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CO/5156/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 2 July 2008

B e f o r e:

LORD JUSTICE MOSES

MR JUSTICE BLAKE

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Between:
THE ENVIRONMENT AGENCY

Appellant

v

THORN INTERNATIONAL UK LIMITED

Respondent

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Mr S Mehta (instructed by Environment Agency) appeared on behalf of the **Appellant**
Mr T Green (instructed by Challinors) appeared on behalf of the **Respondent**

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J U D G M E N T1. LORD JUSTICE MOSES: Thorn International buy used electrical goods, such as refrigerators and computers, for re-sale. Before re-selling them, they repair and refurbish them. The question in this appeal by way of case stated is whether the refrigerators and computers, until such time they have been repaired or refurbished, are "waste" within the meaning of the Environmental Protection Act 1990 ("the 1990 Act") and the Waste Framework Directive, Council Directive of 15 July 1975 on Waste

(75/442/EEC).

2. The justices, sitting for the area of West Bromwich in the county of West Midlands, in a careful and clear case of 15 May 2008 found that the goods bought by Thorn were not waste. The Environment Agency appeals.

3. The relevant statutory provisions and scheme are to be found in the 1990 Act. Section 33 makes it an offence to deposit or keep controlled waste without a waste management licence. Section 75 defines "controlled waste" as household, commercial and industrial waste. It defines the holder of such waste as the producer or the natural or legal person who is in possession of it.

4. The Waste Management Licensing Regulations 1994 provide by paragraph 9 of Schedule 4 that any reference to "waste" in the 1990 Act shall be construed as a reference to "waste" as defined in the Framework Directive.

5. I turn accordingly to the provision according to which any domestic legislation must be construed, namely the Framework Directive. Amongst the recitals as to its purpose are to be found that:

> "... the essential objective of all provisions relating to waste disposal must be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste;
>
> ... the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources;
>
> ... effective and consistent regulations on waste disposal which neither obstruct intra-Community trade nor affect conditions of competition should be applied to moveable property which the owner disposed of or is required to dispose of under the provisions of national law in force ..."

6. The body of the Directive defines waste under Article 1 as "(a) any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard". Annex I identifies categories of waste, which include:

> "Q14 Products for which the holder has no further use (eg agriculture, household, office, commercial and shop discards, etc).
>
> ...
>
> Q16 Any materials, substances or products which are not contained in the above categories."

It would be hard to identify any wider category of those which are capable of coming

within Article 1(a) of the Directive.

7. By Annex IIB, recovery operations are listed. Amongst those recovery operations include:

> "R4 Recycling/reclamation of metals and metal compounds.
>
> R5 Recycling/reclamation of other inorganic materials.
>
> ...
>
> R13 Storage of wastes pending any of the operations ..."

8. By Article 4, Member States are required to take "the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment".

9. The justices made findings which are important for the purposes of resolution of this appeal. They found that the items in question had been retrieved by a company called Wincanton, whose business it is to retrieve used electrical items from electrical appliance retailers who have supplied a replacement product to a consumer and have contracted to take away the existing appliance. Wincanton took such items to a central warehouse, where they were divided between those which were still functioning or were capable of repair and those which were not. Those which were beyond repair were disposed of by Wincanton. They amounted to approximately 80 per cent of all those items retrieved from electrical appliance retailers. The remaining 20 per cent were offered for sale within their warehouse. Wincanton would only offer for resale such goods to companies within what the justices describe as the refurbishment and resale trade. They would require reasons to be given for purchase and business operation details.

10. Thorn was an established customer of Wincanton, and Wincanton was familiar with its business. Thorn would attend at Wincanton's premises and inspect the appliances offered for sale. If they were satisfied that an appliance was still functioning or was capable of repair, Thorn would buy it from Wincanton. It would then transport such an appliance, as the justices, found for repair, and then store the items for a comparatively short period -- at most one week -- until they could be taken inside. Small items such as computers were never left outside, but it was the items stored, sometimes on a number of levels, which came to the attention of officials of the Environment Agency. It was those items stored in the yard which were said to be waste, and therefore, so it was said, it was incumbent upon Thorn to obtain a waste disposal licence.

11. The justices found that, following repair, the items would be taken to repair workshops where they would again be inspected by six trained engineers and repaired or refurbished as necessary. Once repaired, they would be purchased by second-hand retail outlets for sale to the public or transported for resale at Thorn's own retail outlet. Any items that

could not be repaired for resale would be disposed of to a licensed waste carrier. The justices recorded that only a small minority of goods were rejected as being unsuitable for repair.

12. The justices set out part of the evidence, including the evidence of Wincanton on behalf of Wincanton, called by the prosecutor to show the process of selection undertaken by Wincanton before they offered for resale any items to purchasers such as Thorn. The justices found as a fact that there were no hazardous materials stored on Thorn's site in Smethwick. This was an important finding of fact in the context of the purposes of the Framework Directive. In the case stated, the justices asked the question whether they were right to conclude that there were no hazardous materials stored on site. Sensibly Mr Mehta does not pursue any request to this court to answer that question. The conclusion that there were none was a finding of fact open to the justices, and it is important in relation to the second finding which remains controversial.

13. The justices found that the original purpose for which these electrical items were purchased never changed. They said:

> "We take the view that these electrical items have not ceased to be required for their original purpose as following repair they are sold and used for their original purpose. In these circumstances we have concluded that the goods have not been discarded or 'got rid of' and we therefore find that these items do not fall within the category of controlled waste."

Later in their case, they found that the fridges and electrical items seen by officers of the Environment Agency had not been discarded.

14. Their second question was whether as a matter of law they were entitled to conclude that the electrical items were not waste while they awaited repair, refurbishment or disposal, by which I understand those few which the engineers rejected as not worth being repaired.

15. Two contentions are advanced on behalf of the Environment Agency. First, it was contended in cogent and clear submissions by Mr Mehta that the electrical items had been discarded by the consumer (the householder) at the moment he made a contract with the retailer to exchange his particular refrigerator, for example with a new one from the retailer. Thus, they were from that moment waste. Secondly, he submits they did not cease to be waste by virtue of the process of selection and purchase by Thorn for their repair and refurbishment; they would only cease to be waste at such a time as the trained engineers had completed such repair or refurbishment as was necessary.

16. In support of those contentions, he refers to the decision of the European Court of Justice, which is Joined Cases C-418/97 and C-419/97 dated 15 June 2000, which establishes that items which are waste remain waste even though they are capable of economic re-utilisation (see paragraph 65). The issue in that case was at what point the

items in question ceased to be waste. It should be noted that those cases concerned two types of material which undoubtedly were waste. In the case of ARCO Chemie Nederland Limited, the items in question were known as LUWA-bottoms, which were the by-products of the manufacturing process used by ARCO and could, when subjected to various processes, be destined for use as fuel.

17. In the other case, Elektriciteitsproductiemaatschappij Oost-en Noord-Nederland NV (Epon), the items were wood residues from the construction and demolition sector, which were delivered in the form of woodchips and could be transformed into wood powder and used as fuel to generate electricity. The issue in that case was whether, during the process of recovering and transformation into a form which could be used to generate power or energy, they remained waste until the process of recovery was complete. Between paragraphs 95-97, the court sought to assist on the question of the point at which the material which undoubtedly had been waste ceased to be waste, and concluded:

> "Whether it is waste must be determined in the light of all the circumstances, by comparison with the definition set out in Article 1(a) of the directive, that is to say the discarding of the substance in question or the intention or requirement to discard it, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined (see para 97)."

18. The court pointed out that the waste in the form of the wood still contained toxic substances which was then passed into the chips from which the wood powder was regained, and the process did not purge the wood of the toxic substances which impregnated it (see paragraph 96). But it is also important to observe that, in that case, the court pointed out that the mere fact that material was subjected to processes which are identified in Annex IIB, to which I have already referred, did not determine the question whether such material was waste in the first place: see paragraph 49 at which the court said:

> "It does not necessarily follow from the fact that certain methods of disposing of or recovering waste are described in those annexes [annexes IIA and IIB] that any substance treated by one of those methods is to be regarded as waste."

19. Cases such as ARCO were considered by the Court of Appeal in R(OSS Group Limited) v the Environment Agency and others and DEFRA [2007] EWCA Civ 611. The material in question in that case had undoubtedly become waste. It was described in the introduction by Carnwath LJ as waste lubricating and fuel oil from places such as garages and workshops, which were to be converted into marketable fuel oil (see paragraph 1). The question in that case again, like ARCO and Epon, was at what point such material ceased to be waste.

20. At paragraph 53, Carnwath LJ cited Niselli, a case concerning scrap ferrous materials

obtained from dismantling machines and vehicles, as support for the proposition that waste material continued to be classified as waste during the process of recycling (see paragraph 52). At paragraph 59, the court having commented upon the failure of the European Court of Justice to set out any test to determine at which point that which has become waste ceases to be waste, concluded:

> "... although the court continues to pay 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."

21. I would add this: the important point to recall in relation to ARCO, Epon, and OSS was that the question should be focused upon that which was undoubtedly waste and whether it ceases to be waste. 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 [1997] ECR I-7411 as follows:

> "The general concept is now reasonably clear. The term 'discard' is used in a broad sense equivalent to 'get rid off'; 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.

23. The justices appear sensibly, from their findings of fact and from the evidence which they set out, to have focused on the later transactions. The equipment in question had been selected for repair by Wincanton. It was only 20 per cent of those items held by electrical retailers. The goods were then inspected on a second occasion by another independent contractor, namely the respondents in the instant appeal, Thorn. They were then selected for repair. True that in some cases it was discovered by the trained engineers that they would not be worth repairing and they would at that stage be sent for waste disposal, but it was only a small proportion which were discovered to have been wrongly selected at Wincanton's premises, and given the small margin for profit, since these goods would be resold at substantially lower prices than those sold new, it was unlikely that any would be selected by Thorn from Wincanton's premises which needed any substantial work. I therefore would emphasise that the goods seen at Thorn's store at Smethwick had been by that time subject to two separate and independent processes of selection from the retailer since they had been held in the hands of the consumer.

24. The first question therefore for this court is whether the justices were bound to find that when the consumer asked the retailer to collect them they were waste within the meaning of the Act and the Directive. As I have said, there is no doubt that at that stage the consumer was the holder within the meaning of the Act and the Directive. The question turns on whether they had been discarded within the meaning of Wallonne.

25. There are obvious examples of material to be found in the cases which were surplus to requirements and no longer required for their original purpose. The LUWA-bottoms destined for fuel in ARCO and wood residues, although capable of economic reuse, were waste in the hands of the original manufacturer. Similarly, the lubricating and fuel oil were waste, even though they could be converted into marketable fuel. But by way of contrast, the electrical goods in the instant appeal, exchanged for replacement products, could hardly be said to be no longer required for their original purpose. Perhaps, they may have been exchanged because the consumer wanted the advantage of a later model of computer or a less noisy dishwasher.

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 to 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 paragraph 97 in ARCO, and as the Court of Appeal endorsed at paragraph 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.

28. In those circumstances, I would answer the second question in the case in the affirmative and dismiss the appeal.

29. MR JUSTICE BLAKE: I agree that the justices were entitled to reach the findings of fact that they did in this case and the appeal should be dismissed for the reasons given by Moses LJ.

30. The central issue is whether the electrical goods were waste when they came into the possession and control of the respondent firm, and whether they were depended on whether the prosecution could satisfy the justices that the goods in question had been discarded before that time. For the reasons given by my Lord, on the particular facts of this case, the justices were entitled to reach the conclusion that they did that they had not been discarded.

31. In my judgment, the only evidence of discarding in this case was the discarding by Wincanton, when they selected the goods that had come into their possession, obtained from the retailers and in turn from the consumers, and found that 80 per cent of them were useless or not fit for any purpose. Prior to that, there was no evidence of anybody applying their mind to usability or future use. But of course it was not those goods which came into the possession of the respondents. Therefore, the respondents only came into the possession of goods which had been selected by Wincanton as useable. The respondents themselves made their own selection and agreed with that decision, and those goods were stored in those circumstances. In the circumstances of this case, that is enough for the justices to answer the second question in the way they did, it being accepted that the storage and the processing to which the respondents applied to these goods did not in any event create a risk to health, and that is why the first question is

answered also in the affirmative.

32. MR GREEN: Thank you. Costs, my Lord. Can I have costs against the appellant please, subject to taxation?

33. LORD JUSTICE MOSES: Should they be against the appellant or out of central funds?

34. MR MEHTA: I think my Lord has a discretion in relation to whether it should be --

35. LORD JUSTICE MOSES: Normally they would be out of central funds, would they not?

36. MR GREEN: My Lord, if it is out of central funds, I am not going to --

37. LORD JUSTICE MOSES: It does not matter from your point of view, as long as you get them.

38. MR MEHTA: Certainly, central funds --

39. LORD JUSTICE MOSES: Yes, I think out of central funds.

40. MR GREEN: Thank you.