**Neutral Citation Number: [2015] EWCA Civ 718**

Case No: C3/2014/2441

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM**
**THE UPPER TRIBUNAL (LANDS CHAMBER)**
**Deputy Judge HH David Mole QC**
**[2014] UKUT 159 (LC)**

Royal Courts of Justice
Strand, London, WC2A 2LL

09/07/2015

B e f o r e :

**THE CHANCELLOR OF THE HIGH COURT**
**LADY JUSTICE RAFFERTY**
**and**
**LADY JUSTICE KING**

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**Between:**

**TUNNEL TECH LIMITED** **Appellant**

**- and -**

**REEVES (VALUATION OFFICER)** **Respondent**

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**Gordon Nardell QC and James Burton (instructed by Michelmores LLP)**
**for the APPELLANT**
**Sarabjit Singh (instructed by HMRC Solicitors Office) for the RESPONDENT**

**Hearing dates : 24th June 2015**

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**THE CHANCELLOR OF THE HIGH COURT:**

1. There is a dispute between the appellant, Tunnel Tech Limited ("TTL"), and the respondent valuation officer ("the VO"), as to whether or not the hereditament known as The Old Airfield, Winchester Street, Leckford, Stockbridge, Hants SO20 6DD ("the Hereditament"), is exempt from domestic rates under section 51 of the Local Government Finance Act 1988 ("LGFA 1988") as agricultural land or as comprising agricultural buildings within schedule 5 of that Act.

2. TTL is in the business of mushroom growing. TTL maintains, but the VO disputes, that the Hereditament is agricultural land because it is a market garden or nursery ground within

paragraph 2(1)(d) of schedule 5 and, insofar as the market garden status of any of the buildings on the Hereditament is in dispute, the buildings are agricultural buildings within paragraph 3(b) of schedule 5.

3. The President of the Valuation Tribunal for England ("the Valuation Tribunal"), Professor Graham Zellick QC, concluded that the Hereditament is a market garden within paragraph 2(d) of schedule 5 and ordered on 11 December 2012 that the Hereditament be removed from the non-domestic rating lists for 2005 and 2010 from 1 April 2005 onwards.

4. By his decision dated 7 April 2014 His Honour David Mole QC, sitting as a deputy judge of the Upper Tribunal (Lands Chamber) ("the UT"), allowed the appeal of the VO from Professor Zellick's order.

5. This is TTL's appeal from the UT's decision, with the permission of Judge Mole.

**The background**

6. Unless otherwise stated, I gratefully take the following statement of facts from the judgement of Judge Mole.

7. The Hereditament comprises 10 hectares of land, including a reservoir, buildings, hard standings, plant and other structures. It stands in the countryside on the edge of a former airfield about seven miles to the south east of Andover. TTL, a subsidiary of Monaghan Mushrooms Ltd, described by TTL as a major supplier of mushrooms to the UK consumer market, has occupied the Hereditament by virtue of a lease from John Lewis Properties since 1985. During that time the Hereditament has more than doubled in area, a reservoir has been constructed, and buildings have been added, taken away, or put to a slightly different use as production techniques have been developed and refined. The largest structure on the site is the Phase II/III building which came into use in November 2010. It contains nine insulated tunnels, a filling hall and an emptying and dispatch hall, enabling a high degree of atmospheric control of the building and automation of the processes.

8. The processes which take place on the Hereditament comprise three phases. Phase I begins when TTL buys local organic wheat straw, deep litter poultry manure and agricultural gypsum from various different sources. The straw is thoroughly wetted and after two to four days it starts to heat up through microbial action. Poultry manure, more water and agricultural gypsum are then blended with the warm wet straw and over several days the mixture is turned and moved. The microbial action breaks down the cellulose and lignin within the straw and the mixture becomes a homogenous material with a high moisture content. That material then undergoes high temperature fermentation. Until 2006 this was done in the "Phase I Open Side Building". Since then the material has been put into fermentation bunkers, which have a concrete floor that allows air to be forced through into the material above in a measured way that enables temperature and oxygen concentration to be controlled to produce an efficient high temperature fermentation. The end result is to produce a rich, dark compost that will, with further treatment, provide a nutritious material for the growth of mushroom mycelium.

9. The material is then pasteurised. This process was originally carried out in polytunnels but, since November 2010, it has almost all been transferred to the new Phase II/III building. The temperature of the material is allowed to rise, initially to about 49°C, followed by a rise to 57°C for about 10 hours and then cooling to 48°C for three to four days of conditioning. At the end of this process any free gaseous ammonia has been metabolised and unwanted animal pests and weed moulds eliminated. The material is then allowed to cool until it reaches 24°C when it is ready for Phase II.

10. In Phase II the material is taken by conveyor belt into a sterile area where mushroom spawn is applied to it from a hopper at a carefully measured rate. The spawn is mushroom mycelium grown through sterilised wheat or rye grain produced in laboratory conditions. TTL buys this spawn from two specialised sources, Amycel or Sylvan. The spawn is alive but kept dormant by refrigeration to 2°C. Contact with the warm material activates the spawn which starts to grow through it. From 2005 to 2013 a proportion of material was sold at the Phase II stage. This proportion was 63% of total output at 1 April 2005 and down to 0% by 1 February 2013.

11. In the course of Phase III, by careful control of temperature, the mycelium is encouraged to complete its growth throughout the material. Before 2010 this stage was undertaken in the polytunnels. Now it is done in the purpose-built tunnels in the Phase II/III building. By the end of 18 to 20 days the mycelium pervades the material and is visible as a mass of white tendrils. At that point it is winched out of the tunnel, broken up mechanically and conveyed to the vehicles that take it away. The process of breaking it up breaks the mycelial strands and triggers a reaction known as "reanastamosis", which is a surge in activity as the strands seek to rejoin, causing a peak in temperature shortly after the final material leaves the Hereditament.

12. The final material is then taken to specialist mushroom farms. TTL says that is for plant health and economic reasons, consistently with the way the growing cycle for mushrooms produced commercially is nearly always divided between two sites.

13. After TTL's Phase III material has been transferred to the specialist mushroom farms it is covered with a layer of inert material, known as the casing layer, and the mycelium produces "pinheads" which become mature mushroom caps. The total time from the application of mushroom spawn to the harvesting of the first flush is about 5 to 6 weeks. The caps are harvested at the required size and the material is then capable of producing up to another three "flushes" of growth over a period of two to three weeks.

14. The proportion of the Phase III product sold has grown from 37% of total output as at 1st April 2005 to 100% at 1st February 2013, with most now going to mushroom farms within the Monaghan Mushroom group.

15. The VO entered the Hereditament in the 2005 and 2010 valuation lists for non-domestic rates. The original entry was "factory and premises". This was later amended to "land used for waste composting" before reverting to "factory and premises".

**The statutory provisions**

16. Section 51 of LGFA 1988 provides that schedule 5 shall have effect to determine the extent (if any) to which a hereditament is (for the purposes of that Part of the statute) exempt from local non-domestic rating.

17. So far as relevant to this appeal schedule 5 provides as follows:

"SCHEDULE 5

Non-Domestic Rating: Exemption

…

*Agricultural premises*

1 A hereditament is exempt to the extent that it consists of any of the following—

(a) agricultural land;

(b) agricultural buildings;

2 (1) Agricultural land is—

(a) land used as arable, meadow or pasture ground only,

(b) land used for a plantation or a wood or for the growth of saleable underwood,

(c) land exceeding 0.10 hectare and used for the purposes of poultry farming,

(d) anything which consists of a market garden, nursery ground, orchard or allotment (which here includes an allotment garden within the meaning of the Allotments Act 1922), or

(e) land occupied with, and used solely in connection with the use of, a building which (or buildings each of which) is an agricultural building by virtue of paragraph 4, 5, 6 or 7 below.

(2) But agricultural land does not include—

(a) land occupied together with a house as a park,

(b) gardens (other than market gardens),

(c) pleasure grounds,

(d) land used mainly or exclusively for purposes of sport or recreation, or

(e) land used as a racecourse.

3 A building is an agricultural building if it is not a dwelling and—

(a) it is occupied together with agricultural land and is used solely in connection with agricultural operations on that or other agricultural land, or

(b) it is or forms part of a market garden and is used solely in connection with agricultural operations at the market garden.

…

8 (1) In paragraphs 1 and 3 to 7 above "agricultural land" shall be construed in accordance with paragraph 2 above.

(2) In paragraphs 1 and 5(5)(b) above "agricultural building" shall be construed in accordance with paragraphs 3 to 7 above.

(3) In determining for the purposes of paragraphs 3 to 7 above whether a building used in any way is solely so used, no account shall be taken of any time during which it is used in any other way, if that time does not amount to a substantial part of the time during which the building is used.

(4) In paragraphs 2 to 7 above and sub-paragraph (2) above "building" includes a separate part of a building.

18. LGFA 1988 does not contain a definition of "market garden", "nursery ground" or "agricultural operations".

**The decision of the Valuation Tribunal**

19. There were seven individual appeals on liability.

20. Evidence was given on behalf of TTL in the form of witness statements and oral evidence of Timothy Harker, the general manager of TTL who has extensive training and experience in the mushroom growing industry, and witness statements of John Stanley and John Hall, directors of TTL, and the uncontested expert report of Séan Rickard MBA, M.Sc., B.Sc., RiRF, regarding practices in modern agriculture and horticulture. TTL and the VO also adduced evidence in the form of reports from rating experts but the Valuation Tribunal decided that it was unnecessary to consider them as they consisted substantially of legal opinion.

21. In his decision dated 11 December 2012 Professor Zellick said that there have been a number of reported cases over the years, in which statements have been made suggesting that to be a market garden for rating purposes the property must produce a product that, when it leaves property, is of a kind that would be found in a greengrocer's shop or supermarket. He said that there is, however, no case which holds on its facts that that is indeed the law.

22. Having said that the legislation should be interpreted as "always speaking", that is to say as reflecting contemporary reality and to be read in the light of its object and purpose, and that he was free to reach a conclusion which conduces to the objects of the legislation and avoids results that would be anomalous and irrational, he concluded that the Hereditament is a market garden within schedule 5 of LGFA 1988. His reasons were expressed with such lucidity and conciseness that I shall quote them in full, as follows:

> "20. In my view, the many cases relied upon in argument establish a clear, coherent and correct principle in relation to the meaning of market garden: activities which are merely preparatory, ancillary or incidental to, or remote from, the cultivation of the mature product are not such as to qualify as a market garden; but activities proximate to its final stage will suffice. These abstract terms must then be applied, with common sense and sound judgement, to the specific facts of any particular case. I accept that it lacks the certainty of a hard and fast rule, but I do not believe it will be a difficult test to apply and its advantages manifestly outweigh the minimal lack of certainty.
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> 21. On the facts of this case, I have no doubt that the appellants are correct in insisting that their hereditament is a market garden. The bulk of the cultivation and growing take place there; the mushroom mycelium that is passed on is a living, growing, animate product – inchoate mushrooms so to speak – that will itself in just two to three weeks, with minimal intervention, yield mushrooms for harvesting. It is not a compost or fertiliser that will merely stimulate growth; it is not like a seed potato that will be used for propagation; it is not akin to an experimental bulb or the cultivation of seeds; it is not something that needs elaborate and extensive treatment to turn it into something else before the final product can begin to be cultivated; it is not a product a long way from maturity.
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> 22. It is also to be noted that the transfer of the product to growing-on farms, as occurs here, is in accordance with contemporary industry practice. It is grounded in sound commercial practice and gives rise to better, healthier, higher quality mushrooms that would be grown if the material remained *in situ*. I infer from this that an interpretation that encouraged a mushroom-grower to abandon this division would be unlikely to further the legislative intention or purpose and would be inimical to the public interest. That alone would not, of course, determine the issue, but it cannot be without significance

23. I am fortified in my conclusion by the fact that "nursery ground" is an alternative basis for the exemption, which exemplifies something of the legislation's purpose, whether or not this hereditament actually qualifies as such; and by the fact that recognising the exemption on these facts avoids a result both anomalous and irrational."

**The decision of the Upper Tribunal**

23. The appeal to the UT was a re-hearing. As before the Valuation Tribunal, evidence was given on behalf of TTL in the form of witness statements and oral evidence of Mr Harker, witness statements of Mr Stanley and Mr Hall and an expert report of Mr Rickard. In addition, TTL relied on an expert report of Eric Allen BSc, MA, regarding seed potato operations. Evidence was given on behalf of the VO in the form of witness statements and oral evidence of Tracy Dearing BA, MRICS, an employee of the Valuation Office Agency.

24. Judge Mole's decision dated 15 May 2014 is admirably clear and careful. He reviewed the history of the agricultural exemption in the rating legislation, beginning with the Public Health Act 1875 and continuing with the Agricultural Rates Act 1896, the General Rate Act 1967 and LGFA 1988. He also considered several reported cases, namely *Purser v the Local Board of Health for the District of Worthing* (1877) XVIII QBD 818, *Smith v Richmond (Inspector of Taxes)* [1899] AC 448, *Gilmore v Baker-Carr* [1962] 1 WLR, 1165, *Grewar v Moncur's Curator Bonis* [1916] SC 764, *Watters v Hunter* [1927] SC 310, *Twygen v Assessor for Tayside Region* [1991] SC 98, *Darlington & Sons v Langridge* [1973] RA 207 and *Johnson v H B Foods Ltd* [2013] UKUT 0539 (LC).

25. Judge Mole said (at [36]) that Parliament must have intended that the function of a market garden does not include the function of a nursery ground. He said (at [37]) that he agreed with Lord Clyde in *Twygen* that the essential element of the function of a market garden is the production of an article – fruit, vegetables or, indeed, mushrooms or other fungi – that will be sold directly or indirectly to a member of the public for consumption. He said (at [39]) that a nursery is where small plants or trees are propagated or sown with a view to selling them to someone else for another purpose, such as the production of timber, fruit or vegetables, or, perhaps, purposes such as landscaping or decoration.

26. Judge Mole concluded (at [40]) that, as a matter of fact and degree, the operations on the Hereditament are not those of a market garden but of a nursery ground.

27. Judge Mole then rejected (at [44]) TTL's argument that the words "anything which consists of" at the beginning of paragraph 2(1)(d) of schedule 5 of the LGFA 1988, which were added in that paragraph to the definition of "agricultural land" previously contained in section 26(3)(a) of the General Rate Act 1967, included buildings. He said that he could not accept that the parliamentary drafter intended to make a fundamental change by that addition while leaving the structure of the rest of schedule 5 broadly unchanged and continuing to retain the different definitions of "agricultural land" and "agricultural buildings".

28. Finally, Judge Mole said (at [46]) that he placed no weight on what were said by TTL to be comparator sites which benefited from an agricultural exemption from non-domestic rates.

**The appeal**

29. The appeal falls naturally into two parts. Mr Gordon Nardell QC, for TTL, addressed us, first, on the issue whether the UT was wrong to hold that the Hereditament is not a market garden because it does not produce mushrooms to be sold directly or indirectly to a member of the public for consumption. The VO does not dispute that, if TTL succeeds on that issue, then the Hereditament is exempt from non-domestic rates. Mr Nardell then addressed us on the issue whether, if the Hereditament is not a market garden but, as the VO contends and the UT held, it

is a nursery, it is agricultural land within para. 2(1)(d) notwithstanding that the operations of the nursery are carried on in the buildings on the Hereditament.

***The Hereditament as a market garden***

30. Mr Nardell said that the question on the first issue is whether the fact that a crop undergoes further cultivation between leaving a hereditament and consumption by the public is fatal to a claim that the hereditament is a market garden within schedule 5 of the 1988 Act. On that point he submitted that the UT was wrong to say that the essential element of a market garden is the production of an article in its final form for sale to the public and, for that reason, the operations on the Hereditament are not those of a market garden because the material which leaves the Hereditament does not comprise mushrooms.

31. Mr Nardell submitted, as is common ground, that there are no reported cases which are binding on this court in determining whether or not the Hereditament is a market garden within schedule 5.

32. Mr Nardell said that TTL did not adopt or support the test formulated by Professor Zellick, which turns on the proximity of the produce of the hereditament to the final stage of production. He submitted that whether or not a hereditament is a market garden depends upon the nature of the activity being carried on and the purpose of the activity. He submitted that, provided the activity is horticulture and the purpose is to put produce on the consumer's table, the hereditament is a market garden irrespective of whether the activity is undertaken on one property or several and irrespective of whether the properties are occupied by the same person or different persons and whether there has been any sale from one or more of such persons to the others. TTL's case is that this is consistent with, and allows for, the development of more sophisticated production processes in market gardens, as demonstrated by the production methods of TTL in the present case.

33. Mr Nardell submitted that such an approach is consistent with a number of the authorities. He referred to a considerable number of them, first those at the level of the House of Lords and the Court of Appeal and then those below that level.

34. The question in *Purser* was whether land used for the production of fruit, vegetables and flowers was a market garden within the meaning of section 211(1)(b) of the Public Health Act 1875, and so liable to be rated at the reduced rate of one fourth of the net annual value of the property, even though there were built on it 16 greenhouses which practically covered the whole of its surface. The Court of Appeal upheld the decision of the Divisional Court that it was a market garden. Mr Nardell drew attention to various passages in the judgement both in the Divisional Court and the Court of Appeal. It is sufficient to mention the statement of Wills J in the Divisional Court (at p. 821) that market gardens and nursery grounds "are places where operations in the nature of gardening are carried on".

35. *Bomford v Osborne* [1942] AC 14 was not a rating case. The issue was whether and how much of the taxpayer's mixed farm of 536 acres should be separately assessed as "gardens for the sale of the produce" under the Income Tax Act 1918 schedule B r.8. Mr Nardell referred to the statement of Lord Simon LC (at p. 18) that "the main test is that the defined area should be subject to that nature and intensity of treatment which is characteristic of horticulture" and (at p.23) that "a 'garden' implies, amongst other things, the use of special and intense methods of cultivation". He also referred to Viscount Maugham's statement (at p. 33) that it is "the character and nature of the operations on the land which mainly determine whether or not it is within the phrase 'gardens for the sale of the produce'".

36. The issue in *Hood Bars v Howard* [1967] RA 50 was whether an apiary and a greenhouse area on a property of about 5.5 acres were exempt from rates as market gardens or, together, a

market garden within section 2(2) of the Rating & Valuation (Apportionment) Act 1928 ("RVAA 1928"). The Court of Appeal held that they were not.

37. Mr Nardell relied on the statement of Willmer LJ (at p. 60) that in "its ordinary meaning 'market gardening' connotes the cultivation of ground for the production of fruit, vegetables and flowers". Mr Nardell also referred to the statement of Sachs LJ (at p. 66) that the words "market garden" in section 2(2) relate simply to an area in which produce is grown, or predominantly grown, for sale as opposed, for instance, to a kitchen garden in which produce is grown to eat in the house to which the garden belongs.

38. *Grewar* was a decision of the Court of Session on appeal from the Land Court. It was not a rating case but a landlord and tenant case, in which the question was whether the land was a market garden within the meaning of the Agricultural Holdings (Scotland) Act 1908 s.26(3)(d). Section 35(1) contained a statutory definition of a market garden as a holding cultivated wholly or mainly for the purpose of the trade or business of market gardening. The land, measuring about 10 acres, was let for the purpose of growing raspberries, which the tenant sold mainly to jam makers but occasionally to fruit dealers. The whole of the ground was planted with raspberry bushes permanently laid out. It was held by the Court of Session that the land was a market garden. Lord Salvesen said (at p.769) that:

"the conception of a market garden is not a legal conception. It depends upon the mode and, and entirely upon the mode, in which the soil is being cultivated."

39. Mr Nardell relied upon *Grewar* as illustrative of TTL's proposition that the mere fact of further processes being undertaken to the produce of the hereditament between leaving the hereditament and being sold the public for consumption does not preclude the land being a market garden. Just as the raspberries in that case were sold to be made into jam so, Mr Nardell said, the sale of unripe tomatoes to be made by the purchasers into chutney would not be inconsistent with the land being a market garden.

40. Mr Nardell contrasted all those cases with ones in which what were produced were seeds or their equivalent, that is to say something which would be used by another person to produce something else.

41. *Watters*, which was a decision of the Court of Session, was a landlord and tenant dispute. The tenant used the property for experimental bulb growing, and the question was whether it was a market garden for the purposes of the Agricultural Holdings (Scotland) Act 1923. If it was a market garden, then the notice given by the landlord was too short. It was held that it was not a market garden within the meaning of that Act.

42. *Darlington* was a decision of the Lands Tribunal on whether rooms in a building were a market garden or gardens or formed part of a market garden within section 26(4)(a) of the General Rate Act 1967. In that case some of the rooms in a building comprising mushroom laboratories were used for the production of mushroom spawn. Mushroom spores were place on a jelly like material made from malt agar in a test tube in which they germinated into a white mould of mushroom mycelium or mushroom spawn. Small pieces of the white mushroom mycelium were placed in a jar of sterilised cereal grains. They grew throughout the jar until each grain of cereal was enmeshed in mycelium. The jars of mushroom spawn were emptied into plastic bags and the bags were taken to a mushroom farm where the mycelium coated grains were mixed into mushroom composts. From those the mycelium grew out into the compost eventually producing mushrooms. The Lands Tribunal held that the rooms were not separately or together a market garden within the statute.

43. *Twygen* was another Scottish case. It was a decision of the Lands Valuation Appeal Court as to whether certain buildings in a technology park in Dundee were exempt from rates as

agricultural buildings within section 7(2) of the Valuation and Rating (Scotland) Act 1956. That provision was in relevantly similar terms to section 2(2) of RVAA 1928 and the question was whether the buildings were a market garden. The buildings were used for the production of seed potatoes by micro-propagation. The potatoes produced by the ratepayer were edible but were not sold for consumption by the public but so as to provide the means by which others might by repeated propagation obtain a crop of potatoes for consumption. It was held that the buildings were not singly or together a market garden. Mr Nardell submitted that, by contrast with the facts of that case, the horticulture carried on at the Hereditament was with a view to producing an article for consumption.

44. I agree with Mr Nardell that all those cases provide, by way of analogy, if not binding authority, a sound basis for saying that a hereditament is not a market garden if the produce of the hereditament is not intended directly or indirectly for consumption by the public but for further processes by a third party to turn them into something different. They are not, however, a sound basis for TTL's broad submission that a hereditament is a market garden if any part of a process of horticulture is carried on there with a view to ultimate consumption by the public even though the produce of the hereditament is not itself, when it leaves the hereditament, an article capable of consumption by the public or indeed intended for consumption by the public.

45. One of the difficulties thrown up by TTL's analysis is that it provides no distinction between nursery ground and a market garden. Mr Nardell submitted that neither the production of an inert substance (such as compost) nor the production of seeds is horticulture. That is an important part of his analysis because, if seed production is agricultural, then the basis on which he distinguishes *Watters*, *Darlington* and *Twygen* from the present case as being analogous to seed production, falls away. If that distinction falls away, then, since Mr Nardell did not suggest that those cases were wrongly decided, the only proper conclusion is that those cases are classic cases of nursery ground as distinct from a market garden and, by way of analogy, the Hereditament in the present case is also more conventionally classified as nursery ground.

46. No evidence was adduced in the UT or the Valuation Tribunal that the production of an inert substance such as compost or the production of seeds is not horticulture and, it would appear, no argument was advanced to that effect. In *J. Beveridge & Co Limited v Assessor for Perth and Kinross* [1968] SC 1, [1967] RA 482, the Court of Session, sitting as the Valuation Appeal Committee, decided the contrary with regard to compost. That was another case in which the issue was whether certain buildings were exempt from rates as a market garden within section 7(2) of the Valuation and Rating (Scotland) Act 1956. In that case buildings forming part of a market garden were used for the cultivation of mushrooms, which were grown in trays filled with an artificial compost. The compost was prepared and pasteurised, prior to the sowing of the mushroom spawn, in sheds forming part of the buildings. The valuation assessor contended that, even if (as the court held) the growing of the mushroom crop was an agricultural operation, the preparation and pasteurising of the compost was not and so the building in which that was carried out should be assessed for rates.

47. The court rejected that contention. Lord Hunter, who gave the only reasoned judgement, agreed (at p.7) with the proposition of the occupier that agriculture and pasturage may properly include operations reasonably necessary to make the produce marketable or disposable for profit. He said that, having held that the growing of the mushroom crop was an agricultural operation, the preparation and pasteurising of the compost in which the mushrooms were to be grown was also an agricultural operation.

48. I see no reason to differ from that analysis. Even if that is wrong, TTL's description of what constitutes a market garden still has the consequence of an extensive, if not complete, overlap between a nursery and a market garden. What is quite clear, however, is that the rating legislation has separately categorised market gardens and nursery grounds since 1875.

Critically, as I shall expand below, that distinction has been one of substance since at least 1928. From that time the legislation has imposed a different rating consequence for market gardens in which all the agricultural operations are undertaken in buildings (exempt from rates), on the one hand, and nurseries in which all the agricultural operations are undertaken in buildings (not exempt from rates), on the other hand.

49. Contrary to TTL's argument, such authority as exists is not only consistent with but strongly supportive of the conclusion that what distinguishes a hereditament which is a market garden from one which is nursery ground is that there are produced on a hereditament which is a market garden such articles as fruit and vegetables for sale and for consumption directly or indirectly by the public whereas the produce of a nursery is not suitable for, or not intended for, public consumption without some further process. Inevitably, there will some cases at the margins where the distinction between a market garden and nursery ground is not entirely straightforward. To that extent, as the UT said, the question is one of fact and degree.

50. On proper analysis, none of the cases relied upon by Mr Nardell provide sound support for TTL's test for what constitutes a market garden and which results in a substantial, if not complete, overlap between a market garden and nursery ground.

51. In *Purser* the ratepayer produced on the hereditament fruit and vegetables for sale. Neither the judges of the Divisional Court nor the Court of Appeal held that the hereditament was both a market garden and nursery ground even though they considered both types of hereditament. They held that it was a market garden.

52. In *Bomford* the only question was whether the land in question was, for the purposes of the Income Tax Act 1918, farming land or gardens for the sale of the produce. The House of Lords held that the distinction turned on the nature and intensity of the methods of cultivation. The case did not consider the meaning of "market garden" and had no bearing on the distinction between a market garden and nursery ground.

53. The passages in the judgements of Willmer LJ and Sachs LJ in *Hood Bars* relied upon by Mr Nardell are equally consistent with the distinction between a market garden and nursery ground which I have described. The decision that the apiary and the greenhouse area in that case were not separately or together a market garden did not turn on that issue at all. So far as concerned the apiary, it turned on the absence of any authority that keeping livestock such as bees was capable of amounting to market gardening, and also on the fact that the so-called apiary comprised an area of some 6000 square yards which was uncultivated save for some 200 or 300 square yards where there were a couple of beehives. So far as concerned the greenhouse, the court concluded on the facts that the greenhouse could not be seen as something to be isolated from the rest of the grounds or treated as a separate entity and was merely ancillary to the occupation of the ratepayer's house.

54. *Grewar* is entirely consistent with, and authority for, the description of a market garden that I have given. As Mr Singh, for the VO, pointed out, the fruit produced on the hereditament in that case was consumable raspberries. Lord Salvesen said (at p.768) that "a market garden is a piece of ground on which fruit or vegetables or flowers, or any one or more of those classes of produce, are cultivated for profit". *Grewar* is authority for the proposition that a property is not precluded from being a market garden merely because its produce, if suitable for consumption by the public, is intended to be turned into something else such as jam equally suitable for consumption.

55. On their facts, *Watters*, *Twygen* and especially *Darlington* are closer to the present case than any of the others relied upon by Mr Nardell and provide clear support, by way of analogy, to the distinction made by the UT in the present case between market gardens and nursery ground. In *Watters* the Lord President (Lord Clyde) said (at p. 317) that "the trade or business of a

market gardener is … the trade or business which produces the class of goods characteristic of a green grocer's shop, and which in ordinary course reaches that shop via the early morning market …".

56. As Lord Clyde's statement highlights, the sale of a consumable product in a market is an important facet of the notion of a market garden. In the present case, the produce which leaves the Hereditament is neither consumable nor for sale directly or indirectly to the public.

57. TTL has emphasised in this court and below that schedule 5 of the LGFA 1988 is to be interpreted as "continually speaking", that is to say as applying to agricultural techniques as they have developed over time. Reference was made in TTL's skeleton argument in that regard to the speeches of Lord Bingham and Lord Steyn in *R (Quintavelle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687, and to Bennion on Statutory Interpretation (6th ed) (at Code 288, p. 797).

58. The issue of whether or not the Hereditament constitutes a market garden within schedule 5 has, however, nothing to do with the development of agricultural methods in modern times. It is to do with whether the legislation makes a substantive distinction between nursery ground and market gardens and, if so, what that distinction is and how it applies on the facts of the present case. TTL's test is flawed because it does not acknowledge that there is any such distinction if horticulture is being undertaken on a hereditament with a view to ultimate sale for consumption by the public, irrespective of how many processes have to be undertaken in the future after leaving the hereditament, on however many other properties and by however many different occupiers.

59. That is not only inconsistent with the legislative intent to make a substantive difference between the treatment of buildings on market gardens and on nursery grounds and is inconsistent with the general thrust of the cases, but it results in much greater uncertainty and complexity in the practical application of the legislation than the concept of a market garden where the hereditament produces an article suitable and intended for consumption by the public. TTL's test turns on being able to identify the precise moment when horticulture begins. It also turns on the intent and contemplation of the occupier as to what will happen to the produce in the future at the end of a chain of production, potentially on any one of a number of different properties and as the result of what may or may not be done by potentially different occupiers of those other properties. It seems unlikely that Parliament would have intended the implementation of rating legislation to depend on such speculative matters.

60. The Phase III produce of the Hereditament was not in a form intended to be, or able to be, consumed by the public but was intended to be subject to further processes on a different hereditament before being capable of such consumption. The UT was correct to hold that, for that reason, the Hereditament is not a market garden, but rather is nursery ground, for the purposes of schedule 5 of the LGFA 1988.

***The Hereditament as nursery ground***

61. I turn to the second part of the appeal, namely whether TTL is correct in its contention that the Hereditament, as nursery ground, is exempt from rates because it falls within paragraph 2(1)(d) of schedule 5 even though all the agricultural operations are undertaken in buildings. In support of that contention TTL contends that the words "anything which consists of" at the beginning of paragraph 2(1)(d) are to be read literally. Mr Nardell highlighted that those words are different from the introductory words in the other sub-paragraphs in paragraph 2(1).

62. Mr Nardell submitted that this interpretation of paragraph 2(1)(d) does not make paragraph 3(b) otiose. He said that both paragraph 3(a) and paragraph 3(b) are directed to requiring that the building must have a function which is ancillary to the agricultural operations specified there.

In that connection, Mr Nardell referred to and relied upon *Gilmore v Baker-Carr* [1962] 1 WLR 1165 and *W & JB Eastwood Ltd v Herrod* [1971] AC 160.

63. In TTL's skeleton argument for this appeal, and initially in Mr Nardell's oral submissions, TTL's case was that the words "anything which consists of" in paragraph 2(1)(d), which were not be found in the previous rating legislation, effected a change in that, as Mr Nardell put it, they "rehabilitated" *Purser*. Subsequently in his oral submissions, Mr Nardell acknowledged that, since the provisions of paragraph 3 of schedule 5 of LGFA 1988 are not materially different from the definition of "agricultural buildings" in section 2(2) of RVAA 1928 (and on the basis that they have the limited purpose which he ascribes to them) but the courts have consistently treated buildings covering market gardens as exempt, his argument has to be that the words "anything which consists of" in paragraph 2(1)(d) merely state expressly what was always implicitly provided in the definition of agricultural land in RVAA 1928 and subsequent rating legislation.

64. That is, with all due respect to Mr Nardell's skilful advocacy, an impossible contention. Despite TTL's arguments to the contrary, I consider that it is clear that the rating legislation has made a distinction between agricultural land and buildings since the Agricultural Rates Act 1896. The contrast between them lay at the heart of the reasoning in *Smith v Richmond* [1899] AC 443 (HL), [1898] 1 QB 683 (CA), where it was held that under the terms of the Agricultural Rates Act 1896 a plot of land of about 4 acres on which were erected some 57 greenhouses used for growing vegetables and grapes was not a market garden and so not agricultural land, and where *Purser* was distinguished as turning on the different provisions of the Public Health Act 1875.

65. The rating legislation has also made a clear distinction between agricultural land and agricultural buildings since RVAA 1928. In *Gilmore*, a case under the provisions of RVAA 1928, Lord Denning MR said (at p.1172) that the legislation drew a clear distinction between "buildings" and "land" and those terms were mutually exclusive just as they were in *Smith v Richmond*. In *Eastwood*, another case under RVAA 1928, Lord Reid said (at p.167) that:

> "the definition [of agricultural buildings] assumes what has long been recognised when dealing with English rating statutes, namely, that agricultural land does not include the sites of agricultural buildings and that agricultural buildings include the land on which they are built".

66. The distinction between agricultural land and agricultural buildings is made clear in schedule 5 of the LGFA 1988 not merely in paragraph 3 but also in paragraphs 4 to 7, in each of which specific conditions are specified for a building to qualify as an agricultural building.

67. Both Mr Nardell and Mr Singh referred us to statements made in committee in the House of Commons in 1928 by Mr Chamberlain, then then Minister of Health, about the exemption for buildings on market gardens in the bill that subsequently became RVAA 1928. Both Mr Nardell and Mr Singh accepted that those statements do not fall within the principle of *Pepper v Hart* [1993] AC 593 and it is, therefore, unclear to me on what basis it was thought appropriate to refer to them.

68. In *Eastwood* (at p.172) Lord Reid explained as follows the reason for the express reference to "buildings … being or forming part of a market garden" in the definition of "agricultural buildings" in section 2(2) of RVAA 1928:

> "In the case of an ordinary farm the agricultural operations are those carried on outside the buildings, and the use of the buildings must be in connection with those operations. But market gardens commonly include glass-houses. They may be so extensive that the only agricultural operations in the market garden are those carried on in those buildings. And, even where crops are also grown outside, the use of the glass-houses is often not in connection with the agricultural operations on the land outside."

69. That is consistent with the VO's case that the exemption for buildings on market gardens is to be found in what is now paragraph 3(b) of schedule 5 of LGFA 1988.

70. There is a further reason why it is clear that Parliament cannot have intended to extend to nursery ground the exemption for market gardens wholly comprising buildings by the words "anything which consists of" in paragraph 2(1)(d) of schedule 5 of LGFA 1988. If that had been the intention, either paragraph 3(b) would have been deleted or the words "or nursery ground" would have been added after the two references to "market garden" in paragraph 3(b). On any footing, Parliament would undoubtedly have signalled far more clearly in the wording of the statute, and possibly in public statements, the important change in a consistent legislative policy since 1928.

71. There is no obvious explanation as to why Parliament intended that LGFA 1988 and indeed its predecessor legislation since 1928 should confer exemption for rates on market gardens where all the agricultural activities are carried on in buildings but not confer such exemption on nurseries where all the agricultural operations are carried on in buildings. I agree with the UT, however, that the statutory distinction between their treatment is perfectly clear and unambiguous.

72. It is also not entirely clear why it was thought necessary to include the words "anything which consists of" at the beginning of paragraph 2(1)(d). The inference must be that it was thought desirable to clarify that the land mentioned there would not cease to be agricultural land merely because of the presence of structures, however substantial or numerous, not amounting to a building or buildings.

73. TTL relied before the UT on a number of so-called "comparator" sites in support of the proposition that prior to and following LGFA 1988 it was normal rating practice for nursery grounds under cover to be treated as exempt from rates. The UT placed no weight on them. In his oral submissions Mr Nardell accepted that the comparator sites are of limited value. Judge Mole said, in relation to them, that every case is different and there was dispute about important facts concerning the circumstances of those sites which he was in no position to resolve. He was entirely right to place no weight on them. Like the President of the Lands Tribunal (George Bartlett QC) in *Gallagher v Church of Jesus Christ of Latter-Day Saints* [2006] RA 1 at [49], when faced with a similar argument, I cannot see that such evidence assists in this dispute about statutory interpretation.

74. I agree, therefore, with the UT that the buildings covering the Hereditament, being a nursery, do not fall within the definition of "agricultural buildings" in paragraph 3(b) of schedule 5 of LGFA 1988 and the Hereditament itself, being covered by buildings, is not agricultural land within paragraph 2(1)(d) of schedule 5.

**Conclusion**

75. For all those reasons I would dismiss this appeal.

**LADY JUSTICE RAFFERTY**

76. I agree

**LADY JUSTICE KING**

77. I also agree.