UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2019] UKUT 275 (LC)
UTLC Case Number: RA/87/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RATING – EXEMPTION – WHETHER BUILDINGS OCCUPIED TOGETHER WITH AGRICULTURAL LAND – RATEABLE OCCUPATION – SEED BREEDING

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE VALUATION TRIBUNAL FOR ENGLAND

BETWEEN: SENOVA LIMITED Appellant

and

CHRIS SYKES (VALUATION OFFICER) Respondent

**Re: 49 North Road,
Abington,
Cambridge,
CB21 6AS**

Elizabeth Cooke, Upper Tribunal Judge and P D McCrea FRICS

Royal Courts of Justice

3 September 2019

Mr JP Scrafton for the Appellant
Mr Guy Williams, instructed by HMRC Solicitor's Office for the Respondent

The following cases are referred to in this decision:

Cardtronics Europe Ltd v Sykes (VO) [2019] 1 ELR 2281

Gardiner & Theobald LLP v David Jackson [2018] UKUT 253 (LC)

Hilleshog Sugar Beet Breeding Co. Ltd. v. Wilkes (Valuation Officer) [1971] RA 275

John Laing & Sons Ltd v Kingswood Assessment Committee [1949] 1 KB 344

Merlin Entertainments Group Ltd v Cox (VO) [2018] UKUT 406 (LC)

Westminster Council v Southern Railway Co Ltd [1936] AC 511

Wright (VO) v Sovereign Food Group Ltd [1995] RA 80

Introduction

1. The appellant, Senova Ltd, is in the business of plant breeding. It develops seeds for wheat, oats, peas and other crops, and is based at 49 North Road, Great Abington, Cambridge, CB21 6AS ("the appeal property") where it owns offices, a warehouse, some open land and a paddock. Senova's appeal is from a decision of the Valuation Tribunal for England ("the VTE") dated 18 October 2018, in which the VTE dismissed the appellant's contention that the appeal property was exempt from non-domestic rating at three material days in the 2010 rating list on the basis that the land and buildings were agricultural.

2. We heard the appeal at the Royal Courts of Justice on 3 September 2019. Mr JP Scrafton appeared as legal representative for the appellant, accompanied by Mr Andrew Bacon MRICS. Mr Scrafton called Mr Nick Balaam of Senova Ltd to give expert evidence on plant breeding. The respondent valuation officer was represented by Mr Guy Williams of counsel, who called Mr Duncan McLaren MRICS Dip Rating as an expert witness, and Mr Kenneth Bainbridge MRICS as a witness of fact.

3. We carried out an inspection of the appeal property on 2 September 2019, accompanied by Mr Bacon, Mr McLaren and Mr Balaam.

The appellant and the hereditament

4. The following background facts are not in dispute.

5. The appellant develops seeds for eventual sale to farmers. Seeds are initially produced by hybridisation or crossing processes in greenhouses; the appellant has no greenhouses and acquires seeds from other companies. It then takes typically ten years for a particular strain of seeds to be ready for the market, and seed can go on sale, after several seasons of trialling by the appellant, only if it passes the official trial system and is put on the National List by the National Institute of Agricultural Botany (which certifies seeds for DEFRA).

6. The appellant makes contractual arrangements for the trialling and multiplication of seeds. The contracts with growers, supplemented by informal agreement, make arrangements for seeds to be planted and grown on land that meets the appellant's requirements (as to location in particular parts of the country, and in terms of what has been grown on the land in the preceding seasons, for example).

7. The appellant bought its premises at Great Abington in 1994. What it initially owned was rather larger than what it now has, and included a house and 14.89 acres (6.03 ha) of land. In 2008 it sold the house, a greenhouse and 5.55 acres (2.25 ha) of land to Nicki Paine, who now lives at the house.

8. What it now has is therefore 9.34 acres (3.78 ha) on which stand an office building and a warehouse. Its sister company Cygnet Ltd occupies most of the warehouse building and the upper floor of the offices as a separate hereditament, which is not the subject of this appeal. The applicant occupies the lower floor of the office block and has its own part of the warehouse including a large storage area and a couple of smaller rooms. The warehouse is used for short-term storage of seeds, and also for cleaning, measuring and packaging them. Seeds are sent out by courier for trialling, in packages of 1 to 5kg, and in much greater quantities (100kg or more) to multiplication sites.

9. The rest of the land comprises:

    a. A car park for the offices and warehouse;

    b. A landscaped area just to the south of the buildings, bounded by deciduous trees to the west and by a thick conifer hedge on Ms Paine's land to the east. The landscaped area tapers to the south. At its narrow southern end it adjoins a paddock.

    c. The paddock has an area of about 6.77 acres. It has been the subject of a grazing licence in favour of Ms Paine since 2008 (renewed in 2014); it is fenced, and while some of the fencing is new some of it is clearly several years old. It can only be accessed from Ms Paine's land. Because of the trees around the end of the landscaped area it is not possible to see the paddock from the carpark or the buildings, or at all until one reaches the very end of the landscaped area.

10. A public footpath runs north to south along the whole of the land on its western side, alongside the car park and landscaped area and outside the paddock fence.

11. The appeal property came into the compiled rating list with effect from 1 April 2010 at a rateable value of £36,750, subsequently reduced by agreement on appeal to £33,750. It appears that agricultural exemption was not in issue. On 15 November 2012, the warehouse was demolished, and the assessment was reduced to £19,250. On 30 June 2013, a new warehouse was constructed and the rateable value increased to £50,500. It was subsequently agreed that the majority of the warehouse and the first floor offices were occupied by Cygnet, and the assessment was reconstituted, with the hereditament occupied by the appellant entered into the rating list at £22,500.

12. There are therefore three assessments under appeal, each with a different material day.:

    a. The assessment of £33,750 with effect from 1 April 2010;

b. A reduced assessment of £19,250 (reflecting the demolition of the old warehouse) with effect from 15 November 2012; and

c. The assessment of £22,500 (reflecting the fact that the new warehouse had been built but was occupied by two companies) with effect from 30 June 2013.

13. The appellant seeks the deletion of the hereditament from the list on each of those material days on the basis that it is an agricultural building and land, and is exempt from rating.

The law

14. The relevant parts of Schedule 5 to the Local Government Finance Act 1988 read as follows:

> "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…
>
> 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,

15. The paddock is agricultural land, as are the many plots on which seeds are trialled and multiplied for the appellant. For the warehouse and offices to be exempt from business rates the appellant must show *both* that they are occupied together with agricultural land *and* that they are used solely in connection with agricultural operations on <u>that or other land</u>. The underlined words marked a change in 2003 which broadened the exemption. Mr Williams helpfully referred us to the Explanatory Notes to the 2003 Act which say that the amendment was made "so that where farmers work on other agricultural land, perhaps on a share or contract basis, or through the pooling of resources or machinery, the exemption will apply".

16. Mr Scrafton sought to argue that the pre-2003 case law relating to the meaning of "occupation" was now obsolete, but it is unaffected by the amendment. It is well-established that occupation in this context comprises four ingredients. Tucker LJ in *John Laing & Sons Ltd v Kingswood Assessment Committee* [1949] 1 KB 344, 350 said:

> "… there are four necessary ingredients in rateable occupation …. First, there must be actual occupation; secondly, that it must be exclusive for the particular purposes of the possessor; thirdly, that the possession must be of some value or benefit to the possessor; and, fourthly, the possession must not be for too transient a period."

17. The legal status of the occupation – whether the occupier is owner, tenant, licensee and so on - does not matter. A person may be in rateable occupation without being the sole occupier, provided they are in paramount occupation; in *Westminster Council v Southern Railway Co Ltd* [1936] AC 511 the lessees and licensees of shops and kiosks at Victoria Station were in rateable occupation of them, even though the gates of the station were locked at night and the railway company reserved a right to enter the premises. A landowner may, however, be in rateable occupation if exercising general control over the hereditament notwithstanding that it is also occupied by someone else (*Cardtronics Europe Ltd v Sykes (VO)* [2019] 1 EGLR 2281).

18. The leading case on the meaning of "occupied together with" remains *Farmer (VO) v Buxted Poultry Ltd* [1993] AC 369. This requirement remains unchanged despite the 2003 amendment and there can be no doubt of the continued authority of *Buxted Poultry* on this point. Lord Slynn said

> "… for one building to be 'occupied together with' another for the purposes of this Act they must be in the same occupation and the activities carried on in both must be jointly controlled or managed. I also consider that the buildings must be so occupied and the activities so controlled and managed at the same time. These are necessary conditions to be satisfied but to satisfy each of them separately or together is not sufficient to establish that one building is 'occupied together with' another for rating purposes. Nor is there any geographical test which gives a conclusive answer - though the distance between the buildings is a relevant consideration, as the Court of Appeal held.
>
> It is not, however, sufficient to ask generally whether the buildings or buildings and land in question are all part of the same business enterprise. What it is necessary to show is that the two buildings, or as the case may be the buildings and agricultural land, are occupied together so as to form in a real sense a single agricultural unit. Contiguity or propinquity may go far to show that they are. Thus farm buildings surrounded by land which is farmed with other land nearby though not contiguous or even land in another neighbouring village may well as a matter of fact be found to be 'occupied together with' each other. On the other hand separation may indicate that they are not and the greater the distance the less likely they are to be one agricultural unit.
>
> In view of the extension in the Act of 1971 to derate further hereditaments, it is not right now to ask whether the two premises constituted one 'farm' in the ordinary sense but Viscount Dilhorne in the passage quoted above, in my view, indicates the right direction. Though I consider that the actual decision in the case is to be treated as one on its special facts and the correctness of which may in any

event be debatable, the sense of 'togetherness' referred to by Sir Michael Rowe Q.C. in *Hilleshog Sugar Beet Breeding Co. Ltd. v. Wilkes (Valuation Officer) [1971] R.A. 275* perhaps equally shows that the important question is whether the two buildings or the buildings and land are worked together so as to form one agricultural unit."

19. So for the appellant to qualify for exemption it must show that its offices and warehouse were, on the material days, both "in the same occupation" as agricultural land, and jointly controlled and managed with it. The agricultural land need not be contiguous, but the buildings and the land must be "worked together so as to form one agricultural unit".

The appellant's case and the evidence

20. The appellant says that the conditions for exemption are met, first because it occupies the buildings together with the paddock, and/or together with the trialling and multiplication land, and uses them solely in connection with agricultural operations on the paddock and/or on the trialling and multiplication land.

21. In considering the evidence and arguments first relating to the paddock and then to the trialling and multiplication land we are able to make use of the Statement of Agreed Facts that was provided by the parties. We heard the evidence of two experts and one witness of fact.

22. Evidence of fact was given by Mr Kenneth Bainbridge for the respondent. He is a chartered surveyor in the employment of the Valuation Office Agency, and he entered in to the rating list the assessments that are now challenged. He inspected the property in 2000, and was at that stage unaware of the paddock. He visited the property again in 2015. His evidence was essentially unchallenged and relates to the uncontroversial rating history of the hereditament.

23. We also heard expert evidence for the respondent from Mr Duncan McLaren MRICS Dip Rating. He too visited the property in 2015 and was not shown the paddock. His evidence details the rating history of the hereditament and describes the land and the business of the appellant. He gives a lot of helpful detail about the process of plant breeding and comments on the terms of the grazing licence to Ms Paine and the contracts with those who carry out trialling and multiplication. Again, his evidence of fact was unchallenged, save that Mr Scrafton asked him if he agreed that the offices and warehouse are agricultural buildings and he agreed that they are.

24. The most important evidence was given as expert evidence for the appellant by Mr Nick Balaam. He is the appellant's trials manager. He has worked in the plant breeding industry for 39 years for the appellant at Great Abington since 2005 and is clearly very knowledgeable and experienced. He gave conspicuously clear and straightforward

evidence; we accept his evidence of fact without hesitation and are grateful for his explanation of the seed breeding industry and of the way the appellant operates.

The paddock

25. So far as the paddock is concerned, Mr Balaam said that it has not been used for growing seeds at least since he joined the company in 2005. Since 2008 it has been used by Ms Paines on a grazing licence; she has a licence (of which there is a copy in the bundle) not a lease but is responsible for keeping weeds down and for fencing. She has the right to mow the land and take away the grass. Mr Balaam agrees that there is no access to the paddock from the rest of the appellant's property, and said he believed that had been the case since 2008.

26. Mr Balaam said that there had been talk of resuming seed growing on the paddock, so as to have demonstration plots, in 2005 and again six or seven years ago, but that it was decided that that would work better at a different site.

27. The VTE found that the appellant was in occupation of the paddock, but that it had not shown on the balance of probabilities that it was used for seed breeding on any of the material days and therefore that the hereditament was not occupied together with the paddock.

28. We have no difficulty in agreeing that the paddock is agricultural land or that the buildings are agricultural buildings. But we find that the paddock was not in the rateable occupation of the appellant; nor were buildings occupied together with it in the sense expounded in *Buxted Poultry.*

29. As to rateable occupation, we referred above to the four ingredients, of which the first is that there must be actual occupation.

30. The paddock is not physically accessible to the appellant, and there is no evidence that any member of the appellant's staff has set foot there since the grazing licence was granted. The appellant might of course be in occupation by exercising control, and the terms of the licence to Ms Paines do impose some obligations, to keep weeds down, to fence and so on. But she grazes horses on the land and there is no evidence of her being actively supervised by the appellant. There is not even any evidence of the appellant monitoring compliance with the terms of the licence; even if there were, the obligations are such that oversight of those obligations would not amount to occupation by the appellant, which is not physically present on the land and does not in any sense occupy through the presence of its licensee. It would be far less significant even that the level of supervision seen in cases such as *Wright (VO) v Sovereign Food Group* Ltd [1995] RA 80, referred to in the VTE's decision, where an extensive level of monitoring and supervision of the rearing of birds did not amount to rateable occupation. The first ingredient of rateable occupation is not made out.

31. Second, Ms Paines, who has been in occupation on all three dates, occupies the land not for the appellant's business of seed breeding but to graze her horses. The land is not occupied at all, let alone exclusively, for the appellant's purposes. As Mr Williams put it, there is no functional connection between the appellant's business and the land. In contrast to the VTE we have heard positive evidence that the land has not been used for seed breeding since at least 2005. That is 14 years ago, far too long to be accounted for by crop rotation. The appellant moreover has no staff or equipment at its offices who could carry out any agricultural operations.

32. We need not say anything further about the conditions for occupation. The appellant has not been in occupation of the paddock on any of the material days.

33. Turning to "occupied together with", that condition clearly cannot be made out. There is no possibility here of the buildings and the paddock being "one agricultural unit". The buildings are agricultural because they are used for seed breeding, but the paddock is not. Mr Scrafton observed that grass is a crop, but the appellant is not using it as such and the growing of grass as a crop would be nothing to do with the appellant's business.

34. The appellant cannot claim exemption for the buildings on the basis of their being occupied together with the paddock as agricultural land.

The trialling and multiplication land

35. We turn therefore to the trialling and multiplication land.

36. Seeds have to be trialled over a number of years. They are grown on a variety of plots, in different parts of the country, and under carefully specified conditions; some seed may require to be grown in a plot which has been fallow for a particular period, or that has or has not had a specified crop grown on it. The trialling process is distinct from the later multiplication process; both processes are carried out on land that is not owned or leased by the appellant. The appellant's case is that nevertheless it is in control of the land and of the operations on it. Mr Balaam said that the appellant "takes on plots" each year; "that land is then ours for the growing season". We accept that that is how Mr Balaam sees it. He visits all the sites in the course of the year, some several times, and the agricultural operations on the trialling and multiplication plots are done for the appellant and to the standards it specifies.

37. Looking specifically at the trialling land, we note that the appellant itself does not do any trialling of the seeds. Although it owns some agricultural machinery, which it does not store at Great Abington, Mr Balaam explained that it does not have the staff to do the trialling itself, because it takes two people – one to drive the tractor and one to operate the seed drill. The appellant enters contractual arrangements with specialist trialling companies which are then responsible for the trialling; Mr McLaren provided a list of the appellant's

trials in 2015, which involve 11 trials operators and over 3,100 plots, all over the country from Aberdeen to Kent.

38. Mr McLaren provided a copy of one of the appellant's trialling contracts, with Trials Force; it is a brief document of two pages, and does not specify which land is to be used; the contract itself is supplemented by informal discussion and Mr Balaam said that his colleagues will discuss the nature of the plot to be used with the trial farmer. Under "Services to be provided" the contract sets out the following list:

"To provide land and sow Spring Oil Seed Rape.
Newtonhill, Aberdeenshire – 9 entries x 3 replicates

Maintain plots according to best local agronomic practice.
Provide vigour and establishment assessments.
Provide pre-harvest assessments.
Provide yield and % dry matter."

39. Mr Balaam explained that the seed is delivered to Trials Force in Aberdeen. At the end of the process a sample is returned to the appellant so that it can see it and test it. During the growing period Mr Balaam will visit and inspect, perhaps more than once; he will normally give notice of an inspection, and he keeps careful track of the trialling arrangements (which are sometimes set up so as to replicate an official trial).

40. Multiplication is the process of growing seed in quantities large enough to sell, a couple of years before the official trial of the seed, in anticipation of the strain passing the official trial and getting on to the list. It needs to be available to the market as soon as that happens and therefore large quantities are grown in readiness,

41. The contractual arrangements for multiplication are different from those for trialling. Mr McLaren provided a sample multiplication contract. It states that the grower buys the seed, and grows it at his own risk, and the appellant buys it back after harvest if it is up to standard. The appellant is not obliged to buy it back.

42. Mr Balaam observed that the appellant is stringent in enforcing standards; "although probably not in a legal sense we regard it as our seed crop until it doesn't meet standards, and we visit to make sure that is going to happen."

43. We accept the close connection felt by Mr Balaam with the growing crop. But the multiplied crop is not the appellant's crop, it is the farmer's. The land used for trialling and multiplication does not belong to the appellant, which does not matter for the purposes of rateable occupation; what does matter is that the farmer is farming it and the appellant is not.

44. Turning to the four ingredients of rateable occupation, although the second condition is met – the plots are occupied for the appellant's purposes at least during the growing season – it cannot be said that the appellant itself is in actual occupation of the land. It is visiting, and the supervision it provides does not amount to occupation. Again therefore the third and fourth conditions do not arise.

45. Still less could it be said that the buildings are Great Abington are occupied together with the trialling or the multiplication land and "form one agricultural unit".

46. Accordingly we reach the same conclusion as the VTE; neither the trialling land nor the multiplication land are occupied by the appellant, and so the hereditament cannot be said to be occupied together with either category of land.

47. Mr Scrafton pointed out that only two other seed-breeding businesses in the country are not exempted from rating, and would have liked an explanation of this from the respondent. The answer of course is that those establishments are not in issue in these proceedings. It is agreed that the hereditament occupied by Cygnet Ltd is exempt; the appellant might like to reflect on the different arrangements in place for the land rented by Cygnet Ltd nearby (as Mr Balaam explained).

Conclusion

48. For the reasons we have given above, the appeal is dismissed.

49. This decision is final on all matters other than costs. If an appropriate order cannot be agreed the parties may make submissions in writing on costs and a letter containing further directions accompanies this decision.

The evidence of Mr Andrew Bacon MRICS

50. At the start of the hearing on 3 September we declined to admit the evidence of Mr Andrew Bacon MRICS of JMA Chartered Surveyors, and explained that we did so for the reasons given in *Merlin Entertainments Group Ltd v Cox (VO)* [2018] UKUT 406 (LC).

51. In *Gardiner & Theobald LLP v David Jackson* [2018] UKUT 253 (LC) the Tribunal (The Hon. Sir David Holgate, President and Mr A J Trott FRICS) stressed the seriousness of an expert witness's failure to disclose a conditional fee arrangement, and made it clear that the duty of independence relates to factual as well as to opinion evidence (see in particular paragraph 73).

52. In December 2018 the Tribunal (The Hon. Sir David Holgate, President and Mr P D McCrea FRICS) handed down its decision in *Merlin Entertainments Group Ltd v Cox (VO)* [2018] UKUT 406 (LC), where an expert witness had presented his evidence as

evidence of fact in an endeavour to evade the requirement to disclose the basis of his fee. At paragraph 178 of the decision the Tribunal said this:

> "It is unusual for an expert to provide a purely factual witness statement and to be remunerated in that capacity, certainly within those fields which fall within the jurisdiction of this Tribunal. Nevertheless, if that should occur, and particularly where an expert uses his expertise to assemble and/or analyse factual information and data, he still owes the duty of independence to the Tribunal which was discussed in *Gardiner*. In this context, there is no real distinction between an expert assembling information and data to assist a court or tribunal in deciding an issue, and an expert giving opinion evidence for that same purpose. The evidence sought to be adduced in this case illustrates the point. Expert opinion evidence often depends upon an expert identifying and assembling the factual material upon which his or her expert opinion is based. The danger of non-disclosure of relevant information, and the risk of that being influenced by the financial interest of an expert, or his firm, in the success of the client's case, is common to both situations and potentially affects the ability of the court or tribunal to place reliance upon that expert's evidence, in relation to either fact or opinion. As a matter of principle, it seems to us that it cannot be right for an expert to present even purely factual evidence, whether contested or not, without disclosing to the court or tribunal (and to other parties), that he is, or may become, entitled to remuneration dependent on the outcome of the proceedings in which that evidence is given, irrespective of the precise services to which that fee relates.
>
> 179. We consider that ordinarily the Tribunal should refuse to receive evidence from an expert where such an abuse of its process has occurred."

53. In the proceedings in the VTE the appellant was represented by Mr Bacon; he is described in the VTE's decision as advocate and expert witness. In the Tribunal proceedings Mr Bacon lodged the notice of appeal and drafted the appellant's Statement of Case dated 26 February 2019. He submitted a "Witness Statement by a Witness of Fact" dated 5 April 2019 and a "Supplementary Witness of Fact Statement" dated 16 July 2019.

54. On 21 August 2019, the Tribunal held a telephone case management hearing. At that hearing both Mr Bacon and Mr Bainbridge were directed to disclose the basis of their remuneration by 4pm on 28 August 2019.

55. Mr Bainbridge confirmed he was not instructed on a contingency fee basis. Mr Bacon wrote to the Tribunal on 23 August 2019, before seeing the text of the Tribunal's order. He explained that originally he was acting in the capacity of an advocate. From the point that Mr Scrafton was appointed, Mr Bacon said he acted purely as a witness of fact. His view was that in neither role was he obliged to disclose his fee basis: his reading of the RICS "Code of Practice for Advocates", as he called it, did not require him to do so; and in his later role as a witness of fact, since he was not acting as an expert witness, there was similarly no reason to disclose his fee basis.

56. On Tuesday 28 August 2019, having seen the text of the Tribunal's order, Mr Bacon again wrote to the Tribunal, disclosing the fact that he had been instructed on a conditional fee bass throughout, but reiterating his view that he was not obliged to make that disclosure.

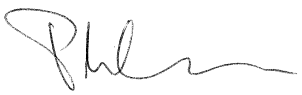
57. Mr Williams in his skeleton argument suggested that we hear Mr Bacon's evidence and then determine the weight to be attached to it. We asked Mr Scrafton at the hearing for his comments on the admissibility of Mr Bacon's evidence. He reiterated Mr Bacon's view that he is a witness of fact and argued that therefore what Mr Scrafton referred to as the "advice" or "guidance" in *Merlin* did not apply to Mr Bacon, and moreover that the RICS Professional Statement *Surveyors Acting as Advocates* did not prevent his acting on a contingency fee basis. He also observed that the decision in *Merlin* was not handed down until after the date of the VTE's decision. *Merlin* was of course handed down some months before Mr Bacon's witness statements were prepared.

58. It appears that neither Mr Bacon nor Mr Scrafton has given consideration to paragraph 178 of the decision in *Merlin*.. The information given by Mr Bacon in his two statements is an example of the kind of evidence contemplated in that paragraph, since he has assembled information about other seed breeders and about rating appeals in which he has taken part. Insofar as Mr Bacon's evidence was evidence of fact, we excluded it because he should have disclosed his conditional fee at the outset (rather than at the last minute and under protest). His failure to make that disclosure at the outset is an abuse of process, as the Tribunal said at paragraph 179 of *Merlin.*

59. We would add that in our view some of Mr Bacon's evidence was expert evidence. He expresses his specialist and technical knowledge about the seed breeding industry and his views about the rating status of the applicant's land. Insofar as it is expert evidence, the conditional fee renders it inadmissible in this Tribunal. There is, of course, not always a bright line between factual information and expert opinion. Whilst professional witnesses may give factual evidence while retained on a conditional fee, provided they disclose that fee basis at the outset, in doing so they run the risk that it may be found to be at least partly expert evidence and therefore wholly inadmissible.

60. The vast majority of experts who appear before the Tribunal are fully aware of and comply with their obligations both to the Tribunal and to their professional bodies. Most are manifestly professional in their conduct. We see many examples of good and constructive practice and we do not wish to give the impression that abuses are common or that expert witnesses are regarded with suspicion by the Tribunal. On the contrary, the Tribunal depends heavily on expert witnesses in its work and relies on their knowledge and integrity. It is for that reason that it places such importance on the preservation of experts' objectivity.

Elizabeth Cooke
Judge of the Upper Tribunal



Peter D McCrea FRICS

19 September 2019

Addendum on costs

61. We have read the respondent's application for costs dated 3 October 2019, the appellant's reply dated 10 October 2019 drafted by Mr Bacon, the respondent's schedule of costs, and the observations on the quantum of costs made by Mr Marc Beaumont of counsel for the appellant dated 5 December 2019.

62. The respondent as the successful party in this appeal from the valuation Tribunal for England is entitled to its costs. Costs normally follow the event and there is no reason why they should not do so in this case.

63. The appellant's suggestion that the respondent joined the appeal as an intervener and is therefore not entitled to costs is not correct; the respondent was given leave to participate despite applying out of time, and was the proper respondent to the appeal.

64. Nor was the appellant's failure on the appeal "the nearest of near misses" as Mr Bacon suggests at paragraph 1.32 of his response to the costs application. The evidence was clear that there was no basis for the agricultural exemption.

65. The respondent has asked for costs on an indemnity basis in view of the fact that the evidence of the appellant's main witness, Mr Andrew Bacon, was deemed inadmissible by the Tribunal because he failed – until very shortly before the hearing, and under protest – to disclose that he was retained on a conditional fee arrangement.

66. The respondent acknowledges that indemnity costs will only be awarded in exceptional circumstances. But it is argued that the award of indemnity costs would be an appropriate response to what the Tribunal regarded as an abuse of process, particularly since the excluded evidence was voluminous and the respondent expended a lot of time and costs in dealing with it.

67. The Tribunal recognises the force of that argument. And in response to the points made by Mr Bacon at paragraphs 1.22 to 1.27, we confirm that we do regard his conduct in failing to disclose the basis of his fee at the outset as having been unreasonable and improper, in the light of the decision in *Merlin Entertainments Group Limited v Cox (VO)* [2018] UKUT 406 (LC) of which he should have been aware. We reject Mr Bacon's further suggestions that the respondent acted unreasonably; it is disappointing to have obviously hopeless points reiterated in the context of costs (in particular the demand that the reasons for the exemption of other seed breeders' premises should have been disclosed).

68. However, the award of costs on an indemnity basis is exceptional; we take the view that the proper response in this case was the exclusion of the evidence and in this case – although not necessarily in any future such case – we do not think it necessary to go further.

69. Accordingly the appellant shall pay the respondent's costs, to be assessed by the Registrar on the standard basis in the absence of agreement.

Upper Tribunal Judge Elizabeth Cooke

Peter D McCrea FRICS

13 December 2019