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Case Number: UT/2024/000095

UPPER TRIBUNAL
Tax and Chancery Chamber

Rolls Building, London, EC4A 1NL

Inheritance tax – business property relief – section 105(3) IHTA 1984 – shares in a company – whether the business carried on by the company consisted wholly or mainly of making or holding investments

Heard on: 7 and 8 May 2026
Judgment date: 29 July 2026

Before

JUDGE JONATHAN CANNAN
JUDGE AMANDA BROWN KC

Between

THE EXECUTORS OF KEITH DENIS LEWIS BERESFORD (DECEASED)

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: James Rivett KC, instructed by Farrer and Co LLP

For the Respondents: Bayo Randle of counsel, instructed by the General Counsel and Solicitor for HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against a decision of the First-tier Tribunal (Tax Chamber) ("the FTT") released on 24 October 2024 ("the Decision"). The FTT found that shares in a company owned by Mr Keith Beresford at the date of his death were not relevant business property for the purposes of business property relief from inheritance tax. In the circumstances, the executors' appeal against HMRC's notice of determination to that effect was dismissed.

2. Mr Beresford owned 100% of the shares in Fiveteam Limited ("Fiveteam") which in turn owned 100% of the shares of Ninecourt Limited ("Ninecourt"). The main asset of Ninecourt was 16 High Holborn, a commercial building in London with six floors ("the Property"). The Property had been acquired by Ninecourt in 2008. From 2010, two of the six floors amounting to approximately 11,000 sq ft had been let on commercial leases to tenants for shops and offices. The remaining four floors amounting to approximately 21,000 sq ft had been used to provide serviced office facilities. The serviced offices were managed by Orega Management Limited ("Orega") as agent for Ninecourt pursuant to a serviced office management agreement which was described as the Orega Management Agreement or "ORA".

3. The FTT found that the business of Ninecourt was wholly or mainly making or holding investments. Hence, business property relief was not available in respect of the transfer of value associated with the value of Mr Beresford's shares in Fiveteam at the date of his death on 18 September 2018.

4. On this appeal, the executors challenge the FTT's finding that the business of Ninecourt was wholly or mainly making or holding investments.

5. We are grateful to both counsel for their written and oral submissions.

STATUTORY FRAMEWORK

6. The statutory framework is not in dispute, and we can summarise it very briefly.

7. Section 104(1) Inheritance Tax Act 1984 ("IHTA 1984") makes provision for business property relief from inheritance tax. Relief is available at the rate of 100% where the whole or part of a transfer of value is attributable to relevant business property. All statutory references in this decision are to IHTA 1984 unless otherwise stated or the context requires.

8. Relevant business property is defined by section 105. It includes unquoted shares in a company, but that is subject to section 105(3) which provides as follows:

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

9. Section 105(4)(b) provides that section 105(3) does not apply to shares in a company if the business of the company is that of being a holding company of a company whose business itself does not fall within sub-section (3).

10. It was common ground that Fiveteam was the holding company of Ninecourt and the issue before the FTT was whether the business carried on by Ninecourt fell within the exclusion from relevant business property in section 105(3).

THE FTT'S FINDINGS OF FACT

11. The FTT made findings of fact in relation to the ORA at [14] – [29] of the Decision. It made further findings of fact at [66] – [80] under a heading "Discussion", at [84] – [91] under a heading "Findings of Fact" and at [98] – [107] under a heading "What did Ninecourt (through

Orega as agent) do?”. It is mainly under the latter heading that the FTT set out its reasons for finding that the business of Ninecourt was mainly that of holding investments. We summarise the FTT’s findings of fact in the following paragraphs. The paragraph numbering in the version of the Decision in our core bundle had gone awry for some reason. We shall therefore use paragraph numbers from the Decision as published under neutral citation [2024] UKFTT 952 (TC).

12. Ninecourt appointed Orega to operate and manage the “serviced office business” which referred to the serviced offices available on four floors of the Property. The duties of Orega included actively seeking and accepting bookings from users, collecting amounts due, providing services to the users, managing the business, preparing management reports and employing individuals to provide the services. We shall describe users as clients, to adopt a neutral term.

13. The duties of Ninecourt included providing working capital, permitting access to the premises, and entering into contracts for various fit-out works.

14. The Orega Management Agreement included detailed provisions dealing with Orega’s commissions and the treatment of income, expenses and profit. It is not necessary for us to set out the FTT’s findings in relation to these provisions in detail. In short, Ninecourt was entitled to a “base return” and a “profit share”, whilst Orega was entitled to a “management fee” and a “profit share”. The FTT set out the figures for those items on an annual basis between 2011 and 2018 at [20] of the Decision.

15. The FTT found that income from clients was in the form of two separate fees. The first was described as a “facility fee”. The FTT found later in the Decision at [68] – [71] that the floors were divided into offices, so that each client entering into a user services agreement would have access to specific offices, enabled by a secure fob. Each office contained a number of identical workstations with an identical amount of space. Initially the price payable would be based on the number of workstations in the particular office space agreed to be used by each client. Ninecourt reserved the right to move clients into different offices if necessary, and this had happened on a number of occasions. If a client was moved into a larger office, the price would remain the price based on the number of workstations originally requested and agreed.

16. It was a matter for clients whether they required workstations. On rare occasions there might be an agreement for an office space that did not contain workstations. That had happened at least once, and the price payable was based on the number of workstations the office could theoretically hold. The standard method of charging customers was effectively per square foot and was subject to negotiation. There were about 42 separate offices which at any given time were occupied by 7 – 20 firms. If a client wished partitions to be moved around, this could and did happen. The client would be invoiced for the initial work and for reinstatement work at the end of the client’s tenure. Some clients had offices for less than 6 months and some for over 2 years.

17. In 2017, the facility fee income was £2,276,000. The direct costs incurred in supplying services covered by the facility fee was £767,000, of which £415,000 was rates.

18. Four floors at the Property were marketed by Orega as serviced offices. Orega provided staff to undertake all requisite services. Orega negotiated the terms with clients; arranged the layout of the offices to be used by a particular client, moving partitions as required; provided an on-site receptionist and phone answering service; cleaned kitchen areas and kept them replenished; and provided and maintained office equipment, heating, air conditioning and electricity.

19. Orega also provided additional services which were charged for separately by way of a "contract services fee". This included fees for meeting rooms, server space, postage, catering and photocopying.

20. The standard terms and conditions of the contract between Orega and clients included the following term:

> The office centre remains the property and in the sole possession and control of Orega [see note below]. We are giving you the right to share the office centre with Orega and other users so that we can provide the services to you … you accept that this agreement does not create any tenancy interest, leasehold estate or other property interest in your favour in the serviced offices.

21. The specific area covered by a licence could be and was changed by Ninecourt on notice from time to time. This was done mainly to better manage the office space.

22. The facility fee was payable for the workstations and standard services. The standard services described in the terms and conditions were recorded in the Decision at [21] as follows (sic):

> We will provide the number of serviced and furnished office rooms for which you have agreed to pay in the initial in the serviced office centre stated in your agreement. Your agreement contains details of the rooms initially allocated for your use. We may need to allocate different rooms from time to time but these will be of equivalent size and we will try to agree these with you in advance.
>
> We will provide the following office services during normal opening hours Monday to Friday; access to your serviced office, personalised telephone answering by our operators, reception of your visitors by our receptionist, heating and (where available) air conditioning, lighting and electrical power, cleaning, servicing, maintenance and repair of our equipment, use of kitchen, sanitary facilities and photocopying areas. We are happy to discuss special arrangements provision of these services outside on normal working hours.
>
> All of the available workstations the number of which are specified on page one of the agreement will be supplied with a telephone handset at the prevailing rate including the rental mainline DDI, personal answering services, voicemail and nightmail box.
>
> IT connectivity services are provided at the prevailing rate. Orega provide Network Switch ports equal in number to the amount of telephone handsets. A dedicated private partition service will be mandatory at the prevailing rate if voice or video conferencing services email and/or web servers over the network are intended....
>
> You will be asked to sign an inventory of all the serviced offices, furniture and equipment you are allowed to use together with a note of its condition and details of the keys or entry cards issue to you. You may only use the service offices as offices which may not include office use of a retail or medical nature. You must not install any furniture or office equipment cabling, IT or telecoms connections without our consent which we may refuse at our absolute discretion....

23. The contract services fee was charged by reference to specific additional services provided by Orega. The most significant services were IT services, including the provision of dedicated server space, telecom services, meeting rooms and maintenance and reinstatement of offices. There were also other services such as secretarial and administrative services, catering and couriers. The annual income for meeting rooms in 2018 was £60,000. The FTT estimated that around 5 hours of meeting rooms per day were supplied to clients and around 15 items of postage per day were supplied.

24. Clients were invoiced by reference to offices, including office numbers and the number of workstations in each office. The FTT produced a helpful table at [25] which compared the

turnover from serviced offices, split between facility fees and contract services fees, and the turnover from the two rental floors:

Year to September	**Turnover serviced offices**	**£**	**Turnover rental activities**	**£**
	Facility fees	**Contract services fees**	**Rent**	**Service charges**
2014	1,878,156	437,417	412,393	101,320
2015	2,438,365	465,224	441,773	25,922
2016	2,770,886	709,031	441,772	6,967
2017	2,275,915	578,514	503,083	22,038
2018	1,575,829	377,606	465,991	18,618

25. In fact, there is a slight error in the table in that the facility fees for 2014 were £1,786,156 but nothing turns on that.

26. The FTT focussed on the activities of Ninecourt in the five years prior to the transfer of value. It was common ground that this was the appropriate period of consideration.

THE FTT'S CONSIDERATION OF THE ISSUES

27. The FTT considered the authorities on section 105(3) at [43] – [49]. In doing so it quoted at length from the Court of Appeal decision in *George v HM Revenue and Customs* [2003] EWCA Civ 1763 ("*George*"), and from the Upper Tribunal decisions in *HM Revenue and Customs v Vigne* [2018] UKUT 357 (TCC) ("*Vigne*") and *HM Revenue and Customs v Pawson* [2013] UKUT 050 (TCC) ("*Pawson*"). It also referred to the well-known opinion of Lord Wilberforce in *Ransom v Higgs* [1974] 1 WLR 1594 as to the meaning of trade. That was in relation to an argument of Mr Rivett KC for the appellant that if the serviced office business carried on at the Property included a trade, then the business could not be wholly or mainly making or holding investments.

28. We shall consider the FTT's reasoning in detail when we come to consider the appellant's grounds of appeal. In short, the FTT looked at various aspects of the business carried on by Ninecourt from the Property. It was common ground that the rental activities on two floors of the Property amounted to holding investments. It is not clear to us whether HMRC accepted before the FTT that the provision of additional services subject to the contract services fee was a trading activity. In any event, the FTT found at [54] and [114] that the provision of those services was itself a trading activity. At [126] the FTT noted as follows:

> 126. Both sides agreed that if we decided that the income generated by the facility fee was from the 'making or holding of investments' then it followed that the business of Ninecourt was 'wholly or mainly making or holding of investments' and therefore BPR would not be allowed on the transfer.

29. It will be necessary for us to consider the precise scope of the parties' agreement in due course. The FTT decided for reasons given at [112] – [125] that the overall range of activities performed by Ninecourt in relation to the facility fee amounted to "managing investments" and that the facility fee was income derived from making or holding investments. Therefore, business property relief was not available.

THE GROUNDS OF APPEAL

30. There are two grounds of appeal for which the FTT itself gave permission to appeal:

(1) The FTT erred in law in its decision on the facts in finding that the activities of Ninecourt at the relevant time consisted '*wholly or mainly*' in the *'making or holding of investments'* within the meaning of s. 105(3).

(2) The FTT erred in law by drawing inferences and/or making a number of findings of fact which were not properly open to it on the evidence such as to amount to an error of law of the type identified in *Edwards v Bairstow* [1956] AC 14.

31. The first ground of appeal encompasses a number of criticisms of the FTT's decision which the appellant says amount to errors of law:

(1) It is said that the FTT misapplied principles in the authorities which led it to wrongly identify the facility fee as being income derived from the holding or making of investments. In particular:

(a) The FTT wrongly interpreted *Pawson* as authority for a proposition that owning and holding land in order to obtain an income from it is generally to be characterised as an investment activity.

(b) The FTT failed to identify that as a matter of legal principle, a building which is used for the purposes of a trade is not being held as an investment.

(c) Having identified that the facility fee was paid for a package of services, the FTT wrongly identified it as income derived from the making or holding of investments when the provision of services is a classic category of trading income.

(d) The FTT wrongly placed weight on another decision of the FTT in *Demetriou v HM Revenue and Customs* [2024] UKFTT 00830 (TC) ("*Demetriou*").

(2) It is said that the FTT failed to analyse whether, when viewed overall, the activities of Ninecourt consisted of wholly or mainly making or holding investments. In particular it failed to consider and apply the relevant factors identified in *Farmer and anor (exors of Farmer, decd) v IRC* [1999] STC (SCD) 321. If it had done so, and made the necessary findings of fact, the only conclusion available to the FTT was that the business did not consist wholly or mainly of making or holding investments. In that regard the FTT failed to make certain relevant findings of fact from the evidence before it, or to consider certain relevant matters.

32. The second ground of appeal alleges that in various respects the FTT drew inferences and made findings of fact which were not properly open to it on the evidence. In particular, it is alleged that:

(1) The FTT wrongly inferred or found at [77] that a "fundamental part of what clients acquired in the transaction was the right to use a specific room in the building". Further, the FTT made a series of evaluative assumptions regarding the relative importance of particular services to customers which were not supported by the evidence.

(2) The FTT wrongly found at [112] that the facility fee conferred a right of 'occupation' on the part of clients. Whilst the nature of the services supplied by Ninecourt are such that it is inherent that each user is granted a licence to enter the premises, the licence provided to each user bears more in common with the express or implied necessary right which is implicitly granted to a hotel or restaurant guest or a shopper or a customer using an internet café. The services which Ninecourt was obliged to provide to customers do not in any sense resemble the conferring of a right of 'occupation' as

that is ordinarily understood and which might, on other facts, indicate that what is being provided is a right over land plus some ancillary services.

(3) The FTT found at [122] that there was a considerable differential between the income from rental floors and the income from serviced office floors. This demonstrated that what was received by clients was different to renting an empty floor. The FTT acknowledged that the payment of a significant premium would be down to the services provided. However, it wrongly went on to speculate that the premium would also be due to the fact that a smaller space than an entire floor was being rented, and that the notice period was considerably shorter giving flexibility to customers.

(4) The FTT wrongly found at [108] that the nature of most of the activities were "investment management activities". That finding was wrong in law and was not available to the FTT on the evidence before it. In particular, the supply of office equipment, heating, electricity and air conditioning were component parts of the services supplied to clients for which clients paid the facility fee. Further, the unchallenged evidence before the FTT was that the contract services fees were charged at a rate which would generate a profit. For example, management accounts for the year ended 30 September 2018 demonstrate that the serviced office business received £165,000 by way of income from IT services at a cost to the business of £67,000.

33. To some extent there are overlaps between the various aspects of Ground 1 and Ground 2 which we address below.

THE AUTHORITIES

34. Before dealing with the appellant's grounds of appeal in detail it is worth considering some of the authorities relied on by the appellant. We start with two cases concerning taxpayers seeking to show that royalties from patents were income from investments which did not fall within the profits of their trade or business for the purposes of excess profits tax.

35. The first case is *IRC v Desoutter Brothers Limited* (1945) 29 TC 155 ("*Desoutter*"). It is common ground that this case is authority for the now well-established proposition that the term "investment", both generally and for the purposes of section 105(3), has the meaning that would be given to it by an intelligent businessman. The question is extremely fact-sensitive and as Lord Greene MR cautioned at p161, it is dangerous to take a finding in one case dealing with particular property as a guide to the treatment of the same type of property in other cases. The point has even more force when looking at different types of property. Lord Greene noted that patents are a peculiar type of property, and no analogy could be drawn with other types of property including real property. In the course of his judgment, he distinguished a patent in the hands of a manufacturer and a patent in the hands of a "mere passive owner", such as a member of the bar. Income from the latter would be income from an investment.

36. The second case is *Commissioners of Inland Revenue v Tootal Broadhurst Lee Co, Ltd* (1947) 29 TC 352 ("*Tootal*"). The taxpayer manufactured and sold textile goods and used certain patents in its manufacturing processes. Lord Normand in the House of Lords stated at p373:

> The meaning of investment is not its meaning in the vernacular of the man in the street but in the vernacular of the business man. It is a form of income-yielding property which the business man looking at the total assets of the company would single out as an investment. It certainly does not include all the property of the company … [T]he Master of the Rolls [in *Desoutter*] gave as a possible example of an income from an investment the royalties passively received by a barrister who exploited a patent inherited or acquired by him by granting licences. I think that a business man would find no difficulty in taking the same view. In these cases the investment is made when

the lease or licence is granted, and it seems to me the preferable view that it is the lease or the licence which is the investment…

37. Lord MacDermott in the same case stated at p376:

> … [A businessman] would, no doubt, find difficulty in giving a precise definition of "investments" as the word is used in the relevant enactment. But I think he would be prepared to go the length of saying something like this: "If, in the course of carrying on my business, I make active use of a business asset - be it my factory building, a piece of machinery, a patent or my working capital that asset is not an investment. Whatever else a business investment may have to be, it is an asset for the time being held intentionally aloof from the active work of the business. It is none the less an asset of the business and may have great business value: for instance, it may enable me to survive bad times and take advantage of good, or it may help me to control supplies or competition. And if it produces income that is income of the business. But I do not earn that income by my business efforts. The part I play there is essentially passive. I cannot, of course, afford to neglect my investment; I may have to preserve it and, on occasion, to change its form. But normally I just hold it and receive whatever it brings in.

38. To put these cases into context, Mr Rivett's submission was that if the Property was used for the purposes of Ninecourt's trade of providing serviced offices then, much like the patents, income from the trade was not investment income and the business could not be wholly or mainly making or holding investments.

39. Mr Rivett also relied on a line of cases including *Coman v Governors of Rotunda Hospital* [1921] 1 AC 1 ("*Rotunda*"), *Fry v Salisbury House Estate Limited* [1930] AC 432 ("*Fry*") and *Griffiths v Jackson* [1983] STC 184 ("*Griffiths*"). These cases concern the distinction between profits taxable as property income under what was Schedule A and profits taxable as trading income under what was Schedule D.

40. In *Rotunda*, the governors of a hospital let out certain rooms in the hospital for entertainment for periods varying from one night to six months. Charges included the use of heating and seating. The Privy Council held that the profits were assessable as trading income under Schedule D.

41. In *Fry*, rooms were let out unfurnished as offices. The taxpayer provided staff to operate the lifts and act as porters, and services such as heating and cleaning if tenants required it at an additional charge. The taxpayer was assessed under Schedule A on the rateable value of the building. The taxpayer accepted that it should be assessed under Schedule D on the profits from supplying services to tenants. The Revenue claimed that the assessment under Schedule D should also include the rents of the offices giving allowance for tax assessed under Schedule A. The House of Lords held that the rents were taxable under Schedule A as profits from the ownership of land and could not be included in the assessment under Schedule D.

42. *Griffiths* was a judgment of Vinelott J concerning furnished flats or bed-sitting rooms let to students. Occupiers signed a short agreement to rent a room with communal facilities. In some cases, laundry services and cleaning of communal areas were provided. The taxpayers were appealing assessments effectively under Schedule A. They relied on *Rotunda* and contended that the income was taxable as a trade under Schedule D. Vinelott J quoted Lord Macmillan in *Fry*, stating at p191b:

> It is a cardinal principle of United Kingdom tax law that "income derived from the exercise of property rights properly so called" by the owner of land (freehold or leasehold) is not income derived from the carrying on of a trade.

43. Vinelott J held that the income was not derived from a trade. He distinguished *Rotunda* at p193b on the basis that in *Rotunda*, the taxpayers remained in legal occupation of the entertainment rooms and retained control of them. He continued at p193e:

> The Rotunda Hospital case, in fact, is a useful illustration of the way in which the owner of land may, without parting with his occupation of it, exploit his rights of property and occupation by carrying on a trade.

44. To put these cases into context, Mr Rivett's submission based on *Rotunda*, *Fry* and *Griffiths* was that if Ninecourt was carrying on a trade then the profits were not taxable as income from property and could not be investment income.

45. Turning to authorities directly on section 105(3), a number of Special Commissioner decisions and judgments of the High Court led up to the Court of Appeal decision in *George*. In that case, a company owned a caravan site from which it conducted various business activities. There was a residential homes park where static caravans were owned by residents. The residents paid site fees and received connections to sewerage, water, electricity and gas which the company re-sold to residents. The company also provided lighting for the common parts and maintained the roads and car parks. It sold caravans and also took a commission on sales of caravans by residents. Other elements of the business included a club for residents and non-residents, storage of touring caravans, an administration office, a separately let warehouse and shop, fields let on grazing licences, an insurance agency and interest received on cash balances.

46. The Special Commissioner found that the caravan sales and commissions, the club, the insurance agency and interest on cash balances were non-investment activities. The caravan storage and rental income from the warehouse, shop and fields were investment income. The main area of dispute was the residential static caravan activity.

47. In brief, the Special Commissioner held that the residential static caravan element of the business involved the provision of services and not the holding of investments. Looking at all the activities in the round, the business of the company was not mainly that of holding investments. Laddie J in the High Court allowed the Revenue's appeal against that decision. He found that the holding of investments was the business of the company. In doing so, he identified "the investment bag" and put into the investment bag the core holding of land and the receipt of fees or rent in respect of its use. He also put into the investment bag all those activities which the average businessman would regard as incidental to that core activity. He went on to hold that the provision of services was ancillary to the investment business. Of the four major activities carried on at the site, only the operation of the country club and the caravan sales were not investment businesses.

48. In the Court of Appeal, Carnwath LJ gave the main judgment with which Hale LJ agreed (as they then were). He noted at [3] and [5] that the relative imprecision of the statutory test in section 105(3) meant that entitlement to relief could depend on fine distinctions between businesses which, for most practical and economic purposes, are virtually identical. The dividing line in any particular case was a matter for the Special Commissioners. Any challenge required a specific misdirection in law or a challenge based on the principles in *Edwards v Bairstow*.

49. In considering the authorities, Carnwath LJ noted at [12]:

> Although it is common ground that the exploitation of a proprietary interest in land for profit is in principle an 'investment' activity, I would agree respectfully with the commissioner's comment as to the wide 'spectrum' involved; and with his view that cases relating to different taxes and different subject matter are unlikely to be helpful.

50. He went on to cite with approval a passage from the Special Commissioner's decision which described a spectrum involving, at one end, the exploitation of land by granting a tenancy coupled with sufficient activity to make it a business. At the other end was land being exploited

with an element of services such that there is a trade, for example running a hotel or a shop from premises owned by the trader. The Special Commissioner continued:

> Normally for income tax, leaving aside services for which a separate charge is made, the income must be either income from land or trading profits. Here the concept of trade is irrelevant and one is required to determine whether the business of the company consists mainly of making or holding investments or some other business. Although I was referred to a number of income tax cases, I do not find these helpful on this issue.

51. Carnwath LJ also agreed with the Special Commissioner that previous decisions of the Special Commissioners were generally distinguishable, either on the facts or because the arguments were different. He did however agree that *Farmer* was particularly helpful, not least because of its emphasis on looking at the business "in the round". The Special Commissioner in *Farmer* had set out various factors at [53] that may be relevant:

> 53. Applying the principles derived from the authorities to the facts of the present appeal the following factors can be identified as relevant to a decision of what the business consists, namely: the overall context of the business; the capital employed; the time spent by the employees; the turnover; and the profit. When these factors have been considered it will then be necessary to stand back and consider in the round whether the business consisted mainly of making or holding investments.

52. Carnwath LJ went on to consider the judgment of Lawrence Collins J in *Weston (exors of Weston, decd) v IRC* [2000] STC 1064. He regarded that case as "unremarkable" in simply holding that the issue was one of fact for the commissioners. The Judge had not permitted the taxpayer to raise an argument that pitch fees on a caravan site were actually paid for services provided by the company rather than for the right to occupy particular pitches. Carnwath LJ did make observations at [15] on the following passage from the judgment of Lawrence Collins J:

> > "Thus land is generally held as an investment where gain is derived from payment to the owner for use of the property, and so a landlord will normally hold his property as an investment, even if the landlord has to engage in activities of maintenance and management which are required by the lease or are incidental to the letting."
>
> That is entirely fair as a statement related to the facts and arguments in that case. However, I will need to consider in more detail the question as to what is meant by 'management', and the relevance to that question of the requirements of the lease.

53. Carnwath LJ then considered in some detail a decision of the Special Commissioner in *Martin and anor (exors of Moore, decd) v IRC* [1995] STC (SCD) 5 ("*Martin*"). It concerned the letting of industrial units on three-year leases where the taxpayer argued that the activity of managing and maintaining the properties was sufficient to take the business out of the "investment category". In the course of his analysis, the Special Commissioner had referred to the judgment of Slesser LJ in the Court of Appeal in *Fry*, distinguishing "mere incidents of an ordinary tenancy" such as the provision of keys and porters, from additional charges for cleaning, lighting and heating where the landlord made a profit. Slesser LJ considered those additional services were severable, because they were not normally incidental to a tenancy. The income attributable to the rent was taxable as such. The income from the additional services was taxable as trading income.

54. Having considered *Martin*, Carnwath LJ made two observations as to its relevance in *George*:

> [27] … First, I agree in general terms that property 'management' is part of the business of 'holding' property as an investment (cf *Webb (Inspector of Taxes) v Conelee Properties Ltd*

[1982] STC 913 at 921, 56 TC 149 at 157). In the case of a building held for letting, management no doubt includes the activity of finding tenants and arranging leases or licences, and that of maintaining the property as an investment. But I would not extend that term to additional services or facilities provided to the occupants (such as those referred to by Slesser LJ), whether or not they are included in the lease and covered by the rent. In the case of a building for letting, it is unlikely to be material. They will not be enough to prevent the business remaining 'mainly' that of holding the property as an investment.

> [28] Where it does matter, in my view, the characterisation of such services depends on the nature and purpose of the activity, not on the terms of the lease (or, where relevant, a site licence). It is true that, in *Fry*, Slesser LJ noted the fact that the particular services mentioned (cleaning, heating and lighting) were optional under the lease, and that a separate charge was made. That was treated as a reason for not regarding them as 'mere incidents' of the tenancy. However, the converse does not follow. There is nothing in that judgment to support the view that, merely because services or facilities are required by the lease, and their cost is included in the rent, they lose their character as services, and become part of the 'holding' of the investment.
>
> …
>
> [30] Secondly, in any event, caution is needed in drawing a direct analogy between the letting of built units and the licensing of plots in a caravan park. In the former case, the 'investment' includes the whole of the site and building, including the occupied units. In the latter, it does not; the 'investment' consists solely of the site, and the occupiers provide their own accommodation. In that sense a caravan park is a hybrid. This makes it more difficult to draw a clear line between 'investment' and 'non-investment' activities. For example, maintenance of the amenity areas of the park is in part designed to maintain the investment, but it is also part of the service provided to the residential occupiers for the enjoyment of their own homes.

55. We note at this stage that in these paragraphs, Carnwath LJ clearly viewed the property as the investment rather than the leases or site licences which Lord Normand in *Tootal* viewed as the investment in connection with patents.

56. Carnwath LJ went on to find at [60] that Laddie J had erred in law. Section 105(3) did not require the opening of an "investment bag" into which are placed all the activities linked to the caravan park, including the supply of utilities, simply on the basis that they were ancillary to the investment business. Nor was it necessary to determine whether or not the investment was "the very business" of the company. That gave insufficient weight to the hybrid nature of a caravan site business. The holding of property as investment was only one component of the business and the Special Commissioner was entitled to find that it was not the main component. He concluded at [61]:

> [61] I would add that I am happy to be able to arrive at this conclusion. I find it difficult to see any reason why an active family business of this kind should be excluded from business property relief, merely because a necessary component of its profit-making activity is the use of land.

57. *McCall v HM Revenue and Customs* [2009] NICA 12 is a decision of the Court of Appeal in Northern Ireland following *George*. It was concerned with the classification of agricultural land which had development value far in excess of its agricultural value. The land comprised pasture land which was the subject of seasonal grazing arrangements known as conacre or agistment under the law of Northern Ireland. Approximately 100 hours of work on the land was carried out by the owner each year. This included cutting and spraying weeds, maintaining the water system, the fences and the drainage system. The Special Commissioner found that this work amounted to a business and that finding was not challenged. However, he found that the business consisted wholly or mainly of holding investments. The activities of the business consisted of making the land available without the separate provision of any substantial other

goods or services. The activities were not so substantial as to constitute themselves a part of the business distinct from the letting of land. The Special Commissioner also found that the owner retained possession of a right to occupy the fields, save that she could not interfere with the graziers' rights to graze cattle or sheep.

58. The Court of Appeal held that the Special Commissioner had properly applied the law and was entitled to reach his ultimate conclusion. It acknowledged that the test to be applied was that of an intelligent businessman and noted that land is generally held as an investment where gain is derived from payment to the owner for the use of the property. Having noted the judgments in *Desoutter*, *Tootal* and *George*, Girvan LJ stated:

> 14. What is clear from the authorities is that a landowner who derives income from land or a building will be treated as having a business of holding an investment notwithstanding that in order to obtain the income he carries out incidental maintenance and management work, finds tenants and grants leases…

59. The Court rejected a submission by the taxpayer that the arrangements should be viewed as the provision of grass and could not be viewed as analogous to a lease of premises in respect of which the landowner carries out work that was essentially maintenance in nature. The Court went on to cite the passage from Carnwath LJ in *George* at [12] referred to above and stated:

> 18. This helpful reference to a spectrum shows that it is necessary to decide where a particular business falls within the spectrum. This necessarily involves a question of fact and degree. It requires a judgment to be made in the light of established facts. Having analysed the evidence and made his findings the Special Commissioner concluded that the arrangement fell towards the lease end of the spectrum not at the hotel or shop premises end. He was fully entitled to do so on the evidence.

60. The issue came before Henderson J, as he then was, in *Pawson* in the context of a holiday letting business. The property in question was a large bungalow overlooking the sea. The FTT found that whilst the business was described as that of letting a holiday cottage, visitors had contractual licences to occupy the bungalow. It found that exploiting the property amounted to a business which did not consist wholly or mainly of holding an investment because services were provided to holidaymakers by the owner. HMRC challenged that conclusion on the basis of *Edwards v Bairstow*, alleging that it was not open to the FTT to reach that conclusion on the facts as found.

61. Henderson J surveyed the authorities in detail, in particular, *Martin*, *Weston*, *George* and *McCall*. Having quoted [27] and [28] of *George*, he stated at [30]:

> 30. This passage in Carnwath LJ's judgment is in my view important for at least three reasons. First, he endorses the general proposition that property management forms part of the business of holding property as an investment, and he includes under that heading maintenance of the property as an investment as well as the activity of finding tenants and arranging leases or licences. Secondly, however, Carnwath LJ draws a distinction between such management activities on the one hand, and the provision of additional services or facilities to the tenants or occupants, whether they are separately charged for or included in the lease and covered by the rent, on the other hand. The characterisation of such services depends on the nature and purpose of the activity, and not on the terms of the lease or site licence. Nevertheless, and this is the third point, where the business is one of letting a building, the provision of additional services or facilities to the occupants is "unlikely to be material" because they will not be enough to prevent the business remaining "mainly" one of holding the property as an investment. The implication is in my judgment clear. In any normal property letting business, the provision of additional services or facilities of a non-investment nature will either be incidental to the business of holding the property as an investment, or at least will not predominate to such an extent that the business ceases to be mainly one of holding the property as an investment.

62. When Henderson J came to consider the decision of the FTT he adopted at [42] a submission of HMRC:

> 42. In considering these rival submissions, I take as my starting point the proposition that the owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity. Further, it is clear from the authorities that such an investment may be actively managed without losing its essential character as an investment: see *Martin*, *Weston* at paragraphs 18 to 19 and *George* at paragraphs [18] and [27]. Accordingly, the fact that the Pawsons carried on an active business of letting Fairhaven to holidaymakers does not detract from the point that, to this extent at least, the business was basically one of an investment nature.
>
> 43. The business activities carried on in relation to Fairhaven which would naturally fall on the investment side of the line included the taking of active steps to find occupants, making the necessary arrangements with them, collecting payment of the rent, the incurring of expenditure on repairs, redecoration and improvement of the property, maintenance of the garden and grounds in a tidy condition, and keeping the property insured. All of these activities were directed at maintaining or enhancing the capital value of the property, and obtaining a regular income from its letting.

63. Henderson J noted the FTT's finding that additional services were provided to occupants, such as a cleaner, heating and hot water, a television, a telephone, a welcome pack and a local person to deal with any queries or emergencies. He stated at [45]:

> 45. It is clear from *George* that the provision of these additional services and facilities is not to be regarded as part of the maintenance of the property as an investment, and that their characterisation as services is unaffected by the fact that no separate charge was made for them. The critical question, however, is whether these services were of such a nature and extent that they prevented the business from being mainly one of holding Fairhaven as an investment. Carnwath LJ made it clear in paragraph [27] of his judgment in *George* that, in the case of a business of letting a building, the provision of such services is "unlikely to be material" because they will not be enough to prevent the business remaining mainly one of property investment. The implication is that in any normal case an actively managed property letting business will fall within the exception in section 105(3) because the "mainly" condition will still be satisfied.

64. Henderson J went on to find that on the facts, the only conclusion reasonably open to the FTT was that the business was mainly that of holding the property as an investment. He considered the business to be a typical example of a property letting business, albeit of a specialist nature.

65. In *Vigne*, the FTT had considered the "starting point" referred to by Henderson J at [42] of *Pawson*. It stated that it was incorrect to start with a pre-conceived idea that the livery business in that case was wholly or mainly one of holding investments. The proper starting point was to make no assumption but to establish the facts and then determine the question. HMRC submitted in the Upper Tribunal that the FTT had erred in taking that approach. That submission was rejected by the Upper Tribunal at [28]:

> 28. … It is clear that in effect the FTT was simply taking the view that the proposition expressed by Henderson J as being an appropriate "starting point" for a managed holiday let property business was not necessarily also appropriate for a livery business of the type under consideration in this appeal, which it considered to be fundamentally different. Accordingly, as the FTT did not consider the deceased to have been owning the land "in order to obtain an income from it", the "presumption of investment activity" referred to in the comments of Henderson J was quite simply inapplicable to the present case, and accordingly the statutory wording should be applied *de novo* and without any presumption of the type referred to by Henderson J in *Pawson*. Mr McNall's arguments [for HMRC] appeared to be based on a

submission that any business involving exploitation of land should, as a matter of law, be assumed to be wholly or mainly a business of investment unless the taxpayer could establish otherwise. This clearly overstates the position; *Pawson* makes it clear that such an assumption only applies to "owning and holding land in order to obtain an income from it", a much more restricted proposition. We also note that Briggs LJ in the Court of Appeal, in refusing permission to appeal in *Pawson*, said this:

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

66. We note that the Upper Tribunal in *Vigne* referred to the "presumption of investment activity" which it attributed to Henderson J. In fact, Henderson J did not use that terminology. He simply referred to what was described as a "starting point".

67. We shall consider Mr Rivett's submissions on *Desoutter* and *Tootal* in due course. At this stage, we derive the following propositions from the authorities, principally *George*, *Pawson* and *Vigne*:

(1) The exploitation of a proprietary interest in land to obtain an income from use of the land by another person is, in principle, an investment activity (see *George* at [12] and [15] and *Pawson* at [42]).

(2) However, this does not amount to a presumption of investment activity. There is no finding of any such presumption in *George* or *Pawson*.

(3) Holding land to obtain an income from use of the land without more is simply one end of a wide spectrum. In the context of section 105(3), that would include granting a tenancy over the land with just enough activity to make it a business (see *George* at [12]). An example of that is *Pawson*, where use was permitted by way of contractual licences rather than tenancies.

(4) At the other end of the spectrum is the exploitation of land by means of a trade carried out on the land, such as a hotel or shop. Examples of that include *Rotunda*, albeit not in the context of section 105(3), and *Vigne*.

(5) Property management directed at maintaining or enhancing the capital value of a property and obtaining a regular income from its letting is part of the business of holding the property as an investment (see *George* at [27] and *Pawson* at [43]). Property management includes finding tenants and maintaining and improving the property.

(6) An investment property may be actively managed without losing its essential character as an investment (see *Pawson* at [42]).

(7) Additional services or facilities provided to occupants such as cleaning, lighting and heating are non-investment activities whether they are included in the rent or a separate charge is made. However, in the case of an ordinary property letting business such services are unlikely to be material (see *George* at [27] and [28] and *Pawson* at [30] and [35]).

(8) It is not appropriate to treat supplies of additional services as investment activities simply because they are viewed as ancillary to investment activities (see *George* at [60]).

(9) Where a business consists of various activities, including both investment and non-investment activities, it is necessary to look at the business in the round. Relevant factors may include the overall context of the business; the capital employed in each activity;

the time spent by employees on each activity; the turnover of each activity; and the profit generated by each activity (see *Farmer* at [53] endorsed in *George* at [13]).

(10) The dividing line between what is wholly or mainly an investment business and other non-investment businesses is a matter of fact for the evaluative judgment of the FTT which can be challenged only where there is a specific misdirection in law or on the principles in *Edwards v Bairstow* (see *George* at [5]).

68. Mr Rivett in particular does not accept all these propositions, at least in the way we describe them above. We set out below why we do not accept Mr Rivett's submissions to the contrary.

THE FTT'S REASONING

69. The FTT recited large passages from *George*, including those referred to above. It also referred to *Vigne* and *Pawson*. The FTT said that it found the passage in *Pawson* at [42] cited above particularly helpful. Before setting out its reasoning, the FTT went on to state at [93]:

> 93. We take as a starting point that the owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity. This is made clear in *Pawson.* We are not taking this as a rebuttable presumption, merely as a starting point in the decision making process.

70. We should say at the outset that we find nothing wrong with that approach. However, the FTT Decision is a little disjointed. As indicated above, its findings of fact are made under various headings. Whilst it sets out the relevant authorities on section 105(3) in detail, it does not separately identify the principles it derived from the authorities. At various stages, interspersed with its findings of fact, the FTT describes its approach to the question of whether Ninecourt's business was wholly or mainly one of making or holding investments. Looking at the Decision as a whole, for present purposes it seems to us that the broad approach of the FTT can be identified from the following passages:

> 48. We consider that *George* makes it clear that we should start from the statute and look at the situation in the round, and *Vigne* and *Pawson* give guidance on the starting point when there is a significant property based asset contained within the business.
>
> …
>
> 54. Although obviously we have to consider the entirety of the business in the round, both parties agreed that we should start with the business that gave rise to the facility fee. The contract fees (being trading income) and the rental fees (being investment income) were relatively uncontroversial, and neither were significant enough on their own to sway the business to being 'wholly or mainly holding or making investments' or not being such.
>
> …
>
> 93. We take as a starting point that the owning and holding of land in order to obtain an income from it is generally to be characterised as an investment activity. This is made clear in *Pawson.* We are not taking this as a rebuttable presumption, merely as a starting point in the decision making process.
>
> 94. After looking at the details of what the relevant company did, we need to look at the nature of the activities in the round.
>
> 95. Active management of an investment is possible without the essential character of investment being lost.
>
> 96. It is important to look not at the level of the activities, but the nature of the activities that are carried out.
>
> 97. It is not important, when looking at these activities, to look at whether they were performed under the terms of a lease or not. In the context of this case, this means that in relation to the

serviced office business, we should look at the entire business relationship with a customer for which the customer paid both a facility fee and a contract fee, to determine the nature of that business.

71. The FTT set out some important findings as to the nature of the transactions between Ninecourt and its clients at [75] – [77]:

> 75. We consider that the primary element contained within the transaction between the client and Ninecourt was that of the use of an office room within a particular building. That particular room, named on the invoice, was for the exclusive use of the client until either the client gave notice, Ninecourt gave notice, or Ninecourt moved the client into another office in the same building. We note that moving offices did happen, but that this was not a common occurrence.
>
> 76. Mr Rivett contends that you can't unpick the facility fee and try to, for example, assign value to the various different elements of what was provided. He contends that 'the whole point is, people bought the package'.
>
> 77. We agree. We are aware that the service provided was different from renting a space in a building under ordinary rental terms, and arranging all the services separately. However, a fundamental part of what the clients acquired in this transaction was the right to use a specific room in the building, fitted out both in the room and in the communal areas with facilities that were desirable and formed part of the price they were willing to pay.

72. The FTT's reasons for finding that the business of Ninecourt was mainly making or holding investments must include those findings, but also include what is said at [108] – [115] on the basis that the starting point was that owning and holding land in order to obtain an income from it is generally to be characterised as an investment activity:

> 108. When looking at these activities in the round (as set out in *George*), we consider that the nature of most of the activities were investment management activities. The advertising of the offices, negotiation of terms, maintenance of office equipment and provision of hearing [sic], air conditioning and electricity were all activities which maintained the value of the investment, rather than provided services to any particular customer.
>
> 109. The provision of dedicated server space, meeting rooms, postage, catering and photocopying were clearly non-management activities (and were invoiced separately).
>
> 110. In addition, the cleaning of the kitchen areas and their replenishment, and the provision of a receptionist and telephone answering service were also non-management activities.
>
> 111. We consider that, contrary to the view advanced by the Appellant, it is possible to place activities in relation to obtaining a profit through the use of land on a spectrum. This should be done not by looking at 'how busy people are performing these activities' but 'to what extent these activities do something other than maintain the investment in the land'.
>
> 112. When we look at the overall range of the activities performed by Ninecourt in relation to the facility fee, which predominantly related to charging for the occupation of floor space, we consider that these fall on the 'managing investments' side of the spectrum.
>
> 113. We have considered whether the consideration of the other services performed, in relation to the contract fee, changes this analysis when looking at the serviced office business in the round, and we consider it does not.
>
> 114. The contract services by themselves are trading activities. The provision of server space is, while no doubt complementary to the serviced office, not so integral to the provision of the serviced offices as to alter the nature of the facility fee.
>
> 115. The other services provided mainly under the contract fee but some under the facility fee are relatively minor in nature, both in their actual usage and in relation to how they change or colour the fundamental nature of what is being provided to the customer as a whole.

73. The FTT then set out its reasoning at [116] – [125] if a different starting point was taken:

> 116. Because HMRC and the Appellant disagree on the starting point for the making of the decision, we also consider as a starting point the proposition that Ninecourt might be trading.
>
> 117. Did the activity by Ninecourt, when combined with the physical space which the customer gained access to, amount to 'trading by the exchange of services for reward'?
>
> 118. We consider that it did not.
>
> 119. It is obvious that some of the basic requirements of a trade such as a customer, and the exchange of something for reward, are met.
>
> 120. However, when turning to what was provided, looking at the agreement, it was
>
>> 'the number of serviced and furnished office rooms for which you have agreed to pay in the initial in the serviced office centre stated in your agreement. Your agreement contains details of the rooms initially allocated for your use. We may need to allocate different rooms from time to time but these will be of equivalent size and we will try to agree these with you in advance.
>>
>> We will provide the following office services during normal opening hours Monday to Friday; access to your serviced office, personalised telephone answering by our operators, reception of your visitors by our receptionist, heating and (where available) air conditioning, lighting and electrical power, cleaning, servicing, maintenance and repair of our equipment, use of kitchen, sanitary facilities and photocopying areas. We are happy to discuss special arrangements provision of these services outside on normal working hours.
>>
>> All of the available workstations the number of which are specified on page one of the agreement will be supplied with a telephone handset at the prevailing rate including the rental mainline DDI, personal answering services, voicemail and night mail box'
>
> 121. Fundamentally, we consider that what is being provided is physical space in a building with some desirable additional services, but not such a level of services as to mean that the principal transaction is 'the exchange of services for reward'.
>
> 122. This is not a clear cut case. We acknowledge that the considerable differential in income from the rental floors and serviced office floors shows that what was received was different to renting an empty floor. A significant premium was paid by the serviced office customers and this, would be to some degree down to the services provided. However, it would also be due to the fact that a smaller space than an entire floor was being rented, and that the notice period was considerably shorter and the flexibility that that offered; together with the fact that the office space was fitted out by Ninecourt to high specifications (in terms of partitioned and pre-decorated offices etc. The cost of which is included as freehold improvements within fixed assets in the accounts. Those higher charges reflect the investment that Ninecourt made in the 'appearance' on the serviced office floors

> 123. We were not presented with comparables for non-serviced offices rented on similar terms, and we do not think this is critical to our analysis due to the variety of other factors being considered.
>
> 124. We do not consider that the frequency of the transactions is enough to point to the activity being a trade. This is clearly not analogous to a hotel business, and the frequency of the contracts is not nearly sufficient enough to merit this being a determinative factor in a trading analysis.
>
> 125. We therefore consider that the facility fee was income derived from the 'making or holding of investments'.

74. The FTT then referred to the parties' agreement at [126], recorded above at paragraph 28. On the basis that the facility fee derived from investment activity, it followed the business of Ninecourt was mainly that of making or holding investments.

DISCUSSION

Ground 1

75. The broad thrust of Mr Rivett's submissions under Ground 1 may be summarised as follows:

(1) The FTT wrongly considered that owning and holding land in order to obtain an income from it is generally to be characterised as an investment activity. It is only where the owner derives income from granting a right of occupation that there will be an investment activity. The FTT misconstrued what was said by Henderson J in *Pawson*. He was referring at [42] to circumstances where rights of occupation were granted and there was actually income from land, which was an investment activity. He was not referring to circumstances where the taxpayer was making a living from providing services on the land, including a right of access to the land.

(2) In any event, in circumstances where the owner of land uses the land to carry on a trade, there will be no investment activity. In this regard, the FTT failed to identify and apply the principles to be derived from *Desoutter* and *Tootal*.

(3) Having identified that the facility fee was paid for a package of services, the FTT wrongly characterised it as income from making or holding investments. On any view, it was trading income.

76. Mr Rivett submitted that FTT decisions since *George* and *McCall* have taken a wrong turn and lost sight of the fundamental principles derived from authorities as to the distinction between income from property and trading income and from authorities concerning the use of assets in a trade. Tribunals have wrongly taken the reference in *George* to a "spectrum" as an invitation to fact-match previous decisions.

77. Mr Rivett accepted that whilst *George* identifies that the concept of "trade" is irrelevant to the issue under section 105(3), he submitted that if an activity does constitute a trade which involves use of an asset then the activity cannot constitute a business of making or holding investments. In other words, a taxpayer does not have to establish that an asset was used in a trade, but if it could then there was no exclusion from relief. The law recognises four types of business activity: trades, professions, vocations and investments (see *Jowett v O'Neill and Brennan Construction* [1998] STC 482). Clearly those activities are mutually exclusive. The proper approach is to ask whether the activities of the business are predominantly directed at maintaining the investment value of the property or are instead directed at providing services to customers who use the property. In the latter case it does not matter that a necessary component of the profit-making activity is the use of land.

78. We acknowledge that a business may include different types of activities. Some of those activities may be characterised as investment activities. Others may be characterised as non-investment activities. That was the case in *George* where the Special Commissioner found that the caravan storage business and rental income from the warehouse, shop and fields was income from investments. In the present case, the parties and the FTT have rightly distinguished between the rental activity carried out on two floors of the building which is clearly an investment activity, and the serviced office activities carried out on four floors of the building.

79. Mr Rivett submitted in his skeleton argument that a single business activity should not be characterised as comprising a combination of investment and non-investment (or trading) activities. It must be characterised as either an investment activity or a trading activity. We broadly accept that submission. We consider that where a business comprises more than one activity, it is necessary to consider what was the main activity of that business. That was the approach of the Special Commissioner in *George* and we are satisfied that it is the right approach.

80. Against that background, there are various aspects to Ground 1 which we consider under the following headings.

The FTT's treatment of Pawson

81. Mr Rivett submitted that the FTT's approach to Pawson, described at [93] of the Decision, was an incorrect reading of *Pawson*. He referred us to the Upper Tribunal decision in *Vigne*, and submitted that the FTT should not have taken as its starting point that owning and holding land was generally to be characterised as an investment activity. In doing so, it was in effect starting with a rebuttable presumption, even though it disavowed doing so.

82. We are satisfied that Henderson J in *Pawson* was not suggesting that there was a presumption that exploiting land for profit amounts to an investment business. Henderson J did not use the language of presumptions and emphasised in his decision the need to look at the business in the round. Similarly, the Court of Appeal at [12] of *George* recorded that it was common ground that the exploitation of a proprietary interest in land for profit is in principle an "investment" activity. It did so without any reference to a presumption and with the caveat that there was a wide spectrum involved. It went on to endorse the proposition in *Farmer* that it is necessary to look at the business in the round. The approach of Henderson J in *Pawson* is entirely consistent with the Court of Appeal in *George*. Both cases simply restate the "cardinal principle" described by Vinelott J in *Griffiths* in the context of section 105(3), whilst endorsing an evaluative approach which requires the FTT to look at the business in the round. As Henderson J stated at [46]:

> 46. … Looking at the business in the round, there was in my view nothing to distinguish it from any other actively managed furnished letting business of a holiday property, and certainly no basis for concluding that the services comprised in the total package preponderated to such an extent that the business ceased to be one which was mainly of an investment nature…

83. Mr Randle for HMRC did not seek to rely on any presumption, and in our view, he was right not to do so. He described the "starting point" of Henderson J as an "analytical tool". We consider that reads too much into what Henderson J was saying. He was simply saying that land held in order to obtain an income from use of the land by another person, without more, lies at one end of the spectrum endorsed by Carnwath LJ.

84. The Upper Tribunal in *Vigne* held that the proposition set out in *Pawson* is limited to land which is owned "in order to obtain an income from it". In doing so it seems to have considered that Henderson J was describing circumstances where there would be a presumption. It then went on to endorse what was said by Briggs LJ as he then was, refusing

permission to appeal in *Pawson*. In refusing permission, Briggs LJ accepted that there was no presumption.

85. The parties addressed us on whether what Briggs LJ said in the context of an application for permission to appeal was authoritative, or at least persuasive. There are authorities on that question, but it is not necessary for us to address them in the present appeal. Quite apart from what is said by Briggs LJ, we see no reason to consider that Henderson J was describing an approach which involved the application of a presumption.

86. In any event, in the present case, the FTT expressly disavowed applying any presumption that owning and holding the Property was to be characterised as an investment activity. The FTT made findings of fact as to the activities carried on at the Property and considered those activities in the round. Having done so and having reached a conclusion on that basis, it also looked at the position from a starting point that Ninecourt might have been trading in relation to the facility fee and reached the same conclusion. There is no suggestion in that analysis that the FTT was applying a presumption, or that the appellant had failed to rebut a presumption.

87. We do consider that the FTT's approach to the "starting point" is rather puzzling. It analysed the issue by reference to two different starting points. If there were no presumption and the test it was applying simply involved looking at the business in the round, then the starting point should make no difference. It seems to us that at [116] to [124] the FTT is actually considering a different issue. Namely, whether Ninecourt was trading in relation to the services it provided in return for the facility fee. The FTT concluded that it was not trading in that regard and therefore reached the same conclusion despite the different starting point. We do not consider that this approach discloses any error of law on the part of the FTT, but once we have addressed the significance of trading, we shall consider the FTT's finding that the facility fee was not trading income.

88. Looking at the Decision as a whole, we are not satisfied that the FTT erred in its approach to *Pawson*.

89. Whilst Mr Rivett argued that there was no presumption, he did accept and submit that there is a dividing line between a business simply granting rights of occupation, which would be an investment business, and other businesses which do not involve granting rights of occupation which would not be investment businesses. This is partly an aspect of Ground 2 and we shall consider it at that stage.

The significance of trading

90. The second aspect of Ground 1 relates to the significance of a finding that Ninecourt was trading from the Property. Mr Rivett submitted that in circumstances where an owner of land uses the land to carry on a trading business there can be no investment activity. In this regard, the FTT failed to identify and apply the principles to be derived from *Desoutter* and *Tootal*. This aspect arises whatever the nature of the facility fee because the FTT found that Ninecourt's income from the contract services fee in relation to additional services was trading income.

91. Mr Rivett placed particular reliance on *Tootal*, where Lord MacDermott stated at p376:

> If, in the course of carrying on my business, I make active use of a business asset—be it my factory building, a piece of machinery, a patent or my working capital—that asset is not an investment.

92. Mr Rivett effectively submitted that because Ninecourt used the Property as the platform for its serviced office activities, which at least to some extent amounted to a trade, the building was not held as an investment.

93. The FTT does not refer in the Decision to this submission, or to *Desoutter* and *Tootal*. We were not taken to the submissions made to the FTT in this regard, however there is no suggestion that the issue was not before the FTT and the FTT did give permission to appeal in relation to all aspects of Ground 1.

94. We do not consider that *Desoutter* and *Tootal* establish any general principle that an asset which is used in the course of a trade cannot be an investment asset no matter how insignificant the trade might be compared to investment activity in connection with the same asset. In the context of section 105(3), the question is whether the business carried on by the company consists wholly or mainly of making or holding investments. In that context, we consider that much will depend on the nature and extent of the trade carried on using the relevant asset. Here a trade was being carried out using part of the Property, that is the four floors where serviced office accommodation was provided. The trade extended at least to the provision of additional services for which the contract services fees were paid. However, we do not consider that, as a matter of principle, the business of Ninecourt could not be mainly that of holding investments simply because there was some non-de minimis trade using the Property.

95. If that were right, the outcome in *George* would not have depended on looking at the business in the round. In *George*, the taxpayer also carried on trading activities from the land in the form of caravan sales and commissions, the club and the insurance agency. Having said that, we acknowledge that the point was not argued in *George*, although Carnwath LJ did endorse an observation of the Special Commissioner that the concept of trade was irrelevant.

96. In our view, the significance of trading from the Property lies in the overall evaluative exercise that the FTT is required to perform when looking at the business in the round and considering whether it was mainly that of holding investments.

97. Mr Rivett submitted that a trading business might own and use extremely valuable capital assets for the purposes of its trade. However, the FTT failed to identify that, as a matter of legal principle, a building which is used for the purposes of a trade is not being held as an investment. In particular, he submitted that the FTT failed to identify the fundamental nature of the business operated by Ninecourt. It ignored the terms and legal effect of the arrangements between Orega and Ninecourt and the activities undertaken by Ninecourt. Instead, it wrongly focused on a narrow examination of the facility fee.

98. The FTT made a finding that the contract services fee was trading income, but the facility fee was investment income. The latter finding is separately challenged by the appellant. For present purposes we are satisfied that the FTT took into account that Ninecourt was carrying on a trade at the Property. It found at [108] – [112] that the services provided in relation to the facility fee amounted to managing the Property as an investment. It went on to consider at [113] – [115] whether the trading activities in connection with the contract services fees changed that analysis. It concluded that they did not.

99. We do not consider that the FTT wrongly focussed on a narrow examination of the facility fee. The FTT records at [126] that the parties agreed that if the facility fee income was derived from making or holding investments then it followed that the business of Ninecourt was wholly or mainly making or holding investments.

100. That approach is understandable on the basis that the activities giving rise to the facility fee would tip the balance where the rental floor income was agreed to be income from holding investments and the contract services fee income was found to be trading income. The same approach was taken in *George*, where the focus was on the income from the residential caravan activity.

101. Looking at the decision as a whole, we are not satisfied that the FTT erred in its approach to the significance of its finding that Ninecourt was trading in relation to the contract services fees.

The facility fee

102. Mr Rivett submitted that the FTT correctly found that the facility fee was paid for a package of services. However, having done so, it ought to have gone on to find that income from those services was trading income.

103. The FTT cited at [46] the following passage from Lord Wilberforce's opinion in *Ransom v Higgs*:

> 'Trade' cannot be precisely defined, but certain characteristics can be identified which trade normally has. Equally some indicia can be found which prevent a profit from being regarded as the profit of a trade. Sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organisation, even of intention, and in such cases it is for the fact-finding body to decide on the evidence whether a line is passed.
>
> ....
>
> Trade involves, normally, the exchange of goods, or of services, for reward, not of all services, since some qualify as a profession, or employment, or vocation, but there must be something which the trade offers to provide by way of business. Trade, moreover, presupposes a customer (to this too there may be exceptions, but such is the norm), or, as it may be expressed, trade must be bilateral—you must trade with someone…
>
> Then there are elements or characteristics which prevent a trade being found, even though a profit has been made—the realisation of a capital asset, the isolated transaction (which may yet be a trade)… Although these are general characteristics which one cannot state in terms of essential prerequisites, they are useful benchmarks, so when one in faced [sic] with a novel set of facts, as we are here, the best one can do is to apply them as tests in order to see how near to, or far from, the norm these facts are.

104. The FTT found at [112] that the facility fee predominantly related to charging for the occupation of floor space and that the overall range of activities in relation to the facility fee amounted to "managing investments". That finding in relation to some of the services provided for the facility fee is challenged under Ground 2. The FTT then went on to find at [117] – [125] that the facility fee was not trading income. In doing so, it plainly had regard to the factors described by Lord Wilberforce. It also took into account at [121] its conclusion that fundamentally what was being provided was physical space in the Property.

105. On the face of it, the FTT reached an evaluative conclusion that the facility fee was investment income from the Property. Mr Rivett submitted that on the FTT's findings of fact such a conclusion was not open to the FTT. The facility fee was clearly trading income in circumstances where:

(1) Ninecourt appointed Orega as its agent, which would be odd in the context of an investment business.

(2) The FTT had found that the contract services fees were trading income.

(3) The FTT had found at [76] and [77] that the facility fee was paid in relation to a package of services which could not be unpicked and that the services provided were different from renting space in a building on ordinary rental terms.

106. Mr Rivett submitted that there was no legal or evidential basis for the FTT's finding at [75] that the primary element of the transaction was the use of an office room within a particular building. The evidence demonstrated that the Property was merely the platform from which a service-intensive business activity was carried on, rather than the source of the income itself.

107. We do not accept Mr Rivett's submissions. We consider that the FTT was entitled to infer from the evidence and the facts as found that the primary element of the transaction was the use of the offices by clients. As Mr Randle submitted, it is clear from *George* and *Pawson* that an investment may be actively managed without crossing the line into a non-investment activity. We should be slow to interfere with the FTT's evaluative assessment of what the facility fee was paid for and in the present circumstances there are no grounds for us to do so.

108. The FTT expressly accepted that the facility fee covered a bundle of standard services. The FTT's task was to identify the nature and purpose of what was being provided for the facility fee. That inquiry necessarily required the FTT to form a view about the relative importance or substance of what was being supplied.

109. We shall return to the question of whether the FTT was entitled to make the finding it did in relation to what was being provided when we come to the first aspect of Ground 2. At this stage, we are not satisfied that this aspect of Ground 1 establishes any error of law on the part of the FTT.

Reliance on Demetriou

110. The grounds of appeal and Mr Rivett's skeleton argument alleged a procedural unfairness arising from the FTT's reliance on the decision in *Demetriou*, which was released following the hearing but before the FTT released its Decision. It was said that the appellant had no opportunity to make submissions on the case, which was wrong in law and in any event distinguishable on its facts. Mr Rivett did not address this aspect of Ground 1 in his oral submissions.

111. The FTT referred to *Demetriou* at [49] as follows:

> 49. Since the date of this hearing, a further case has been heard by this Tribunal, that of *Demetriou* [2024] UKFTT 00830 (TC) which we found gave a helpful summary of the cases above, and also considered what the starting point should be in making the decision.

112. We are satisfied that the FTT was relying on its own reading of the authorities. To that extent this ground of appeal adds nothing to the other aspects of Ground 1 which may explain why Mr Rivett did not pursue it in his oral submissions. In the circumstances, it is not necessary for us to say anything further in relation to *Demetriou*.

The factors in Farmer

113. The approach in *Farmer* was approved by the Upper Tribunal in *HM Revenue and Customs v Brander* [2010] UKUT 300 (TCC) at [73]. Mr Rivett submitted that if the FTT had followed the approach in *Farmer*, the only conclusion open to the FTT was that the business did not consist wholly or mainly of making or holding investments. He submitted that the FTT failed to analyse whether, when viewed overall, the activities of Ninecourt consisted of wholly or mainly making or holding investments. In particular it failed to consider and apply the relevant factors identified in *Farmer*. It also failed to make certain findings of fact required by the analysis in *Farmer*, notwithstanding certain unchallenged evidence before the FTT. These criticisms were made by reference to the following matters:

(1) The FTT's findings in the table at [25], quoted above, that in each of the five years prior to the death of Mr Beresford, 75% of the turnover of Ninecourt was attributable to its serviced office activities.

(2) The FTT's finding that some 66% of the floor space of the Property was used for the serviced office activities.

(3) The unchallenged evidence that in four of the five years prior to the death of Mr Beresford, the gross profit generated by the serviced office activities was significantly in

excess of the gross profit generated from the rental aspects of the business. Weak performance in 2018 was due to disruption to the serviced office activities caused by building works next door. The evidence was that the gross profit was as follows:

Year ended 30 September	**Serviced Office Gross Profit £**	**Rental Floors Gross Profit £**
2014	555,917	399,788
2015	841,330	358,035
2016	1,220,492	335,538
2017	981,463	412,284
2018	361,259	370,949

(4) The unchallenged evidence made clear that the majority of the work undertaken by Ninecourt, through its management and employees and those of Orega, related to the operation of the daily requirements of the serviced office activities. In addition to the provision of the services which Ninecourt was obliged to provide to clients, its contractual obligations included marketing activities for new customers, administrative duties and keeping the facilities of the serviced offices up to date. In this regard the unchallenged evidence of Mr Andrews contained a detailed account of the activities of staff in operating the Ninecourt business.

114. In the circumstances, Mr Rivett submitted that the only conclusion available to the FTT based on the factors in *Farmer* was that the business of Ninecourt did not consist wholly or mainly of making or holding investments.

115. It is common ground that a business should typically be considered over a 5-year period prior to the relevant transfer of value and that the factors described in *Farmer* at [53] can be helpful, namely:

(1) the overall context of the business;

(2) capital employed in the various business activities;

(3) time spent by the employees undertaking the various activities;

(4) the turnover of the various activities;

(5) the profitability of the various activities.

116. It is then necessary to stand back and consider in the round whether the business consisted mainly of making or holding investments. This is not a tick-box exercise. The weight given to any particular factor is a matter of judgment and will vary according to the circumstances of the particular case.

117. In this case the FTT did not directly refer to *Farmer*, although it did quote the passage in *George* where Carnwath LJ described it as particularly helpful, not least because of its emphasis on looking at the business in the round. However, it is important to note the agreement between the parties recorded at [126] of the Decision which we set out again for convenience:

> 126. Both sides agreed that if we decided that the income generated by the facility fee was from the 'making or holding of investments' then it followed that the business of Ninecourt was

‘wholly or mainly making or holding of investments’ and therefore BPR would not be allowed on the transfer.

118. It seems to us that was why the FTT considered that it was not necessary to specifically look at the factors described in *Farmer*. Mr Rivett was keen to emphasise that what was agreed before the FTT was not that it should ignore the fact that the contract services fee was trading income. In our view that is not what the FTT did. It focussed on the facility fee and held that the facility fee was income derived from making or holding investments. That finding tipped the balance in favour of HMRC’s case that the business as a whole was mainly that of holding investments.

119. In the circumstances, we are not satisfied that the FTT wrongly failed to consider the relevant factors described in *Farmer*.

Conclusion on Ground 1

120. For the reasons given above, we are not satisfied that the FTT erred in law as alleged in Ground 1.

Ground 2

121. There are various aspects to Ground 2. Essentially, the appellant says that the FTT drew a number of inferences and made findings of fact which were not open to it on the evidence. We also address under this ground the appellant’s case that it is only income from the grant of a right of occupation that can amount to investment income. We note, at the outset in considering Ground 2, that the FTT described this at [122] as “not a clear cut case”. That is an indicator that if the FTT did go wrong in its approach to the evidence then there may well have been a material error of law.

122. It was not disputed that the question whether a business consists wholly or mainly of making or holding investments is an evaluative judgment with which an appellate tribunal should be slow to interfere (see *Fage UK Ltd v Chobani* [2014] EWCA Civ 5 at [114]). Further, tribunals are free to draw, or to decline to draw, inferences from the primary facts of the case before them using common sense. Reasons for a decision will always be capable of having been better expressed. An appellate tribunal should not subject a decision to a narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract (see *Volpi v Volpi* [2022] EWCA Civ 464 at [2] and [5]). We should read the FTT’s decision fairly and as a whole, without focusing too much on individual phrases or passages in isolation, and without being hypercritical (see *DPP Law Ltd v Greenberg* [2021] EWCA Civ 672).

123. On that basis, we consider the various aspects of Ground 2 under the following headings.

What clients acquired

124. We have set out in paragraph 71 above the FTT’s findings at [75] – [77]. It found that the primary element for which the facility fee was paid was the use of an office at the Property. The FTT accepted the appellant’s case that clients bought a package of services for the facility fee. However, it considered that a fundamental part of what clients acquired was the right to use a specific office. That finding was crucial to the FTT’s subsequent conclusion at [112] that the facility fee fell on the investment side of the spectrum. It described it as the “managing investments” side of the spectrum but we do not consider that the FTT meant anything other than that the facility fee was to be treated as income from an investment activity.

125. The appellant contends that the FTT was not entitled to infer that a fundamental part of what the clients acquired was the right to use a specific room in the Property. Further, it is said that the FTT made a series of evaluative assumptions at [114], [115] and [122] as to the relative importance to clients of particular services which were ungrounded in the evidence.

126. The FTT made findings as to what services were provided in consideration of the facility fee which it summarised in the Decision. We have described those findings above, including the description of the standard services in the terms and conditions. In our view the FTT was entitled to infer at [112] on the basis of the evidence and its findings of fact that the facility fee predominantly related to charging for the occupation of floor space. It had found that specific offices were identified by room numbers in the user agreements and on invoices, clients had access via secure fobs, and pricing was by reference to floor area regardless of workstation use.

127. The FTT was effectively saying that the substance of the transaction was the grant of a licence to occupy land. Mr Rivett in his skeleton argument submitted that HMRC were required to put that point to the appellant's witness in cross-examination in accordance with the decision of the Supreme Court in *Tui UK Ltd v Griffiths* [2023] UKSC 48 at [42]-[44] and [70]. Having failed to do so, it was not then open to the FTT to find either that the facility fee was paid for the right to use a specific room in the building or that the package of services acquired could be recharacterised so as to identify one component part of the package as more important than any other part of the package.

128. Mr Rivett did not rely on this point in his oral submissions. We do not accept the submissions. It is not usually necessary to explore the legal nature of an agreement in cross-examination of a witness of fact. In this case, we are not satisfied that there was any procedural unfairness arising from the fact that HMRC did not put to the appellant's witness that a fundamental part of what clients acquired was the right to use specific offices in the Property. It was plainly HMRC's case throughout that the facility fee was income from an investment activity. The substance of what clients acquired was a matter of inference for the FTT based on the primary facts as found.

129. The FTT appears to find at [114] and [115] that the other services provided by Ninecourt, whether pursuant to the facility fee or the contract services fee, did not change the fundamental nature of what clients received for the facility fee. We consider that it was open to the FTT to make that finding.

130. Finally, at [122] the FTT sought to explain the price differential paid by tenants on the rental floors and clients occupying serviced offices. It found that the explanation was to some degree down to the services provided, but also to differences in the floor area being used, the terms as to notice and the fact that serviced offices were fitted out. Again, we consider that the FTT was entitled to draw that inference on the basis of the evidence and its findings of fact.

131. The Appellant must satisfy us that no reasonable tribunal, properly directed, could have drawn these inferences. We do not consider that threshold is satisfied.

Right of occupation

132. The appellant contends that the FTT wrongly found at [112] that the facility fee conferred a right of occupation on clients. It accepts that each client was granted a licence to enter the premises. It does not accept that there was any right of occupation. It is said that the licence granted had more in common with the rights of a guest to enter the premises of a hotel or restaurant. The package of services provided to clients did not resemble a "right of occupation".

133. Mr Rivett submitted that the terms of the user agreements are such that clients have no legal interest in the Property and no proprietary interest of any kind. He pointed to the following facts: Key fobs remain the property of Orega; clients are not permitted to install any office equipment or furniture without Orega's consent; clients can, in principle, be allocated different offices within the Property and the FTT found that this happened on a number of occasions although it was not a common occurrence; clients were not permitted access outside normal working hours, Monday to Friday, save by way of separate agreement.

134. We have noted Mr Rivett's submission that if no legal right of occupation is granted then there can be no investment activity. He relied on *Rotunda*, *Fry* and *Griffiths* in support of that submission. However, those cases were decided in the context of whether income was taxable as property income under Schedule A or trading income under Schedule D. The Special Commissioner in *George*, in a passage quoted by Carnwath LJ, stated that he had been referred to a number of income tax cases, but did not find them helpful. It is not clear from the Special Commissioner's decision which cases he was referring to, but it seems likely to be those cases on the distinction between Schedule A and Schedule D. That is why he also stated in that context that the concept of trade was irrelevant.

135. In *George* itself there was a reference to *Fry*, however that was solely in the context of distinguishing the rental income in *Fry* from the income charged for the additional services. There was an argument in *Fry* that the existence of income from providing services meant that the whole income was in the nature of trading income. Carnwath LJ referenced that issue in *George*. He went on to find at [28] that the characterisation of the additional services depends on the nature and purpose of the activity, not on the terms of the lease, notwithstanding that in *Fry* a separate charge was made for the additional services. He did not endorse any suggestion that the distinction between property income and trading income, resting on the nature of the interest granted to users, was relevant to section 105(3).

136. Mr Rivett pointed to various references to "lettings" and "occupational lettings" in the cases decided on business property relief, including references by Henderson J in *Pawson* and by Briggs LJ when refusing permission to appeal in that case. He also sought to persuade us that cases on section 105(3) could be analysed by reference to whether a legal right of occupation had been granted. We are not persuaded that the cases can be analysed on that basis. For example, *McCall* was said to involve the grant of a legal right of occupation. However, without going into a detailed analysis of land law in Northern Ireland, the owner under the grazing arrangements retained the right of occupation. Similarly, *Pawson* was described as a "holiday letting" but as Henderson LJ noted, holidaymakers simply had contractual rights to occupy. There is no suggestion that they had any proprietary interest in the land or that such an interest was a pre-requisite to investment activity.

137. We agree with the Special Commissioner in *George*, that the income tax cases do not assist in distinguishing investment income from non-investment income. The test is by reference to what an intelligent businessman would consider to be an investment. Perhaps the reference nowadays should be to a reasonable person in business. It does not depend on legal niceties of whether the user is granted a proprietary interest or exclusive possession of the property in question. That is not to say that factors which would be relevant to those issues are not also relevant to the question of whether property is an investment. However, we do not consider that there is any anterior question as to the nature of the interest granted. Section 105(3) asks a straightforward factual question as to whether the business is wholly or mainly one of making or holding investments. The question is not always easy to answer, and as Carnwath LJ observed it may involve fine distinctions between businesses which may appear to be virtually identical.

138. We are not satisfied that the FTT made any error of law at [112] when it referred to the facility fee being charged for "occupation" of floor space. It was not finding that a legal right of occupation had been granted and it did not need to make such a finding.

139. In looking at the nature of the rights granted, we do not accept Mr Rivett's submission that the clients in this case were granted rights more akin to a hotel guest. We agree with Mr Randlel that a hotel guest receives transient access to whichever room the hotel allocates, with no expectation of consistency or exclusivity. Ninecourt's clients received named, identified

offices on invoices tied to specific room numbers; pricing was calculated by reference to specific floor areas; and the arrangements continued, in some cases, for over two years. The FTT was entitled to find that the primary element of the transaction in relation to the facility fee was for occupation of identified space within an office.

The premium for serviced offices

140. The FTT acknowledged at [122] the considerable income differential between the serviced office floor income and the rental floor income. It considered that to some degree this was due to the services provided to clients, but also that it was due to smaller offices, shorter notice periods and fitting out to a high specification. The price differential was identified at [78], where the FTT found that in the five-year period to 2018 the rental income for two floors was between £412,000 and £503,000, which we calculate to be an average of some £229,000 per floor. This compared to the facility fee income for 4 floors of between £1,576,000 and £2,771,000, which we calculate to be an average of some £543,000 per floor.

141. Mr Rivett submitted that the FTT wrongly speculated as to why a "premium" was paid for the serviced office floors and that there was no evidence to justify the FTT's findings at [122]. What the FTT should have found is that the reason for the price differential was because entirely different things were being provided. In relation to the serviced accommodation, clients received a substantial package of services in the form of access to high specification offices with electricity, heating, internet, telephone and air conditioning.

142. We are satisfied that the FTT was entitled to make the inferences it did at [122]. In essence, it did find that different things were being provided. There is no reason why it should not describe the differences in the way it did based on the evidence before it. The FTT noted at [123] that it did not have any evidence of "comparables" for non-serviced offices rented on similar terms to the user agreements. We are satisfied that in the absence of comparable evidence, even if such evidence could be obtained, the FTT was still entitled to draw those inferences.

Investment management activities

143. The FTT found at [108] that most of the services provided within the facility fee were "investment management activities":

> 108. When looking at these activities in the round (as set out in *George*), we consider that the nature of most of the activities were investment management activities. The advertising of the offices, negotiation of terms, maintenance of office equipment and provision of hearing [sic], air conditioning and electricity were all activities which maintained the value of the investment, rather than provided services to any particular customer.

144. Mr Rivett submitted that the FTT was wrong to conclude that most of the activities were "investment management activities". In particular, the supply of office equipment, heating, electricity and air conditioning were component parts of the services supplied to clients for which the client paid the facility fee.

145. Carnwath LJ considered property management expenses at [27] of *George*. He identified that in the case of a building held for letting, management included finding tenants, arranging leases or licences and maintaining the property as an investment. However, he expressly found that management did not extend to the provision of additional services or facilities to the occupants, such as cleaning, lighting and heating. That was the case whether or not the cost of such items was included in the lease and covered by the rent. He did note, as did Henderson J in *Pawson*, that such items were unlikely to be material and unlikely to prevent a business from being mainly that of holding the property as an investment.

146. In the light of those observations, we consider that the FTT did err in concluding that the supply of heating, electricity and air conditioning were investment management activities. They did not maintain the value of the investment in the same way as the activities identified by Henderson J at [43] of *Pawson* were directed to maintaining or enhancing the capital value of the property, and obtaining a regular income from its letting. However, in relation to office equipment, it seems to us that the supply made by Ninecourt was of a furnished and equipped office. In those circumstances, the FTT was right to find that maintenance of the office equipment was an investment management activity.

147. Mr Randle submitted that the difference between the present case and *George* is that the services covered by the facility fee were not individually metered, invoiced and sold at a profit. It was the cost of running the building absorbed into the facility fee. We do not accept that submission. Carnwath LJ made clear that it does not matter whether the cost of services is included in a rental payment or licence fee. The price paid is not part of the investment income and is not a cost of maintaining the investment. Henderson J was equally clear at [45] of *Pawson* where he stated that the provision of additional services, in that case a cleaner, heating and hot water, a television, a telephone, a welcome pack and a local person to deal with queries, were not to be regarded as part of the maintenance of the property as an investment.

148. Closely related to this aspect of Ground 2 is a criticism made by Mr Rivett that the FTT did not clearly identify the investment. Whether it was the Property, or whether it was the user service agreements. He relied on the observations of Lord Normand in *Tootal* quoted above that the preferable view was that it was the lease or licence of the patent which was the investment. That was also the approach of the Special Commissioners in *Martin*, *Weston* and *Farmer*. He submitted that the FTT could not have been treating the Property as the investment, because at [27] and [28] it expressly stated that it did not consider the reason for the original purchase to be relevant to the issues, or the circumstances in which Ninecourt started providing serviced office accommodation. However, he submitted that the short-term user service agreements could not be construed as amounting to a series of investments.

149. Mr Randle was somewhat equivocal on this question. However, his submission was that the FTT's decision was consistent with what Lord Normand said in *Tootal*. Whichever way it is looked at, there was a periodical payment for use of a specified office. The reasonable businessman would regard that as being an investment.

150. We do not know whether the FTT was specifically invited to identify the investment and this was not a separate ground of appeal. In any event, we note that Carnwath LJ and Henderson J in *George* and *Pawson* do not specifically identify the investments, but both appear to treat the relevant land or building as the investment. We are inclined to the view that it is the Property which is the investment here. That said we do not consider that much if anything turns on whether it is the Property or the individual user service agreements that are identified as the investment.

151. Finally, under this aspect of Ground 2, Mr Rivett submitted that the FTT failed to identify from the unchallenged evidence that the contract services fees were charged at a rate which would generate a profit. For example, management accounts for the year ended 30 September 2018 demonstrate that the serviced office business received £165,000 by way of income from IT services at a cost to the business of £67,000. We do not consider that the FTT can be criticised in this regard. The FTT found that Ninecourt was trading in relation to the contract services fee. That was a sufficient finding given that the focus was on how the facility fee fell to be characterised. The parties' agreement noted at [126] was that the facility fee would tip the balance.

Conclusion on Ground 2

152. For the reasons given above there is one aspect on which we are satisfied that the FTT erred in law. It wrongly treated the supply of heating, electricity and air-conditioning as being investment management activities.

153. The FTT stated at [122] that this was not a clear-cut case. That was in the context of considering whether Ninecourt's activities in respect of the facility fees were trading activities. It was not in the context of its overall analysis of whether the Property was an investment. Both parties agreed that if the facility fee derived from investment activity then the business as a whole was mainly an investment business. If the facility fee amounted to trading income then the business as a whole was not mainly an investment business.

154. In our view, the FTT's error might have affected its ultimate decision as to whether or not the facility fee was derived from an investment activity or a non-investment activity. On that basis we set aside the decision (see Henderson LJ in *Degorce v HM Revenue and Customs* [2017] EWCA Civ 1427 at [95]) and we will therefore re-make the decision. It was not suggested that we should remit the appeal to the FTT.

RE-MAKING THE DECISION

155. We must re-make the decision on the basis of the FTT's findings of fact, including the FTT's inferences from primary facts where we have rejected the appellant's challenges to those inferences.

156. We apply the principles identified at paragraph 67 above. In particular, we must consider the facts and the FTT's permissible inferences in the round and determine whether the business of Ninecourt was wholly or mainly one of making or holding investments.

157. We do so in the light of the parties' agreement that the characterisation of the facility fee tips the balance. The investment activities carried on in respect of the rental floors would not, by themselves, determine the character of the whole business. Nor would the trading activities carried on in respect of the contract services fee.

158. For the reasons already given, we have found no error of law in the FTT's conclusions that the primary element of the transaction between clients and Ninecourt was the use of an office within the Property; a fundamental part of what clients acquired was the right to use a specific room in the Property; and that the facility fee predominantly related to occupation of floor space. Nor have we found any error of law in the FTT's conclusion that the premium paid for serviced accommodation was not attributable solely to services.

159. We have also concluded that most activities connected with the facility fee could properly be characterised as investment management activities. The exception is the provision of heating, electricity and air-conditioning. For the reasons given above, those were services provided to clients rather than activities directed to maintaining or enhancing the Property as an investment. It is not necessary for us to consider whether these activities amounted to a trade. It is sufficient for us to find that they are non-investment activities.

160. In our judgment, whilst the provision of heating, electricity and air-conditioning formed part of the package supplied to clients, it was not a sufficiently material feature of that package to alter the character of what was provided in return for the facility fee. Namely, a licence to occupy an office within the Property.

161. Viewed in the round, a reasonable business person would consider that the facility fee was income from an investment. It follows, in accordance with the parties' agreement recorded by the FTT, that the business of Ninecourt as a whole was mainly one of making or holding

investments. Business property relief is therefore not available on the transfer of value associated with the Property by virtue of section 105(3).

CONCLUSION

162. For the reasons given above in relation to Ground 2 we set aside the FTT's decision, re-make the decision to confirm HMRC's determination and dismiss the appeal against that determination.

JUDGE JONATHAN CANNAN
JUDGE AMANDA BROWN KC

Release date: 29 July 2026