



## A victory for the taxpayer



Last month we heard that HMRC had failed in their appeal in the Balfour case. The case concerned whether inheritance tax business property relief (BPR) was available on a Scottish agricultural estate which comprised a mixture of in-hand farms and let land, cottages and buildings.

The IHT legislation provides that BPR is not available on a business which wholly or mainly holds investments (such as let-land and cottages) rather than trading assets. In the case of an estate with a mix of in-hand and investment activities an assessment is required of which type of activity predominates.

Lord Balfour held an interest in the Whittingehame Estate under the Will of his great-uncle, Arthur Balfour, the Prime Minister and World War I statesman. The estate comprised of 1,907 acres with three let farms, two in-hand farms, twenty six let houses and cottages and two business premises. There were also parks, woods, sporting rights and a farmhouse.

The case, and the subsequent appeal, focussed on two main issues. The first issue was a technical one relating to whether in the two years prior to death Lord Balfour had run a single business or whether for most of that time the Will trustees had a lettings business which was separate from Lord Balfour's in-hand farming activities. Here the judges have approved a widening of the concept of a single business for IHT purposes. The second issue was whether Lord Balfour's business was mainly involved in investment or trading activities.

HMRC will have been hopeful of winning the appeal, not least because the first instance judge had made a mistake in his judgement when he included the let farms as part of Lord Balfour's in-hand trade.

Previous case law has established various factors which guide the assessment of whether a business is predominantly engaged in trading or investment; they closely follow those set out in the previous high profile case *Re Farmer* in 1999. The appeal judges' conclusions can be summarised as follows:

The "various factors"	Investment	Trade
Turnover	X	✓
Net Profit	X	✓
Time spent	X	✓
Capital value	✓	X
Acreage	Equal	Equal
Overall context	X	✓

Although it was found that the capital value of the investment assets exceeded the value of the trading assets by nearly 2 to 1, the appeal judges did not think this was decisive and they accepted the view put forward by the executors that capital value should carry little weight given the estate's long term policy of holding land which would not be effected by relatively short term fluctuations in market value.

Having considered these factors the appeal judges concluded that the decision of the first instance judge was correct and that the BPR claim should be allowed.

The fact that the significant capital value of the investment assets did not tip the "investment business balance" will be of comfort to land owners with similar situations. But the decision will also be welcomed for its clear summary of the law which will help those wishing to make business planning decisions to maximise the availability of inheritance tax relief. HMRC is able to appeal again although at the time of writing it is thought that they have not done so.

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### Welcome

Welcome to our latest issue of **Agricultural Law Quarterly**. We hope you will find these articles on recent developments in agriculture to be of interest.

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# Real Property

## Defects in title: what a seller should know!

Quite often property is sold subject to something. This could be a lease, or a problem with the title which the Seller is aware of but does not want to rectify.

Often the problems that a property is burdened with are of a technical legal nature and the Seller does not want the transaction to become bogged down supplying information on a defect to a Buyer, so will state in the sale contract that a Buyer may not raise enquiries on the defect.

In *Area Estates Ltd v Weir* this was exactly the case. At auction W contracted to buy a freehold property from A. The contract contained a special condition that a lease of the property had determined by operation of law and that W may not raise any requisition on this.

The lease had not in fact ended because the surrender was void at law.

Although the surrender was subsequently ratified, W sought

to rescind the contract. At first instance the Court held that W was entitled to complain about the existence of the lease and rescind the contract.

On appeal by A, the Court of Appeal rejected A's arguments that the defect was only technical and that the contractual condition passed to W the risk that the lease continued.

When dealing with land subject to a defect it is important that all reasonable searches are made by the Seller to discover the defect so that it may be properly and fully described in the contract. The risk connected to the defect can only then be effectively and properly passed to the Buyer and the Seller avoid the Buyer being able to withdraw from the contract.

*Area Estates Ltd v Weir* [2010] EWCA Civ801

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# Agriculture

## What is the future for GMOs?

In one corner of England scientists have just cracked the complete genetic code of wheat, whilst another has been the subject of an outcry that began when an American newspaper quoted an unnamed British farmer who claimed he was selling milk from a clone-derived animal into the food-chain. So, what is the future of GMOs?

Amongst the latest crop trials awaiting EU approval for commercial growth are potatoes that can fight off blight without the aid of pesticides, sugar beet capable of withstanding glyphosate and maize resistant to its two main pests. But Brussels has generally kept its doors shut to GMOs and over the course of nearly ten years just two GM crops have been approved for growth on farms in the EU. The first, which was granted approval in 1998, is a maize variety with resistance to European corn borer and the second is a highly efficient starch potato that contains just the right compound for industrial processing. However, this may all stand to change.

The European Food Safety Authority run by the EC painstakingly tests and re-tests GM food until it gains scientific approval. Once authorised, the next step involves the release of the GMO for cultivation and this is where the changes are happening.

On July 13 2010, the Commission adopted a comprehensive proposal that provides more freedom to the Member States so that once approval is completed they can decide whether to allow, restrict or ban cultivation of the particular GM product on their territory. This move is

designed to support the implementation of a faster GM approval process for those who support GMOs because the process will no longer have to cater for those member states that want to place blanket bans over GM.

Britain is one of Europe's most vigorous cheerleaders for the expansion of GM crops. Along with Spain and the Netherlands it has lobbied the European Commission to overturn the current system governed by an EC Directive made in 2001. The UK has committed hundreds of millions of pounds of public money to agricultural research around the world. For those member states which are less inclined towards GM, there is an opt-out from GM cultivation all together.

The new EC proposal intends to paint a certain political picture for biotechnology companies with currently limited access to the EU market, farmers with a limited choice of agricultural products and finally to producers and importers of GM seeds with no current access to the market or to the product.

Consumers and the wider public constantly receive contradictory messages on concerns over the safety of GMOs and with Member States free to make divergent opinion, this trend is set to continue. However, at least in some territories, producers should see a clearer route to the European GM market in the years to come.

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*"The new EC proposal intends to paint a more certain political picture for biotechnology companies with currently limited access to the EU market..."*

# Planning

## Coalition Government plans for planning



This summer, several proposals to reform the planning system have hit the headlines as the Coalition Government pursues its localism agenda. Most proposals stem from the Conservative pre-election green paper and aim to restore democratic and local control over the planning system, rebalance the system in favour of sustainable development, and produce a simpler, quicker, cheaper and less bureaucratic planning system. We will not know much of the detail until the Decentralisation and Localism Bill is put before Parliament, due later this autumn.

### **Abolition of RSs**

The proposal to abolish Regional Strategies (RSs) has caused the most controversy to date. RSs bridged the gap between national and local planning policies, enabling a strategic approach to be taken to housing, waste, minerals, energy, transport and the environment. Eric Pickles (Secretary of State for Communities and Local Government) revoked RSs in July and the sudden removal of this middle layer of policy has led to uncertainty for local planning authorities and developers alike.

RSs no longer form part of the development plan. This is important because it is against the development plan (and material considerations) that all planning applications are judged. If a recent application was justified by RS policy it is now questionable how much weight that policy support should be given.

Furthermore, local planning policies had to be compliant with the RS. As they no longer exist, the drawing up of local policies by many councils all over England has stalled whilst parameters are reassessed.

Of particular interest to many is the loss of regional housing targets. In practice, local planning authorities will still need housing targets, but, in the absence of regional targets, they will be able to decide the targets for themselves. The Government will seek to encourage local authorities to promote development using financial incentives.

While the system readjusts, landowners with an eye on the development potential of their land, will want to keep an eye on, or better still become involved in, the new housing targets to be adopted by the local planning authority and the allocation of sites to enable those targets to be met.

### **Home on the Farm**

The Government has announced it will promote "Home on the Farm" schemes to encourage farmers to convert existing disused or underused buildings into affordable rural housing. This is expected to start this September, though detail of how these schemes will work, has to date, been lacking.

### **Rural planning**

Landowners will also want to keep tabs on the proposal for the designation of brownfield land to include land previously occupied by agricultural buildings to facilitate the development of disused buildings for other purposes. This sits alongside a proposal to introduce rules within a national planning framework to prevent the development of the most fertile farmland in all but exceptional circumstances. However, not much has been said about either of these since the election.

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# Food

## Turning over a new leaf

From the 1st of July this year, all pre-packaged organic foods produced within the EU must carry the new "Euro-Leaf" logo (pictured below). The logo is designed to give added consumer confidence in organic products, as it signifies compliance with EU legislation on organic production brought into force in 2009.

The logo will assure consumers that the products are either wholly "organic" within the meaning of the legislation, or, if the product has been processed, made from 95% organic ingredients. The producers involved must also have passed annual inspections and the product must come directly from the producer or preparer in a sealed package.

In addition to the use of the new logo, from 1 July, any products which are not certified as organic in accordance with EU legislation may not be labelled as such.

The logo or code of the national certification body (in the UK this will be the Soil Association, Organic Farmers and Growers Association, or other appointed body) must also appear alongside the Euro-Leaf. The packaging must also indicate where the organic products were farmed. The location can be given as either "EU-agriculture" or "non-EU agriculture",



although where all the ingredients are from a particular country, the name of the country can be given instead.

The logo will not have to appear on products which have come from outside the EU, but where it is used, their origin should be given. Products which aren't packaged will not have to display the new label.

There will be a two year transition period to enable producers to comply with the new requirements, but after that, if the new logo fails to appear on products the operator (being the person responsible for the requirements of the legislation being met) may lose their organic certification, and the right to market their products as organic will be withdrawn.

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# Employment

## Time to retire

At the end of July 2010, the Government announced that it intends to remove the default retirement age of 65 (DRA) by April 2011. If the proposals go ahead, this means that employers will generally no longer be able to retire employees when they reach a particular age and will instead have to rely on another fair reason, for example, poor performance to justify any dismissal.

The abolition of the DRA will have a significant impact on business planning, particularly for those businesses with employees approaching or past the current DRA. As the agricultural sector traditionally employs large numbers of older people, you may want to consider the following:

1. The current statutory retirement procedure requires employers who wish to retire an employee to notify the employee 6-12 months before the compulsory retirement date and to give them the right to request to work beyond that retirement date. If an individual is retired in accordance with this procedure this will be a

fair dismissal and will not constitute age discrimination. If the Government's proposals go ahead, this regime will be phased out so employers will only have until 5 April 2011 to issue these statutory retirement notifications with all retirements having to take effect before 1 October 2011.

2. Whilst the proposals should not affect an employer's existing ability to impose a compulsory retirement age beyond 1 October 2011, the employer will need to be able to objectively justify the chosen age and this, as now, is likely to be difficult for most employers.

In order to plan ahead you may want to establish whether any of your employees are approaching or past the DRA and consider whether these employees should be retired under the current statutory retirement regime before it disappears.

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