Neutral Citation Number: [2008] IEHC 73

THE HIGH COURT

2006 No. 70 SS

IN THE MATTER OF A CASE STATED PURSUANT TO SECTION 39 OF THE VALUATION ACT, 2001 AND IN THE MATTER OF THE VALUATION OF THE FOLLOWING PREMISES: VALUATION TRIBUNAL APPEAL NUMBER VA05/01/008 – PROPERTY NUMBER 933808, NANGLES NURSERIES, CARRIGROHANE, BALLINCOLLIG, COUNTY CORK.

BETWEEN

NANGLES NURSERIES

APPELLANT

AND

COMMISSIONERS OF VALUATION

RESPONDENT

Judgment of Mr. Justice MacMenamin delivered the 14th day of March, 2008.

Introduction

1. This is an appeal by way of case stated, primarily against a determination of the Valuation Tribunal that an area of 2.5 acres in a total area of 3 acres in the Nangle's premises at Carrigrohane, Ballincollig, County Cork, was land developed for horticulture and thus was property not rateable. The case stated is, apparently, the first pursuant to s. 9 of the Valuation Act, 2001 ("the Act of 2001" or "the Act").

2. Pursuant to s. 39, sub-section (5) of the Act it is the duty of the court to hear and determine any question or questions of law arising on the case, and where necessary to reverse, affirm or amend a determination, or if necessary, to remit the matter to the Tribunal with the opinion of the court thereon. This case stated is brought on the application of the Commissioners of Valuation (the Commissioners) against certain determinations made in relation to the Nangles premises aforesaid. The parties in the title are named and identified in accordance with their standing before the Valuation Tribunal. To avoid confusion the parties are hereinafter referred to by their appropriate name, that is to say "Nangles", "the Commissioners" and "the Tribunal".

3. In order to understand the issues which arise in this case it is necessary to describe the relevant lands and to consider the circumstances in which the appeal arises. The old valuation of the lands in question was €19.05. In a determination published on 15th June, 2004, the Commissioners revised the valuation to €120, obviously a substantial increase. The oral hearing of the appeal against this determination before the Valuation Tribunal took place on 1st March, 2005 before Mr. Fred Devlin, FCS, FRICS, Chairman of that Tribunal division, Mr. Joseph Murray, Barrister at Law, and Mr. Maurice Ahern, Valuer. The Tribunal heard evidence from Mr. Ronan Nangle, director of the company and Mr. Terence Dineen, a valuer, on behalf of the Commissioners.

The Nangles' premises in Carrigrohane

4. The property concerned is described as a nursery/garden centre. It occupies a three acre site, now on the outer fringes of Cork City, at the junction of the Carrigrohane and Model Farm Roads. The property has been occupied by Nangles Nurseries, a family firm, for over 50 years. It is held under a 10-year lease from 1996 at a rent of €50,000 per annum. In recent years certain buildings on the land were constructed by the Nangle family comprising: (a) an office of 55.56 sq.m.; (b) a shop of 167.14 sq.m.; (c) a store of 152.36 sq.m.; (d) a container store of 29.52 sq.m. The remainder of the site, excluding the building curtilage, is used for the purposes of the business. Originally the enterprise specialised in rose production. There was no retail element. Gradually over the years there evolved a retail dimension to the business. The Nangles specialise in selling mature specimen plants, trees, instant hedging, and screening.

5. The Nangles operate another nursery farm in Aherla, County Cork. This is an area of some 60 acres, which the Commissioners accept is non-rateable. There was no material in the case stated before the court as to the precise wholesale/retail breakdown of the business of the nursery at Aherla, or as to why, exactly, one undertaking was deemed rateable in contrast with the other.

6. In the subject premises, up until late 2003, a shop unit was housed in a converted shed with one tiny office. It was described as a horticulturally-based retail unit. There the company sold seed potatoes, lawn fertiliser, onion sets, summer bedding and garden chemicals. Towards the end of 2003 the Nangle family made improvements to the retail section, built the offices, and created the storage area. A larger range of horticultural products are now stored, including pots and garden ornaments. The Nangles say the primary function of the site is in its function as a nursery, that is to say, the propagation and maintenance for sale of specimen plants to architects, designers, landscapers, construction companies, golf courses and private clients. The company also carries large quantities of single types of plants popular with landscapers. Also contained in the site is a garden centre containing plants, holding bays and two heeling-in frames as well as plastic 'tunnels' and a potting area. Pedestrian paths are provided. These permit customers to traverse the site in order to select the required plants or products.

7. Counsel for the Commissioners laid emphasis at the hearing before this Court on evidence that all the trees, bushes and plants in the Carrigrohane nursery are bought in and either potted or planted in the ground or for display purposes pending sale. These trees and plants are not grown from seed on that site. Between initial delivery and disposal, perhaps a period of several years, the various plants and trees are continuously tended so that they continue to flourish. Periodically the plants and shrubs are re-potted as necessary and are held either in the 'heeling-in' frames or in holding bays. Plants in the holding bays remain in pots, while those in the 'heeling-in' frames are embedded by the heel of a gardener's boot in the soil and there remain until sold. Bamboo plants are held in a plastic covered tunnel, or in holding frames appropriate to their size and nature. While no specific findings of fact were made by the Tribunal, no dispute arises on the matter which has been identified as being the facts upon which the Tribunal reached its ultimate determination.

8. The constructions on the land are basic. They are said to be of little commercial value. The shop and other ancillary buildings, with the exception of the store used solely for storing machinery and implements in connection with nursery activities, are generally used for the sale of garden products.

9. Written submissions were filed by Nangles Nurseries and the Commissioners and were adopted by them in the course of the Tribunal hearing. Ultimately, having heard evidence as to fact, and submissions on the law, the Tribunal concluded in a detailed determination that (a) the lands excluding the buildings were lands developed for horticulture and thus not rateable; (b) the container store was a 'farm building' and thus not rateable; and (c) the other buildings were rateable. This latter finding is not challenged.

Issues for determination
10. The matters for determination by this Court are whether the first determination (a) was correct in fact and law, and whether the Tribunal was entitled to adjudicate on (b), that is in relation to the container store when that issue had not been raised either in the notice of appeal or the appeal hearing.

11. With regard these findings which are now challenged, counsel for the Commissioners submits that the Tribunal erred as follows:

> - First, in concluding that the lands were a nursery. Alternatively, the conclusion that the lands were a nursery was one no reasonable tribunal could have come to in the light of the evidence;
>
> - second, it is contended the Tribunal posed itself the wrong question. It asked itself: "Is it a nursery and therefore exempt from liability from rates?", whereas, in order to gain exemption with the ambit of the Act, counsel submits there is a twofold test – not only must the premises be a nursery, but in addition they must not be "used for the sale or processing of horticultural produce".
>
> - third, it is contended that the Tribunal erred in concluding that "a nursery must provide a facility for inspection by would-be purchasers"; and
>
> - fourth, in holding that the Valuation Act, 2001 had not changed the law with regard to this type of land holding.

Relevant provisions of the Act
12. The preamble to the Valuation Act, 2001 states that it is, *inter alia*, an Act to revise the law relating to the valuation of properties, for the purposes of the making of rates in relation to them and *to make new provision in relation to the categories of properties in respect of which rates may not be made and to provide for related matters*. An objective of the Act therefore, is as the preamble says, to re-cast or review the categories of properties *not* liable for rates, that is those which are to be exempt from liability. These categories are not further identified in the preamble.

13. By virtue of s. 15, it is provided (subject to a number of immaterial conditions) that 'relevant property' is to be rateable. At s. 15(2) it is provided that by way of exemption:

> "Subject to sections 16 and 59 relevant property referred to in Schedule 4 shall not be rateable."

14. It is now necessary to consider the relevant definitions which arise in this case stated in their statutory context.

Exempt user
15. The starting point for this analysis must be the schedule to the Act. In schedule 4, among the categories of property deemed not rateable is:

> "… 2– land developed for horticulture"

It is necessary to analyse the literal meaning of the definitions which are contained in both the schedule and the body of the Act itself in order to clearly identify all the relevant elements. However, pausing at this part of the definition, clearly the term 'horticulture', originally a sub-category of 'agriculture', is used in a broad generic way. It is not confined or qualified by any restrictive adverb such as 'exclusively' or 'solely' prior to the words 'for horticulture'. However, such restrictive or qualifying words are to be found in the same schedule in regard to other types of property identified as being exempt. (See paragraph 7, "public religious worship"; paragraph 15, "community halls"; paragraph 16, "charitable organisations"; paragraph 17, "societies for the advancement of science, literature, paragraph 19, "buildings used by members of the Oireachtas or representatives in the European Parliament". Thus, restrictive terms can be seen frequently employed in the schedule and other parts of the Act. When certain premises, otherwise rateable are to be rendered exempt, the circumstances of such exemption are clearly identified, and where so qualified or restricted such qualification is described, or circumscribed. In cases of potential 'mixed use', as defined in the Act, any ambiguity is similarly obviated by the application of the term 'exclusively'.

16. This precision in the Act is not confined to activities described in the schedule. The same type of phraseology is also found in the definition section of the Act (section 3). To take one relevant example, exempt 'farm buildings' are, *inter alia*, there described as meaning:

> "… the buildings, parts of buildings, or other structures occupied together with land developed for horticulture or forestry and used solely in connection with the carrying on of horticultural or forestry activities, as the case may be on that land, …" (emphasis added)

17. Then there is an exception to these identified exempt farm buildings as defined:

> "other than –
>
> (i) …
>
> (ii) … buildings, *parts* of buildings or other structures used for the storage of agricultural, horticultural or forestry goods not produced on the land attached to such buildings or structures or
>
> (iii) *buildings, parts* of buildings, or other structures, used in the processing or sale of agricultural, horticultural or forestry goods (whether produced on the land attached to such buildings or structures or not) or used for saw mills or the carrying on of activities necessarily related to the activities of saw mills …" (emphases added)

The section therefore sets an exception whereby farm buildings are not to be exempt, that is where used in *processing or sale* of horticultural goods, whether produced on land attached to such buildings or structures or not.

18. Later in the same section (s. 3), "land developed for horticulture" is defined as:

> "… land used for market gardening, nurseries, allotments or orchards, *other* than land or buildings, or parts of buildings,

used for the *sale or processing* of horticultural produce;" (emphasis added)

19. This provision requires close analysis in conjunction with s. 15(2) and schedule 4. Taken together, these constitute the manner in which the Act identifies exempt categories of activity relevant to this case stated.

20. It will be seen that in relation to s. 3, the exempt category of activity is identified, as in the case of 'farm buildings', followed by has been termed in argument an 'exception' to be made in the case of land or buildings or parts of buildings used for the sale or processing of horticultural products. However, it is necessary to closely analyse each part of the definition sections of the Act in order to ascertain whether (as averred by the Commissioners) there is one single exempt category or whether there is an exempt category to which there is an exception, or a subtraction, identified by the words after 'other than'…"

21. Looking again to the context of the definition, other forms of precise terminology can be found in further descriptions in s. 3 which contain definitions of "mixed premises", "domestic premises" and "farm buildings" where terms of restriction or qualification "wholly" or "partly" are used.

22. Thus, throughout the Act there are drawn terms of restriction or exclusion, by the deployment of terms such as "exclusive", "sole", "mixed" and "partly".

23. Taking all the relevant provisions together, "land developed for horticulture" is to be defined as being land or buildings used for the purpose outlined earlier, that is market gardening, nurseries, allotments, or orchards other than that for the sale or processing of horticultural produce. It is important to note that, by way of distinction from the definition of 'farm buildings', there is no proviso as to the location or connection of such lands to other activities. Nor is there any term of restriction or exclusion.

24. Prior to further analysis of these provisions and the facts of the case, it is necessary to move to two other areas. The first of these is the legal authority which this Court must apply on issues of fact and law in a case stated of this type. The second is as to the principles of interpretation applicable to the relevant statutory provisions.

25. In consideration of the first issue there is no controversy. A court should be slow to interfere with the decisions of an expert tribunal, such as the Valuation Tribunal, to which the principle of curial deference applies. It may only do so on the basis of an identifiable error of law or unsustainable finding of fact, that is to say a finding a fact for which there is no evidential basis. (See *Mara v. Hummingbird Limited* [1982] I.L.R.M. 421; *Henry Denny & Sons (Ireland) Limited v. The Minister for Social Welfare* [1998] 1 I.R. 34; *Premier Periclase Limited v. Commissioner of Valuation*, The High Court, Unreported, 24th June, 1999, Kelly J.

Principles of interpretation

26. The statute under consideration is, obviously, for the purpose of rating. It is to be strictly interpreted. It is subject to the same general principles of interpretation as a taxation or penal statute.

27. Certain general principles of interpretation of a taxation or penal statute were considered in *The Revenue Commissioners v. Doorly* [1933] I.R. 750 where Kennedy C.J. observed:

> "The duty of the court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the Taxing Act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms, on the alleged subject of taxation, for no person or property is to be subjected to a taxation unless brought within the letter of the taxing statute, i.e. within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to Acts of Parliament so far as they can be applied without violating the proper character of Taxing Acts to which I have referred."

The Chief Justice then referred to provisions which created an exemption from liability:

> "I have been discussing taxing legislation from the point of view of the imposition of tax. Now the exemption of tax, with which we are immediately concerned is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes, […] *The court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, excepts for some good reason from the burden of a tax thereby imposed generally on that description of subject matter*. As the imposition of, so the exemption from, the tax must be brought within the letter of the Taxing *Act as interpreted by the established canons of construction so far as applicable.*" (emphasis added)

28. These important and relevant observations the latter emphasis as important as the former, were endorsed by the Supreme Court within the last ten years in the case of *Saatchi and Saatchi Advertising v. Megarry* [1998] 2 I.R. 562 and applied to the law of rating by the High Court (Ó Caoimh J.) in *Slattery v. Flynn* [2003] I.L.R.M. 450. Ó Caoimh J. concluded:

> "… insofar as the Act of 1978 [Local Government (Financial Provisions) Act, 1978] is an Act giving relief, the Act must be construed against the ratepayer insofar as any ambiguity is concerned."

It is important to emphasise that these observations are to apply only where there is ambiguity. But if there be such ambiguity in a relieving or exempting section it is to be construed against the rate payer. One issue for determination in the instant case is to define the parameters of precisely what is the "exempting section".

29. Counsel for the Commissioner submits that applying these same principles to the Act, the charging provision, i.e. s. 15(1) which specifies that, (subject to certain other provisions), relevant properties shall be rateable, is subject to s. 15(2), which identifies exemptions where "relevant property referred to in Schedule 4 shall not be rateable". Thus, it is submitted, in order to avail of an exemption the appellant is bound to establish that the exemption applies "clearly and without doubt and in express terms".

30. It will be recollected that the preamble to the Act identifies the purpose of the Act which is to make 'new provision' in relation to the categories of land which are to be exempt. This rather negative form of definition therefore implies that there is to be a new identification of lands which are to be rateable.

31. In the context of the Valuation Act, 1986 Finlay C.J. commented in *Kinsale Yacht Club v. Commissioners of Valuation* [1994] 1 I.L.R.M. p. 463:

> "I am satisfied that the statutory provision in the 1986 Act cannot, of course, with any precise use of words be described as either a taxation or penal statute. It does, however, having particular regard to the phrase used in section 2 of the 1986 Act that categories of fixed properties specified in the Schedule inserted by that Act shall be deemed to be rateable hereditaments in addition to those specified in section 12 of the Act of 1852, constitute a platform or necessary statutory precondition intended to lead to 'the fresh imposition of liability' in the meaning of those words as contained in the judgment of Henchy J. I see no logical reason therefore why these statutory provisions should not receive from the court the strict interpretation referred to in that judgment."

32. It is legitimate to observe that the Act of 1986 now repeated which extended liability to rates to certain categories of land and premises did so in an entirely straightforward manner containing in a schedule identified categories of land to be rendered rateable. This was phrased in a positive fashion.

33. Finlay C.J. in the course of the passage referred to above was referring to Henchy J. speaking for the Supreme Court in *Inspector of Taxes v. Kiernan* [1982] I.L.R.M. 13, where, at p. 15 of that report that judge stated:

> "… when a word or expression is used in a statute creating a penal or taxation liability, then if there is looseness or ambiguity attaching to it, it should be construed strictly so as to prevent the fresh imposition of liability from being created unfairly by the use of oblique or slack language."

Thus, where the word or expression creates a liability, if there is looseness or ambiguity in its phraseology it is to be construed strictly (as in the case of rating liability) so as to prevent a fresh imposition of liability being created unfairly by the use of oblique or slack language.

34. In the course of the same judgment Henchy J. observed:

> "A word or expression in a given statute must be given meaning and scope according to its immediate context, with the scheme and purpose of the particular statutory pattern as a whole and to an extent that will truly effectuate the particular legislation or a particular definition therein."

35. I consider both of these observations are of considerable assistance in the present context where, as here, it is suggested that there is an imposition of a new liability. I interpret the effect of the first quotation as being if there is looseness or ambiguity in the provision it is to be construed strictly to prevent a fresh imposition being created unfairly. The manner of unfairness identified by Henchy J. is by the use of oblique or slack language.

36. With regard to the second quotation it is clear that the process of interpretation of the statute must take place in accordance with the statutory pattern as a whole, that is the statutory pattern of the Act of 2001. See *McCann v. O Cualachain* [1986] I.R. 196 and *Crilly v. Farrington* [2001] 3 I.R.

37. As a further aid to interpretation also relevant in this case there is a helpful quotation from Finlay CJ. in *McGrath v. McDermott* [1988] I.R. 258 where he observed that:

> "[The court may resort] … in any case of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be considered with it."

38. The Act of 1986 does not come within this category of other statuettes as it is expressly repealed by the Act of 2001. It is not in any case legitimate for a cover in interpreting a taxing Act to use antecedent legislation otherwise than for the purpose of deducing an intention to impose or not to impose a tax on a particular subject. Other than the observation already made on the 1986 Act therefore, no further response can be made to it.

39. I would therefore summarise the principles which are applicable in an interpretation of this statute in the light of these authorities as follows:

> (1) while the Act of 2001 is not to be seen in precisely the same light as a penal or taxation statute, the same principles are applicable;
>
> (2) the Act is to be strictly interpreted;
>
> (3) impositions are to be construed strictly in favour of the rate payer;
>
> (4) exemptions or relieving provisions are to be interpreted strictly against the rate payer;
>
> (5) ambiguities, if they are to be found in an exemption are to be interpreted against the rate payer;
>
> (6) if however there is a new imposition of liability looseness or ambiguity is to be interpreted strictly to prevent the imposition of liability from being created unfairly by the use of oblique or slack language;
>
> (7) in the case of ambiguity the court must have resort to the strict and literal interpretation of the Act, to the statutory pattern of the Act, and by reference to other provisions of the statute or other statutes expressed to be considered with it.

40. I have considered whether s. 5 of the Interpretation Act, 2005 is of assistance in the process of interpretation of these provisions. I do not think it provides further assistance in the present context. Whether or not the provisions under consideration are provisions that relate to "imposition of a penal or other sanction" (see s. 5(1) of the Act of 2005), I consider that it is clearly established on authority that the principles outlined earlier are those applicable.

41. However, I do consider that in the interpretation of this statutory provision the court should apply two further principles identified by Bennion in *Statutory Interpretation*, Butterworths, 2002, where he observed:

> "Where upon investigating a grammatically ambiguous enactment it appears that the interpretative factors all point in favour of one of the opposing constructions and against the other, the doubt is to be resolved in favour of the first

construction, it is to be presumed that an absurd result is not intended."

42. That "relevant property" is to be rateable is clearly established by the charging provision in the Act, that is s. 15 already referred to. This is subject to s. 15(2) which deals with exemptions to such liability. This in turn provides that property referred to in schedule 4 of the Act shall be exempt.

43. One must then look to the schedule and the definition in s. 3 already outlined. In the schedule what is deemed not rateable is "land developed for horticulture" Taking this part of the definition in isolation there is no ambiguity. Applying the principle outlined by Chief Justice Kennedy in *Doorly*, if there had been an ambiguity it would be necessary for it to be resolved against the rate payer. Furthermore, on a consideration of the schedule elsewhere where the Act sought to restrict the purview of an exempt category it did so explicitly by reference to the terms of restriction outlined earlier. No such limiting adjective is applied in the case of horticulture. Nor is there to be found anywhere in the Act an exemption for lands used "*solely for horticulture*". Thus, taken alone, the exempt category is unambiguous insofar as it is defined in the schedule. Reference to s. 3 of the Act, however, creates greater difficulty. "Land developed for horticulture" is defined in s. 3 as being:

> "… land used for market gardening, nurseries, allotments or orchards other than lands or buildings or parts of buildings used for the sale or processing of horticultural produce."

The question then arises as to whether the general 'exemption' which has been created in the Act is one exemption or two. Do the words after 'other than' constitute an additional category or a division of the first 'genus' of market garden etc. If there is one exemption and were it to be simply ambiguous then such exemption might fall to be interpreted against the rate payer. Are the provisions taken together in fact ambiguous? And if so, what are the consequences?

44. For the purposes of interpretation it is helpful to therefore enquire whether the provisions taken together constitute (a) one entire composite relieving provision or alternatively (b) a relieving provision with exceptions.

One collective relieving provision

45. This is the position adopted by the Commissioners. If it is ambiguous they contend the liability should fall upon the rate payer. The inexorable logic of their position, on the facts, is that they must contend for ambiguity.

46. On any interpretation, if indeed there is one collective relieving provision, the effect of the words after "other than" is quite radical. Ultimately, the logic of the position is that lands used for market gardening, nurseries, allotments or orchards if used for sale or processing of horticultural produce (what is stated to be an exemption for a whole category of activity) may not be not an exemption at all, if sale or processing of horticultural produce takes place on such lands or buildings. But if this is so, it creates not a simple ambiguity but a paradox, in that, on any common sense definition of the terms (or by reference to dictionary definitions) nurseries, or market gardens are places where plants or trees are reared for sale or transportation (the concise Oxford Dictionary of Current English defines "nursery" as being:

> "A place where plants, trees, etc. are reared for sale or transportation.")

Thus, the activity of selling itself cannot be a distinguishing feature. It is inherent in the activities.

47. To interpret each of the activities identified into one single exemption would be to raise the question as to when and in what circumstances exemption may be claimed at all. The effect would be arbitrary.

48. On a common sense interpretation, all or any market gardens or nurseries may engage in sales as being some part of their activity. As a matter of common sense, such market gardens and nurseries also at some stage bring in plants or seeds for the purpose of propagation and cultivation. Thus the term 'rearing' as in plans adds little to the definition.

49. In the course of argument a number of hypothetical instances were considered as to the consequences were the Commissioners' interpretation to apply. First, it would lead to widespread uncertainty. It would be surely extremely difficult, if not impossible, for any person engaging in horticultural activity to be certain of their liability for rates. Would their situation be altered if they engaged in any sale in their nursery or market garden? Would liability for rates be based alternatively on what might be an extreme interpretation of nursery or market garden based on the rearing of plants? This is not a distinction to be found in the Act. As a further possibility would liability depend on the extent of sale, which might be the activity of any market gardener or nursery owner placing their produce on sale on their own lands in the summer, even for a limited period of two to three weeks.

50. It is difficult to avoid the conclusion that any such interpretation could give rise to an unworkable and impractical consequence rendering certainty impossible.

51. The consequence might be to impose a liability for rates based on factors such as scale or intensity or location of horticultural activity rather than such liability being established as a matter of statutory definition.

52. The weakness of this interpretation is also surely demonstrated because ultimately it may well depend upon findings of fact made by the Tribunal, not law. I would add parenthetically that, insofar as there has been any finding of fact by the Tribunal on the activities in Nangles Nursery – an issue not disputed or in issue at the hearing – no basis has been established whereby it should be either disturbed or reversed in the course of the hearing before this Court.

53. A further consequence of the "composite" interpretation would be if the proviso as to sale or processing of horticultural produce undermines the effect of the entire exemption, such interpretation might well be considered as constituting, or giving rise to an absurdity, and the court must lean against such interpretation. But a number of further features arise.

54. Firstly, it is a noteworthy feature of this case that the Tribunal records evidence that Nangles operate another nursery in more rural Cork, in Aherla, extending to some 60 acres, which the Commission has always accepted as not rateable. The rhetorical question which may be posed is why is this so? If in fact one of the defining criteria underlying this determination by the Commissioners is the enhanced value of the subject premises as a result of urban expansion, or the balance of retail versus wholesale activity, neither of these issues is statutorily recognised.

55. Turning the to objectives of the Act as identified in the preamble it is clear that the object of the Oireachtas was to make *new provision in relation to the categories of properties in respect of which rates may not be made*. By necessary implication therefore an objective of the Act is to identify new categories of liabilities. However, this is of particular significance in the light of Henchy J.'s

observations in *Kiernan* referred to earlier. If the effect of the "composite" and entire exemption is to impose a new liability in the case of sale or horticulture then the statutory methodology adopted is nothing less than oblique. Liability for rates should not be reliant upon a series of reducing definitions resembling a Russian doll, each one opening to reveal a yet smaller category.

56. It noteworthy that in the case of *Kinsale Yacht Club* Finlay C.J. considered what might be the situation in the event of there being an inconsistency of language in a rating statute giving rise simultaneously to an apparent liability and exemption for rates. A similar position of apparent inconsistency arose in the *Kinsale Yacht Club* case, but was resolved by reference to other provisions of the Act of 1986.

57. In the course of his judgment in that case the then Chief Justice said:

> "I accept that such an inconsistency exists and if the issue before this Court was an assertion on behalf of the Commissioner that a particular property was deemed to be a rateable hereditament under reference No. 1, although it appeared capable of being exempted under reference No. 2, the question of ambiguity would very clearly arise and different considerations would apply to such a case [than] in my view apply to the present case."

58. In *Inspector of Taxes v. Kiernan* [1981] I.R. 117, the Supreme Court had referred to the necessity, in construing the statute creating penal or taxation liability, for a strict interpretation which would prevent the imposition of liability from being created unfairly "by the use of oblique or slack language". Accordingly, if the Commissioners of Valuation seek to bring a category clearly excluded from liability for rating by virtue of one wording within a category of liability for rates in another wording, a resulting ambiguity would have to be resolved in favour of the occupier of the property for the reasons given by the then Chief Justice.

59. This is, however, precisely the situation which arises here. This is a case where the Commissioners seek to avail of an ambiguity to bring within an additional category a particular form of that activity which was generally obviously intended should be excluded. (See the judgment of Keane J. in *Commissioner or Valuation v. International Mushrooms Limited* [1994] 3 I.R. at p. 481. I consider this authority of particular assistance in that (although not referred to in argument) it identifies the contingency, and the consequences which arise in the instant case. Thus, in the event that there is one new composite definition imposing a liability which is ambiguous, it is in such context to be strictly interpreted against the Commissioners, by virtue of the creation of a new liability. This conclusion would apply even as may be the case here there is an overlap or 'crossover' between the first group of word and the second which succeed 'other than'.

An alternative interpretation an exemption with an exception

60. It is the obligation of the court to seek to identify an interpretation of the section which leads to a certain rather than an uncertain consequence. I consider that this result is achieved by recognising a distinction based on the words "other than" contained in the definition.

61. On this interpretation, as a matter of logic there is an exception to the exemption created by the words "other than" which are followed by a description of a form of distinct activity, that is the use of lands or buildings or parts of buildings where the business engaged in is the sale or processing of horticultural produce. So viewed in a common sense way, this may be seen as meaning, for example, a shop or a processing plant. In this context I consider that it is not the word 'sale' but the word 'produce' which is of particular importance. It relates to what is done with plants or fruit after horticultural activity has ended. Such plants or fruit become "goods" or "produce". They are no longer being reared or propagated. They are to be sold in a shop. They no longer grow in an orchard or nursery. The plant has been removed from the surrounding earth and been either potted or cut. Viewing the term 'processing', what occurs is that (for example) fruit has been removed from a tree and processed. The 'horticultural' activity has therefore ceased and what was formerly a fruit being reared or propagated in a nursery or market garden has become a product or a good that has been processed.

62. Although, of course, there may be circumstances in which there may be an overlap in the activities on either side of the term 'other than', the test is ultimately a common sense one which is as to whether the horticultural activity has ceased or not. When a plant is removed to a shop, even though it may still be potted, horticultural activity in the sense of propagation and cultivation has ceased. It is placed in the shop simply for sale. Similarly, when a plant or fruit has been processed such horticultural activity as was previously taking place has ceased and a new "process" of the what is now a horticultural product has begun.

63. This interpretation also makes greater sense in the context of other provisions of the Act. For example in the case of "farm buildings" they are defined as:

> "The buildings, parts of buildings or other structures occupied together with lands developed for horticulture or forestry and used solely in connection with the carrying on of horticulture or forestry activities as the case may be on that land."

It will be noted that this relieving provision which provides an exemption uses a number of clearly qualifying words, that is to say "and used solely". These terms do not arise in the context of any definition of the lands used for horticulture.

64. One might do observe that were the activity of "selling" or sale which are relied on so strongly in the course of argument on the part of the Commissioners applied not in the case of "horticulture", but in the case of "agriculture" it might have far-reaching consequences.

65. For these reasons, on any available interpretation of the provisions, I conclude that no error was committed in the finding that the premises were "a nursery". I conclude that for the reasons outlined in this judgment the "2.5 acres" is not liable to rates and is exempt under s. 15(2) of the Act. It is necessary, however, to turn then to the other finding of the Tribunal in relation to the container store.

The "container store"

66. A notice of appeal to the Valuation Tribunal is to be in a stipulated format. The printed form provided stipulated such appeal should specify the grounds upon which an appellant considers that the value of the property the subject of the appeal is incorrect and should further identify any detail in relation to the property concerned which is similarly incorrect. It must also specify the grounds on which the appellant considers the property ought or ought not to have been included in the relevant valuation list. (See ss. 30 and 31 of the Act) Dependent upon the determination by the Commissioner an appellant may appeal to the Tribunal against a decision of the Commissioner to allow or disallow an appeal in relation to a property.

67. By virtue of s. 35 of the Act an appeal made to the Tribunal under s. 34 should specify the grounds upon which the appellant considers the value of the property is incorrect and also identify the value the appellant considers the Commissioner ought to have

determined as being the appropriate value of the property. It is noteworthy, however, that neither the statutory form nor the attached material provided by the Nangles contained any reference at all to the container store.

68. In the case stated the issue of this container store was merely mentioned at one paragraph, simply in the context of the Tribunal determination that the container store was a "farm building" and thus not rateable. The container store is not mentioned at all in the submission to the Tribunal made on behalf of the Commissioners. It is mentioned only obliquely in the précis of evidence submitted to the Tribunal on behalf of the Nangles in the context of references to "a proper storage area" and a "bad looking, corrugated, green horticultural shed". However, there is no evidential material before this Court to demonstrate that the issue of this container store was ever put fairly and squarely as an issue which is to be the subject matter of an appeal to the Tribunal or a determination thereby. As a simple matter of compliance with the Act, and as fair procedures, such an issue should have been clearly identified.

69. In the absence of such identification it follows that this issue was not appropriately dealt with and therefore the Tribunal fell into error. It proceeded to deal with an issue which was not properly before it and had not been the subject matter of the appeal, submissions, or evidence.

70. In the light of this fact it would be inappropriate to make any further observations on matters which are yet to be determined by the Tribunal both as issues of fact and law. It may be certain that the matters dealt with in the course of this judgment will be of assistance to the Tribunal.

71. Consequently, while affirming the decision of the Tribunal on the issue relating to the 2.5 acres of the 3 acre site in question, I consider that the case should be remitted back to the Tribunal to deal appropriately and in accordance with law with the "container store". I would add that it would be appropriate that in any further hearing the Tribunal should make clearly identified findings of fact. While this did not become an issue in the instant case, it is a fundamental requirement provided for by the statute. (See the judgment of Blayney J. in *Mitchelstown Co-operative Agricultural Society v. Commissioners of Valuation* [1989] I.R. 210.