Neutral Citation Number: [2010] EWCA Crim 927

Case No: 200905547C5

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CRIMINAL DIVISION)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2010

Before :

Lord Justice Hughes
Mr Justice McCombe
and
Mrs Justice Sharp DBE

- -

Between :

	Regina	**Appellant**
	- and -	
	W, C and C	**Respondent**

- -
- -

Gary Lucie and Malcolm Galloway (instructed by the Environment Agency) for the Appellant
Geoffrey Mercer QC and Jonathan Barnes (instructed by Waters & Barbary) for the Respondent PC,
Geoffrey Mercer QC and Michael Melville-Shreeve (instructed by Waters & Barbary), for the Respondent TC
and
Joss Ticehurst (instructed by Howell Hylton) for the Respondent W

Hearing date: 18 March 2010

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Judgment

Mr Justice McCombe:

1. In October 2009 in the Crown Court, the respondents stood trial on an indictment charging each with four offences of knowingly permitting the deposit of controlled waste contrary to section 33(1)(a) and (6) of the Environmental Protection Act 1990 ("the Act") (counts 1 to 4) and one offence of disposing or keeping of controlled waste contrary to section 33(1)(b)(i) and (6) of the Act (count 5). On Friday, 9 October 2009, at the close of the Crown's case, the learned judge heard submissions on behalf of the respondents that there was no case for any of them to answer. The judge acceded to those submissions and the Crown applies to this court under section 58 of the Criminal Justice Act 2003, for leave to appeal against that decision. We grant leave.

2. The prosecution arose from the deposit at a farm of a large quantity of materials, extracted principally from neighbouring farm land in the course of construction on that land of new

hotel premises. The materials consisted in large measure of soil and subsoil excavated during the works. The deposits occurred in the period between October 2007 and February 2008. The respondents, TJC and PAC, are the owners of the farm onto which the materials were deposited; the respondent W is the manager of the site. The prosecution claimed that they were able to identify at least 648 lorry loads of materials amounting to some 9126 tonnes that had been deposited onto the land owned by TC and PC and managed by W. It was common ground that no waste management licence under the Act had been obtained in respect of these activities. The Crown's case was that the materials constituted "controlled waste" within the meaning of the Act and that the tipping of it onto the land and its presence on it thereafter, without the issue of the relevant licence, constituted the deposit of such waste and the disposal of and keeping of it contrary to the provisions of the Act to which we have referred. There was evidence that the respondents had been paid some £20,000 to £25,000 to receive the materials onto their land.

3.The defence case that was to be presented, and which was known to the judge when he made his ruling, was that the receipt of the material was for the purpose of creating an area of hard standing for the extension of the farm facilities and the construction of a new farm building on top of it. It appeared from the Crown evidence that the materials had in fact been used to create a horizontal platform of some 100 x 60 metres, extending outwards in a wedge form from the naturally sloping land, with a vertical elevation of about 15 metres at its highest point.

4.Material to the Crown case, for reasons to which we shall return, was that the farm is set in an area of substantial scenic beauty in a Special Area of Conservation, within the highest category of such designation in European Union terminology. In late November 2007 public authorities became aware of the tipping activities at the farm site. A letter was written by the parish council to the County Council about them. A monitoring officer employed in the Minerals and Waste Planning Unit of the County Council visited the farm on 29 November 2007. He expressed the written view that the operation being undertaken did not have waste disposal as its primary objective but rather that it was an engineering operation and he advised all concerned that he would not be taking any further action but would leave it to the appropriate, i.e. planning authority. That was the District Council. The planning officer of the District Council visited on 14 December 2007. The opinion that he expressed at the time was that the activity was "permitted development" for planning purposes, within the meaning of the Town and Country Planning (General Development) Order. On 6 February 2008 officers from the Environment Agency ("the Agency") attended; they took the view that the activity required a waste management licence under the Act and the respondent W was informed of this shortly thereafter by telephone and by letter. On 18 March 2008 the same planning officer from the District Council who had attended in December visited the site again. Following this visit the defendants were advised that the activity did after all require planning permission as an engineering operation. The defendants were advised that the substantial alteration to the ground was regarded as visually intrusive, but that it was open to them to make a retrospective application. By the time the prosecution was commenced, no such application had been made.

5.On 1 April 2008 the Agency received from the respondents an application for an exemption from the licensing requirements of the Act. Further information supplied by the respondents to the Agency thereafter stated that the object of the activity was to raise the

level of the land to permit the building of a cattle shed. The application stated that 2500 tonnes had been deposited whereas waste transfer notes obtained from the haulage companies, following service on 13 February 2008 of notices under Section 34 of the Act, indicated that some 7000 tonnes had been deposited.

6. Proceedings were taken against the haulage contractors for depositing controlled waste contrary to the Act and they pleaded guilty to the charges. Those convictions were not, however, adduced in evidence in the present case pursuant to sections 74 and 75 of the Police and Criminal Evidence Act 1984.

7. On 16 May 2008 the respondents were interviewed by officers from the Agency. In those interviews the respondents W and PC informed the officers that the bulk materials had come from a farm where digging operations had been carried out to construct foundations for a new hotel. Following those interviews the respondents were charged with the offences for which they came to be tried in the Crown Court.

8. The relevant provisions of the Act are as follows. Section 33 of the Act provides:

> " (1) Subject to subsection (2) and (3) below [subsections (1A, (1B), (2) and (3) below] and, in relation to Scotland, to section 54 below, a person shall not –
>
> (a) deposit controlled waste, or knowingly cause or knowingly permit controlled waste to be deposited in or on any land unless a waste management licence [an environmental permit] authorising the deposit is in force and the deposit is in accordance with the licence [the permit];
>
> (b) treat, keep or dispose of controlled waste, or knowingly cause or knowingly permit controlled waste to be treated, kept or disposed of –
>
> (i) in or on any land
>
> (ii) by means of any mobile plant,
>
> Except under and in accordance with a waste management licence;
> …
>
> (6) A person who contravenes subsection (1) above or any condition of a waste management licence commits an offence."

Section 75 of the Act supplies these definitions:

> "(2) "Waste" means any substance or object in the categories set out in Schedule 2B to this Act which the holder discards or intends or is required to discard; and for the purposes of this definition –
>
> "holder" means the producer of the waste or the person who is in

possession of it; and

"producer" means any person whose activities produce waste or any person who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste

(3) …

(4) "Controlled waste" means household, industrial and commercial waste or any such waste.

(6) Subject to subsection (8) below, "industrial waste" means waste from any of the following premises - …

(e) … any premises used for agriculture within the meaning of the Agriculture Act 1947].

(7) Subject to subsection (8) below, "commercial waste" means waste from premises … used wholly or mainly for the purposes of a trade or business excluding - …

(b) industrial waste; [and] …

(d) waste of any other description prescribed by regulations made by the Secretary of State for the purposes of this paragraph.

(8) Regulations made by the Secretary of State may provide that waste of a description prescribed in the regulations shall be treated for the purposes of provisions of this Part prescribed in the regulations as being or not being household waste or industrial waste or commercial waste; … and references to waste in subsection (7) above and this subsection do not include sewage (including matter in or from a privy) except so far as the regulations provide otherwise. "

9.On these facts, two submissions were made by the respondents to the judge. First, it was argued that the Crown had failed to establish that the material deposited was "waste", let alone "controlled waste". Secondly, it was argued that, if the Crown had made out a sufficient case for the jury that the material was "waste", then it had failed to make out a sufficient case that it was "controlled waste". The judge accepted both these submissions.

10.The judge enunciated certain "basic points" in paragraph 9 of his careful judgment:

"Now before I go further some basic points fall to be made. The first is that material can start as waste but cease to be waste. Secondly, its status as waste or not falls to be re-determined according to who, from time to time, is its "holder". Assuming for my current purposes the accuracy of my hypothesis that the material in this case emanated from various building sites then at the time that it was excavated its holder would have been the person who had produced it or had possession of it (perhaps the

> owner of the site or the building contractor). As it was being carried from those sites in lorries the haulier would become its holder. When deposited on the [C] land the holders would become the [C] brothers and possibly [W]. The moment that deposit takes place, the issue of whether it is material that the holder discards or intends or is required to discard is an issue that must be applied to the new holders, say the [C] brothers. This is an analysis with which Mr Galloway, counsel for the Environment Agency, took no issue."

11. He then set out the names of and references to the six cases to which he had been referred from which he proceeded to set out some "general propositions" that could be gathered. Those propositions were these:

> "First there is the proposition that waste (and therefore discard) should not be interpreted restrictively and its interpretation should take account of EU directive objectives (primarily the protection of human health and the environment).
>
> Second, the fact that a material had been subject of a production or recovery process did no[t] conclusively establish that it is or is not waste.
>
> Waste includes substances discarded by their owners even if they are capable of economic re-utilisation or have a commercial value.
>
> Waste does not cease to be waste simply because it has come into the hands of someone who intends to put it to a new use but that is because the aims of the Directive require that it continue to be treated as waste until acceptable recovery or disposal has been achieved. The courts have not established any criteria to establish what this means."

12. The judge said that the Crown's case was opened on the basis that the respondents were motivated simply by the desire to make money from the tipping operations. On this appeal, Mr Galloway for the Crown takes issue with that formulation of his submissions to the judge and jury in opening the case. We think that the "money motive" has little if anything to do with the issues before us. However, the judge held that the Crown evidence, from the planning officials, to the effect that this was an engineering project for the purpose advanced by the respondents and the division of the funds between them, leaving funds that "were not so large as to spell a simple profit motive, [left] the opening contention of the Environment Agency in tatters". It seems clear to us that the Crown's case for saying that this material was waste went much further than a case based simply on the payments made to the respondents by the tippers.

13. The judge went on to consider the functions of judge and jury in the case. He held, in our view correctly, that in a prosecution under section 33 it is a matter for the judge to determine whether the material in issue is capable of being "controlled waste" within the meaning of the Act and that, if so, it is then for the jury to decide whether it is in fact "controlled

waste".

14. The crux of the judge's decision on the first defence argument is to be found in paragraph 18 of his judgment in the following passage:

> "Is the material deposited at [T] Farm capable of being regarded as waste? The incontrovertible evidence is that it was received onto the farm for a specific purpose which was immediately put into effect. It represented a valuable commodity to the [C] brothers, not in itself a conclusive matter but nonetheless a pointer against it being waste. Despite the gloss put on the normal meaning of "discarded" by the European jurisprudence it is not such as to rob the word of all its natural meaning. There is not the slightest element of "discarding" in the use to which the Defendant put the material immediately upon its deposit. In a sense this is a case that is far more Inglenorth than Palin Granit. In the latter there was only a potential use for the material at some undetermined future date. In the former the use intended was immediate. Notwithstanding this analysis of the situation, can it be said that the material falls foul of the principle once waste remains such until acceptably disposed of or recovered? Well, this contention does not get off the ground unless the Prosecution can prove that the material in the instant case was once waste. This, in a sense, may go to the second submission but assuming for a moment that the Prosecution had proved it was waste once, this leads onto a consideration of what acceptably disposed of or recovered means. No court, so far as I am aware, has provided any criteria to judge this issue against. I simply content myself with saying that I anticipate it may mean recovered or disposed of in a way which meets the aims of the waste directive. Mr Galloway contends that it means that the material must be used lawfully e.g. not in breach of planning control. I am not satisfied that it does bear that meaning."

From this he concluded that the first submission succeeded.

15. The judge's conclusion on the second defence submission, which he held also succeeded, was this:

> "I cut short what could be a very long story by saying that if the Prosecution established by evidence that it was material excavated from building sites e.g. to create holes in which foundations could be formed, then it would at least be capable of being controlled waste. The question is whether the Prosecution has established this. The evidence of witnesses who observed the material once deposited at [T] Farm will not do. This is because soil and subsoil is capable of either being waste or not dependant on its source. What the Prosecution relies upon is the evidence from waste transfer notes produced from hauliers to the farm which in some cases contain details of the site from which the material came and

> in other cases contains a categorisation of the material defining it as waste. The relevant legislation makes the waste transfer notes admissible in evidence. The point at issue is whether without more they prove anything. At their height they would be evidence of the opinion of hauliers that the material being carried was controlled waste. It must be remembered that it would have been simple enough for the Prosecution to secure evidence from the operators of sites from which the material came, evidencing the process by which the material was produced. No such evidence was secured. In my judgment what has been obtained does not amount to any evidence that could enable a jury to find that the material that was loaded onto the haulage lorries was controlled waste."

16. In the result the defence submission of no case was accepted and this appeal is now brought against that decision.

17. On the appeal, it is argued by Mr Lucie and Mr Galloway for the Crown that the judge was wrong in his conclusions on each of the defence arguments. On the first submission, it is said that the judge erred in finding that the offence had to be judged at the time when the materials came into the possession of the respondents and when, accordingly, they became "holder"(s) of it, and not at the time when the deposit was effected by the hauliers, which was the moment at which the permitting and/or causing of the deposit fell to be decided. It is further argued that "waste" does not cease to be such simply because the recipient has a use for it; it is still waste until acceptable recovery or disposal has been achieved; the ruling contravened the aims of the Waste Framework Directive; the material would have been commonly regarded as waste and was not subjected to any recovery operation before being simply pushed into place for its new use.

18. On the second argument, the Crown contends that, if this material was capable of being waste, the ruling failed properly to construe and apply section 75 of the Act, failed properly to assess the admissions made by each respondent in interview and a letter written by JC and PC on 4 April 2008 as to the provenance of the material, together with the evidence of the waste transfer notes. All this, say the Crown, was quite sufficient evidence of the material being controlled waste.

19. The Act represents the United Kingdom's transposition of the European Union's Waste Framework Directive (at the relevant time Directive 2006/12/EC). In particular, section 75 (2) reproduces, effectively verbatim, the words of Article 1 of that Directive. The recitals to the Directive make clear its objectives. In particular, recital (2) provides:

> "(2) The essential objective of all provisions relating to waste management should be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste."

20. The law in this area has been the subject of a number of decisions, the most relevant of which were those to which the learned judge was referred. Some of the decisions are those of the European Court. Of these, after an extensive review, Carnwarth LJ has said that, "a search

for logical coherence in the Luxemburg case law is probably doomed to failure" (see *R (OSS Group Ltd.) v Environment Agency & ors* [2007] EWCA Civ 611 – a case which we shall call "*OSS*").

21. In *OSS* Carnwarth LJ, giving the main judgment of the Civil Division of this court (and with whom Sir Anthony Clarke MR (as he then was) and Maurice Kay LJ agreed) identified the following points emerging from the cases in the European Court:

> "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 art 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 (*Pallin Granit Oy* paras 32-37 – see further below)."

(The shortened names of the cases in that passage are references to *Palin Granit Oy* [2002] ECR I-4475; *ARCO Chemie Nederland v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [2002] QB 646; *Inter-Environnement Wallonie ABSL v Region Wallonne* [1997] ECR I-7411; *Tombesi* [1997] ECR I-3561.)

22. After further analysis of these cases and immediately after his comment on the "logical coherence" (or otherwise) of them, Carnwath LJ said this,

> "A fundamental problem is the court's professed adherence to the art 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.
>
> 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 art 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, whose only subjective intention is to use, not to get rid of, the materials in issue."

He concluded the discussion of the cases as follows:

> "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."

23. *OSS,* like *Arco,* the Scottish case of *Scottish Power Generation Ltd. v Scottish Environment Protection Agency* 2005 SLT 98 and the case in the Dutch Statlijke Rad of *Icopower BV v Secretary of State* (14 May 2003), considered in *OSS*, were all cases concerning combustible fuels extracted or created from unused oils or extracted from manufacturing processes. The narrow decision in *OSS* was an affirmative answer to the question "…

whether a lubricating oil, thus not originally used as fuel, which becomes waste can thereafter be burnt other than as waste" (see paragraphs 4 and 70 to 72 of the judgments).

24. Although the underlying principles setting the legal characteristics of waste remain the same here as in the "fuel" cases, the practical application of the legal tests to the facts appear more readily perhaps from other decisions relating to materials more like those involved in this case. Two cases, in the courts of England and Northern Ireland respectively, which were cited to us, have been concerned with the recovery and re-use of materials more akin to those with which we are concerned here.

25. In *Department of the Environment and Heritage Service v Felix O'Hare & anor.* [2007] NICA 45, the Court of Appeal in Northern Ireland was concerned with soil and clay removed from a playing field site in advance of building work by the first respondent and subsequently removed by the second respondent to land belonging to a third party for the purpose of erecting a windbreak on the third party's land. The building contractor and the excavation contractors were charged with offences relating to the deposit of controlled waste, contrary to the Northern Irish legislation equivalent to the present English Act. The recipient of the materials was not a defendant in the proceedings.

26. After a review of the cases in the European Court and in this country, Girvan LJ set out the following principles:

> "(i) The word "discard" when read in the light of the language texts of the Directive points to the concept of getting rid of an unwanted object or substance (see in particular the judgment of Carnwath LJ in *R(OSS Group Ltd v Environmental Agency* [2007] EWCA Civ 611 and the judgment of Butler-Sloss LJ in *Cheshire County Council v Armstrongs Transport (Wigan) Ltd* [1995] Crim LR 162.
>
> (ii) A rational system of control points to the conclusion that the categorisation of materials as being waste or not being waste depends on the materials qualities and not on the qualities of their storage or use even if the storage and use is environmentally safe. (See *Castle Cement Ltd v Environmental Agency & Lawther* per Stanley Burton J.
>
> (iii) The nature of the material has to be considered at the time of its removal from the original site (*Kent County Council v Queensborough Rolling Mills Co Ltd* [1990] 154 JP 442).
>
> (iv) The definition of waste in the act must be taken from the point of view of the person disposing of the material [*Long v Brooke* [1980] Crim LR 109).
>
> (v) Excavated soil is capable of being waste. Whether or not it is in any given case is a question of fact to be determined on the evidence adduced (*Ashcroft v McErlain Ltd* QB Eng 30 Jan 1985). "

He concluded that the deposited materials were "controlled waste" within the meaning of the Northern Irish legislation and said this:

> "On the undisputed evidence before the Resident Magistrate there was, however, only one logical conclusion to reach, namely that the soil did constitute controlled waste. In the course of carrying out the works on the land beside the school preparing the site for the construction of the extension soil had to be removed. Traditionally soil and stones would not be regarded as waste material and frequently will not in fact be waste. However this soil when excavated represented material which had to be disposed of in some manner. It had to be got rid of or, in the terms of the Directive, "discarded"."

27. In *Environment Agency v Inglenorth Ltd.* [2009] EWHC 670 (Admin), the court was concerned with materials left over from the demolition of a greenhouse at a garden centre, some of which was intended to be reused by the owner for business purposes at another garden centre owned by him on a different site. The materials included breeze blocks, concrete, tiles, brick, clay pipe and clay. The defendant in the proceedings, Inglenorth, transported 20% of the material to the owner's second site. It was charged with failing to take reasonable measures to prevent the contravention by another of section 33 of the Act, in failing to inform that other of the need for a waste management licence in order to deposit controlled waste at the second site, contrary to section 34 of the Act.

28. The Divisional Court (Sir Anthony May P and Dobbs J) held that the materials deposited at the second site were not waste within the meaning of the Act. The final paragraph of the President's judgment was in the following terms:

> "In my judgment 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 then would be hardcore delivered to my drive for me to use to mend the drive or to use as a subbase 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."

29. The President said this of the decision in *O'Hare*:

> "It is certainly correct that that case has quite close similarities with the present one but, apart from the fact that it is in a different jurisdiction, there are these important differences. First, that from the sentence from paragraph 16 that I have just read out, the court concentrated on what the material was when it was excavated and had to be got rid of and, secondly, and importantly, that so far as I can see the court did not have in that case the kind of findings of fact which we have in the present case by the Stockport

Magistrates."

Returning to the case before him the President made two points, as follows: (in this passage "Mr Evans" was the owner of, or perhaps the controlling mind of the company which owned, the two sites in question)

> "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 Mr McCullough 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 judgment must be between depositing the material for storage pending the 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."

30. Before stating his conclusion on the case in paragraph 38 of the judgment which we have already quoted, the President said this:

> "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 had 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 judgment 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 use.

> In my judgment, 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 my drive for me to use to mend the drive or use as a subbase 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."

Dobbs J agreed with the judgment of the President.

31. The respondents in the present appeal not unnaturally relied heavily upon *Inglenorth*, as they did before the judge. They submitted that the immediate re-use of the deposited materials took them outside the definition of "waste" in the Act, since that removed the element of "discarding" which the European Court has consistently adopted as the touchstone of the definition of waste.

32. Given the findings of fact in *Inglenorth* and (importantly) the nature of the materials involved, we consider, as did Sir Anthony May and Dobbs J, that the material deposited at the second site, at the only moment that it mattered for the purpose of the prosecution in that case (namely the date of the deposit itself), could properly be considered not to be waste within the meaning of the Act.

33. However, we do not take the view that the question of immediate re-use of the relevant material can be entirely determinative of the status of the material regardless of other considerations. Sir Anthony May's example of hardcore delivered for the immediate invisible repair of a domestic driveway may be one thing, but (by way of further example) the piling up of hardcore and subsoil, which was waste in the hands of the party who extracts it from the land, for the construction an intrusive artificial ski-slope on someone else's land may well be another. As Girvan LJ said in *O'Hare* such material may well remain as waste which has to be disposed of in some manner notwithstanding an immediate intention of the recipient to re-use it. "The term "discard" must be interpreted in the light of the aims of the [Directive]…" and "…material which was originally waste needs to continue to be so treated until acceptable recovery or disposal has been achieved": see again per Carnwath LJ in *OSS*, paragraphs 14(iv) and 56.

34. We conclude, like the Court of Appeal in Northern Ireland, that excavated soil which has to be discarded by the then "holder" is capable of being waste within the Act and, in any individual case, ordinarily will be. Having become waste it remains waste unless something happens to alter that. Whether such an event has happened is a question of fact for the jury. The possibility of re-use at some indefinite future time does not alter its status: see *Palin Granit*, and indeed *ARCO*. Actual re-use may do so (*Inglenorth*), but only if consistent with the aims and objectives of the Act and of the Directive: (c.f. *O'Hare*), the principal ones of which are the avoidance of harm to persons or to the environment, as set out in the recitals to the Directive. Which of those aims and objectives are relevant to an

individual case will depend on the cases presented by the parties. In this case, for example, the main concern maintained by the Crown is for the environment around the village where the respondents' farm lies (as a Special Area of Conservation) and visual amenity in the area generally. Matters which, in our judgment, are readily capable of assessment by a jury in deciding whether any material in issue is in fact "waste".

35. Accordingly, and with respect to the judge who grappled admirably with an opaque and extremely difficult area of law, we find that he was wrong to accede to the first defence submission in this case.

36. In the first place, he was in error in assessing the status of the materials entirely by reference to the respondents as "holder"[s]: see paragraph 9 of the judgment, last sentence. The hauliers were also clearly "holders" of materials which it was open to the jury to find to have been waste from the moment of excavation at the neighbouring farm and requiring to be discarded by the land owners as "holders". The additional question was whether what the jury could find to be "waste" from the moment of excavation to the moment immediately prior to deposit on the respondents' land ceased to be so because of the intended and actual use of it by the new holders. That too, in our judgment, was a question of fact for the jury.

37. Secondly, the judge fell into error, we think, because he then concentrated entirely upon the intentions of the respondents to put the material to immediate use and found that it could not be waste because there was not the slightest element of discarding in the use to which they put it immediately after the deposit: see paragraph 18. At the close of the Crown's case there was to our minds undoubtedly evidence to go to the jury which would entitle them to find that these materials were waste that were required to be disposed of by the producers and by the hauliers and that the respondents had been paid to relieve that need on their part. If satisfied, on that material, that this was waste at that stage, the further question that remained for the jury was whether, having regard to the aims of the Directive, the materials ceased to be waste, no longer being discarded by anyone, which was being subjected to acceptable recovery or disposal.

38. All would depend on the facts of the individual case. There may be cases where what is deposited as waste in the recipient's hands is deprived of that character by later acceptable use. However, in the present case, the answer to the question posed at the end of paragraph 37 above is likely to resolve all five counts on the indictment, by virtue of the jury's view of the respondent's intended and immediate actual use of the materials. Was that a use in accordance with the objectives in the Directive and particular recital (2), quoted in paragraph 19 above? If so, that would seem to us to be likely to resolve all the counts, for it is difficult to see how in this particular case the character of the material, when received into the possession of the respondents, could be held to change at the instant of deposit on their land. This is not to cast doubt on the pleas of guilty entered by the hauliers who may well have accepted that their sole purpose was to dispose of controlled waste, the intended and actual purposes of the respondents in receiving it being immaterial to them.

39. In our judgment, the real question on the appeal arose out of the first defence submission. We consider that, if there was a case to go to the jury on that point, there was clearly a case to

answer that this was "controlled waste".

40. Having regard to the definitions contained in Section 75 of the Act, there seems to us to have been ample evidence that, if waste at all, these materials were "controlled waste" as being "industrial waste" from "…premises used for agriculture…" (section 75(6)(e)) and/or "waste arising from works of construction or demolition, including waste arising from work preparatory thereto" (section 75(7) and/or (8) and reg. 5(2) of the Controlled Waste Regulations 1992 (SI 1992/558)). These provisions, together with the evidential material identified by the Crown in written argument (paragraphs 48-55 and especially the admissions made in various forms by all defendants), clearly provided an evidential basis from which a jury was entitled to conclude that the material came from a neighbouring farm ("premises used for agriculture") where a hotel was being constructed ("waste arising from works of construction…including waste arising from work preparatory thereto").

41. We have considered the question of "controlled waste" aside from questions of burden of proof. However, like Stanley Burnton J (as he then was) in *Skipaway Ltd. V Environment Agency* [2006] EWHC 983 (Admin) paragraph 28, we consider that, if this was "waste" the onus of showing that it was not "controlled" was on the respondents.

42. For those reasons we consider that the defence submission of no case was wrongly accepted and that this appeal must be allowed. We order, pursuant to section 61(4)(b) Criminal Justice Act 2003, that a fresh trial may take place in the crown Court for the offences charged in the indictment.