Appeal number FTC/33/2009

Inheritance tax – Exempt transfers and relief – Business property relief – Replacement property – Deceased having liferent interest in family estate – Deceased declared to be fee simple proprietor of the estate – Deceased entering into partnership with intended successor – Whether deceased's interest in partnership, which subsisted immediately before his death, replaced previous business carried on by deceased – Whether business excluded from business property relief as consisting mainly of making or holding investments – Inheritance Tax 1984, ss 105(1), (3), 107.

IN THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Before:

LORD HODGE and
SIR STEPHEN OLIVER QC
(Judges of the Upper Tribunal)

Between

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and -

ANDREW MICHAEL BRANDER
(as Executor of the Will of the late fourth Earl of Balfour)

Respondents

Roderick N Thomson QC (instructed by General Counsel and Solicitor to HM Revenue and Customs) for the Appellants

Julian Ghosh QC and Elizabeth Wilson, counsel, instructed by Turcan Connell, Solicitors for the Executor

Hearing dates: 5, 6 and 7 May 2010

DECISION

1. This is an appeal by the Commissioners of H M Revenue and Customs ("HMRC") from the decision of Judge J. Gordon Reid QC dated 14 May 2009, [2009] UKFTT 101 (TC) and [2009] SFTD, in which he allowed the appeal by Mr Brander as Lord Balfour's executor ("the executor") against a notice of determination denying inheritance tax business property relief ("BPR") in respect of the late Lord Balfour's interest in the "Whittingehame Farming Company" ("WFC") in relation to assets of the Whittingehame estate, namely land, houses and cottages, which were let to third parties.

2. Lord Balfour died on 27 June 2003. On his father's death in 1968 he inherited a liferent interest in Whittingehame Estate, East Lothian. The trust estate comprised the landed estate, which we describe below, and certain moveable property which is described in the joint statement of agreed facts. In November 2002 the heritable estate was released from the liferent in the court process which we describe in paragraph [14] below. This appeal is principally concerned with (i) the correct analysis of Lord Balfour's interest in the heritable properties in the trust estate while a liferenter, (ii) the way in which the estate was run before 2002 and (iii) the nature of the business or businesses conducted on that landed estate both before and after 2002.

The scope of the appeal

3. This is appeal on a point of law only: section 11(1) of the Tribunals, Courts and Enforcement Act 2007 ("the 2007, Act"). HMRC applied for permission to appeal under section 11(3) of the 2007 Act on a wide range of grounds initially to the First-tier Tribunal and thereafter to the Upper Tribunal. By decision notice dated 10 November 2009 the Upper Tribunal granted permission to appeal on certain grounds but refused permission to appeal on other grounds on the basis that those grounds did not have a real prospect of success.

4. As HMRC alleged that the First-tier Tribunal had erred in law in failing to make certain findings in fact in relation to matters which HMRC asserted were uncontested, the Upper Tribunal, in order to ensure that HMRC could properly argue their case, invited them to produce a statement of proposed facts. Thereafter the Upper Tribunal added a further question to those which the First-tier Tribunal had formulated, asking whether the First-tier Tribunal had erred in law in failing to make the findings of fact which HMRC sought. We emphasise that that question also is a point of law.

The relevant provisions of the Inheritance Tax Act 1984

5. Chapter 1 of Part V of the Inheritance Tax Act ("IHTA 1984") deals with BPR. The business must be a business carried on for gain: s.103(3). Business property which falls under s.105(1)(a), (b) or (bb) attracts 100% relief: s.104.

6. Section 105 provides (so far as relevant):

(1) "Subject to the following provisions of this section and to sections 106, 108, 112(3) and 113 below, in this chapter 'relevant business property' means, in relation to any transfer of value,-

(a) property consisting of a business or interest in a business;

(b) securities of a company …

(bb) any unquoted shares on a company …

(d) any land or building, machinery or plant which, immediately before transfer, was used wholly or mainly for the purpose of a business carried on by a … partnership of which he then was a partner; and

(e) any land or building, machinery or plant which, immediately before the transfer, was used wholly or mainly for the purposes of a business carried on by the transferor and was settled property in which he was beneficially entitled to an interest in possession.

(3) A business or interest in a business … are not relevant businesses property if the business … 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."

7. Section 106 provides:

"Property is not relevant business property in relation to transfer of value unless it was owed by the transferor throughout the two years immediately preceding the transfer"

8. Section 107 provides:

"(1) Property shall be treated as satisfying the condition in section 106 above if –

(a) it replaced other property and it, that other property and any property directly or indirectly replaced by that other property were owned by the transferor for periods which together comprised at least two years falling within the five years immediately preceding the transfer of value, and

(b) any other property concerned was such that, had the transfer of value been made immediately before it was replaced, it would (apart from section 106) have been relevant business property in relation to the transfer.

(2) In a case falling within subsection (1) above relief under this Chapter shall not exceed what it would have been had the replacement or any one or more of the replacements not been made.

(3) For the purposes of subsection (2) above changes resulting from the formation, alteration or dissolution of a partnership .... Shall be disregarded."

9. Section 110 provides that the value of a business or an interest in a business shall be its net value and defines net value.

10. From the above, several issues have arisen in this appeal. First, as Lord Balfour held the landed estate as owner and not as liferenter only for a number of months before his death, the status of his interest before November 2002 is relevant in order to assess whether the two-year requirement of section 106 is met. From November 2002 until his death in June 2003 Lord Balfour farmed the estate in partnership. Thus, in order to qualify for BPR on the value of Lord Balfour's partnership interest, (a) that interest must have replaced other property that would (apart from section 106) have been relevant business property immediately before its replacement and (b) Lord Balfour must have held the replaced property and the partnership interest for an aggregate of two years.

11. Secondly, there is a question whether, before the liferent was replaced by fee simple proprietorship, the trustees ran a business separate from Lord Balfour's farming business and the former business was carried on otherwise than for gain (s.103(3)). The parties dispute whether Lord Balfour in that period used Whittingehame Estate for the purposes of his business. Relevant to that issue is the question whether and to what extent Lord Balfour, as liferenter under the terms of the Will, had the legal right to occupy and exploit the property comprised in the Whittingehame Estate. That topic is addressed in paragraphs [15] to [31] below. Thirdly, if Lord Balfour carried on a composite business of estate management and farming on the estate, there is an issue whether on a proper analysis the business is to be characterised as one mainly of holding investments: s.105(3). There is also, as we stated in paragraph [4] above, an issue whether the First-tier Tribunal erred in failing to make certain findings of fact.

The background

12. Lord Balfour held his interest in Whittingehame Estate as a liferenter under the Will of Arthur James Balfour, the Prime Minister, philosopher and World War 1 statesman who in 1922 became the first Earl of Balfour. The Will, which the first Earl executed on 1 January 1923, was an unusual and complex document. In it the first Earl sought to preserve intact through successive generations the family estate of Whittingehame, East Lothian, which then comprised, among other things, Whittinghame House, agricultural and forestry land, amounting to approximately 10,000 acres, and ancillary houses and cottages.

13. Since the first Earl died in 1930, his trustees have sold off substantial parts of the estate, including Whittingehame House, principally to meet death duties. As a result, when Lord Balfour died on 27 June 2003, the estate was an agricultural estate of contiguous units located immediately to the south east of Traprain Law, amounting to 771.85 hectares (1,907.25 acres). It comprised (a) Whittingehame Tower

Farmhouse, (b) Whittingehame Mains Farm and Eastfield Farm, which were operated in hand (c) Luggate, Papple and Overfield Farms, which had been the subject of separate agricultural lets since the 1950s, (d) policy parks, woodlands and sporting rights, (e) twenty six let houses and cottages and (f) two sets of business premises.

14. On 6 November 2002 the House of Lords, in an application by Lord Balfour under section 47 of the Entail Amendment (Scotland) Act 1848, ended his liferent by holding that he was entitled to a declaration that he was the fee simple proprietor of the heritable estate. On 26 November 2002 the Inner House of the Court of Session applied the judgment of the House of Lords. On 22 January 2003 an extract decree of the court declaring Lord Balfour's fee simple proprietorship was recorded in the Register of Sasines. Thus from that date until his death Lord Balfour owned Whittingehame Estate. With effect from 10 November 2002 Lord Balfour entered into partnership, called the Whittingehame Farming Company, with his nephew and heir, Mr Michael Brander, who later became his executor. The estate's heritable properties were included in the capital of that partnership. The partnership business was estate management and farming. The executor's contention was that it continued the previous business which Lord Balfour had carried on.

The Will of the first Earl of Balfour

15. The parties disputed the status of Lord Balfour's liferent both before the First-tier Tribunal and in the appeal which we have heard. It is therefore necessary that we set out the relevant provisions of the Will.

16. The first Earl recorded in his Will that he had formerly held the estate under a settlement of strict entail but had come to hold it in fee simple. By purpose "In the Seventh Place", which we discuss below, he sought substantially to restore the restrictions of entail in relation to his heritable estate. Before discussing that, it is necessary to consider the earlier provisions in order to set that purpose in its context.

17. By purpose "In the Third Place" he ordered his trustees to deliver to his brother, Gerald, his sister, Alice, and to the liferenter his private papers to be categorised as "political" or "private" and either preserved or destroyed as they saw expedient. The transferees were authorised to publish any of the papers and the profits therefrom were to be paid to the liferenter. By purpose "In the Fourth Place" the first Earl gave his sister, Alice, the liferent use and enjoyment of the house called "Redcliff" on Whittingehame Estate. He imposed on her the obligation to keep the house in proper repair and to pay the trustees the premium needed to insure the property and empowered her to let the house during her lifetime. He dealt with family heirlooms, which were moveable property, in purpose "In the Sixth Place", appointing his trustees either to retain custody of them or to lend them to the liferenter of the residue of his estate. He imposed as a penalty on any liferenter, who borrowed the heirlooms and sought to dispose of, grant security over, or allowed a creditor to attach any of them, the forfeiture of his liferent interest in the residue of the estate.

18. The first Earl dealt with the residue of his estate in purpose "In the Seventh Place". That provided, so far as is relevant, as follows:

> "With regard to the whole rest and residue of my means and estate heritable and moveable, real and personal, wherever the same may be situated, I direct my Trustees to hold and retain the titles to the same … and to deal with the same, subject to the conditions and provisions relating thereto hereinafter written: and to pay to or apply the whole nett revenue or income thereof for behoof of the following series of heirs, in their order successively each for his or her liferent use allenarly, videlicet:- …."

19. The Will then specified the beneficiaries in order who were to receive the liferent, starting with his brother, Gerald, whom failing his male heir, and in the event that none of the persons named survived to take the liferent, the First Earl left the fee of the residue to his nearest heirs and representatives. He continued his direction to the trustees as follows:

> "and that in the manner for the purposes, with the facilities and subject to the powers conferred by me and afterwards expressed: (First) I hereby declare that all of the liferents successively before provided shall be for alimentary use only, and the respective rights and interests shall not be assignable or affectable by the debts or deeds of the liferenters or the diligence of creditors: (Second) … (Third) I desire and direct my Trustees to put my said brother Gerald, and each of the other heirs on whom I have successively by these present conferred liferents in the residue of my means and estate as hereinbefore provided into the personal occupancy and liferent use and possession, not only of my landed estates of Whittingehame and others in Scotland but also of the furniture and plenishing in and about the Mansion House of Whittingehame, Offices, policies and gardens thereof, so long as the said Mansion house and others and furniture and plenishing in and about the same shall remain unsold:"

20. The first Earl then conferred a similar liferent on his brother, Gerald, and the successive heirs in relation to his London house at Carlton Gardens and continued with the following important provision:

> "And I desire and direct my Trustees as far as possible consistently with the terms of this trust to confer upon my said brother Gerald, and the other heirs succeeding as liferenters as aforesaid all the rights, powers and privileges and that under the same obligations as if I had conveyed the said landed estates in Scotland and house and others in Carlton Gardens, London, or any other residence I may possess directly to them in liferent successively:"

21. The first Earl then granted an additional power to enable the liferenters to grant certain leases:

> "And without prejudice to the foresaid rights, powers and privileges but in addition thereto I authorise my Trustees to confer on each of the successive liferenters power to open up and work minerals and to let the subjects liferented including such minerals and that on lease at a fair rent, but without grassum or other consideration for granting such lease other than the rent or royalties and not exceeding the periods following, videlicet:- (One) Agricultural subjects, nineteen years: (Two) Minerals of every description, Thirty one years: (Three) the Mansion house, Offices, Policies and gardens at Whittingehame, the leasehold house and others in Carlton Gardens, London, and all other house property furnished or unfurnished in each case as may be considered best, Two years: and (Four) Shootings and fishings, Ten years:"

22. The Will then dealt with the repair and insurance of the liferented property:

> "Declaring that it shall be the duty of my Trustees to see that the buildings, fences, and others on the said estates and the said house and others in Carlton Gardens, and any other residence I may possess are kept by the successive liferenters in proper repair and the whole buildings, furniture and plenishings duly and fully insured in the names of my Trustees against loss by fire:"

23. The following provision is also in our opinion important as in it the first Earl provided separately for the management of in hand farms on the estate:

> "(Fourth) Whereas I have at present on hand and in my own occupancy the Home Farm of Whittingehame (which includes Overfield Farm) it is my wish and desire that means should be provided to permit the same being carried on as I have been in use to do, therefore I do hereby confer upon my Trustees full power and authority with consent and approval of the liferenter for the time to carry on the Home Farm (including Overfield Farm) or to let the same or any part thereof for such term or terms as they may think fit in which latter case the whole stock, crop and implements of husbandry on said farm including as aforesaid, or such part thereof as may be necessary shall be realised and disposed of and the nett proceeds shall fall into the residue of my means and estate and be invested and managed by my Trustees as part thereof, and any loss incurred in the course of carrying on or managing the said farm shall be borne by the liferenter for the time, and all or any profit shall belong to him or her as his or her property:"

24. In order to preserve his estate the first Earl, in empowering successive liferenters to grant liferents of annuities to a spouse or children, made the annuities subject to an aggregate limit. He also expressed the wish that, if on termination of the liferents a successor became entitled to the residue as his or her absolute property, that heir should re-settle the residue so that it should be held together and enjoyed by successive heirs as liferenters. He provided that the trustees could sell part of the

residue only with the consent of the liferenter and specified that the trustees should use the price obtained from such a sale either to purchase land as an addition to the estate of Whittingehame, or to reduce burdens over his landed estates in Scotland or to invest and use in trust for the same purposes as governed the residue of his estate. In our opinion the first Earl in his Will thus repeatedly manifested a wish to preserve intact Whittingehame Estate.

The status of the fourth Earl's possession under the Will

25. Mr Thomson QC for HMRC contended that on a correct construction of the Will, Lord Balfour's interest was not equivalent to a proper liferent of the estate but he had merely (i) a right to the net income of the estate and (ii) a right to possess and farm the in hand farms.

26. He contrasted the terms of the grant to the residuary beneficiary with the liferent of Redcliff given by the First Earl to his sister, Alice, in purpose "In the Fourth Place": paragraph [17] above. He submitted that the expression "liferent use" in relation to heritable property had to be interpreted in the context of the particular deed and could mean no more than a grant of personal possession. Such a right of occupancy did not give a right to let the premises. He referred to *Clark and Others* (1871) 9 M 435, *Bayne's Trustees v Bayne* (1894) 22 R 26, *Cathcart's Trustees v Allardice* (1899) 2 F 26, *Johnston v Johnston* (1904) 6F 665, *Smart's Trustee v Smart's Trustees* 1912 SC 87, *Johnstone v Mackenzie's Trustees* 1912 SC (HL) 106 and *Lady Miller v Commissioners of Inland Revenue* [1930] AC 222, 1930 15 TC 25. He also referred to the Stair Memorial Encyclopaedia, Volume 13, "Liferent and Fee" at para 1606 and Dobie, "A Manual of the Law of Liferent and Fee in Scotland" at p.228.

27. On a proper construction, he submitted, the Will gave the residuary beneficiary a right to the net income of the estate and a right of personal occupation and possession but not a right to let the liferented estate. The controlling provision was the one set out in paragraph [18] above: the liferent was of the net revenue and not of the estate. It was the trustees who held the estate and paid the net income to the liferenter for his use. He was only an alimentary liferenter. The epithet "personal" governed not only occupancy but also liferent use and possession in the first quotation in paragraph [19] above. This supported the construction that the liferent was only of the net income; as to the rest it was merely a right of personal occupation. The provision in the second quotation in paragraph [19] above, in which the first Earl instructed the trustees to confer all powers which a proper liferenter would have, was expressly stated to be "as far as possible consistently with the terms of this Trust". That referred back to the controlling provision. Accordingly the First-tier Tribunal erred in law in holding otherwise.

28. We disagree. In our view the words which the First Earl of Balfour used are perfectly apt to set up a liferent and we see no reason why the words should not be given their natural meaning. The law requires us to ascertain the intention of the maker of the Will, which is derived from construing the words which he used in the

gift in the context of the Will as a whole: *Johnstone v Mackenzie's Trustees*, Lord Shaw of Dunfermline at p.111-112.

29. We do not construe the words set out in paragraph [18] above, which refer to the payment of the net income, as the governing provision; purpose "In the Seventh Place" must be read as a whole in the context of the Will. In our opinion, so read, the first Earl's purpose was to preserve Whittingehame Estate and to confer as wide powers on the liferenters of the residue as were consistent with that aim. The preservation of an estate by a trust and an alimentary liferent against a future liferenter's improvidence and the resulting diligence of creditors does not militate against there being a liferent of the estate rather than a mere personal right of occupancy. While alimentary provisions have often comprised income-producing assets such as bonds or shares, it is competent to create an alimentary liferent of heritable property. We recognise that an alimentary liferent involves a continuing trust as you cannot have an alimentary fee; but that does not in any sense suggest that the alimentary beneficiary's interest is not a liferent, which includes the power to grant leases of the liferented estate. Without an express power to the contrary, such leases are valid only during the beneficiary's lifetime.

30. The power given to the trustees, which we have quoted in paragraph [20] above, to confer on the liferenter the right to grant leases for specified periods is not inconsistent with his already having as liferenter a power to grant leases, which would fall on his death. There would be an obvious convenience in a landed estate, in which some farms and many residential properties were let out, for the leases not to expire on the death of a particular liferenter.

31. We also cannot reconcile HMRC's interpretation with the power, which we have quoted in paragraph [21] above, to keep in hand and farm the Home Farm of Whittingehame, which then included Overfield Farm, and the requirement that the liferenter at any time should bear the losses and take the profits of management of those farms. In our view, this provision is consistent with an intention that the liferenter should enjoy the liferent of the estate: where farms were let, he would receive the rent; where farms were in hand he could farm them. This provision also had the important consequence that the liferenter needed to keep separate books and records of his in hand farming.

32. In our view, the words, which we have quoted in the second quotation in paragraph [19] above, confirm the first Earl of Balfour's intention to give as wide rights, powers and privileges as were consistent with the preservation of the estate by the restriction against assignation and alienation which the alimentary liferents entailed. In short, we construe the Will as an attempt by the first Earl of Balfour to preserve his estates, and in particular Whittingehame Estate, and to give his heirs as wide powers to enjoy the estates as were consistent with their preservation. We see no inconsistency between the wish to preserve Whittingehame Estate and the grant of a full liferent interest to his successive heirs.

33. Judge Reid (in paragraph 33 of his Decision) construed the provisions of the Will as directing the trustees to grant to Lord Balfour the powers equivalent to those of a proper liferenter. For the reasons we have given we see no error of law in Judge Reid's construction.

The management of the Whittingehame Estate

34. It appears that since the date of the Will there has been a change in the farms which are in hand. As we have stated in paragraph [12] above, Whittingehame Mains and Eastfield Farm were operated in hand by Lord Balfour and remain in hand. It is not clear what comprised the Home Farm, to which the Will refers, but Overfield Farm has been let out since the 1950s. Lord Balfour operated the in hand farms in a partnership with Mr George Thomson, known as Whittingehame Farming Company ("WFC"), until Mr Thomson died on 28 September 1999. Thereafter Lord Balfour continued to operate Whittingehame Farming Company in the same way but as a sole proprietor.

35. As the parties recorded in the Joint Statement of Agreed Facts which Judge Reid narrated in paragraph 11 of his decision, the trustees of Whittingehame Estate Trust prepared periodic accounts during the subsistence of Lord Balfour's liferent interest and WFC prepared separate accounts. The trust accounts did not include the activities of WFC. The trustees did not see the WFC accounts. The trust and WFC operated separate bank accounts before November 2002. Lord Balfour, and not the trustees, was the authorised signatory of the trust bank account. The trust was registered for VAT in March 1976 in the names of the trustees as a non-profit making body. Until 1999 WFC was not registered for VAT. After Mr George Thomson's death in 1999, WFC was registered for VAT in Lord Balfour's name and from November 2002 in the name of Lord Balfour and Mr Brander as partners of the new partnership between them, which retained WFC as its name.

36. There was a composite insurance policy covering the whole estate and the premiums were apportioned between WFC and the trust until 10 November 2002.

37. WFC had no business beyond farming the in hand farms. From December 1999 Lord Balfour employed Bidwells, property consultants, to manage Whittingehame Estate and Bidwells invoiced WFC and the trust separately. From that time he also engaged contractors to carry out the farming activity on the in-hand farms.

Whether the estate comprises one or two businesses

38. The submission of the executor, which the First-tier Tribunal upheld, was that Lord Balfour's business activities were a single composite business including the in hand farming, the commercial woodlands and the letting activities.

39. HMRC also contended that Judge Reid erred in law in holding that from at least 1999 until November 2002 the estate management and farming activities carried on at Whittingehame Estate were managed as a single composite business. In particular Mr

Thomson submitted that the First-tier Tribunal erred in failing to have regard to the different capacities in which Lord Balfour acted (i) when managing WFC's in hand farming operation and (ii) when acting on behalf of the trustees in connection with the rest of the trust estate.

40. In essence, HMRC's submission was that Lord Balfour operated a separate business of in hand farming through WFC, whether as a partner or a sole proprietor, and in relation to the rest of the estate management he acted as agent or factor of the trustees. Mr Thomson pointed out that on one occasion in the 1960s Lord Balfour had referred to himself as factor of the estate in correspondence. Mr Thomson also founded on the facts which we have recorded in paragraphs [33] to [35] above. He pointed out that there was no evidence that Lord Balfour personally granted any leases, whether of houses or cottages. He submitted that in relation to the estate other than the in hand farms, it was the trustees who took the business risks and were liable for any losses. Lord Balfour was, he submitted, entitled only to the net income of the lettings. He observed also that in 1982 WFC granted a standard security in favour of the trust over Redcliff Cottage in security of a loan of £10,000 and that the security was discharged when WFC repaid the loan in 1992.

41. Mr Thomson submitted that the facts of the operation of the estate had to be considered in the context of the Will as correctly construed, namely as HMRC submitted it should be construed. He submitted that the facts found and the inferences properly derived from them compelled the conclusion that there were separate businesses.

42. Mr Thomson also criticised Judge Reid for misdirecting himself in relation to the evidence which he used to support the conclusion that Lord Balfour in his daily activities made no demarcation between WFC and the estate. The correspondence on which Judge Reid relied all related to trust matters and not the in hand farming business. He submitted also that Judge Reid erred in concluding that there was no apportionment between the estate and WFC of the wages of Mr David Young, who was a general worker on the estate. The evidence pointed towards a demarcation between the business of the estate and the separate business of WFC, which was run in a partnership and then on a contract farming basis.

43. HMRC also criticised Judge Reid for failing to distinguish *Scales v George Thomson & Company Limited* (1927) 13 TC 83 because it concerned one taxpayer operating two related and intermeshed enterprises. Mr Thomson also submitted that he erred in law in his application of *Fetherstonhaugh & Others (Finch) v Inland Revenue Commissioners* [1984] STC 261 in paragraph 31 of his decision because he treated section 49 of the 1984 Act as relevant to the question whether there was a single business or separate businesses at Whittingehame Estate. Further, he submitted that the case concerned in hand farmland while the land in dispute in this case was let property and thus it did not address the circumstances of this case.

44. We are not persuaded that Judge Reid erred in law in concluding that Lord Balfour used the trust assets as part of the overall business enterprise which he carried

on for gain (para 31 of his decision). The legal background, which we consider to be significant, is that he was a liferenter of the whole estate. See our construction of the Will in paragraphs [26] to [30] above. In that context, the control exercised by Lord Balfour and the willingness of the trustees to conform to his wishes in the use of the trust assets can readily be understood. See Judge Reid's finding of fact 35, part of which we quote in paragraph [60] below. We recognise that the evidence was not clear as to who granted the leases of the dwelling houses on the estate. But that is, in our opinion, of little moment. Lord Balfour had the power to grant leases which were valid during his lifetime; if he and the trustees chose that the latter granted the leases, that could be a matter of administrative convenience as the leases would not expire on his death.

45. The existence of separate trust accounts and accounts for WFC is consistent with the terms of the Will which envisaged separate accounting for the in-hand farming business. See paragraph [12] above. While it appears that for a while all the farms in the estate had been let out, Lord Balfour had taken the two farms in hand and had until 1999 operated them in partnership. The existence of the partnership and the need to calculate the profits of the partnership activity would of itself have necessitated separate accounts. That separation of accounts in turn necessitated such demarcation of activities between WFC and the rest of the estate as occurred. On the death of Mr George Thomson, Lord Balfour farmed as a sole trader and maintained the practice of separate accounts, which was, as we have stated, consistent with the terms of the Will. He, as liferenter, sought to operate the estate for the benefit of the estate as a whole. In doing so, he had to use the resources which the Will made available to him and accept the terms on which he received those resources. The heritable assets were held by the trustees as Lord Balfour had a trust liferent and not a proper liferent; the estate was not conveyed to the heir in liferent (see *Miller v CIR*, (1930) 15 TC 25, Lord Sands in the Inner House at p.55). The trustees received the rents from the tenants and paid the net sums, after deduction of expenses, to Lord Balfour. The trustees kept separate accounts. HMRC argued that it was not merely a matter of separate accounts; the trustees took financial risks in relation to the let properties. But the risks in letting are mainly capital risks. The management costs of running the estate, so far as they were met by income handled by the trustees, reduced, and could (as they did in 2002) eliminate, its income from lettings. But the Will imposed on the liferenter the obligation to keep the estate in good repair: see the quotation from the Will at the end of paragraph [20] above. Thus to the extent that such costs reduced or eliminated the income from lettings, it was the liferenter who suffered.

46. There was no dispute between the parties that Lord Balfour carried out the management of the estate both on a day-to-day basis and in terms of strategic decision-making, including in relation to capital disposals. Lord Balfour gave instructions to the solicitors acting for the trustees and they carried out his instructions. Nor was it disputed that the trustees played a passive administrative role, leaving the management to Lord Balfour and the solicitors.

47. Lord Balfour selected the tenants of the dwelling-houses which were scattered across the estate and fixed the rents. He chose the tenants with an eye to benefitting the estate as a whole. The First-tier Tribunal made no findings as to who granted the leases of the dwelling houses; but if trustees did grant such leases, or Lord Balfour signed leases on their behalf, that would not signify much. There was ample evidence to support Judge Reid's findings that the trustees carried out Lord Balfour's wishes. That they did so, at least in relation to matters which concerned the liferent as distinct from proposals for the disposal of capital assets, is consistent with our interpretation of the Will. Lord Balfour, as liferenter, had the right to exploit the trust assets and general income therefrom. He was subject to the controls of the alimentary liferent: he could not assign his rights and rights of creditors were restricted. Subject to that restriction, he was entitled to exploit the assets to generate income.

48. The finding that Lord Balfour handled matters on the estate with an eye to the overall benefit of the estate was not challenged. He took care to account separately for the activities of WFC on the one hand and those carried out on the rest of the estate on the other as he had to produce separate accounts. We accept that there was evidence of some demarcation between WFC and other estate activities in order to enable the production of accounts for WFC and the trust. But we do not accept that Judge Reid was not entitled to hold that Lord Balfour "in his daily business activities" made no demarcation between WFC and the rest of the estate (finding of fact 32). There may be some force in HMRC's criticism of the First-tier Tribunal's reliance on correspondence which appears to relate to estate matters other than WFC, but such demarcation as occurred appears to have been in the context of the allocation of costs between WFC and the estate. There appears to be support for the finding that there was no strong demarcation in relation to the use of staff (finding of fact 33): Lord Balfour's secretary and the estate gamekeeper dealt with the whole estate. Lord Balfour employed the worker, David Young; his wages were paid from estate funds; and there appears to have been only limited recharging between WFC and the estate for the purposes of the preparation of the accounts when he worked on the in hand farms at harvest. Mr Ghosh accepted on behalf of the executor that the finding that WFC received income from some let farms was erroneous, but in our view little turns on that. The demarcation of costs between WFC and the rest of the estate appears to have been incomplete. In any event we are not persuaded that a more careful demarcation of costs and income between WFC and the rest of the estate would point significantly towards the existence of two separate businesses. In our view, it would be consistent also with the administrative need to account separately for the activities of WFC under the Will and also because for many years it operated as a partnership.

49. We are not persuaded that Judge Reid misinterpreted *Scales v George Thomson*. While it is correct that in that case one company ran two businesses and one of the businesses, underwriting, was held to be a separate business, the relevance of the case was in the approach which Rowlatt J adopted in assessing whether there were separate businesses. He looked not to the method of financial book-keeping but (at p.89) to whether there was any "inter-connection, any interlacing, any interdependence, any unity at all embracing those two businesses". In paragraph 32 of his decision, Judge Reid looked to the approach and not the particular facts. There was thus no need to

distinguish the facts. In the context of Lord Balfour's management of a traditional landed estate, using the assets made available to him by the liferent, we have no difficulty in seeing why Judge Reid ascertained in the established facts the needed interlacing and dovetailing of activities.

50. Similarly we are not persuaded that Judge Reid erred in law in his application of *Fetherstonhaugh v IRC* in paragraph 31 of his Decision. If in that paragraph he had treated that case or section 49 of IHTA, 1984, as relevant to the question whether there were separate businesses, we consider that that would have been an error. But we do not interpret him as having done so. Rather he reached his conclusion that Lord Balfour used the trust assets as part of an overall business enterprise which he carried on for gain at Whittingehame Estate from the factual findings which he had made. He then referred to section 49 and to the reasoning in *Fetherstonhaugh* which fell to be applied in the context of that conclusion and stated that Lord Balfour was to be treated as beneficially entitled to the property in which the liferent interest then subsisted, namely the whole estate. In our view that is a correct statement if his prior conclusion is correct: for the purpose of valuing the transfer of value, one has regard to the value of the trust assets used in the business and not the value of his liferent in those assets. He concluded the paragraph by stating:

> "The fact that the trust was a separate entity from Lord Balfour does not mean that there had to be two separate businesses. The existence of these two entities required certain administrative accounting procedures but such procedures do not themselves create two separate businesses."

51. That concluding observation in our view is consistent with the court's approach in *Scales* and flows from the findings of fact which he made. His reasoning would have been clearer if he had rearranged the paragraph to make that observation before referring to the section and the case of *Fetherstonhaugh* but we see no legal error in his approach.

52. While in *Fetherstonhaugh* the land in question was in hand land, we do not see that as a ground for challenging Judge Reid's reference to the case, because the case was concerned principally with the interpretation of the phrase "assets used in the business" in statutory provisions which pre-dated IHTA, 1984, in relation to the activities of a sole trader. There is nothing in the report of the case which discloses whether the 3,655 acres which were let out of the 5,500 acres covered by the settlement were in any way operated as a unitary landed estate along with the 1,845 acres of in hand land, part of which was the subject of the dispute in that case. The taxpayer in that case did not seek to argue that there was one business. We therefore do not accept HMRC's submission that the case supported their contentions.

53. HMRC invited us to make further findings of fact which, they submitted, were relevant to the case and were either uncontested or necessary inferences from primary findings of fact. In pursuing this line of argument Mr Thomson acknowledged that the First-tier Tribunal was not obliged to make findings of fact about everything which was raised before it. The issue was whether the evidence supported the

conclusions which the Tribunal had reached. Mr Thomson submitted that to establish that the First-tier Tribunal had erred in law in failing to make findings on relevant evidence he had to meet a difficult test: he had to show that the First-tier Tribunal had ignored the evidence which not only was uncontested in the sense that there was no contrary evidence but also was clear and unambiguous and did not support the conclusions which the Tribunal had reached.

54. Mr Ghosh QC for the executor submitted that on appeal findings of fact were not open to attack unless they betrayed an error of law. It was not enough for the appellate tribunal to alter a finding because it would have come to a different conclusion. To be impugned the finding must be perverse or the evidence must make the opposite conclusion irresistible. Nor was the appellant entitled to seek to introduce new evidence in the appeal or seek to reargue the facts which had been found.

55. We consider that there are only very limited circumstances in which the Upper Tribunal can set aside a pure finding of fact on the ground of error of law. In *Edwards v Bairstow* [1956] AC 14, Viscount Simonds famously stated (at p.29) that the court could do so

> "if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained."

56. In deciding whether a finding of fact is perverse in that sense, there may be circumstances in which the Upper Tribunal in the exercise of its jurisdiction in relation to errors of law will be able to hold that uncontested evidence, on which a First-tier Tribunal has failed to make findings, gives rise to the inference that its decision on the facts is perverse. This is in some ways analogous to the finding in judicial review that a decision-maker has failed to take account of a relevant consideration which is material to his decision. But in our view before the Upper Tribunal can overturn a decision on the ground of failure to make particular factual findings it must be satisfied (a) that it can properly make those findings and (b) that the new findings, when considered together with the existing findings (which were either uncontested or survived challenge), point irresistibly to a conclusion which is contrary to that which the First-tier Tribunal has reached. See *McCall v Revenue and Customs Commissioners* [2009] STC 990, Girvan LJ at para 9. Unless both tests are met, the challenge must fail.

57. In relation to (a), the Upper Tribunal is not in a position to adjudicate upon disputes about what a witness said in unrecorded oral evidence. Such facts are not objectively verifiable. Nor is it charged with reconsidering all of the evidence which was before the First-tier Tribunal in order to make its own factual findings; this is not a re-hearing on the evidence. Nor is it appropriate for counsel, when advancing such a submission, to cherry pick from the evidence points which when listed in a particular combination might give rise to inferential findings contrary to the decision under challenge.

58. In this context we do not find *E v Secretary of State for the Home Department* [2004] QB 1044 and *Lloyds TSB Bank plc v Hayward* EWCA [2002] Civ 1813 to be helpful. The former concerned the admission of new evidence in a public law case in the sensitive area of an asylum appeal. We recognise Carnwath LJ's observation (at para 40-42) that it is a safe working rule that the substantive grounds for intervention are the same in an error of law jurisdiction and judicial review, but it is well known that the courts adopt a particular approach to asylum judicial reviews, partly because of the nature of the evidence which is available and partly because they are under a duty of "anxious scrutiny" where error can have dire consequences for the asylum seeker. The latter case was a normal appeal from the High Court to the Court of Appeal in which a judge was held to have erred in failing to make findings about a contemporaneous document which might have cast light on what occurred at a lengthy meeting seven years before, where the other disputed evidence was based on the fallible recollection of witnesses. The Court of Appeal ordered a retrial. The Court's jurisdiction differed from that of the Upper Tribunal and the challenge to the failure to make a factual finding was focused on one document, whose terms were ascertained and which was central to the issue which the court had to resolve.

59. We are not satisfied that HMRC have made out a case for this Tribunal to make further findings of fact. Some of the proposed findings were not disputed. For example, in 1994 Lord Balfour proposed the sale for residential development of the surplus steading of Eastfield Farm and asked the trustees to agree to the proposal. But this fact sheds no light on the question with which we are concerned. As a liferenter Lord Balfour needed the consent of the trustees to alienate any property as he had no right to do so. Similarly, HMRC cited evidence of Lord Balfour dealing with capital expenditure in relation to the planting of woodlands. But while there was such evidence, it did not unequivocally support of the general finding of fact which Mr Thomson sought, namely that in connection with Whittingehame Estate Trust matters. Lord Balfour at all times acted on behalf of the trustees and was not operating his own business. On the contrary, it was equally consistent with the conclusion that Lord Balfour operated the estate as a single business and that he worked for its future for the benefit of his successors, where through capital investment the estate would benefit on the longer term. We see no error in law in the decision not to make such findings.

60. Similarly HMRC requested a finding that in 1974 WFC purchased Redcliff cottage and in 1982 granted a standard security to the trust over that cottage in return for a loan of £10,000 from the trust; in 1992 the loan was repaid and the security discharged; the cottage was sold about that time. While these facts were not disputed, they do not materially advance HMRC's case. WFC was throughout that period a farming partnership which had to account for its business separately from the rest of the trust assets. The events do not tell us about Lord Balfour's position. He, unlike his partner, had wider business interests in the other trust assets.

61. Other proposed and undisputed facts included findings that while the trustees were not personally active in the administration of the estate, their interests were represented by their solicitors who dealt with Lord Balfour; that the solicitors acted on

behalf of the trustees; that Lord Balfour made recommendations to the trustees through the solicitors; and that the trustees relied heavily on the advice and opinion of Lord Balfour. Again, we see no error of law in not making such findings. It is clear that Lord Balfour dealt with the solicitors and that in relation to capital investments or capital disposals, he needed the trustees' consent as the land was vested in them. It may also be that the solicitors prepared leases of the houses, which Lord Balfour arranged to let, in the name of the trustees. But none of that was inconsistent with a liferenter operating the business of the estate for his own benefit as an integrated business, using such assets as the Will made available to him. The facts, taken with the other undisputed facts and the facts which Judge Reid has found and HMR accept, do not point unambiguously towards a conclusion that the First-tier Tribunal reached a decision which was contrary to the evidence.

62. We do not consider that it is necessary to recite and discuss the many facts on which Mr Thomson asked us to make findings. Some were primary facts said to have been disclosed on cross-examination which Mr Ghosh disputed. Some were inferences, which were disputed, which HMRC asked us to take from primary facts. Others were more detailed findings which were consistent with findings which Judge Reid made (for example that the accounts of WFC were prepared by different accountants from those of the Trust or that WFC had a different accounting date, both of which were consistent with the finding that there were separate accounts), and others entailed the rewording of findings or were matters which Judge Reid took into account in making the findings which he did. In our view HMRC have not demonstrated in relation to any of these that Judge Reid erred in law in failing to make the requested findings.

63. Much of the HMRC's quest for the additional findings rested on the assumption that their interpretation of the Will was correct and that Lord Balfour had an interest only in the net income of the trust assets other than the in hand farms which were operated by WFC. Based on that assumption they sought to argue that everything which Lord Balfour did for the estate beyond his work for WFC was as agent of the trustees who carried on the business of the estate. As, generally in agreement with Judge Reid, we have rejected that interpretation of the Will, most of the proposed findings lose their potency. We are satisfied that the primary facts which have been demonstrated as being available to the First-tier Tribunal do not contradict Judge Reid's decision or call it into question.

64. In our judgment the First-tier Tribunal was entitled to conclude that Lord Balfour operated the estate as one business before November 2002. In finding of fact 35 Judge Reid recorded the evidence, which he accepted, of Mr Robert Balfour, who had been a trustee since the mid 1980s, in these terms:

> "The Trustees had no active role to play as Lord Balfour occupied and ran the whole Estate as if he were the owner; in particular Lord Balfour dealt with the letting of residential properties on the Estate through [the solicitors]; Mr Balfour as trustee was never called upon to sign any lease; the Trustees were not authorised signatories on any bank account; the income and

> expenditure of the Estate were dealt with by Lord Balfour; Lord Balfour dealt with all forestry work; property disposals were instigated by Lord Balfour; Lord Balfour's wishes on estate matters, which Lord Balfour regarded as his own business, were invariably acceded to by the Trustees. Very few meetings of the Trustees took place. Trust accounts were issued to the Trustees once they had been approved by Lord Balfour; these accounts did not include the in hand farming operations. The correspondence produced also shows that the Trust solicitors in effect took instructions from Lord Balfour rather than the Trustees. The Trustees became involved in formal or administrative matters only."

65. In our opinion this finding has not been undermined. The trustees did not carry on a business separate from Lord Balfour's operation of both WFC and the rest of Whittingehame estate. In finding of fact 39 Judge Reid found that the nature and scope of the business activities being carried out on the estate and the manner in which they were carried out were essentially the same both before and after 2002 until Lord Balfour's death. He found that after Bidwells were appointed, Lord Balfour continued to be involved in the running of the estate and the trustees' role did not change. Bidwells reported to and took their instructions from Lord Balfour.

66. In our judgment HMRC have failed to demonstrate that Judge Reid erred in law in holding that Lord Balfour, not least in the two years before he died, operated a single composite business. His finding of fact 40 was in these terms:

> "Lord Balfour used trust assets, namely the heritable property, and in particular the let property, in a single composite business carried on by him at Whittingehame. The overall intention was always to make a profit."

We consider that he was entitled to make that finding.

67. Finally in this context, we do not accept Mr Thomson's criticism of the taxpayer for not adducing more evidence. The case proceeded on agreed facts and documents and on the oral evidence of witnesses led on behalf of the executor. HMRC presented no evidence. HMRC did not request that any further evidence be produced. In these circumstances we see no proper basis for that criticism or for making inferences adverse to the taxpayer in this regard.

Whether the business was mainly investment activity

68. The third submission on behalf of HMRC was that if the First-tier Tribunal was correct in holding that Lord Balfour conducted one composite business at Whittingehame Estate during the relevant period, it erred in law in concluding that that business was not one mainly of holding investments. Accordingly, under section 105(3) business property relief was not available.

69. Mr Ghosh did not dispute that income from the letting of property was investment income, however much work was involved in its generation. But, Mr

Thomson submitted, Judge Reid had erred in holding to the contrary. Mr Thomson referred to *Moore's Executors v Inland Revenue Commissioners* [1995] STC (SCD) 5, *Burkinyoung's Executor v Inland Revenue Commissioners* [1995] STC (SCD) 29, *Farmer's Executors v Inland Revenue Commissioners* [1999] STC (SCD) 321 and *Inland Revenue Commissioners v George* [2004] STC 147.

70. The First-tier Tribunal, in paragraphs 41 and 42 of its decision, as a fall-back, had also decided the case on the basis that the letting of the twenty six houses and cottages constituted the holding of investments. But, Mr Thomson submitted, in that regard Judge Reid had erred in a number of respects. He had failed to apply the tests which the authorities had identified as relevant to deciding whether a business consisted mainly of holding investments. He erred in treating the agricultural tenancies as farming activity and thus misrepresented the reality in his apportionment of land use. He failed to consider the capital values of the different components of the estate. He erred in grouping the policy parks and woodlands with the in hand farms as Lord Balfour as liferenter had no interest in growing timber and woodland related income. Sporting activities were minor and non-commercial. He erred in taking into account the time spent by labourers rather than managers in comparing the time devoted to trading and investment activities. He erred in being swayed by Mr Barrett's evidence about how most landed estates were operated as he should have concentrated on the particular circumstances of Whittingehame Estate. Accordingly, the evidence did not support the conclusion that the letting side of the business was ancillary to the farming, forestry, woodland and sporting activities of the business.

71. In considering this submission we are prepared to proceed on the basis that Mr Thomson's suggested findings, namely (a) that the large majority of any money raised from forestry or woodland activity was of a capital nature unrelated to Lord Balfour's liferent interest and (b) that the shootings on the estate raised little or no net income, are part of the background to the relevant assessment.

72. Mr Ghosh submitted that in applying section 105(3) of the 1984 Act the court should give the word "investment" its normal meaning. The word "mainly" meant what it said. The issue was a question of fact which was assessed primarily as an overall impression. There were a number of potentially relevant *indiciae*, such as acreage, turnover, profit, time spent and capital value, but they were not conclusive and the weight attached to a particular factor would vary according to the circumstances of the particular case. He had invited the First-tier Tribunal to ignore acreage and capital value as *indiciae* because his case was that there was a composite business and the use of the land changed over time. Capital value was irrelevant in this case as the estate was not used to realise capital value. He accepted Judge Reid had erred in treating the let farms as part of the farming (i.e. non-investment) side of the business but that error was not material as properly stated the farmed acreage and the let acreage were about the same. That error did not affect the outcome: *IRC v George*. If one adopted a quantitative approach, the turnover, the profit and the time spent on the non-investment business all supported the conclusion that the business which Lord Balfour carried on at Whittingehame Estate was not mainly the holding of investments.

73. In our judgment the case law on this question, to which we were referred can be summarised as follows:

74. In deciding what the term "the business of holding investments" means, the test which the decision-maker applies is that of an intelligent businessman who would be concerned with the use to which the asset was being put and the way it was being turned to account: *McCall v Revenue and Customs Commissioners*, Girvan LJ at para 11.

(ii) The question whether a business consists wholly or mainly of making or holding investments is a question of fact for the decision-maker: *IRC v George*.

(iii) The decision-maker is required to look at the business in the round and, in the light of the overall picture, to form a view as to the relative importance to the business as a whole of the investment and non-investment activities in that business: *IRC v George*, Carnwath LJ at paras 13, 51, 52 and 60.

(iv) This exercise involves looking at the business over a period of time as the First-tier Tribunal did in this case. See, for example, *Farmer's Executors v IRC*.

75. In so doing, the decision-maker can have regard to various factors, such as the overall context of the business, the turnover and profitability of various activities, the activities of employees and other persons engaged to assist the business, the acreage of the land dedicated to each activity and the capital value of that acreage. Not one of these factors is conclusive as the exercise involves looking at the business in the round: *Farmer's Executors v IRC*, Dr A N Brice at para 53; *IRC v George*, Carnwath LJ at para 52. It also appears to us that while the decision-maker must consider all relevant factors in relation to a particular business, there will be circumstances in which a factor, which is relevant to one business, is not relevant to another.

(vi) The fact that the owner of an investment engages in activities to manage and maintain his investment does not of itself take the business out of the investment category: *Moore's Executors v IRC*, Sir Stephen Oliver QC at paras 20-23; *Burkinyoung's Executor v IRC*; *IRC v George*, Carnwath LJ at para 18.

(vii) In looking at the question in the round it is not appropriate in every case to compartmentalise the business and attribute management and maintenance activity either to investment or to non-investment as an ancillary activity: *IRC v George*, Carnwath LJ at paras 51 and 60.

(viii) Because the question is a question of fact, the Upper Tribunal can interfere with the decision of the First-tier Tribunal only if an error of law has been demonstrated: *Edwards v Bairstow; IRC v George*. The question therefore is whether Judge Reid reached a view which was open to him on the evidence.

76. If, as HMRC suggested, Judge Reid in paragraph 40 of his Decision is to be taken as deciding that in relation to the let residential units, Lord Balfour's

management and planning activities prevented that aspect of the estate business from being the holding of investments, we consider that he was in error. See point (vi) above. But his assessment in that paragraph of the context of the businesses, namely the management of the whole estate as a unit and the securing of benefit for the estate as a whole throughout the residential units, remains a relevant factor to be considered beside the examination of the other relevant factors which he undertook in paragraphs 41 and 42 of his Decision.

77. In carrying out that exercise we accept Mr Thomson's submission that Judge Reid erred in treating the agricultural tenancies as part of the farming activities. Indeed Mr Ghosh conceded this. We are satisfied however that this error is not material to the outcome of the assessment of the various relevant factors in this case.

78. In our view the in hand farms and woodlands fall to be treated as non-investment activity throughout. We do not accept HMRC's contention that the woodlands are to be treated otherwise because Lord Balfour as liferenter did not have a direct interest in the capital realisations of timber from the woodlands. As liferenter, Lord Balfour was entitled to benefit from windfalls and coppicing. More importantly, it was integral to the business which Lord Balfour conducted that he was preserving the estate for himself and his successors. Given that the trustees held the trust assets for the benefit of the liferenters, any capital realisations from the sale of timber would be available to assist the business of the liferenter at about the time of the felling, whether through the purchase of land or buildings or otherwise. Up to 2000 Lord Balfour used the policy parks (which comprised 16.03 hectares) to graze cattle and in 2001 and 2002 let them on seasonal lets. Thus, if one treats the policy parks along with the let farms as letting activities only from 2001, the balance of land use until and including 2000 was:

Non-investment (in hand farms, policy parks and woodlands):	393.60 ha
Letting (let farms)	371.00 ha
In and after 2001 the figures were:	
Non-investment:	377.57 ha
Letting (policy parks and let farms):	387.03 ha

79. Both before and after 2001 the use of land was split between the two categories approximately equally. As a result the acreage used is not a weighty factor in one or other direction.

80. We accept that sporting activities generated little income but they were combined with vermin control throughout the estate and are a factor to be considered on the non-investment side of the business.

81. We see no error in law in Judge Reid's consideration of the evidence of Mr Barrett about practice on landed estates in Scotland. Such evidence may assist in the assessment of the overall context of the business. In his discussion of the evidence in paragraph 13 of his Decision Judge Reid recorded the limitations of Mr Barrett's

knowledge of the particular circumstances of Lord Balfour's operation of Whittingehame Estate and must be taken to have had regard to those limitations in the weight which he attached to his evidence. We do not doubt that the principal focus of the assessment must be on the business in question but we detect no error in law in his treating of Mr Barrett's evidence as relevant and supportive of the evidence of other witnesses with a more detailed knowledge of the business.

82. In our judgment, subject to the non-material error about the allocation of acreage between trading and investment activity, which we discussed in paragraph [71] above, Judge Reid's approach in paragraph 42 of his Decision contains no legal error. We do not accept that the error necessitates a reference back to the First-tier Tribunal for reconsideration as the relevant facts are available to us and point clearly towards the view that Judge Reid reached the correct conclusion in deciding that Lord Balfour's business was not mainly one of holding investments. We look at the other factors which were before Judge Reid in turn.

83.

(i) *Overall context*: Looking at the overall context of Lord Balfour's business in operating a unitary landed estate with in hand farming, forestry/woodland, and sporting activities as well as the letting of farms and surplus dwelling-houses, Judge Reid was entitled to treat that context as a factor which pointed towards a business which was mainly a trading business.

(ii) *Turnover and net profit*: Judge Reid recorded in finding of fact 38 the turnover of trading and letting activities and counsel put before us agreed figures of both turnover and net profit for the period 1996 to 2002 which had formed part of the evidence before him:

Period	Trading Turnover (£)	Letting Turnover (£)	Net Trading Profit (£)	Net Letting Profit (£)
1996	166,285	49,622	39,369	2,231
1997	184,935	56,219	50,237	1,035
1998	123,527	57,583	22,999	9,682
1999	141,601	68,068	23,040	21,354
2000	121,546	67,009	(15,617)	31,825
2001	119,804	82,027	11,181	8,342
2002	101,966	95,266	25,452	(22,551)
To Nov 2002	119,364	96,248	14,249	43,484

84. In our view Judge Reid was entitled to conclude that those factors strongly supported the conclusion that the management of Whittingehame Estate was mainly a trading activity.

85.

(iii) *Time spent*: We consider that it is appropriate to take account of the time spent by contractors farming the in hand land as well as the time spent by Bidwells in the management of those farms and forestry in assessing the balance of time between trading and investment activity of Lord Balfour's business. In particular we do not consider that it is failing to compare like with like to put the contractors' time on one side and not to put the tenants' time in the let farms on the other as farming the let farms was not part of Lord Balfour's business. While, as Judge Reid opined (in paragraph 42) it was not possible to make a precise quantitative assessment, the figures of time spent pointed towards a predominance of trading activity. But those figures must be treated with caution. We see particular force in Judge Reid's warning for, as Mr Thomson submitted, there were no figures for the time spent by manual labourers on the general maintenance of the estate, which would have included the let houses and cottages and the landlords' obligations in relation to the let farms as well as the assets used for trading. Using the agreed figures, Bidwells spent 205 hours on trading activity and contractors spent 1,139 on contract farming in 2001 while in the same year, Bidwells spent 421 hours on letting and property maintenance. This gives the result of 1,544 hours or 79% of time that year being trading related and 421 hours or 21% being related to letting. In 2002 on the same basis the trading hours of Bidwells were 287 and contract farming was 1723 hours (totalling 2,010 hours). Bidwells' letting and property maintenance work involved 554 hours. The percentages for 2002 are 78% and 22%. Again this points to the predominance of the trading activity.

86. (iv) *Capital value*: We recognise that Mr Ghosh invited Judge Reid to ignore, or at least attach little weight to, capital value as the long-term policy of the estate was to retain land so that market values were generally immaterial to Lord Balfour's business decisions. In our view Judge Reid was entitled to share that view. So far as capital value is relevant, the following is the picture. Using the agreed property values at the date of Lord Balfour's death on 23 June 2003, the capital value of the let properties (£4,357,500) exceeded the value of the other properties (£2,313,065) in the ratio of 1.88:1. Other things being equal, this factor pointed to some degree towards investment activity. But as the First-tier Tribunal was entitled to attach little weight to this factor, we are not satisfied that it has been demonstrated that Judge Reid erred in law in this regard.

87. We are satisfied that on the evidence before him, Judge Reid was entitled to conclude that section 105(3) did not apply because Lord Balfour's business at Whittingehame Estate did not consist mainly of holding investments.

A business carried on for gain

88. HMRC accepted that, if we held that Lord Balfour carried on a single composite business of estate management and farming activities, his business was carried on for gain: see section 103(3) of the 1984 Act.

Conclusion

89. Having decided the questions raised by HMRC against them, we therefore refuse the appeal.

LORD HODGE

SIR STEPHEN OLIVER QC
JUDGES OF THE UPPER TRIBUNAL
RELEASE DATE:
16 August 2010