its description is called into question, and only secondarily its history. That approach accords with the view taken by the Court of Appeal in *Clearbrook* that, in considering whether a tree is "cultivated", it is its character "at the crucial time" which should be considered, and its history is only relevant as to that.[182]

The decision in the *Portland* case, which also looked at the meaning of the word "garden", has already been considered in more detail in the context of felling licences.[183]

23.9.5 The 1999 Model Order and the draft regulations

The exemption in the 1999 Model Order relating to fruit trees provides that consent is not required for:

> "(b) the cutting down, topping, lopping or uprooting of a tree cultivated for the production of fruit in the course of a business or trade, where such work is in the interests of that business or trade; or
> (c) the pruning, in accordance with good horticultural practice, of any tree cultivated for the production of fruit."[184]

The exemption in the draft regulations issued in 2010 is in identical terms.[185]

The first of these two provisions clearly applies only to commercial fruit growers, and allows felling and uprooting as well as pruning. It is difficult to imagine why it would ever now be appropriate to make a tree preservation order in relation to fruit trees cultivated commercially.

As for the second, as with the older Model Orders, the wording makes no reference to the cultivation of the tree having to be in the course of a business or trade, so that it would apply equally to trees in domestic gardens and those in commercial orchards. But note that it now only allows pruning, not lopping or topping—let alone felling or uprooting. Arguably, consent under a tree preservation order is not required for pruning anyway,[186] but this puts the matter beyond doubt, and also makes it clear that tree surgery on any scale large enough not to count as "pruning" does need consent.

The meaning of the words "cultivated for the production of fruit" has already been considered.[187]

23.10 Forestry operations

23.10.1 Works on land subject to a Forestry Commission involvement

As noted earlier, land which is managed by the Forestry Commission is technically "Crown land".[188] As a result of the changes made by the Planning and

[182] *R. v Clearbrook Group PLC* [2001] 4 P.L.R. 78, CA; (as *R. v Havering PLC*) [2002] J.P.L. 567; see **23.9.2**.
[183] See **18.2.4**.
[184] 1999 Model Order art.5(1)(c), (d).
[185] Draft TCP(TP)R 2011 reg.14(1)(a)(vi), (d).
[186] See **23.2.1**.

Compensation Act 2004 noted in the previous Chapter, bringing Crown land within the ambit of planning control, the Commission is in principle bound by a tree preservation order protecting trees on its land.

However, the 2004 Act inserted a new s.200 into the 1990 Act, which preserved the rule that a tree preservation order and (in the future) tree preservation regulations do not have effect in relation to:

- works carried out by or on behalf of the Commission itself, on land placed at its disposal under the Forestry Act 1967, or otherwise under its management or supervision[189]; or
- works done by anyone in accordance with a plan approved by the Commission under the terms of either a forestry dedication covenant or a condition it has imposed on a grant or loan.[190]

This means that the Commission's approval of such a plan still effectively authorises the works in question, avoiding the need for either a felling licence or consent under a tree preservation order.

23.10.2 Works requiring a felling licence

In brief, as explained earlier in this book, a licence is required to fell trees (other than very small ones) so as to produce more than 5 cubic metres of timber in any quarter. A licence is thus not needed for lopping, topping or pruning operations.[191] Nor is it needed for the felling of trees in an orchard, garden, churchyard or public open space,[192] or where the felling is on land subject to a forestry dedication agreement or for the felling of elms subject to Dutch elm disease.[193] There are a number of other exemptions, many in similar terms to the exemptions considered earlier in this Chapter.

Where a tree protected by a tree preservation order is to be felled in circumstances such that a felling licence is required under the Forestry Act 1967, the felling does not also require consent under the order (or, in future, under the regulations); the felling licence once granted is sufficient authority to fell the tree.[194]

In practice, it is the Forestry Commission that takes the leading role in such cases, although it does always consult the relevant local planning authority. The procedure has accordingly been considered in **Chapter 18**.[195]

[189] TCPA 1990 s.200(1)(a), substituted by Planning and Compensation Act 2004 s.85.
[190] TCPA 1990 s.200(1)(b), (2), substituted by 2004 Act s.85.
[191] FA 1967 s.9(2)(c).
[192] FA 1967 s.9(2)(b).