[2017] AACR 5

(RM v Sefton Council (HB)
[2016] UKUT 357 (AAC))

Judge Jacobs **CH/4612/2014**
27 July 2016

Capital – disregard of business assets – whether flat let to tenants a business asset – whether presence of tenants affected valuation

The claimant let a flat she owned to tenants and moved into privately rented accommodation. She claimed housing benefit, telling the local authority that she did not wish to sell her home as it was an investment for the future. The local authority refused her claim as it regarded the flat as a capital asset worth more than £16,000 and the First-tier Tribunal (F-tT) dismissed her appeal. Among the issues before the Upper Tribunal were whether the flat was a business asset whose value could be disregarded under paragraph 8 of Schedule 6 to the Housing Benefit Regulations 2006 and, if not, its value. In reaching his decision the UT judge reviewed the relevant case law, including decisions of the Tax and Chancery Chamber.

Held, dismissing the appeal, that:

1. the meaning of "business" depended on its context in the legislation: *Town Investments v Department of the Environment* [1978] AC 359 and the disregard of business assets as capital applied in income-related benefits (paragraph 16);

2. the case law did not attempt to specify what may amount to sufficient administration or activity to create a business. Carrying out the duties of a landlord was not sufficient: R(FC) 2/92. At best the authorities provided individual examples in particular contexts and, although they identified potentially relevant factors, these were neither essential nor exhaustive of the factors that had to be considered: *Ramsay v Commissioners for Her Majesty's Revenue and Customs* [2013] UKUT 0226 (TCC). No single factor was decisive. It was the combined effect of all the facts and circumstances of the case that determined the proper classification of the issue (paragraph 19);

3. the totality of the activities carried out by the claimant as a leaseholder and as a landlord did not allow for the flat to be treated as a business asset whose value could be disregarded (paragraph 29);

4. the value of the property exceeded £16,000 after any allowances for the existence of sitting tenants, the mortgage, and expenses of sale, so that the claimant was not entitlement to housing benefit on her rented home (paragraph 34).

DECISION OF THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

This decision is given under section 11 of the Tribunals, Courts and Enforcement Act 2007:

The decision of the First-tier Tribunal under reference SC068/13/14878, made on 22 May 2014 at Liverpool, did not involve the making of an error on a point of law.

REASONS FOR DECISION

A. What this case is about

1. The claimant bought a flat as her home in 2010. After she was made redundant in September 2011, she decided to rent it out and to move into a room. Subsequently, she moved to live with her mother and then rented a flat next to hers. She claimed housing benefit on 28 December 2012, but the local authority refused the claim on 6 June 2013, on the ground that the claimant's interest in her flat represented capital in excess of £16,000. The First-tier Tribunal dismissed her appeal against that decision, but Upper Tribunal Judge Bano gave her permission to appeal to the Upper Tribunal. He directed a hearing of the appeal for 25 July 2016. As he was

not available on that date, I took the hearing. The claimant attended and spoke on her own behalf. Mr Peter McCluskey attended on behalf of the local authority. I am grateful to them for their helpful and clear submissions. A number of issues arose during the proceedings, but only two remained in issue by the time of the hearing before me:

- Was the claimant's flat a business asset, the value of which could be disregarded?
- If it was not, what was its value at the time of her claim?

B. The legislation

2. Section 134 of the Social Security Contributions and Benefits Act 1992 provides:

> "No person shall be entitled to an income-related benefit if his capital or a prescribed part of it exceeds the prescribed amount."

Housing benefit is an income-related benefit: section 123(1)(d).

3. Regulation 43 of the Housing Benefit Regulations 2006 (SI 2006/213) provides that the prescribed amount is £16,000. Regulation 44 provides for any capital specified in Schedule 6 to be disregarded. Paragraph 8 of Schedule covers:

> "(1) The assets of any business owned in whole or in part by the claimant and for the purposes of which he is engaged as a self-employed earner …"

Regulation 2(1) defines "self-employed earner" and the related term "employed earner" by reference to section 2(1) of the 1992 Act:

> "**Categories of earners**
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> **2.** – (1) In this Part of this Act and Parts II to V below –
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> (a) 'employed earner' means a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with earnings; and
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> (b) 'self-employed earner' means a person who is gainfully employed in Great Britain otherwise than in employed earner's employment (whether or not he is also employed in such employment)."

Section 122(1) of the 1992 Act defines "employment" and "employed":

> "'employment' includes any trade, business, profession, office or vocation and 'employed' has a corresponding meaning;"

4. Regulation 47 deals with the valuation of capital:

> "**Calculation of capital in the United Kingdom**
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> 47. Capital which a claimant possesses in the United Kingdom shall be calculated at its current market or surrender value less –
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> (a) where there would be expenses attributable to the sale, 10 per cent; and
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> (b) the amount of any encumbrance secured on it."

C. The social security and child support case law

5. The starting point is the reported decision of Mr Commissioner Goodman in R(FC) 2/92. The claimant owned a house that was occupied by a protected tenant paying rent. The Commissioner rejected the argument that the house was a business asset.

"10. … The word 'business' is not defined anywhere in the Social Security legislation, so far as I can see. However, the mere receipt of rent from a letting has been held in another context not of itself to be a 'business', *Bagettes v. G P Estates* [1956] Ch. 290, CA Cf. *Re. Wallis, ex. p. Sully* (1885) 14 QBD 950. In *Smith v. Anderson* (1980) 15 Ch D 247 at 258-261 Jessel MR discussed the meaning of 'business'. At page 260-261 he said:

> 'There are many things which in common colloquial English would not be called a business, even when carried on by a single person, which would be so-called when carried on by a number of persons … for instance, a man who is the owner of offices, that is, of a house divided into several floors and used for commercial purposes, would not be said to carry on a business because he let the offices as such; but suppose a company was formed for the purposes of buying a building, or leasing a house, to be divided into offices, and to be let out, should not we say, if that was the object of the company, that the company was carrying on business for the purpose of letting offices, or was an office-letting company, trying it by the use of ordinary colloquial language? The same observation may be made as regards a single individual buying or selling land with this addition, that he may make it a business, and then it is a question of continuity. A man occasionally buys himself land, as many landowners do, and nobody would say he was a land-jobber or dealer in land. But if a man made it his particular business to buy and sell land to obtain profit, he would be designated as a land-jobber or dealer in land. … so in the ordinary case of investments, a man who has money to invest, invests his money and he may occasionally sell the investments and buy others, but he is not carrying on a business.'

The actual decision on the facts of the case by Jessel MR was overruled by the Court of Appeal (1880) 15 Ch. D. 268 *et seq*. but without in any way impugning the definition of business given by Jessel MR.

11. In R(SB) 4/85 at paragraphs 9-12, the learned Commissioner considered the meaning of 'business' in a context similar to the present one but he was not concerned with the particular type of problem that I have here and I do not find his remarks of assistance in the present context.

12. In my judgment however, using Jessel MR's definition of 'business' by analogy, it cannot be said that the carrying of a business is constituted by the ownership by an individual of a tenanted house, the collection of the rent, the execution of repairs and the carrying out of other landlord's duties. For that reason, in my view, the tribunal are correct in law in saying in their reasons for decision, 'The house is not a business, it is an investment and as such its value falls to be included as a capital asset for family credit purposes.' The tribunal had found the relevant facts and drawn their conclusion, which was a conclusion of law and was correct in my judgment. Consequently I do not accept that the tribunal erred in law and in my view its reasons were sufficient.

13. Lastly, I should say that the fact that paragraph 6 of Schedule 3 to the General Regulations uses the plural noun in the expression 'the **assets** of any business …' is not conclusive of the matter just because the claimant only owns **one** house. That is because the use of the plural noun has to be taken as qualified by section 6(c) of the Interpretation Act 1978 (applied to regulations by section 23 of that Act), stating, 'In any [regulation], unless the contrary intention appears, … words in the singular include the plural and words in the plural include the singular.' I do not consider that any contrary intention is shown here and that the word 'assets' could also mean a single asset. Nevertheless the

> circumstances of this case show that there could not be any question of the house being an asset of a business."

Just to correct one small error: *Smith v Anderson* was decided (as the Commissioner later records) in 1880, not (as he first says) 1980.

6. It is convenient next to go to R(SB) 4/85. That was a decision of Mr Commissioner Munroe. The claimant owned investments and argued that these were personal rather than business assets. The Commissioner remitted the case for rehearing, with the following guidance on classifying the assets at [9]–[12].

- Unlike partners, a sole trader is under no duty to keep business and personal assets separate, so that a grocer can take a pack of butter for personal use.
- Everything owned by a trader is not a business asset, even if it could be taken by a creditor, so that the trader's toothbrush would not be a business asset.
- "In the case of a capital asset it has to be considered whether the asset is part of the fund employed and risked in the business."

For the final proposition, the Commissioner cited his previous decision in R(U) 3/77. The issue there was whether cottages on a farm that were let to tenants who were unconnected with the farm were assets of the farm business. The Commissioner held that they were not, so that the rental income was disregarded in arriving at the profit of the business.

7. I now come to the other cases in which the classification of a rental property was considered.

8. CIB/1595 and 2114/2000 were decisions of Mr Commissioner Williams. The Commissioner relied on a variety of factors relevant in tax law to assess the evidence.

> "18 I agree that this should have been the starting point in this case, namely that receipt of rental income from a tenanted house is not of itself evidence of a business, although it may be business income. The secretary of state's representative submits that the Commissioner in R(FC) 2/92 is perhaps stating the law too widely in saying (paragraph 12):
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> > '… it cannot be said that the carrying of a business is constituted by the ownership by an individual of a tenanted house, the collection of rent, the execution of repairs, and the carrying out of other landlord's duties.'
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> 19 This submission is supported by reference to CIS 11355 1995. I agree that this states the test too strongly, while not dissenting in any way from the conclusion of the Commissioner on the facts of R (FC) 2/92. Whether or not the way in which one or more rented houses are held and exploited is such as to produce investment income or business income is a question of fact. There is considerable caselaw about income from assets for tax purposes, where the question is of importance both to income tax and to value added tax, and the question has often been before the higher courts. This is often summarised in the six 'badges of trade' identified by the Royal Commission on Income Tax in 1952:
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> - the subject matter of the transaction;
> - length of ownership;
> - frequency of similar transactions;
> - work done on the property;
> - circumstances responsible for the realisation;
> - motive.

> The approach is to test the evidence by reference to each of these or similar tests and then to take an overview of the conclusions. (See Revenue Law Principles and Practice, chapter 6, Butterworths, for a summary).
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> 20 I do not consider that I need analyse the law any further, because I can see no evidence at all in the papers to suggest that any of these six tests are satisfied. Owning a single rented house is not of itself evidence of a business: R(FC) 2/92. There is no evidence that the appellant or his wife own any other rented property, or use No 9 for multiple lets such as 'bedsits'. The circumstances of the purchase and length of ownership do not suggest a business, nor does the motive behind acquisition. Nor is there any evidence of an intended sale for a profit. There is no evidence of any similar present or past transactions, and no evidence of supplementary work or activities by the appellant, his wife, or her agents or employees to exploit the property."

9. CCS/2128/2001 was a child support decision of Mr Commissioner Mesher and so a different context. The Commissioner accepted that there could come a point at which the amount of administrative or activity involved in dealing with a rental property could result in there being a business.

> "8. The Secretary of State submitted that the case should be remitted to a new appeal tribunal for rehearing and the absent parent agreed. I have hesitated over whether I could substitute a decision on the facts, as to whether the parent with care's rental income should be taken into account as earnings from self-employment or under paragraph 15 of Schedule 1 to the MASC Regulations as other periodical payments received. Paragraph 14 of the Secretary of State's submission sets out the general position soundly. Commissioner's decision R(FC) 2/92, although it is about the question of whether a house that was let constituted a business asset, does give helpful guidance. The mere ownership of property and the receipt of rent and payment of expenses or liabilities would not constitute employment as a self-employed earner. That situation is more properly looked at as the ownership of a capital asset, which produces income. But there will come a point, depending on the circumstances of individual cases, at which the amount of administration and/or activity involved even in the letting out of a single property would amount to the carrying on of self-employment. I have concluded in the end that I have insufficient evidence about the exact nature of Heritage Park, the terms of its letting and the activities required of both the parent with care and the absent parent beyond receiving the rent, to make a final decision."

I agreed with this in R(CS) 2/06, saying:

> "49. … The authorities relied on by Mr Commissioner Goodman show that the issue is one of the proper use of language: is what the non-resident parent does within the normal signification of the word 'business'? It is not just a matter of the number of people that are involved, or the number of properties that are owned, or of the number of units that are let. The tribunal must consider all the relevant circumstances of the case."

10. CH/4258/2004 was a decision of Mr Commissioner Levenson. The claimant ran a retail business on the ground floor of a property. In order to purchase the freehold, she had to purchase the three flats above the business. All were let to tenants. The Commissioner decided that they were not part of the claimant's retail business, nor part of a separate business.

> "17. I am not quite sure that the submissions of either party quite dealt with the wording of the provision in question. Paragraph 7(1) of the schedule refers to the assets of <u>any</u> business owned by the claimant (my emphasis). It does not matter in the present case whether the 3 flats are part of the retail business or part of some other business, so long as

they are part of a business owned by the claimant and for the purposes of which she is engaged as a self-employed earner. Mr Posen is correct that this relates to the purposes of the business, not to the purposes of the asset. However, it seems to me that Mr Atkinson is correct insofar as he implies that the use of the asset indicates whether it is owned by the business.

18. With all due respect to Mr Commissioner Monroe I do not find the whole formulation in paragraph 11 of his decision to be particularly helpful. If, as in the present case, the business is owned personally be the claimant and, for example, there is no limited company which owns or operates any business or asset of the claimant, then virtually all of the claimant's assets are at risk if the business fails, whether or not they are used for business purposes.

19. Paragraph 7(1) of the schedule must refer to any asset used for the purposes of any business owned by the claimant, except for any asset owned by a business in respect of which the claimant is not engaged as a self-employed earner. There can be little justification for disregarding large amounts of capital or valuable assets owned by a claimant for a means tested benefit and if capital is not used in a business then (subject to other statutory disregards) there can be no justification for disregarding it. The answers to the questions inherent in this test will mainly be matters of fact and degree. In the present case I see no basis for saying that the 3 flats are in any way used for the retail business and the facts that they are covered by the same business loan as the retail business, and that the freehold covers the retail business as well as the 3 flats, do not affect this. That leaves the question of whether the 3 flats are assets of some other business in respect of which the claimant is engaged as a self-employed earner.

20. In R(FC) 2/92, a case concerning a similar provision, having reviewed earlier authorities in different contexts, Mr Commissioner Goodman said (in paragraph 12) that:

> 'In my judgment … it cannot be said that the carrying of a business is constituted by the ownership of an individual of a tenanted house, the collection of the rent, the execution of repairs, and the carrying out of other landlord's duties.'

I agree with that. There would come a point where a tribunal would be entitled to find that the scale of the operation would make such activities a business, but the facts of the present case come nowhere near that point. The tribunal was correct to find in effect that the 3 flats were not assets of any business in respect of which the claimant was engaged as a self-employed earner."

D. The Revenue case law

11. I have had the advantage of being referred to the decision of Upper Tribunal Judge Berner in *Ramsay v Commissioners for Her Majesty's Revenue and Customs* [2013] UKUT 0226 (TCC). Mr and Mrs Ramsay together owned a single property that was divided into ten flats, five of which were rented out. On the transfer of the property to a company, Mrs Ramsay claimed relief under section 162(1) of the Taxation of Chargeable Gains Act 1992, which applied if the transfer was of "a business as a going concern, together with the whole assets of the business".

12. The First-tier Tribunal had made these findings of fact:

(1) "Upon taking over the administration of the Property in 2002, Mrs Ramsay and her husband arranged to meet each of the then five tenants to explain that the rent must be paid on time and to the accountant (who was at that time responsible for dividing the income amongst the various owners).

(2) Mr and Mrs Ramsay took responsibility for the checking and payment of quarterly electricity bills for the communal areas.

(3) Upon acquisition of the Property outright (after the acquisition of the remaining two-thirds share), Mr and Mrs Ramsay took responsibility for cancelling previous insurance policies and arranging a new policy in Mr and Mrs Ramsay's sole names.

(4) Mrs Ramsay attended the Property to unblock the drains (five in number).

(5) Mrs Ramsay and her son oiled and re-attached steel wires on some of the garage doors belonging to the flats, and cleared the debris from previous tenants which had accumulated in other garages.

(6) Mr and Mrs Ramsay took responsibility for returning post for previous tenants to the various senders.

(7) They confirmed with Belfast City Council compliance with fire regulations and installed/replaced fire extinguishers where applicable.

(8) A post and wire fence and hedging was erected at the rear of the Property to segregate it from adjacent land.

(9) A flower bed was created in front of the hedge.

(10) The shrubs around the Property were pruned and leaves swept up and discarded in the local refuse tip.

(11) The back garden and car park were weeded on a regular basis.

(12) The flagstones to the rear of the building were bleached to ensure removal of algae.

(13) The communal areas were vacuumed and dusted on a regular basis and the mahogany staircase polished.

(14) Mr and Mrs Ramsay frequently, when passing the Property, checked the security of the windows and doors at the rear of the building.

(15) On occasion Mrs Ramsay found rubbish dumped in the car park of the building which she took to the Council tip.

(16) Vacated flats were cleaned and cleared of furniture abandoned by previous tenants in preparation for new tenants.

(17) Additional assistance was provided in particular to one elderly tenant, including dealing with telephone calls from the tenant regarding alleged faulty electricity supply, replacement of a broken window and liaising with social services in relation to her care package."

13. Judge Berner analysed the case law, decided that the First-tier Tribunal had made an error of law, and re-made the decision in Mrs Ramsay's favour:

> "67. Applying these principles, in this case I am satisfied that the activity undertaken in respect of the Property, again taken overall, was sufficient in nature and extent to amount to a business for the purpose of s 162 TCGA. Although each of the activities could equally well have been undertaken by someone who was a mere property investor, where the degree of activity outweighs what might normally be expected to be carried out by a mere passive investor, even a diligent and conscientious one, that will in my judgment amount to a business. I find that was the case here."

14. The judge's review of the case law is worth recording in full as it covers cases that are not generally considered in the social security jurisdiction.

> "**The meaning of 'business'**
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> 25. As Mr Stone pointed out, the word 'business' has been described, by Lord Diplock in *Town Investments v Department of the Environment* [1978] AC 359 at p 353, as 'an etymological chameleon; it suits its meaning to the context in which it is found.' That case concerned whether a lease to a government ministry, where the premises were occupied by civil servants was a business tenancy within the meaning of then-applicable counter-inflation legislation. By reference to the mischief of those provisions, 'business' was construed broadly, so as to have no less wide a meaning than that applicable in covenants regarding the use of demised premises.
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> 26. That construction followed from *Rolls v Miller* (1884) 27 Ch D 71, where Lindley LJ pointed out (at p 88) that the dictionary meanings of 'business', where the word means almost anything which is an occupation, as distinguished from a pleasure, or anything which is an occupation or duty which requires attention, were not of great assistance. The word must be construed according to its ordinary sense, having regard, in that context to the object of the covenant, and in this to the purpose of the legislation.
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> 27. There is no direct authority on the meaning of business in the context of s 162 TCGA. In the capital gains context generally, I was taken to *Harthan v Mason* 53 TC 272, a case concerned in part with whether the taxpayer had disposed of a business for the purpose of obtaining relief from a charge to CGT under s 34 of the Finance Act 1965. That provision, known as 'retirement relief', provided relief where an individual who had attained the age of 60 years disposed of a business, subject to certain conditions. The relief was nevertheless confined to 'chargeable business assets', which excluded assets held as investments.
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> 28. In *Harthan v Mason*, the taxpayer and his sister owned a row of terraced houses which they simply let to tenants. There were few facts found concerning the management of the properties, the judge in the High Court (Fox J) commenting merely (at p 276) that he had no doubt that the owners also did various work in finding tenants and doing repairs and in dealing with the various other matters to which an owner of a property would normally attend. The judge held that the decision of the General Commissioners that the activity of the taxpayer and his sister in relation to the property was not a business was a matter of fact, and a conclusion to which they could reasonably have come on the facts.
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> 29. *Harthan v Mason* provides little assistance on the question of construction of 'business' in the context of this case. Equally, reference to cases in other contexts may lead to a misunderstanding of the proper approach in the context of a relief from CGT on the transfer to a company. Thus, for example, the distinction drawn between a trade taxable under Schedule D, Case 1, on the one hand, and property income taxable under Schedule A is not material to the construction of 'business' for this purpose.
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> 30. Thus, in *American Leaf Blending Co*, a case relied upon by the FTT, and to which I have already referred, the Privy Council made clear that dicta to be found in some of the speeches in the House of Lords in *Salisbury House Estate Ltd v Fry* 15 TC 266, which suggested that the letting of land does not constitute a trade, had no relevance to the question in that case, namely whether the letting of land by a company amounted to the carrying on of a 'business' within the meaning of the applicable Malaysian legislation. The Privy Council held (at [1979] AC 676, 684) that 'business' is a wider concept than 'trade'.

31. The Privy Council went on to draw a distinction between the case of a private individual merely receiving rents and a company doing the same. Giving the judgment, Lord Diplock said (at p 684):

> 'In the case of a private individual it may well be that the mere receipt of rents from property that he owns raises no presumption that he is carrying on a business. In contrast, in their lordships' view, in the case of a company incorporated for the purpose of making profits for its shareholders any gainful use to which it puts any of its assets prima facie amounts to the carrying on of a business. Where the gainful use to which a company's property is put is letting it out for rent, their Lordships do not find it easy to envisage circumstances that are likely to arise in practice which would displace the prima facie inference that in doing so it was carrying on a business.
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> The carrying on of "business", no doubt, usually calls for some activity on the part of whoever carries it on, though, depending on the nature of the business, the activity may be intermittent with long periods of quiescence in between. In the instant case, however, there was evidence before the special commissioners of activity in and about the letting of its premises by the company during each of the five years that had elapsed since it closed down its former tobacco business. There were three successive lettings of the warehouse negotiated with different tenants; there was removal of machinery from the factory area which made it available for use for storage and a separate letting of that area to a fresh tenant; and as recently as October 1968 there was the negotiation of a letting to a single tenant of both the factory area and the warehouse.'

32. Mr Richard Ramsay, appearing for Mrs Ramsay, argued that the reference to 'some' activity in this passage indicated that only a modest degree of activity was required. I do not accept that submission. The Privy Council was making the point, simply, that mere passive receipt of rent would not normally be regarded as the carrying on of a business, and that it had to be accompanied by some activity, even if that activity were not continuous. It was not setting a quantitative test as to the degree of activity required to cross the threshold; that remains a question of fact.

33. On the other hand, it is clear from the judgment of the Privy Council that no qualitative distinction should be drawn between activities that are carried out in the course of a passive investment activity, and those carried out in the course of a business. The activities of the company to which the Privy Council referred were all of a nature that might be expected to have been carried out by any property owner in receipt of rent; that did not prevent the Privy Council from finding that the evidence of such activity reinforced the prima facie inference that the company was carrying on a business.

34. The distinction between a business and a trade was also clearly expressed in *Griffiths v Jackson; Griffiths v Pearmain* 56 TC 583. There the taxpayers, who were both practicing accountants, owned 11 properties parts of which were occupied by rent controlled tenants, but which were mainly let furnished to students and other short term occupiers. The taxpayers provided various amenities and services, and spent much of their spare time in collecting rents, inspecting properties, arranging lettings and ironing out tenants' problems. In finding that this did not amount to a trade, Vinelott J in the High Court took the view that the general commissioners must have been misled into thinking that because the taxpayers could fairly be said to have been carrying on a business of letting furnished rooms and providing services to the occupiers, they were carrying on a trade. He concluded (at p 593):

> 'I may perhaps be permitted to add that I am not without sympathy for the taxpayers. It is a peculiar feature of United Kingdom tax law that the activity of letting furnished flats or rooms, while it may be a business and, in this case, a demanding and time-consuming business, is not a trade. Formerly the principle operated in favour of the taxpayer whose liability to tax on the proceeds of exploitation of his proprietary rights was exhausted by the Schedule A assessment. Now the proceeds of letting are taxable under Schedule A and the rule operates to the disadvantage of the taxpayer; his income is not earned income and he is not entitled to capital allowances and to the rollover relief for capital gains tax purposes afforded to a person carrying on a trade. The business may, as in this case, occupy much of the taxpayer's free time or even be one which required his whole time attention. The taxpayer may put as much or more work into his business as, for instance, someone whose business consists in arranging licences to fix vending machines on the property of others and who daily or at less frequent intervals collects the proceeds and replenishes the machines. It is not too easy to see why in the modern world a business consisting of the exploitation of the right of property in land should be treated differently from a business consisting of the exploitation of other assets. However, the principle is now too deeply embedded in the law to be altered except by legislation.'

35. Moving away from the cases that have been concerned with whether an activity was a trade, there have been a number of cases on the meaning of 'business' in relation to VAT. As Mr Stone and Mr Ramsay both accepted, that again is a rather different context to the one in which this case falls to be determined. In particular, the use of the term 'in the course or furtherance of any business' which now appears in s 4 of the Value Added Tax Act 1994 ('VATA'), is part of the UK implementation of the definition of 'taxable person' now contained in Article 9 of EU Council Directive 2006/112/EC, meaning any person who, independently, carries out in any place 'any economic activity, whatever the purpose or results of that activity'. Article 9 itself provides that the exploitation of tangible or intangible property for the purpose of 5 obtaining income therefrom on a continuing basis is, in particular, regarded as an economic activity. That this is a term of wide meaning is clear from the case law of the ECJ; see, for example, *D A Rompelman and E A Rompelman-Van Deelen v Minister van Financiën* (Case 268/83) [1985] ECR 655, from which it is clear that the mere letting of immovable property is regarded as the exploitation of that property.

36. There is no such basis for the meaning of 'business' in the TCGA. Nonetheless, whilst acknowledging the caveat to be attached to consideration of cases concerning VAT, the discussion in certain of those cases is useful to note. One such is *Customs and Excise Commissioners v Lord Fisher* [1981] STC 238 where the question largely resolved itself around whether the sharing of the costs of what was otherwise an activity (a shoot) for pleasure and social enjoyment by itself turned that activity into a business.

37. In that case, in the High Court, Gibson J discussed the judgment of the Court of Session in *Customs and Excise Commissioners v Morrison's Academy Boarding Houses Association* [1978] STC 1. Firstly, there can be no exhaustive definition of 'business' for VAT purposes. Based on the definition of 'business' for those purposes, which is now contained in s 94(1) VATA, and which provides that 'business' includes any trade, profession or vocation, it is clear that a wide meaning of 'business' is intended. Secondly, it is necessary to consider the whole of the activity as it is carried on.

38. The judgment goes on to describe certain criteria identified by counsel for the Crown in *Lord Fisher*, largely by reference to *Morrison's Academy*, as relevant for determining whether an activity is a business. As Gibson J made clear, however, these were not

principles which, if satisfied, would in all cases demonstrate that an activity must be regarded as a 'business' for VAT purposes. The test is a statutory test, for which the identified criteria are no substitute. The criteria were set out at p 245 of Gibson J's judgment as follows:

> '… the aspects of that activity which are to be considered, as being indicia or criteria for determining whether the activity is a business, are six in number and were listed by counsel for the Crown as follows: (a) whether the activity is a "serious undertaking earnestly pursued", a phrase derived from the judgment of Widgery J in *Rael-Brook Ltd v Minister of Housing and Local Government* [1967] 1 All ER 262 at 266, [1967] 2 QB 65 at 76, or "a serious occupation, not necessarily confined to commercial or profit-making undertakings", a phrase derived from the speech of Lord Kilbrandon in *Town Investments Ltd v Department of the Environment* [1977] 1 All ER 813 at 835, [1978] AC 359 at 402, both of them cited to and referred to by the tribunal in their decision; (b) whether the activity is an occupation or function actively pursued with reasonable or recognisable continuity: per Lord 45 Cameron in *Morrison's Academy* [1978] STC 1 at 8; (c) whether the activity has a certain measure of substance as measured by the quarterly or annual value of taxable supplies made: again per Lord Cameron (at 8); (d) whether the activity was conducted in a regular manner and on sound and recognised business principles: again per Lord Cameron (at 10); (e) whether the activity is predominantly concerned with the making of taxable supplies to consumers for a consideration: per the Lord President (at 6); (f) lastly, whether the taxable supplies are of a kind which, subject to differences of detail, are commonly made by those who seek to profit by them: per the Lord President (at 6) and per Lord Cameron (at 10).'

39. Business property relief provides relief from inheritance tax. There have therefore been a number of cases concerning that relief (in s 105 of the Inheritance Tax Act 1984 ('IHTA')), principally in relation to the provision, in s 105(3), that a business or an interest in a business is not relevant business property if the business consists wholly or mainly of making or holding investments.

40. In this connection, I was referred to two decisions of the special commissioners (in each case Sir Stephen Oliver QC), both of which were heard in January 1995. In the first, *Martin and another (executors of Moore deceased) v IRC* [1995] STC (SCD), the deceased owned and let industrial units on three-year leases at fixed rents. The deceased sought and chose tenants, granted and renewed leases, complied with landlord's covenants and managed the premises. It was accepted by the Revenue that these activities constituted a business. Likewise, in *Burkinyoung (executor of Burkinyoung deceased) v IRC* [1995] STC (SCD) 29, it was accepted that the activities of the deceased in relation to a house he had owned, which was divided into 25 four furnished flats let on assured shorthold tenancies, constituted a business. The evidence was that running the flats involved maintenance of them and their common parts to a standard that would attract tenants to take and renew tenancies. Getting possession or redress from tenants was a difficult and onerous task.

41. These are cases therefore where the question for the tribunal was not whether there was a business (which was conceded), but whether the business was one that consisted wholly or mainly in the making or holding of investments. Those cases cannot therefore, in my judgment, assist the determination of this case.

42. In another case on the question of relevant business property that I was not referred to, the First-tier Tribunal (Judge Barlow and Mrs Stott) did have to consider the question whether the activities of the deceased amounted to a business. In *Revenue and Customs*

Commissioners v Lockyer and another (as personal representatives of Pawson deceased) [2012] UKFTT 51 (TC), the deceased owned a bungalow which was let as a holiday cottage. Various services were provided, including cleaning and gardening, and for example hot water was turned on before the arrival of guests. The cottage was advertised for letting. The tribunal found that this was a business. It relied on the criteria referred to in *Lord Fisher*, in particular that this was a serious undertaking earnestly pursued, there was reasonable continuity and the activities had a measure of substance. That conclusion was not challenged on the appeal to the Upper Tribunal (where the Revenue's appeal was allowed on the basis that the tribunal had been wrong to find that the property was not held mainly as an investment).

43. The question whether an activity, and relevantly to this case activity connected with the letting of property, can amount to a business has also been considered, again at the level of the special commissioners, in a national insurance context. In *Rashid v Garcia* (SpC 00348; 11 December 2002) Mr Rashid claimed to be a self-employed earner for Class 2 national insurance purposes. The definition of 'employment' for this purpose was contained in s 122(1) of the Social Security Contributions and Benefits Act 1992 as including 'any trade, business, profession, office or vocation'. The question, therefore, was whether the activities of Mr Rashid in connection with his ownership and letting of four properties constituted a business. A number of activities were carried out, including maintenance, advertising for tenants, making credit checks, compiling and checking inventories, drawing up tenancy agreements, collecting rent, cleaning the common parts and maintaining the garden. With members of his family it was estimated that between 18 and 28 hours was spent on these activities each week.

44. The special commissioner (Dr Avery Jones) decided (although acknowledging that the case was near the borderline) that he was not satisfied that there was sufficient activity for a business to be constituted. He held that the property holding was an investment which by its nature required some activity to maintain it, rather than a business. In doing so, the special commissioner referred to the particular definition of 'employment' as the context. He took the view that because business had been included along with trade, profession, office or vocation in that definition, that implied activity in contrast to mere investment. He referred to a property rental business as one example of an investment business, and concluded that whether property rental business is a business in any particular case is a matter of degree.

45. It is clear from this that the special commissioner based his conclusions on the particular context applicable to national insurance, and in particular on the alignment in the relevant legislation of business with trade, profession, office or vocation. He appears to have treated that context as providing particular colour to the meaning of 'business' in determining the level of activity that would require to be found to distinguish it, in a national insurance context, from mere investment.

46. There is no such context for the purpose of s 162 TCGA. There is no statutory definition of 'business' in that respect. Business is not aligned as a concept with trades or professions, and there is nothing in that respect to colour its meaning. Nor is any special exception created for cases where the business comprises wholly or mainly the holding of investments. What there is, on the other hand, is a requirement that a person who is not a company transfers a business as a going concern to a company. The logic, and perceived purpose, of s 162 is to defer a charge to capital gains tax when the only change that has taken place is the form in which the business is operated (from non-corporate to corporate), and to the extent that the consideration consists of shares in the company. The legislation is looking at business in the context of something that is or may be carried on both by, for

> example, an individual and by a company. In my judgment the proper approach in that context is to construe 'business' broadly, according to its unvarnished ordinary meaning."

E. Conclusions from the case law

15. These are the conclusions I draw from the case law.

16. The meaning of "business" depends on its context in the legislation (*Town Investments Ltd v Department of the Environment* cited by Judge Berner). The disregard of business assets as capital applies in income-related benefits. That makes the decision of *Rashid v Garcia* cited by Judge Berner particularly pertinent as it was made under the Social Security Contributions and Benefits Act 1992.

17. Any distinction or comparison between business and investment is not helpful. For one thing, something may be both an asset of a business and an investment. The claimant may run a hotel as a business but plan to use the proceeds of sale of the hotel and the business to provide a pension in retirement. For another thing, the same kind of activities may have to be undertaken in respect of assets of both types (*Ramsay* at [33]).

18. The number of properties involved and the number of units in which they are let are not decisive of the outcome. Their significance can only be stated in terms of likelihood. Letting a single property as a unit is unlikely to be a business (as in R(FC) 2/92 and *Ramsay* at [32]), although the amount of administration or activity involved may create a business (as discussed in CCS/2128/2001, CH/4258/2004 and R(CS) 2/06). Letting out a single property as units for multiple occupation is more likely to be a business on account of the amount of administration or activity involved. Letting more than one property is also more likely to be a business, although not necessarily so (as in R(U) 3/77 and CH/4258/2004).

19. The cases do not attempt to specify what may amount to sufficient administration or activity to create a business. They agree that carrying out the duties of a landlord is not sufficient (R(FC) 2/92*)*. Beyond that, at best they provide individual examples in particular contexts. The factors identified in *Lord Fisher* (cited in *Ramsay* at [38]) are potentially relevant, but neither essential nor exhaustive of the factors that have to be considered. The same is true of the factors identified in CIB/1595 and 2114/2000, although it is important not to confuse trade and business (*Ramsay* at [30] and [34]). No single factor is decisive. It is the combined effect of all the facts and circumstances of the case that determine the proper classification of the issue. As Jessel MR said in *Erichsen v Last* (1881) 8 QBD 414 at 416:

> "The facts, as I understand them, are clear enough, and the question is whether what the company do amounts to carrying on trade in the United Kingdom. There is not, I think, any principle of law which lays down what carrying on trade is. There are a multitude of things which together make up the carrying on of trade, but I know no one distinguishing incident, for it is a compound fact made up of a variety of things."

20. R(SB) 4/85 is more helpful when the issue is which assets form part of a business than when the issue is whether there is a business at all.

F. Was the claimant's flat a business asset, the value of which could be disregarded?

21. The claimant told me that she had two sets of responsibilities in respect of her flat: as a landlord for her tenants and as a leaseholder herself. I accept what she told me.

22. As a landlord for her tenants, the claimant had to deal with a number of issues. She had to organise the paperwork relating to five changes to the terms of the tenancy. She had to visit every quarter in order to check on decoration and other matters. She had to deal with a leak in

the roof, a tap leak, a broken window and a cracked ceiling rose that cause the chandelier to fall. Some of these were organised by telephone, others not. There was also a health and safety issue that arose when the tenants wanted to have a visitor. This involved obtaining advice and quotations. As the building is listed, issues arose relating to planning and conservation. The claimant used a property agent for some aspects of obtaining and vetting tenants and ensuring the paperwork was correct.

23. As a leaseholder herself, the claimant had to deal with her obligations to the freeholder. In particular, she had to deal with issues relating to the external decoration of the property. Access to the rear of the premises to erect scaffolding could only be secured through her flat. This required coordination with her tenants, as did the decoration of the balcony and windows of the flat.

24. In addition, there were financial arrangements. There was landlord insurance to arrange and letting out the flat required permission from her mortgagee until she transferred her finance to a buy-to-let mortgage.

25. The First-tier Tribunal Judge's reasons were:

> "She did not need to leave her home as she can work anywhere, she is not making any profit on the business she claims to be running although she is advising others on how to run a business. She had told the Local Authority she does not wish to sell her home as she wishes to keep it as an investment for the future. … she is not running a business renting out her old home."

26. Mr McCluskey reminded me that the claimant had at first identified herself as self-employed only in respect of providing virtual office services – meaning that she worked from home. She had not presented herself as being self-employed in respect of letting out her flat. She had said the flat was an investment and later said it should be regarded as a pension fund. Only after that did she say it was a business asset. I do not hold any of that against her. It is for the tribunal to classify the flat. The claimant's initial presentation might be of some relevance if she had had in mind at the time the nature of the tests that are set out in the case law, but she did not.

27. The claimant's legal duties as a leaseholder are not relevant, as they are ones that she would have had even if she were still living in the flat. Their operation may have been more onerous as she had to coordinate with her tenants, but this was not on its own of great significance. The same is true of some of the things she had to do as a landlord. Arranging for a leaking tap to be fixed, for example, takes time, especially when the claimant was not on the spot, but the time involved was only minimal.

28. The claimant's duties as a landlord that would not have arisen if she had remained in the property were more significant, but not sufficient to take them outside what Mr Commissioner Goodman called "the collection of rent, the execution of repairs and the carrying out of other landlord's duties". The claimant was a considerate and conscientious landlord who took her duties seriously. Doing so, put her to inconvenience. To add to her burden, she was living over 250 miles away, so that she either had to travel or make arrangements by email or telephone. She was, on the other hand, fortunate to have tenants who caused her so few problems.

29. The issue is one of degree. Even if I were to take account of the totality of the claimant's actions as a leaseholder and as a landlord, whether or not they would have arisen if she had remained in her flat, they represent no more than many landlords of leasehold flats would have to undertake, and at best a marginal additional burden beyond what the luckiest of landlords could expect with the best of tenants.

30. The claimant's mortgage arrangements do not change this analysis. They took time to organise, as these things do, but the fact that the mortgage arrangements were changed to buy-to-let is not significant to whether the property was a business asset. Finally, the fact that the claimant was awarded a New Enterprise Allowance for 26 weeks from 15 May 2013 is not significant, as she was also self-employed in the capacity of providing virtual office services.

G. As the claimant's flat was not a business asset, what was its value at the time of her claim?

31. Upper Tribunal Judge Bano raised the issue of valuation when he gave permission to appeal:

> "There seems to me to be an arguable question of law as to whether the value of the house constituting the relevant asset should have been taken as the value of the house with vacant possession, or the value of the house subject to the tenancies granted by the claimant."

The First-tier Tribunal did not deal with this, as valuation was not presented as being in issue. The issue is whether, given the evidence, the tribunal should have enquired into the valuation before deciding that she had "equity in her previous home of over £16,000".

32. Some of these figures may not be entirely accurate, as the claimant backtracked on her evidence at some points. I am, though, satisfied that given the threshold of £16,000 and the other figures involved, any mistakes I may have made are not material to the outcome of this case. The claimant bought her flat in 2010 for £182,000 with the help of a mortgage of £136,000. That was the highest figure she gave. It is the most favourable to her as it produces the lowest equity, by which I mean the difference between the value of the flat and the outstanding mortgage. She first let the flat in March 2012 and the tenants finally vacated in March 2014 having had a succession of shorthold tenancies. In December 2013, the claimant put the flat on the market for £192,000 and she secured an offer for £190,000 not long before the tenants left. In the event, the sale did not go through. These figures show that the estate agent's valuation and the eventual offer were not significantly affected by the presence of shorthold tenants.

33. The issue in this case is the valuation between the claim and the local authority's decision, which is roughly the first five months of 2013. The First-tier Tribunal was entitled to take account of subsequent evidence insofar as it could be related back to that time: R(DLA) 2 and 3/01. It is fair to take account of the fact that the estate agent was able later in 2013 to put a value on the property of £192,000 and to secure in a few months an offer at just below that figure despite the presence of shorthold tenants. It is also fair to rely on those figures for valuation, which could not have changed significantly from a few months earlier. Even if the property had not increased in value since 2010, there was an equity of at least £46,000 from which 10 per cent must be deducted for the costs of sale pursuant to regulation 47. That still leaves over £40,000, which is £24,000 above the threshold of £16,000. On either the estate agent's valuation or the buyer's offer, the position is less favourable to the claimant.

34. In conclusion, the valuation of a property may be affected by the presence of tenants, but the evidence in this case shows that this was not significant as the claimant would be able to secure vacant possession in a reasonable time. Given the figures, and the consequent extent of the equity in the claimant's property, I consider that the tribunal was not required of its own accord to raise the issue of valuation. As my analysis of what the claimant told me shows, any consideration would not have assisted her.