

THE MEANING OF WASTE

Richard Turney¹

INTRODUCTION

1. Industrial processes and indeed the concept of consumerism are predicated on a number of inputs and, inevitably, a number of outputs some of which are wanted and others of which are not. At the same time, one person's waste is capable of being another's livelihood. In that context and in a world (or at least a continent) when the pressure to protect the environment has led to close regulation of waste disposal, there has been considerable difficulty in formulating an objective definition of "waste".

THE MEANING OF 'WASTE'

2. The definition of waste is integral to the protection of the European environment from the impacts of waste generation and management. Objects or substances that are defined as 'waste' are controlled by EC waste legislation in order to protect human health and the environment. In particular, the definition of 'waste' is applied by the competent authorities specified by the Waste Framework Directive ("WFD") (now Directive 2006/12/EC)² when making waste shipment or permit decisions.
3. Subject to certain exclusions, the concept of 'waste' is defined in Art. 1(a) of the WFD as follows:

"...any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard;"³
4. Annex I, to which this definition refers, sets out a list of different categories of waste. This list is non-exhaustive, however, as is made clear by the final category which incorporates "*any materials, substances or products which are not contained in the abovementioned categories*" Accordingly, the focus of litigation concerning whether certain materials are caught by the definition has generally focused on the meaning of the phrase "*discards or intends to discard*". In **OSS Ltd v. Environment Agency** [2007] 3 C.M.L.R. 30 (discussed further below), Carnwath LJ extracted the following propositions from the various cases up until June 2008:

"13.The ordinary English meaning of the word "discard" is an imperfect guide to its significance in the definition of waste. Other language versions have equal status in

¹ I am indebted to Charles Banner of Landmark Chambers, in whose shoes I am standing at this seminar and whose 2008 paper on "Recent Developments in Waste Law" I have plagiarized to a large extent. All errors remain my own.

² Previously Directive 75/442/EEC.

³ Annex 1 of the WFD, to which Art. 1(a) refers, sets out 16 different categories of waste, which are elaborated in the European Waste List issued pursuant to Article 1(2).

European law, and may have a slightly different emphasis. For example, the French "se défaire de", or the German "entledigen", might perhaps be better translated as "get rid of": see my discussion in *Mayer Parry Recycling v Environment Agency* [1999] 1 CMLR 963 para 24-30. I there concluded on the then state of the authorities (including *Vessoso & Zanetti* [1990] ECR I -1461; *Tombesi* [1997] ECR I-3561; *Inter-Environnement Wallonie ABSL v Région Wallonne* [1997] ECR I-7411)

"The general concept is now reasonably clear. The term 'discard' is used in a broad sense equivalent to 'get rid of'; but it is coloured by the examples of waste given in Annex I and the Waste Catalogue, which indicate that it is concerned generally with materials which have ceased to be required for their original purpose, normally because they are unsuitable, unwanted or surplus to requirements..."

Although much of the rest of the judgment has been overtaken by subsequent authority, that still seems to me a fair general summary of the intended meaning of the word "discard", taken on its own.

14. It is clear, however, that it is only part of the story. The following points, some of which will need further discussion, can be found in the cases:
 - i) The concept of waste "cannot be interpreted restrictively" (*ARCO* para 40).
 - ii) Waste, according to its ordinary meaning, is "what falls away when one processes a material or an object, and is not the end product which the manufacturing process directly seeks to produce" (*Palin Granit Oy* para 32).
 - iii) The term "discard" "covers" or "includes" disposal or recovery within the terms of Annex IIA and B (*Wallonie* para 27; *ARCO* para 47); but the fact that a substance is treated by one of the methods described in those Annexes does not lead to the necessary inference that it is waste (*ARCO* para 48-9).
 - iv) The term "discard" must be interpreted in the light of the aims of the WFD, and of article 174(2) of the treaty, respectively:
 - a) The protection of human health and the environment against the harmful effects caused by the collection, transport, treatment, storage and tipping of waste; and
 - b) Community policy on the environment, which aims at a high level of protection and is based on the precautionary principle and the principle that preventive action should be taken (*Palin Granit Oy* para 23).
 - v) Waste includes substances discarded by their owners, even if they are "capable of economic reutilisation" (*Vessoso & Zanetti* [1990] ECR I -1461 para 9) or "have a commercial value and are collected on a commercial basis for recycling, reclamation or re-use" (*Tombesi* para 52).
 - vi) In deciding whether use of a substance for burning is to be regarded as "discarding" it is irrelevant that it may be recovered as fuel in an environmentally responsible manner and without substantial treatment (*ARCO* para 73).
 - vii) Other distinctions, which may be relevant depending on the nature of the processes, are –

a) between "waste recovery" within the meaning of the WFD and "normal industrial treatment" of products which are not waste ("no matter how difficult that distinction may be") (*Wallonie* para 33);

b) between a "by-product" of an industrial process, which is not waste, and a "production residue", which is (*Palin Granit Oy* para 32-37 – see further below)."

5. The interpretation of the definition of 'waste' has been considered extensively by the EC Commission, the ECJ, the courts of England & Wales and Defra in the following contexts:

(1) The Communication issued by the EC Commission in February 2007 on the distinction between production residues that should be treated as wastes and those that should be treated as non-waste 'by-products';

(2) The ECJ's decisions in Case C-176/05 *KVZ retec GmbH v. Austria* [2007] ECR I-01721, Case C-252/05 *R (Thames Water Utilities) v. Bromley Magistrates' Court* [2007] 1 W.L.R. 1945 and Case C-188/07 *Commune de Mesquer v. Total France SA* [2009] Env LR 9;

(3) The Court of Appeal's decision in *OSS Ltd v. Environment Agency* [2007] 3 C.M.L.R. 30, which was highly critical of the ECJ's approach to the meaning of waste;

(4) Two more recent Divisional Court decisions in *Environment Agency v Thorn International UK Ltd* [2009] Env LR 10 and *Environment Agency v Inglenorth* [2009] Env LR 33, which serve to highlight the difficulties in the practical application of the definition of waste;

(5) The recent Defra consultation on the meaning of waste.

(i) The Commission Communication

6. A 'production residue' arising out of a manufacturing process is something which is not the end product that the manufacturing process in question directly seeks to produce: see Case C-9/00 *Palin Granit* [2002] ECR I-3533. Such a material *may* be, but is not necessarily, 'waste' within the meaning of the WFD. Some such materials have been held to be non-waste 'by products' instead. This is a distinction which has historically been the subject of considerable ambiguity and litigation.

7. In February 2007 the Commission issued a Communication to the European Parliament and Council setting out guidance on the issue: *Interpretative Communication on Waste and By-products* COM (2007) 59 ("the Communication").⁴

⁴ English language version available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0059:FIN:EN:PDF>.

8. The purpose of the Communication was described by the Commission in the following terms:

“In order to improve the legal certainty of waste legislation, and to make the definition of waste easier to understand and apply, this Communication seeks to guide competent authorities in making case by case judgements on whether a given material is a waste or not, and to give economic operators information on how these decisions should be taken. The Communication will also help to smooth out differences in the interpretation of these provisions throughout the EU.

The Communication aims to explain the definition of waste set down in Article 1 of the Waste Framework Directive, as interpreted by the European Court of Justice, in order to ensure that the Directive is properly implemented.”⁵

9. The Communication contains a useful compendium of the ECJ’s caselaw up to February 2007 as to whether a substance falls within the Art. 1(a) definition as one which “*the holder discards or intends to discard*”. It records the three-part test which the ECJ requires to be met if a production residue is to be considered to fall outside this definition as a non-waste ‘by-product’, namely that *further use of the material must not be a mere possibility but a certainty, without any further processing prior to reuse, and as part of a continuing process of production.*⁶ The Communication also notes the ECJ’s requirement that the use for which the by-product is destined must also be lawful - in other words that the by-product is not something that the manufacturer is obliged to discard or for which the intended use is forbidden under EU or national law.

10. The Communication goes on to review the various factors which the ECJ, applying the above test, has used to distinguish between waste and by-product on a case-by-case basis (although none of these factors can be definitive) They include:⁷

- (1) Did the manufacturer deliberately choose to produce the material in question?
- (2) Will further use bring a financial advantage to the waste holder?
- (3) Can any other use than disposal be envisaged?
- (4) Does the use have a high environmental impact or require special protection measures?
- (5) Is the treatment method for the material in question a standard waste treatment method?

⁵ COM (2007) 59, at p.1.

⁶ See eg. **Case C-9/00 *Palin Granit Oy*** [2002] E.C.R. I-3533. Note: this test is cumulative – all three parts must be met

⁷ See eg. **Joined Cases C-418/97 & C-419/97 *ARCO Chemie*** (2000) E.C.R. I-4475.

- (6) Does the undertaking concerned perceive the material as waste?
- (7) Does the undertaking seek to limit the quantity of the material produced?
11. As Carnwath LJ noted in **OSS**, many of these factors introduce an objective element into the question of whether a substance is one which “*the holder discards or intends to discard*”.
12. Finally, the Communication addresses certain specific by-product materials and sets out the Commission’s view on whether they are to be classified as waste in accordance with the ECJ’s test.

(ii) ECJ jurisprudence following the Communication

Meat and bone meal: the KVZ case

13. In March 2007 the ECJ delivered its judgment in Case C-176/05 **KVZ retec GmbH v. Austria** [2007] E.C.R. I-01721. The material at issue in this case was a meat and bone meal (“**MBM**”), which had been developed by a German engineer as a fuel for use in an incineration process at a power station in Bulgaria.
14. MBM was described in the following terms at para. 30 of the judgment:
- “Meat and bone meal is one of the products resulting from the rendering process. ...[It] is produced by the crushing of animal carcasses which are subject to a batch pressure process. After the material obtained has been crushed again, the fat is extracted from it and the residue, which is rich in protein, is dried in order to obtain a powder which is, in part, also pressed and made into pellets.”
15. A shipment of MBM en route to Bulgaria was detained by Austrian customs authorities at the river port of Vienna/Hainburg. They required the MBM to be declared as ‘waste’ and the shipment to be notified under the old Waste Shipment Regulation (Regulation 259/93).⁸ Following the institution of proceedings in Austria, the Vienna Regional Civil Court referred a number of questions to the ECJ.⁹
16. One of the principal issues was whether the MBM constitute ‘waste’ within the meaning of the Waste Shipment Regulation, which adopts the definition contained in the WFD. The ECJ held as follows
- (1) Regulation 1774/2004 (which lays down rules for the collection, transport, storage, handling etc. of ‘animal by-products’) imposed an obligation to dispose of products containing ‘specified risk material’. Accordingly, insofar as the MBM

⁸ Now replaced by the new Waste Shipment Regulation (Reg. 1013/2006) – see further below.

⁹ See para. 27 of the judgement.

contained such material, it fell within the definition of waste in the WFD as a “substance or object which the holder is required to discard”.¹⁰

- (2) Insofar as MBM did not contain ‘specified risk material’, the issue was whether it could fall within the definition of waste as “substance or object which the holder intends to discard”. As to this, the ECJ held at paras. 61-62:

61. In that regard, it should be borne in mind that the concept of ‘waste’ within the meaning of Directive 75/442 cannot be interpreted restrictively (see *ARCO Chemie Nederland and Others*, paragraphs 37 to 40, and *Palin Granit*, paragraph 23). It should also not be understood as excluding substances and objects which are capable of economic reuse. The system of supervision and management established by Directive 75/442 is intended to cover all objects and substances discarded by their holders, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation or reuse (see *Palin Granit*, paragraph 29).

62. Goods, materials or raw materials may constitute not a residue but a by-product which the undertaking does not wish ‘to discard’, within the meaning of the first subparagraph of Article 1(a) of Directive 75/442, and which it intends to exploit or market on terms which are advantageous to it. In addition to the criterion of whether a substance constitutes a production residue, a relevant criterion for determining whether or not that substance is ‘waste’ within the meaning of Directive 75/442 is the degree of likelihood that that substance will be reused, without any further processing prior to its reuse. If, in addition to the mere possibility of reusing the substance, there is also a financial advantage to the holder in so doing, the likelihood of reuse is high. In such circumstances, the substance in question must no longer be regarded as a burden which its holder seeks to discard, but as a genuine product (*Palin Granit*, paragraph 37).

63. However, whether it is in fact ‘waste’ within the meaning of Directive 75/442 must be determined in the light of all the circumstances, regard being had to the aim of that directive and the need to ensure that its effectiveness is not undermined (see, to that effect, *ARCO Chemie Nederland and Others*, paragraph 88).

64. It is for the national court to determine, in accordance with the case-law mentioned in the previous three paragraphs, whether, on 6 June 2003, the holder of the meat-and-bone meal intended to discard it.

65. If that court reaches the conclusion that, in the main proceedings, the holder of the meat-and-bone meal in fact intended to discard it even though it did not contain any specified risk material, then that meat-and-bone meal should be classified as waste.”¹¹

17. The other principal issue was whether, even if MBM was ‘waste, it was excluded from the scope of the old Waste Shipment Regulation by virtue of Art 1(2)(d), which excluded from the Regulation’s scope those shipments of waste mentioned in Art 2(1)(b) of the WFD?¹² This provides, in relevant part:

¹⁰ See paras.54-57.

¹¹ These observations reflected the opinion of Advocate-General Kokott at paras.73-85.

¹² Note: the new Waste Shipment Regulation (Reg. 1013/2006) is materially different in this regard: see below.

“The following shall be excluded from the scope of this Directive:

...

(b) where they are already covered by other legislation:

...

(iii) animal carcasses and the following agricultural waste: faecal matter and other natural, non-dangerous substances used in farming.”

18. The “*other legislation*” relied upon by the claimant company invoking this exclusion was Reg. 1774/2002, which lays rules for (inter alia) the collection, transport, storage, handling etc. of ‘animal by-products’ – defined as including “*entire bodies or parts of animals*” and certain “*products of animal origin*” which are not intended for human consumption. The MBM in this case fell within this definition.

19. The ECJ held that, although MBM was covered by Regulation 1777/2002, the exclusion in Art. 2(1) of the WFD did not apply because MBM did not constitute “*animal carcasses*” within the meaning of that provision. See in particular paras. 43-46:

“43. It must be stated that the Community legislature has chosen to express that exclusion in precise terms. The concept of animal carcasses, on account of its natural literal meaning, refers to dead animals, that is to say to an unprocessed raw material. The fact that those carcasses are whole or in pieces in no way alters the fact that they have not undergone any processing capable of altering their inherent nature. By contrast, what is at issue in the main proceedings is meat-and-bone meal, that is to say a material of a completely different nature from the material from which it was produced on account of the fact that it has undergone a specific process, as described in paragraph 30 of this judgment.

44. The fundamental difference between those two kinds of material is reflected, as regards the definition of animal by-products, in the clear distinction between ‘entire bodies or parts of animals’ and ‘products of animal origin’ made by Article 2(1)(a) of Regulation No 1774/2002.

45. Furthermore, the context of the term animal carcasses militates in favour of a strict interpretation of the concept. Besides animal carcasses, Article 2(1)(b)(iii) of Directive 75/442 excludes from its scope certain agricultural waste which is specifically listed. The inclusion, in the same provision, of those two terms, namely animal carcasses and the agricultural waste specified, indicates that there is a link between them as regards their origin. By analogy, the concept of animal carcasses could cover animal carcasses from agricultural production and not from the specific process of slaughtering or rendering from which meat-and-bone meal is obtained.

46. A strict interpretation of the concept of animal carcasses is, in addition, consistent with the case-law of the Court according to which the concept of waste cannot be interpreted restrictively (see Joined Cases C-418/97 and C-419/97 *ARCO Chemie* [2000] ECR I-4475, paragraphs 37 to 40, and Case C-9/00 *Palin Granit* [2002] ECR I-3533, paragraph 23), which implies a strict interpretation of the exceptions to the concept of waste.”

20. The ECJ noted, however, that the new Waste Shipment Regulation (Reg. 1013/2006) contained a more broadly worded exclusion clause. In line with the 11th recital in the preamble to the new Regulation, which states that it is necessary to avoid duplication with Regulation 1774/2002, Art 1(3)(d) excludes from its scope “*shipments which are subject to the requirements of Regulation 1774/2002*”. This would plainly exclude MBM. However, the new Waste Shipment Regulation did not come into force until 12th July 2007 and so did not apply to the present case. The more narrow exclusion clause in the old Waste Shipment Regulation will continue to be relevant in cases where the material facts occurred prior to 12th July 2007.

Sewage which escapes from a sewerage network: the Thames Water case

21. In Case C-252/05 **R (Thames Water Utilities) v. Bromley Magistrates’ Court** [2007] 1 W.L.R. 1945, the ECJ considered a reference by the High Court in the course of criminal proceedings brought by the Environment Agency against Thames Water for the illegal depositing of waste under s.33 of the Environmental Protection Act 1990, relating to the spilling of untreated sewage from the sewerage network on to land in Kent..

22. Thames Water’s first argument was that sewage which escapes from a sewerage network maintained by a statutory sewerage undertaker pursuant to the Urban Waste Water Directive (Directive 91/271/EC) fell outside the definition of ‘waste’ in the WFD.

23. The ECJ rejected this argument. First, it noted that the exclusion, in certain circumstances, of “*waste waters*” under Art. 2(1)(b) demonstrated that the Community legislature intended expressly to classify waste waters within the meaning of the WFD.¹³ Then, at paras. 28-29 it rejected the argument that the position was different if the waste water was spilled accidentally:

“28. The fact that waste water escapes from a sewerage network does not affect its character as ‘waste’ within the meaning of Directive 75/442. The escape of waste water from a sewerage network constitutes an event by which the sewerage undertaker, the holder of that waste water, ‘discards’ it. The fact that the waste water is spilled accidentally does not alter the outcome. The Court has held that accidental spillage of hydrocarbons onto land may be regarded as an action by which the holder of those hydrocarbons ‘discards’ them (see, to that effect, *Van de Walle and Others*, paragraph 47). The Court also held that Directive 75/442 would be made redundant in part if hydrocarbons which cause contamination were not considered waste on the sole ground that they were spilled by accident (see *Van de Walle*, paragraph 48). The same reasoning must be applied to waste water which leaks accidentally.

29. The answer to Question 1 must therefore be that waste water which escapes from a sewerage network maintained by a statutory sewerage undertaker pursuant to Directive

¹³ Paras. 25-26.

91/271 and the legislation enacted to transpose that directive constitutes waste within the meaning of Directive 75/442.”

24. Thames Water’s second argument was that the escaped sewage was excluded from the scope of the WFD under Art. (2)(1)(b), which excluded “*waste waters, with the exception of waste in liquid form... where they are already covered by other legislation*”. Thames Water contended that the Urban Waste Water Directive and/or the Water Industry Act 1991 constituted ‘other legislation’ for these purposes.

25. The ECJ responded by first recalling its observations in ***AvestaPolarit Chrome*** that, in order to be “*covered by other legislation*” for the purposes of the Art 2(1)(b) exclusion, the substance in question must be subject to rules (whether in EC or national law) which contain precise provisions organising the management of waste and which ensure a level of protection which is at least equivalent to that resulting from the WFD.¹⁴ It then stated at paras. 35-38:

“35. Directive 91/271 does not ensure such a level of protection. Although it regulates the collection, treatment and discharge of waste water, it does no more than lay down, as regards leakage of waste water, a duty to prevent the risk of such leaks when designing, constructing and maintaining collecting systems. Directive 91/271 does not lay down any objective in relation to the disposal of waste or decontamination of contaminated soil. It cannot therefore be regarded as relating to the management of waste water which escapes from sewerage networks and ensuring a level of protection which is at least equivalent to that resulting from Directive 75/442.

36. As regards the national rules applicable to the case in the main proceedings, it has not been possible, either on the basis of the written pleadings submitted to the Court or of the observations made at the hearing, to determine the exact scope of the powers conferred on the competent authorities of the United Kingdom. It will be for the national court to determine, in the light of the criteria set out in paragraphs 34 and 35 above, whether the Water Industry Act 1991 or the Urban Waste Water (England and Wales) Regulations 1994 contain precise provisions organising the management of the waste in question and whether they are such as to ensure a level of protection of the environment equivalent to that guaranteed by Directive 75/442 and, more particularly, by Articles 4, 8 and 15.

...

38. The answer to Question 2(a) must therefore be, first, that Directive 91/271 is not ‘other legislation’ within the meaning of Article 2(1)(b) of Directive 75/442 and, second, that it falls to the national court to ascertain whether, in accordance with the criteria set out in the present judgment, the national rules may be regarded as being ‘other legislation’ within the meaning of that provision. Such is the case if those national rules contain precise provisions organising the management of the waste in question and if they are such as to ensure a level of protection of the environment equivalent to that guaranteed by Directive 75/442 and, more particularly, by Articles 4, 8 and 15.”

¹⁴ **Case C-114/01 *AvestaPolarit Chrome Oy*** [2003] E.C.R. I-8725.

26. Thames Water's third and final argument was that the sewage was excluded from the scope of the WFD by Article 2(2) which provides that "*specific rules for particular instances or supplementing those of this Directive on the management of particular categories of waste may be laid down by means of individual Directives.*" The ECJ had previously held that the provisions of an individual Directive falling within Art 2(2) prevailed over those of the WFD in situations where the individual Directive specifically seeks to regulate.¹⁵

27. This argument was also rejected by the ECJ on the following ground:

"...Directive 91/271 does not contain any provision which concerns, as such, waste water escaping from a sewerage network. It cannot therefore be regarded as containing specific rules for particular instances or supplementing those of Directive 75/442 on the management of waste water which escapes from a sewerage network."¹⁶

Accidental spillage of heavy fuel oil: the Commune de Mesquer case

28. Case C-188/07 **Commune de Mesquer v. Total France SA** [2009] Env LR 9 arose out of the sinking of the ship *m.v. Erika* off the coast of France in 1999. The ship broke up and her cargo, several million tonnes of heavy fuel oil (a product created when crude oil is refined), was spilled into the sea in what was France's worst ever oil disaster. The oil polluted a number of beaches on the French Atlantic coastline in the Commune of Mesquer, which issued proceedings to recover the cost of cleaning up the beaches.

29. The factual circumstances relating to the spilt oil were as follows:

- (1) The Italian electricity production company ENEL entered into a contract with Total International Ltd for the supply of heavy fuel oil.
- (2) The heavy fuel oil was to be used for electricity generation by ENEL in Italy.
- (3) To fulfil the contract with ENEL, Total Raffinage Distribution (now Total France), sold a certain quantity of heavy fuel oils meeting ENEL's specifications to Total International Ltd, which chartered the ship *m.v. Erika* in order to transport it to the port of Milazzo in Sicily.

30. The French Cour de Cassation referred three questions to the ECJ, the first two of which were:

- (1) Can heavy fuel oil, as the product of a refining process, meeting the user's specifications and intended by the producer to be sold as a combustible fuel, be treated as waste within the meaning of Article 1 of the WFD?

¹⁵ See **Case C-444/00 R (Mayer-Parry Recycling Ltd) v. Environment Agency** [2004] 1 W.L.R. 538.

¹⁶ At para. 40.

- (2) Does a cargo of heavy fuel oil, transported by a ship and accidentally spilled into the sea, constitute – either in itself or on account of being mixed with water and sediment – waste falling within Category Q4 in Annex I to Directive 2006/12? This Category includes “*materials spilled, lost or having undergone other mishap, including any materials, equipment, etc., contaminated as a result of the mishap*”
- (3) If answer to the first question on ‘no’ and the answer to the second question is ‘yes’, can the producer of heavy fuel oil (Total Raffinage) and/or the seller and carrier (Total International Ltd) be regarded as the “producer” and/or “holder” of waste within the meaning of Article 1(b)-(c) of the WFD, and for the purpose of applying Article 15 (‘the polluter pays’), even though at the time of the accident which transformed it into waste the product was being transported by a third party?

31. Judgment was given on 24 June 2008. The Grand Chamber of the ECJ held:

- (1) Heavy fuel oil could not be treated as waste ([35] to [48]). The ECJ considered the distinction between a production residue and a by-product. The ECJ confined the meaning by-products to those goods and materials where the re-use “is not a mere possibility but a certainty, without prior processing and as an integral part of the production process” (at [44], relying in *Palin Granit*).
- (2) Once spilt and mixed with water and sediment, the fuel oil became waste ([53] to [63]). Although the WFD notes “materials spilled” as falling within a category of waste, that does not alone suffice to categorise the spillage as waste. The Court rejected the suggestion that the “uncertain or even hypothetical” possibility of recovering the spilt oil meant that it should not be classed as waste. Further, it noted that regardless of the location of the spill, the arrival of the slick on the coast of France meant that it was deposited within a member state and therefore the WFD applied *ratione loci*;
- (3) The national court may treat the seller and carrier as a producer of the waste and therefore as a “previous holder” if it reaches the conclusion that the seller/chartered “contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship. In short, the producer cannot be liable unless he has contributed by his conduct to the risk of pollution occurring ([69] to [89]).

32. *Commune de Mesquer* confirms the general approach of the Commission in respect of the treatment of by-products, and also demonstrates the implicit link to be

adopted between the concept of environmental harm from waste and the definition of waste itself.

(iii) Criticism of the ECJ's approach: the OSS case

33. The ECJ's approach to the meaning of 'waste' under the WFD came under considerable criticism in the Court of Appeal in June 2008 in ***OSS Group Ltd v. Environment Agency*** [2008] Env.L.R. 8.

34. OSS collected waste lubricating oil from garages and workshops and converted it into marketing fuel oil which could be used in exactly the same way as ordinary fuel. The issue before the Court was when did this material cease to be 'waste': was it at the completion of the process of preparing it for use as a fuel (as OSS contended), or was it when it is actually burnt (as the Environment Agency contended)? If it was latter, then more costly controls under the Waste Incineration Directive would apply.

35. Carnwath LJ (with whom Maurice Kay LJ and Sir Anthony Clarke MR agreed) accepted OSS's submission that the material ceased to be waste at the completion of the process of preparing it for use as a fuel. Having reviewed the relevant ECJ caselaw to date (see para 14 above), Carnwath LJ was scathing about the absence of a coherent test:

"55.As this review demonstrates, a search for logical coherence in the Luxembourg case-law is probably doomed to failure. A fundamental problem is the court's professed adherence to the Article 1(a) definition, even where it can be of no practical relevance. The subjective "intention to discard" may be a useful guide to the status of the material in the hands of the original producer. However, it is hard to apply to the status of the material in the hands of someone who buys it for recycling or reprocessing; or who puts it to some other valuable use. In no ordinary sense is such a person "discarding" or "getting rid of" the material. His intention is precisely the opposite.

56. Understandably, the court has held that a material does not cease to be waste merely because it has come into the hands of someone who intends to put it to a new use. But that should not be because it still meets the Article 1(a) definition in his hands; but rather because, in accordance with the aims of the Directive, material which was originally waste needs to continue to be so treated until acceptable recovery or disposal has been achieved. Unfortunately the court has consistently declined invitations to develop workable criteria to determine that question. Instead, it continues to insist that the "discarding" test remains applicable, even where the "holder" is an end-user such as Epon [*in the ACARO case*], whose only subjective intention is to use, not to get rid of, the materials in issue.

57. In *Mayer Parry* Advocate General Alber frankly summed up the court's position as he saw it:

"The Court of Justice has thus refused to make classification of a material as waste dependent on its economic value, its fitness for reuse... or the environmental hazards posed by it... The holder's conduct can be appraised only

with regard to his intentions, a fact which causes the body applying the law considerable difficulties.

The Court of Justice solves this problem by inferring an intention to discard the substance from objective indicators; in doing so it has regard both to all the factual circumstances and to the aim of the waste Directive..." (*Mayer Parry* Opinion para 108-9).

58. Similarly, in *Palin Granit Oy*, the Court itself, having noted the lack of precision in the definition of waste, commented:

"Directive 75/442 does not provide any decisive criteria for determining the intention of the holder to discard a given substance or object. Nevertheless, the Court, which has been asked on a number of occasions for preliminary rulings on whether various substances are to be regarded as waste, has provided a number of indicators from which it may be possible to infer the holder's intention. The classification ... must be made having regard to those factors and in the light of the aims of Directive 75/442." (para 25)

59. In other words, although the Court continues to play lip-service to the "discarding" test, in practice it subordinates the subjective question implicit in that definition, to a series of objective indicators derived from the policy of the Directive. What is required from the national court is a value judgment on the facts of the particular case in the light of those indicators."

36. Applying such a value judgement in the present case, Carnwath LJ drew assistance from a Dutch case (*Icopower BV v. Secretary of State*, 14th May 2003) where the facts were described as follows:

" The appellant collects industrial waste products. These waste products consist of a mixture of paper, cardboard, untreated wood, plastic foil, textiles, possibly mixed with a limited percentage organic leftover substances (canteen waste) and/or glass, stone and cans. After acceptance a pre-selection takes place and the leftover substances are homogenised and reduced in size on a shredder, after which the ferro-metals are separated from the rest of the substances. After that low calorific fractions are separated from high calorific ones in a screen drum. Hereafter a separation takes place of non-ferro-metals and different components. The remaining flow, called ' fluff' by the appellant, is brought into the correct humidity degree, homogenised and pressed into energy pellets. The energy pellets are sold to electricity and heat-producing plants where they are used as (additional) fuels in these installations ..."

37. Having described those facts Carnwath LJ continued at paras. 62-63::

"62.The court noted that the pellets were produced with the sole aim of their use as fuel; that it was not claimed that they contained pollutants such as heavy metals; and that they were used in the same way as regular fuels, with no special precautionary measures being needed to protect the environment. On this basis it concluded that the energy pellets were "equivalent to regular fuels" and that, applying the reasoning of the *ARCO* judgment, they could not be characterised as waste under Article 1(a).

63. Although we are not called upon to decide the correctness of that decision, I see no reason to doubt it. It seems to me a practical and common sense approach to the issue, which is consistent with the letter and spirit of the Directive and with the case-law. It is also consistent with the objective of encouraging the recovery of waste materials for uses which replace raw materials. It should be enough that the holder has converted the waste material into a distinct, marketable product, which can be used in exactly the same way as an ordinary fuel, and with no worse environmental effects. It cannot be said that such a material is being "discarded" in any ordinary sense of the term, and there is nothing in the objectives of the Directive which requires any fictitious assumption to that effect..."

38. Carnwath LJ declined to adopt any of the proposed 'end of waste tests' advanced by the parties, stating at para. 67 that "*however desirable it might be to have a definitive test, the ECJ has consistently declined invitations to provide one*".

(iv) Waste in the Divisional Court

39. In ***Environment Agency v Thorn International UK Ltd*** [2009] Env LR 10, the EA appealed against the acquittal of Thorn in the magistrates' court. Thorn's business consisted of the acquisition of old electrical goods, their repair/refurbishment and resale. The EA prosecuted Thorn for storing waste, namely the goods, without a waste management licence. The Divisional Court dismissed the appeal. Moses LJ held that the key question was whether the items concerned had become waste:

"21...The question whether something has ceased to be waste is not determined by considering whether those subjecting it to the process of reclamation intends to discard it or not, because if that was the question, then undoubtedly it would cease to be waste at the moment when those subjecting it to such a process had the intention to reuse it. Rather, the question of whether something which is undoubtedly waste ceases to be waste is determined by whether the cycle of repair or restoration is complete. To that extent I agree with the submissions advanced on behalf of the Environment Agency. But in the instant case, the focus must be concentrated on the logically prior question of whether these electrical goods were waste at all. True it is that the holder within the meaning of the Directive, the consumer, no longer wanted the particular item in question. In some cases, no doubt, the electrical item would be as good as new, but was no longer needed either because it was too old or was not suitable. There is no specific finding in this case by the justices as to whether the items had been discarded at that stage. The test as to whether an item is discarded was set out in ***Inter-Environnement Wallonie ASBL v Region Wallonne*** (C-129/96) [1997] E.C.R. I-7411 as follows:

"The general concept is now reasonably clear. The term 'discard' is used in a broad sense equivalent to 'get rid of'; but it is coloured by the examples of waste given in Annex I and the Waste Catalogue, which indicate that it is concerned generally with materials which have ceased to be required for their original purpose, normally because they are unsuitable, unwanted or surplus to requirements."

22 I reject the contention that the justices were bound to conclude that the electrical goods were waste in the circumstance that there was a contractual arrangement between consumer and retailer, who agreed to take the particular item in question on purchase of another new item. There is nothing to be found within the purposes of the Directive or the actions of the consumer to dictate a conclusion that such an item must be waste. The justices found that these items had not been discarded. Whether they were focusing their attention on the moment at which they had been exchanged with a new item obtained from a retailer or at a later stage is not clear. But for my part I would reject any principle which established that the justices were bound to conclude that at that stage they had been discarded.

...

26 It seems to be suggested by the Environment Agency that every time a consumer no longer wishes to keep such an item it, by operation of principle of law consistent with the Directive, automatically becomes waste because the consumer no longer wants it. In my view, that is far too extreme a view and far too stringent a rule. As I have said, the issue in **ARCO**, **Epon** and **OSS** was merely whether items which were undoubtedly waste had ceased to be waste. It was contended that since they were waste, until further inspection of the premises by the trained engineers, the items remained waste until any necessary repair or refurbishment was complete. In my view, the justices were entitled to find that the items in question, even if they should have been regarded as waste at an earlier stage, were not by the time they had become selected by Thorn. None of the purposes of the Directive are achieved by so regarding them. Thorn regarded them as capable of reuse with some repair and refurbishment. The mere fact that that which in one form is undoubtedly waste remains waste until its character is changed by a process of recycling does not establish a rule of law that any item which requires repair or refurbishment is waste until that process is concluded. As the European Court of Justice pointed out at [97] in **ARCO** , and as the Court of Appeal endorsed at [59] in **OSS** , it depends on all the circumstances.

27 In the instant case, there was no change to the form of these goods at all. There was nothing hazardous within them whilst they awaited repair. They were retained for their original purpose. The justices were not purporting to lay down any rule; they merely applied the Directive according to its purpose to prevent hazardous materials harming either the environment or those humans who came into contact with them. Construing that purposively, they applied the Directive to the facts of this case. In my view, they were entitled to reach the conclusion that, certainly at the time those goods were held by Thorn, they were not waste.”

40. **Thorn** emphasises that it will often be for magistrates on a particular set of facts to decide whether the item concerned is waste. Although there is guidance in the case law, certain cases (such as **Thorn**) demonstrate that the analysis is only in part a science. To a large extent it will be a matter of practical analysis by the fact finder.
41. The same approach can be seen in **Environment Agency v Inglenorth** [2009] Env LR 33, another unsuccessful appeal against an acquittal in the magistrates’ court. That case concerned a contractor (Mr Campbell) who had demolished a greenhouse at

one garden centre and deposited the materials from the demolition at another garden centre owned by the same person (Mr Evans) for relaying a car park. The issue was whether the defendant had deposited waste without a waste management licence and failed to take reasonable measures to inform the owner of the land that he needed to hold a waste management licence. The case turned in particular on the period in which the defendant had been charged with the offence. However, the following comments of Sir Anthony May are of wider interest (my emphasis):

31 [Counsel for the EA] has in his written submissions summarised the points that he would make as follows. He submits that the Magistrates in the present case were wrong in law in interpreting the meaning of the word “discard” as being equivalent to “get rid of”. He submits that they failed to apply the correct test in order to distinguish waste residue from non-waste product. He submits that they wrongly considered that the intention to reuse it must be immediate when the relevant question was whether the reuse itself is immediate. He submits that they took into account an irrelevant factor that no Annex II disposal or recovery operation was to be undertaken on the material which in any event was mistaken on the facts found. Fifthly, he submits that properly applying the definition of waste in the Environmental Protection Act, as imported from the Waste Framework Directive, the Magistrates could not rationally have concluded that the demolition material involved was not waste.

32 On the question of the need for reuse being immediate, in my judgement certain analysis is necessary. First of all, the Magistrates found explicitly that in Mr Evans' hands the material which Mr Campbell deposited was a valuable commodity intended for immediate reuse and they have found as a fact that Mr Campbell knew that the intention was to use the material at the Cheadle Garden Centre to make good a car park there.

33 No doubt questions might arise as to whether a use of deposited material for purposes such as building works was to be immediate. No doubt if it were Mr Evans that was being prosecuted that would be a question which might arise and might or might not have been decided in his favour or against him. Two things, however, arise in the present case. First, as [counsel for the EA] accepted, immediate use cannot be taken literally. As for example, if material is deposited at a site intending it to be used straight away for building operations, if it is not used straight away, because, for instance, the weather is bad and prevents building operations; or other and different material is required to be delivered first before this material can be used; or machinery has to be brought on to the site before it can be used and there is some delay before it is brought to the site; any of these examples would not, depending on the facts, prevent the material from being reused immediately, if that is the expression that needs to be addressed. The distinction in my judgement must be between depositing the material for storage pending proposed reuse and depositing it for use more or less straight away without it being, in any sensible use of the word, stored. Depending always on the facts, hardcore which is going to be used next week for current building operations is not being stored.

34 Secondly, the issue in this case was not whether Mr Evans had been guilty of an offence of having the waste material on his site without the proper licences, but whether Mr Campbell and his company were guilty of the two offences charged. The two offences charged can only be referable to what Mr Campbell did or did not do and what he knew or did not know on August 14, 2006. They are in fact charged as being committed on or before August 30, 2006 but Mr Campbell's involvement only took place on August 14 and ceased once he had delivered the material. Quite plainly, since Mr Campbell was not himself going to reuse this material, the question of its immediate use can only be judged as a matter of Mr Evans' then intention because by the time Mr Campbell had left he had dropped out of the picture and Mr Evans was never, one supposes, going to use the material within five minutes of it being delivered.

35 Accordingly, in my judgement, the point made by [counsel] in relation to intention to use, immediate intention to use or immediate use is not in point for the purposes of the informations brought against Mr Campbell.

36 [Counsel for the EA's] main general submission is, as I understand it, as follows. This material was demolition material which at the Standish site plainly was waste. It was brought to the Cheadle Garden Centre site and it remained waste not only while it was being brought but when it arrived and it should have been regarded as waste and the subject of the requirement of the licence until Mr Evans actually used it, which in the event he did not.

37 In my judgement, upon the findings of fact of the Magistrates in the present case that is not a correct analysis. It may well be, and it does not matter, that the material was or was capable of being waste after it had been produced by the demolition exercise of the Standish site and before it was removed for use elsewhere. If it been taken to a waste disposal site straight from Standish, no doubt it would have been waste throughout that operation. But the question, and in my judgement the only question in the present case in relation to the informations brought against Mr Campbell in the terms in which they were, is whether this was waste when it was deposited at the Cheadle site. Upon the Justices' findings of fact, at that stage Mr Evans, and I am quoting from the case,

“... had no intention of discarding the material. The product would be used as hardcore material for the purpose of making up a car park at the Cheadle site. That intention was not a mere possibility, but was one clearly formed by Mr Evans shortly before or before the demolition of the greenhouse.”

And, I would add, that intention was, upon the Justices' findings, communicated to Mr Campbell and they further found that the material was a valuable commodity intended for immediate reuse.

38 In my judgement, those findings of fact entirely support the decision that the Justices came to that upon its deposit at the Cheadle Garden Centre this material was not waste. It was no more waste when it was delivered to the Cheadle site upon those findings of fact than would be hardcore delivered to my drive for me to use to mend the drive or to

use as a sub base for my garage floor for concrete to be put on top of it. It may well be that this material was waste when it was at Standish but, given the findings of fact by the Magistrates, it was not waste and they properly so found upon its delivery to the Cheadle Garden Centre. In my judgement, the Justices came to the right decision for those reasons and I would dismiss this appeal.

42. I confess to having reservations about the approach of the Divisional Court in *Inglenth*. The transition from waste to non-waste is treated in a rather simplistic way: the material was wanted by Mr Evans, so by the time it was in his hands it was not waste. That is an analysis which sits uncomfortably with the approach of the ECJ as summarised in *OSS* above, which emphasises that discarded goods may remain waste even if they are capable of economic reutilisation.

(v) The Defra consultation

43. In January 2010, Defra began a consultation on new guidelines on the legal definition of waste. The consultation closed in April 2010 and the responses and final guidelines will be published this summer. As the guidelines are in the form of a consultation draft, and they do little more than summarise the effect of the case law described above, the proposed guidelines are only considered briefly here.

44. The first part of the draft “Guidance on the legal definition of waste and its application” is a “practical guide” which attempts to address the questions of whether a substance or object has become waste, and when a substance or object which has become waste ceases to be waste. In respect of the first question, the draft guidance states:

“A substance or object becomes waste when it is **discarded**. Discard has a special meaning which is not necessarily the same as its dictionary meaning. It includes not only the disposal of a substance or object but also its recovery or recycling. Whether a substance or object is being discarded has to be decided on a case-by-case basis, and taking account of all the circumstances, to ensure the aims of the WFD (i.e. protection of the environment and human health) are not undermined. In other words, each case must be assessed on its own merits.”

45. The draft guidance proposes eight questions which can be used to identify whether the substance or object has become waste:

(1) Is the substance or object included in Annex 1 to the WFD? If so, it is likely to be waste.

(2) Is the substance or object a by-product of a production process? Production residues are likely to be waste. To attempt to identify the difference between a production residue and a by-product, the guidance suggests that if an affirmative answer to the following questions can be given, it will indicate that the residue is waste:

Is its use not just a possibility but a certainty?

Can it be used directly, without any further processing prior to its use?

Is the use an integral part of the process of production?

Is it fully suitable for the proposed use?

Is the use lawful?

Can it be used without any special precautions being taken to ensure protection of the environment or human health?

Is there a genuine market for it?

Is it free of any contaminants that could have an adverse effect on its use?

Can it be used without any additional risk to the environment or human health, when compared with an equivalent raw material?

(3) Does the substance or object need to be disposed of? If there is a legal or practical requirement to dispose of the substance or object, the guidance suggests that it would be waste.

(4) Has the substance or object been transferred to a disposal or recovery operation? The guidance states that, if so, that will indicate that it is waste.

- (5) Does the substance or object have a low economic value? The guidance notes that the holder of items with low economic value will have an incentive to “get rid” of them but points out that “it does not follow, though, that a substance or object with a good economic value to the producer is not a waste”.
- (6) Is the substance or object hazardous or polluting? Although the guidance accepts that the “question of harm is not always relevant to the issue of whether something is waste”, it is relevant in the case of something unwanted as it will make it a burden on the holder and is also relevant in the case of contamination of another substance.
- (7) Is the substance or object still suitable for its use? The guidance refers to out of date and damaged goods.
- (8) Is the substance or object being passed on as second hand goods? If so, it is generally not waste.

46. The draft guidance then gives six questions to assist in identifying whether a substance has ceased to be waste:

- (1) Has the waste only been pre-treated, rather than fully recovered or recycled? A substance will remain waste if it needs further treatment before re-use. The guidance gives the examples of sorting and size reduction a pre-treatment processes.
- (2) Has the waste been converted or transformed into a distinct product? New products will not be treated as waste but the guidance notes that the “new product needs to be distinct from the original waste and minor changes to its composition are unlikely to be sufficient.”
- (3) Have all unwanted substances been removed from the waste? The substance or object will remain waste until contamination has been removed.
- (4) Is recovered/recycled material fully suitable as a replacement for a non-waste material? The guidance continues: “To cease to be waste, the

material that results from the recovery or recycling of waste must be fully suitable as a replacement for the non-waste material for which it is substituting.”

(5) Is it certain to be used? The absence of a genuine market for the recovered material is likely to mean it remains waste.

(6) Can the recovered/recycled material be used without undermining the aims of the WFD? The guidance notes that material will not cease to be treated as waste if to do so would undermine the aims of the WFD by posing “greater risk to the environment or human health than the non-waste material it replaces”.

47. The second part of the draft guidelines identifies the relevance of the definition of waste in the various relevant regimes and the rationale for promulgating guidelines. The third part of the draft guidelines consists of detailed guidance on the definition of waste. It is perhaps this part which will provide the most assistance to those considering waste processes, because it engages with the more complex points of characterisation and with the extensive ECJ jurisprudence considered above.

48. One might ask, finally, whether any guidelines will make any practical difference to the difficulties of identifying what constitutes “waste”. As the case law shows, there is a challenging borderline between waste and non-waste, which requires the exercise of factual judgments. Resorting to the purpose of the WFD will, on occasion, assist but it does not provide a complete answer. What is relatively clear is that the EA regularly contends for a broad definition to the word “waste”, which means that many undertakings may simply prefer to take a precautionary approach and treat certain materials as waste rather than face criminal charges. If they do face such charges, it seems that magistrates may be willing to take a narrower, pragmatic approach to the definition of waste on a particular set of facts.

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Richard Turney

Landmark Chambers

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