

INHERITANCE TAX – relief for agricultural property – cottage with garden and orchard extending to 0.6 acres – whether activities were agriculture – whether orchard and garden were agricultural land or pasture – whether cottage was of a character appropriate to the property – whether the property was used for the purposes of agriculture – appeal dismissed – IHTA 1984 Ss 115(2) and 117

THE SPECIAL COMMISSIONERS SpC 00297

RACHEL JANE DIXON

Appellant

- and -

THE COMMISSIONERS OF INLAND REVENUE

Respondents

SPECIAL COMMISSIONER : DR NUALA BRICE

Chairman's name: use right arrow to move to starting point after this box

Sitting in London on 22 October 2001

***Nigel Ginniff of Counsel, instructed by Messrs Hewitson & Harker
Solicitors, for the Appellant***

***Peter Twiddy, Assistant Director of Inland Revenue: Capital Taxes, for
the Respondents***

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DECISION

The appeal

***1. Mrs Rachel Jane Dixon (the Appellant) appeals against a notice of
Determination dated 1 May 2001 in the following terms:***

"The Commissioners of Inland Revenue have determined-

In relation to the deemed disposal for the purposes of inheritance tax on the death on 17 January 1998 of Mrs Sally Onora Bacon ("the Deceased").

That the property Nook Cottage, Underbarrow, Kendal was not "agricultural property" within the meaning of section 115(2) Inheritance Tax Act 1984 for the purposes of relief under section 116 of that Act."

The legislation

2. Part V (sections 103 to 159) of the Inheritance Tax Act 1984 (the 1984 Act) contains the provisions about miscellaneous reliefs. Chapter II (sections 115 to 124B) contains the provisions about relief for agricultural property. Section 115 contains the provisions which are preliminary to Chapter II and section 115(2) provides:

"(2) In this Chapter "agricultural property" means agricultural land or pasture and includes woodland and any building used in connection with the intensive rearing of livestock or fish if the woodland or building is occupied with agricultural land or pasture and the occupation is ancillary to that of the agricultural land or pasture, and also includes such cottages, farm buildings and farmhouses, together with the land occupied with them, as are of a character appropriate to the property."

3. Section 116 contains the provisions about the rate of the relief which is now 100%. Section 117 provides:

"117. Subject to the following provisions of this Chapter, section 116 above does not apply to any agricultural property unless-

(a) it was occupied by the transferor for the purposes of agriculture throughout the period of two years ending with the date of the transfer, or

(b) it was owned by him throughout the period of seven years ending with that date and was throughout that period occupied (by him or another) for the purposes of agriculture."

The issue

4. On 27 July 1994 Mrs Sally Onora Bacon (Mrs Bacon) gave to the Appellant 40% of her interest in property known as Nook Cottage (the gift). At the date of her death Mrs Bacon owned the remaining 60% interest. The property consisted of a cottage, garden and orchard with a total area of 0.60 acres. Sometimes sheep were allowed to graze on the land and sometimes the damsons from the orchard were sold for money.

5. The Appellant argued that the activities carried on at the property were agriculture; that the orchard and garden were agricultural land and

pasture; that the cottage was of a character appropriate to the property; and that the property had been occupied by Mrs Bacon for the purposes of agriculture throughout the period of two years ending with the date of the gift and with the date of her death. The Inland Revenue accepted that agriculture included horticulture but argued that the orchard and garden were not agricultural land or pasture; that the cottage was not of a character appropriate to the property; and that the property had not been occupied by Mrs Bacon for the purposes of agriculture for the period of two years ending with the date of her death.

6. Thus the issues for determination in the appeal were

(1) whether the activities carried on at the property were agriculture;

(2) whether the orchard and garden were agricultural land or pasture within the meaning of section 115(2);

(3) whether the cottage was of a character appropriate to the property within the meaning of section 115(2); and

(4) whether, if the property was agricultural property; it was used by Mrs Bacon for the purposes of agriculture throughout the period of two years ending with the date of the gift and the date of her death.

The evidence

7. A bundle of documents was produced by the Appellant and another bundle was produced by the Inland Revenue. There was also a statement of agreed facts. Written and signed statements by the Appellant dated 6 September 2001, by Mr J H Park dated 17 October 2001, by Mr T W Shepherd dated 6 June 1998 and by Mr Peter Bell dated 23 April 1998, were also produced. These were not objected to by Mr Twiddy. In accordance with Regulation 17(4) of the Special Commissioners (Jurisdiction and Procedure) Regulations 1994 SI 1994 No 1811 I have, in assessing the truth and weight of the evidence in these written statements, taken account of the fact that I did not see the witnesses and that they were not available to be questioned.

The facts

8. From the evidence before me I find the following facts.

9. Mr Bacon was a stockbroker but was injured in the Second World War. He wanted to find a property which was not expensive and which, in the words of his daughter (the Appellant) "would provide some kind of living". Mr Bacon originally came from Windermere and Mrs Bacon from Morland. In 1949 they found Nook Cottage, Underbarrow, Kendal, Cumbria (the property) which is in the Lyth Valley, which is famous for its damson trees.

10. The property consists of cottage with three bedrooms, a garage, outhouses and an orchard. The total area of the property is 0.6 acres and the area of the orchard is about 0.5 acres. When Mr Bacon saw Nook Cottage the orchard was planted with damson trees.

11. *The Westmorland damson is a member of the plum family and has a unique flavour. Westmorland damsons grow mainly in and around the Lyth and Winster valleys. The white blossom attracts tourists in the spring and when the fruit ripens in September it is sold from road-side stalls and in local shops. The trees may not grow true from damson stones and so the best means of propagation is to dig up and replant the numerous small suckers that spring from the roots of older trees.*

12. *Access to Nook cottage is from an un-surfaced unadopted lane. The garden area is of lawn with a small vegetable patch and flower garden to the front of the cottage. The remainder of the land is steeply sloping and banking and is planted with fruit trees.*

13. *In 1949 Mr and Mrs Bacon purchased the freehold of Nook Cottage and, after they moved in, the garden yielded fruit and vegetables and the Appellant gathered snowdrops from the orchard and sold them for pocket money. Mrs Bacon raised and sold daffodils and narcissi.*

14. *The property adjoining Nook Cottage was called Underhill and it was occupied by the Park family who, in 1949, had also recently arrived. Underhill was a nursery garden and orchard where vegetables, fruit and flowers were grown commercially. Soon the Bacon family and the Park family became close friends. In the autumn Mr Park would pick the fruit in the orchard at Nook Cottage and he would then take it with his own fruit to Kendal or Windermere where it was sold in fruiterers' and green-grocers' shops. The amount of money received by the Bacon family for the fruit each year at that time was in the region of £70.*

15. *In 1955 the Appellant became ill and spent one year in Denmark. When she returned her father was ill and he died in 1960. After his death the freehold of the property was owned solely by Mrs Bacon. Mrs Bacon then obtained full-time work as a domestic cook and as the driver of the school bus. The fruit from the orchard continued to be sold each autumn and was also used to make home-made preserves. Hens were also kept in the orchard and the garden for their eggs and poultry meat. Occasionally the Bacon family kept geese and, for one year before the death of Mr Bacon, a goat was kept for the milk.*

16. *In 1969 the Appellant married and left home. She returned in 1982 and has lived at Nook Cottage ever since. After 1982 the orchard was improved by the addition of apple and crab apple trees and the re-planting of the damson trees as required. The arrangement for the sale of the fruit by the Park family continued. In the year 2000 the fruit was sold for £40. In addition Mr Bell from a neighbouring farm, who was better situated for retail selling, used to sell fruit for Mrs Bacon and he estimated that it was sold for about £20 to £30 a year.*

17. *On occasion the Park family would put their calves in the orchard at Nook Cottage. Between 1994 and 1997 in the summer months Mr Shepherd, a neighbouring farmer, was allowed to graze six ewes and lambs in the orchard and, in return, Mrs Shepherd undertook general household duties for Mrs Bacon.*

18. *On 27 July 1994 Mrs Bacon gave 40% of her sole interest in the property to her daughter (the Appellant), retaining the remaining 60%.*

19. Mrs Bacon died on 17 January 1998 and the Appellant is her personal representative. At that date of Mrs Bacon's death her 60% share in the property was valued at £68,400 and the 40% share which had been given to the Appellant in 1994 was valued at £44,000 as at the date of the gift. Mrs Bacon also left securities valued at £330,000 and cash at the bank of £24,000.

20. On 27 June 2001 the District Valuer in Cumbria produced his report on the property. He stated that it was common for the traditional houses, cottages and farmsteads in the Lyth Valley to have their own small orchards attached to their properties. He thought that before Mr and Mrs Bacon purchased Nook Cottage it was used as a labourer's cottage for the neighbouring Nook Farm. Attached to the report of the District Valuer were copies of sales particulars of a number of properties in the same area as Nook Cottage. Most had their own damson orchards of areas up to about three-quarters of an acre but were advertised as country homes.

21. On 24 August 2001 the Secretary of the Westmorland Damson Association wrote to the Appellant's solicitors in the following terms:

"Nook Cottage Orchard, Underbarrow

...The orchard has been visited by a member of the committee and has been noted in our records. The orchard has a plentiful supply of suckers which could be dug up and used to regenerate/create other orchards of Westmorland damsons. This has not been undertaken by any of our appointed representatives and will at present be a daunting task as the orchard is very overgrown, These suckers may have a nominal value of approximately £100 but will require manpower and materials to dig and pot up.

Also, until the orchard wilderness is cleared the crop of damsons from the mature trees is not commercially pickable. But the potential is there."

22. Neither Mrs Bacon nor the Appellant included the price received for the fruit in their income tax returns. There were no accounts. Photographs of the property were produced at the hearing and on one a fruit-picking ladder was clearly visible.

Reasons for decision

23. I consider separately each of the issues for determination in the appeal.

(1) - Did the activities constitute agriculture?

24. For the Appellant Mr Ginniff referred to Words and Phrases Legally Defined, Third Edition, Butterworths, 1988 and relied upon a number of definitions of agriculture in other statutes. For the Inland Revenue Mr Twiddy accepted that agriculture included fruit growing and he referred to the definition in the Agricultural Holdings Act 1956.

25. There is no definition of agriculture in the 1984 Act. Section 96 of the Agricultural Holdings Act 1986 provides that:

""agriculture" includes horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes and "agricultural" shall be construed accordingly".

26. The definitions relied upon by Mr Ginniff came from earlier statutes and most were of a similar effect. However, the definitions in section 17 of the Agricultural Wages Act 1948 and in section 2(1) of the Rent (Agriculture) Act 1976 also included "the production of any consumable produce which is grown for sale or for consumption or other use for the purposes of a trade or business or of any other undertaking (whether carried on for profit or not)".

27. Dealing first with these latter definitions they appear to support the view that the word agriculture has some connotation of commerciality. They refer to produce grown "for sale" or "for consumption or other use for the purposes of a trade". (The positioning of the word "for" before "consumption" and the lack of the word "for" before "other use" indicates that "for consumption or other use for the purposes of a trade" is all one phrase. It is not "for consumption or for other use".)

28. However, in the light of the definition in the Agricultural Holdings Act, it is clear that fruit growing and the use of land as grazing land could be agriculture. However, it seems to me that whether these activities are or are not agriculture for the purposes of the 1984 Act is a matter of fact and degree to be determined in the light of the purposes of the 1984 Act.

29. The purposes of the 1984 Act are not to give relief for a private residence and garden but to give relief for land and pasture used for agriculture. In this appeal, although there was some sale of surplus fruit, and there was some grazing of sheep in return for household duties, these activities are consistent with the conclusion that the property was used as a residence and garden and not for agriculture.

(2) Were the orchard and garden agricultural land or pasture?

30. The second issue is whether the orchard and garden were agricultural land or pasture within the meaning of section 115(2).

31. For the Appellant Mr Ginniff argued that the orchard and garden were agricultural land or pasture. He argued that the property was a small-holding and was typical of the small units which were unique to the locality. The activities undertaken at the property, including the grazing of lambs, ewes, calves, hens and geese, were such as would be carried on at a Scottish croft or a lakeland hill farm where little profit was made (if at all). There was no requirement of commerciality or profit. The word "husbandry" did not appear in section 115(2). He distinguished Starke and another (Executors of Brown deceased) v Inland Revenue Commissioners Ch D [1994] STC 295; CA [1995] STC 689 which, he argued, was only authority for the view that "land or pasture" did not include buildings.

32. For the Inland Revenue Mr Twiddy argued that the property was not agricultural land. He relied upon Starke as authority for the view that the

definition of land in the Interpretation Act 1978, as including buildings or other structures, did not apply within the context of section 115(2). He referred to section 33(3) of the Income and Corporation Taxes Act 1988 (the 1988 Act) and section 133(1) of the Capital Allowances Act 1990 (the 1990 Act) and suggested that an appropriate definition of agricultural land could be land occupied wholly or mainly for the purposes of husbandry. The property did not meet that test. The land was not occupied wholly or mainly for the purposes of husbandry. The letter from the Westmorland Damson Association indicated that the fruit was not commercially pickable and that the value of the suckers was negligible. The fact that surplus fruit was sold did not make this agricultural land. The use of the land for poultry, geese, and a goat was use as a garden and not as a farm. There had to be some element of a business of some description which there was none here. Mrs Bacon had not relied upon agricultural activities for her livelihood.

33. In Starke the deceased owned a site of 2.5 acres on which was built a substantial farmhouse, which had six bedrooms, and an assortment of outbuildings. The site formed part of a farm and the issue was whether the site was "agricultural land or pasture" within the meaning of section 115(2). The Court of Appeal held that the phrase "agricultural land" in section 115(2) did not include buildings and so the site could not be characterised as agricultural land or pasture.

34. Section 33(3) of the 1988 Act appears in Part II of that Act which contains provisions relating to the charge to income tax in respect of property comprised in Schedule A. Section 33 contains provisions for the allowance of excess expenditure where an estate consists of agricultural land. Section 33(3) defines agricultural land as "land, houses or other buildings in the United Kingdom occupied wholly or mainly for the purposes of husbandry". The same definition is used in section 133(1) of the 1990 Act which is the interpretation section for Part V of the 1990 Act which gives allowances for capital expenditure incurred on the construction of certain buildings by the owner or tenant of agricultural land.

35. In the light of the decision in Starke it is clear that the definitions in section 33(3) of the 1988 Act and in section 133(1) of the 1990 Act (which refer to buildings) cannot be applied to section 115(2) of the 1984 Act.

36. The question however remains as to whether the definition in section 115(2) requires that there should be some element of commerciality. It seems to me that I do not have to decide that issue in this appeal. Certainly there is no mention of commerciality in either section 115 or section 117. However, in my view as a matter of fact and degree the property in this appeal was not agricultural land or pasture.

(3) Was the cottage of a character appropriate to the property?

37. For the Appellant Mr Ginniff argued that the cottage was "a cottage as was of a character appropriate to the property" within the meaning of section 115(2). He referred to the Ninth Supplement of McCutcheon on Inheritance Tax at paragraph 14.72 where three tests were suggested for the "character test" and argued that the property passed all three tests.

38. For the Inland Revenue Mr Twiddy cited Inland Revenue Commissioners v Korner and others HL [1969] 1 WLR 554 at 560A as authority for the view that this was a matter of fact to be decided in the circumstances of each case and judged in accordance with the ordinary ideas of what was appropriate. He relied upon Starke in the High Court at 298j as authority for the view that the cottage had to be proportionate in size and nature to the requirements of the farming activities. He argued that a distinction had to be drawn between the ordinary use of a large garden on the one hand and agriculture on the other. He argued that the property consisted of a house and a garden with an orchard and was typical of houses in that area.

39. In Korner the issue was whether the expenses of a farmhouse which was also used as a home could be deducted in computing the profits of the farming business for the purposes of income tax. It was relevant that the definition of "farm land" in the Income Tax Act 1952 meant land wholly or mainly occupied for the purposes of husbandry and included the farmhouse. It was held that as the farmhouse was an asset of the business all the expenses were deductible. That authority is not of direct assistance in the present appeal which concerns a different definition in a different statute.

40. McCutcheon describes the "character test" in the following way:

"The present position is that the "character test" is considered against three main tests:

(i) the elephant test: although you cannot describe a farmhouse which satisfies the character test you will know it when you see it!

(ii) man on the (rural) Clapham omnibus: would the educated rural layman regard the property as a house with land or a farm?

(iii) historical dimension: how long has the house in question been associated with the agricultural property and is there a history of agricultural production?"

41. Applying those tests to the facts of the present appeal I first apply the elephant test and conclude that Nook Cottage is not of a character appropriate to agricultural land or pasture but rather the converse. That is, that the orchard and garden are of a character appropriate to Nook Cottage which is a private residence in a rural area. Applying the second test in my view the educated rural layman would regard the property as a residential cottage with land. Finally, there is no history of agricultural production but rather a history of the use of a property as a private residence in a rural area. In my view the property consists primarily of a cottage used for domestic residential purposes with a garden and orchard of a character appropriate to the cottage.

42. That means that the property is not agricultural property and so I do not have to go on to consider whether it was used for agricultural purposes. However as arguments were put I very briefly express my views.

(4) Was the property used for the purposes of agriculture?

43. For the Inland Revenue Mr Twiddy argued that the property had not been used for agricultural purposes. It was necessary to look at the situation on the occasion of the two disposals in 1994 and 1998. He cited *Wheatley and another v Inland Revenue Commissioners* [1998] STC (SCD) 60.

44. In *Wheatley* the deceased owned a meadow which was used solely for the purposes of feeding horses. It was common ground that the meadow constituted pasture and that the horses were not connected with agriculture. The issue was whether the meadow had been occupied for the purposes of agriculture. The Special Commissioner found that, as the horses were not connected with agriculture, the meadow had not been occupied for the purposes of agriculture.

45. I do not find that authority of great assistance. However, on the facts of this appeal it seems clear to me that the property was not occupied for the purposes of agriculture but was rather occupied for the purposes of a private residence. For that reason also the appeal would be dismissed.

Decision

46. My decision on the issues for determination in the appeal are:

(1) that although fruit growing and the use of land for grazing come within the definition of agriculture nevertheless, as matter of fact and degree, the activities carried on at the property were not agriculture;

(2) that the orchard and garden were not agricultural land or pasture within the meaning of section 115(2);

(3) that the cottage was not of a character appropriate to the property within the meaning of section 115(2); that means that the property is not agricultural property and so it is not necessary to decide the fourth issue but my views are:

(4) that, if the property were agricultural property; it was not used by Mrs Bacon for the purposes of agriculture throughout the period of two years ending with the date of the gift and the date of her death.

47. The appeal is, therefore, dismissed and the Notice of Determination is confirmed.

Chairman's name: use right arrow to move to starting point**NUALA BRICE**

SPECIAL COMMISSIONER

dixon

SC 3077/01

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