts of this appeal.

225. What is clear from the decisions is that although application of the principles is consistent, each case is heavily dependent on its facts and there is an evaluative exercise that needs to be carried out by the Tribunal in order to determine the facts and the application of the principles to them.

226. In *George*, Carnwarth J identified the existence of a statutory line dividing businesses which consist of mainly holding investments from those which do not. He described the activities of a business falling on either side as "investment" and "non-investment" activities.

227. The decision of the FTT in *Graham* contains a helpful summary by Judge Hellier of the principles derived from the Court of Appeal's decisions in *George* and *McCall* as they apply to s.105(3) IHTA.

> "[56] We derive the following principles for McCall and George as to the proper construction of section 105(3):

(1) investment is not a term of art but has meaning an intelligent businessman would give to it; such a person would be concerned with the use to which the asset was being put and the way it was being turned to account (*McCall [10]*)

(2) property may be held as an investment even if the person holding it has to take active steps in connection with it *McCall [14]* Girvan LJ said in that case that what was clear from the authorities is that a landowner who derives income from land or buildings will be treated as having a business of holding an investment notwithstanding that in order to obtain the income he carries out incidental management and maintenance work, finds tenants and grants leases;

(3) land is generally held as an investment where gain is derived from payments to the owner for the use of the property *McCall [11] George [15]*;

(4) thus the exploitation of a proprietary interest in land for profit is capable of being an investment activity so that the land is an investment, and part of the business is holding it: the holding of property for letting is generally the holding of it for investment *George [18]*;

(5) but there is a wide spectrum at one end of which is the exploitation of land by the granting of a tenancy and at the other end of which is the exploitation of premises as a hotel or by a shopkeeper. The land subject to tenancy would generally be an investment and any business

encompassing it would therefore include holding investments, but the business conducted at a shop or hotel would not be one wholly or mainly of holding investments: *George* [12];

(6) property management is part of the business of holding property as an investment. To this extent investment business activity is not limited to purely passive business. "Management" for these purposes includes the activity of finding tenants and maintaining the property as an investment but does not extend to providing additional facilities whereby the landlord might earn additional fees (such as for cleaning and heating) whether or not included in the lease or covered by the rent (*George [23]*).

228. We would add to this the overriding principle that a decision maker must look at the business in the round and in light of the overall picture to form a view as to the relative importance of the business as a whole of the investment and non-investment activities in that business (*McCall* [11]).

229. In *George* the court had to consider the applicability of BPR in the context of a caravan site business and in *McCall* it was considered in the context of agricultural land that had been zoned for development use. The UT decision in *Pawson* is significant as it considers application of the Court of Appeal decisions in the context of a holiday letting business (in that case a seaside bungalow). We draw the following principles from it:

(1) As a starting point it can be taken that the owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity [43].

(2) An investment may be actively managed without losing its essential character as an investment. [42].

(3) When reviewing the activities involved, the relevant test is not the degree or level of activity involved but rather the nature of the activities that are carried out. In other words an investment will not stop being an investment simply because it involves very active managing [48].

(4) Activities which naturally fall on the investment side of the line include the taking of active steps to find occupants, making the necessary arrangements with them, collecting payments of rent, the incurring of expenditure on repairs, re-decoration and improvement of the property. This is because these activities are directed at maintaining or enhancing the capital value of the property and obtaining a regular income from its letting [43].

(5) Additional services such as providing a cleaner/caretaker to clean the property in between lettings, heating and hot water, television and telephone, being on call to deal with emergencies as the provision of television and telephone, being on call to deal with emergencies and more minor services such as replenishing cleaning materials as needed and providing a welcome pack and providing laundry services are not regarded as part of the maintenance of a property as an investment. [44 and 45]

(6) The critical point for determination is whether the services which fall on the non-investment side are of such a nature and extent that they prevent the business from being mainly one of holding investments. In a "normal" case an actively managed property letting business will fall within the exemption in s. 105(3) because the "mainly" condition will still be satisfied.

230. We also take into account the comment of Lord Hodge and Sir Stephen Oliver QC in the UT decision in *HMRC v Brander* [2010] UKUT 300 (TCC) that no single factor is conclusive as the Tribunal needs to look at the business in the round. In looking at the

question in the round it is not appropriate in every case to compartmentalise the business and attribute management and maintenance activity either to investment or to non-investment as an ancillary activity (*Brander* [75(iii) and (vii)].

231. For clarity, as *Vigne* has been raised by Mr Marks in his submissions, we add here that we do not see there being any presumption that needs to be rebutted that the business is one of holding investments. We note in this regard the Upper Tribunal's criticism in *Vigne* of Henderson J's decision in Pawson. However we agree with the comments made in *Graham* (at [71]) which put that criticism into perspective – outlining that what is needed is to identify and consider individual elements separately but to then also step back and consider the whole picture.

*Application of the case law principles to the facts*

232. What we must determine is where, taking into account the specific facts, the business carried on by HM falls on the spectrum identified in *George*.

*The evidence*

233. No material direct evidence of the way in which the business was operated has been provided to the Tribunal. Basic records that would typically be expected such as invoices and letting terms have not been submitted to the Tribunal.

234. As we have mentioned in our initial comments on the evidence available, and as pointed out by Mr Bracegirdle, we have instead mainly assertions. The witness evidence that has been provided is also of limited assistance for the reasons mentioned.

235. It is possible on this basis to conclude that the Appellants' have failed to discharge their burden of proof to satisfy us that HM's business was not as HMRC contend one of mainly holding investments.

236. However, in the context of this appeal, HMRC has engaged with Mr Marks for several years in discussions as to the nature of HM's business and those discussions have taken into account the various factual assertions made by Mr Marks. We go on, therefore, to consider whether, if those assertions were correct, the business would be one eligible for BPR.

237. Mr Marks seeks to rely on two factors which he claims differentiate HM's business from a typical holiday letting business and which move it into the non-investment category.

238. These are: (a) HM's personal involvement in the business, and (b) the fact that it was a Kosher holiday let.

239. Mr Marks also submits that from a commercial or economic perspective it should be clear that the Flat was not being held as an investment by HM.

240. We deal with each of these in turn.

*HM's personal involvement*

241. The parties do not dispute the level of HM's personal involvement. However, the degree of her involvement is not particularly relevant to the question of whether her business consisted wholly or mainly of holding investments. It is instead the qualitative nature of the activities undertaken that is relevant.

242. This follows from the principle that active management of a property business does not necessarily mean that it is not an investment business. We note in this regard the observation of the Tribunal in *Ross* that even if the owner "had spent every hour of a six day working week at Green Door Cottages, that would not necessarily have demonstrated that this business not a predominantly investment business." [99].

243. When we examine the nature of the activities asserted to have been undertaken by HM and the services provided, the mains ones (excluding those related to Jewish Kosher observance which we address separately), comprise the following:

(1) Finding guests – through word of mouth and occasional advertising.

(2) Meeting and greeting guests and handing over keys (when this was not done by the block caretaker).

(3) Arranging for the caretaker to offer assistance to guests.

(4) Arranging for the caretaker to be available to receive the delivery of specialist medical equipment for a particular guest with disabled children.

(5) Providing a welcome pack to guests.

(6) Arranging cleaning in between lettings.

(7) Arranging for the provision of linen and laundry.

(8) Arranging for repairs and maintenance of the flat.

(9) Being the first point of contact if guests needed anything

(10) Arranging for the provision of food of requested

244. We note that there are references to HM inviting guests for dinner or drinks at her house – but Ms Selby has acknowledged that this was not something offered to all guests and so we have not included it. We note also that there was a reference to HM providing additional services not specifically included in the holiday letting contract and which were not "incidental" to holding the property as an investment. We cannot consider this as no letting contracts were provided and no description of the additional services were given.

245. Some of the services listed would fall on the "investment" side of the line.

246. These include the steps taken to finding guests, collecting the payments and letting them into the property. It would also cover incurring expenditure on repairs and redecoration of the property.

247. The other services listed may fall on the non-investment side but whether they are sufficient to prevent the business from being one mainly of property investment is dependent on an evaluation of their significance in the context of the business.

248. We go on therefore to make that evaluation.

*Offering the services of a caretaker*

249. From the information provided it appears that Mr Robertson was caretaker for the entire block who also assisted HM with her letting business when asked to. Although he mentions in his memo being asked to help guests when needed and refers to handing over keys and collecting/delivering food, there is no indication of how frequent this was, what help he actually provided or when it was provided. There is also no indication of whether a formal arrangement was in place setting out his responsibilities. The only specific example of him providing assistance (which is referenced by Ms Selby) is when he made himself available at HM's request to take delivery of medical equipment for a specific guest when she stayed at the property with her disabled children and of being told to help her if she needed it. We contrast this with the full time caretaker in *Ross* who lived on site, was employed by the business and assisted guests out of hours.

*Providing welcome packs, pre-letting cleaning and the provision of linen and laundry*

250. We consider the provision of welcome packs, cleaning the flat in between lettings and arranging for the provision of linen and laundry to be more or less standard services in the context of holiday lets and do not therefore regard such services if they were provided by HM to be any more than ancillary to the provision of accommodation.

*Arranging for cleaning during a tenancy if requested by guests*

251. We do not see this as anything out of the ordinary in relation to holiday lets, it is certainly not exceptional. There is also no indication of whether this option was actually taken up by guests.

*Welcoming guests and being the first point of contact in case of problems*

252. Again, we do not see this as anything out of the ordinary.

*The provision of food*

253. Although the provision of food is a potentially key non-investment service we have no information as to how often guests would actually require it to be provided. The details given as to the precise nature of the service are also unclear – ranging from HM arranging delivery (whether by Rev. Sklan, the caretaker or personally) of food before a guest's arrival, to HM making arrangements with the synagogue shop for guests to collect food, to HM simply informing guests of the availability of supplies. There is simply not enough information here to be able to make a determination.

254. In summary, there is nothing in this list that in our view persuades us that HM's business was anything other than one of mainly holding investments.

255. We have taken a broad approach here based on the limited information available. We note again that the lack of information and the lack of established facts prevents a more accurate evaluation from being carried out. We contrast our simplistic approach with the approach taken in other cases. For example in *Graham* – the Tribunal was able to adopt a far more specific approach as it had access to a range of information including a division of time spent between those activities regarded as of an investment nature and the additional services which were not. We also note the position in *Ross* where the Tribunal had the benefit of a financial breakdown showing the split of costs between services and property expenditure (see [59]) which showed that more than half the expenditure was incurred on the "holiday experience". This was again a helpful factor for the Tribunal. Here, other than broad descriptions and one specific example we have no real idea of frequency, cost, quality or scope of the non-investment services.

256. However, adopting the terminology used in *Graham* there is in our view nothing mentioned which indicates to us that the business was an "exceptional case".

*The Kosher nature of the business*

257. Mr Marks contends that the Kosher nature of the letting is the factor which when combined with the other services is sufficient for the business to be an "exceptional case".

258. From the information presented the specific Kosher elements of the business were as follows:

(1) The provision of a lighting timer circuit that would operate the lighting in the flat during the Shabbat.

(2) The provision of a hot water urn that would switch on at the start of the Shabbat and switch off at its end.

(3) The provision of a hotplate with an electric timer (that we assume would work on a similar principle as the hot water urn).

(4) The provision of separate cupboards, crockery and kitchen utensils for meat, milk and neutral items.

(5) The ritual immersion of cooking utensils and crockery items in the synagogue ritual bath (when first purchased, when broken and/or when incorrectly stored).

(6) The provision of religious candles and wine for use in Jewish festivals and rituals.

(7) The provision of Kosher toilet roll.

(8) The provision of Kosher food or assistance in arranging for the purchase of Kosher food from suitable shops.

259. We note Mr Marks' emphasis (and the emphasis of Ms Selby and Rev. Sklan) on the importance of the Kosher integrity of the flat and its significance for those wanting to use it as a holiday let.

260. However, we do not regard the religious characterisation or religious significance of a particular service as a determining factor per se. Notwithstanding any such characterisation or significance it is necessary to have regard to the substantive nature of the services and to assess, in the round, whether they are sufficient to prevent the business from being mainly one of holding investments. In other words it is still necessary to determine the predominant nature of the supply (see *Graham* at [83]).

261. As we state in relation to the non-Kosher related services, we cannot determine from the information available, the time spent on any of the items in the list above, the costs incurred in respect of them or, where relevant, their frequency. We are in the same position for the Kosher related services and so our assessment of them is again a necessarily a broad one.

262. On the information available, the Kosher related services specified do not seem to us to be sufficient to alter what would otherwise be mainly a business of holding investments.

263. More specifically, we would not regard the installation of timer switches for lights and kitchen appliances to be capable of affecting the qualitative nature of the business. Similarly, the separation of meat, milk and neutral items although uncommon would not in our view be sufficient in our view to alter that characterisation. On the information provided we would also regard the provision of Kosher compliant toilet paper and the supply of religious candles and wine as minor and ancillary in the context of the holiday letting (noting here that no indication has been given of the quantity or cost of those supplies to displace that view).

264. In terms of the services provided via Rev. Sklan, his main input appears to be the immersion of the kitchen utensils in the ritual bath at the Synagogue at HM's request. He states in his evidence that this was necessary only when items were first purchased or were broken or when they had been incorrectly stored. We have no idea therefore of how frequently these services were provided. He also refers in his statement to needing to regularly check various issues to ensure that property remained Kosher to the required standard. We do not have details of what those particular issues were – although we note that there is reference to checking after each letting to ensure that items had been stored in the correct areas. There is also some confusion as to his responsibilities in relation to the supply of Kosher food. In addition we have no details of the actual arrangement between Rev. Sklan and HM in respect of his services – such as whether he was paid, how much time his commitments took or whether his responsibilities were specifically agreed. We are unable therefore to conclude whether or not the services he provided were sufficient to alter the

nature of what would otherwise be a business of mainly holding investments whether alone or in conjunction with the other services.

**DETERMINATION ON THE BPR ISSUE**

265. In summary we accept that the provision of a Kosher flat as a holiday let is not common and that it requires certain services to be provided that would not be provided for a non Kosher holiday let.

266. However given the lack of evidence and taking into account where the burden of proof lies on this issue, Mr Marks has failed to demonstrate that the Kosher related services supplied either alone or in conjunction with the non-Kosher related services are such as to move HM's business from being a typical holiday let to a business which is not mainly one of holding investments as that term is used for the purpose of s 105(3) IHTA.

267. In short our view is that the business is a holiday let, albeit one that caters for a specific market – and Mr Marks has not demonstrated that it is "exceptional".

**CONCLUSION**

268. For the reasons given we dismiss Mr Marks' appeal in respect of the Lower Rate Issue and his appeal in respect of the BPR Issue.

269. The Determinations as to those issues therefore stand.

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

270. 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.

**VIMAL TILAKAPALA**
**TRIBUNAL JUDGE**

**Release date:** 23 July 2024