

**Neutral Citation Number: [2012] EWCA Crim 2064**

Case No: CA 2011: 07004, 07005, 07017, 07171, 2012: 00134, 01424, 02053 (C5)

**IN THE COURT OF APPEAL (CRIMINAL DIVISION)  
ON APPEAL FROM BASILDON CROWN COURT  
HH Judge Jonathan Black**

Royal Courts of Justice  
Strand, London, WC2A 2LL  
16/10/2012

**B e f o r e :**

**LORD JUSTICE PITCHFORD  
MR JUSTICE KING  
and  
MR JUSTICE BLAIR**

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**Between:**

**Godwin Chukwnaenya Ezeemo,  
Reliance Export Limited,  
BJ Electronics Limited,  
Chika Ezeemo,  
Joseph Benson,  
Orient Export Limited,  
Nnamdi Chinedu Ezechukwu**

**Appellants**

**- and -**

**R**

**Respondent**

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**F McGrath (instructed by Ennon & Co. Solicitors) for the 1st Appellant  
F McGrath (instructed by Joseph Hill & Co. Solicitors) for the 2nd and 7th Appellant  
6th Appellant was not represented and did not attend  
D Barry (instructed by Shepherd Harris, Solicitors) for the 3rd and 5th Appellants**

**G Ross (instructed by Gans & Co. Solicitors) for the 4th Appellant  
J Goudie QC, S Mehta and H McCann (instructed by The Environment Agency) for the  
Respondent**

**Hearing date : 25 September 2012**

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## HTML VERSION OF JUDGMENT

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### **Lord Justice Pitchford :**

1. The appellants, natural and legal persons, appeal against conviction with a certificate of leave granted by the trial judge, His Honour Judge Jonathan Black.

### **The trial**

2. On 17 October 2011 at Basildon Crown Court the appellants faced an indictment containing 21 counts charging them with offences of transporting waste, specified in Article 36(1) of the European Waste Shipment Regulation 1013/2006 (the "EC 2006 Regulation"), namely wastes listed as hazardous in Annex V (or mixed wastes), that were destined for recovery in Nigeria, a non-OECD country, contrary to regulation 23 of the Transfrontier Shipment of Waste Regulations 2007 (the "UK 2007 Regulations"). The appellants had pleaded not guilty on an earlier occasion to similar counts contained in an amended composite indictment. The judge ordered severance of several counts concerning other defendants and the trial proceeded against the appellants upon a separate trial indictment.
3. The trial indictment was arranged so as, with one exception, to charge the principal offence in the odd numbered counts. In the case of the natural defendants, the even numbered counts were alternatives. The alternative counts charged the defendant as an officer of a body corporate whose offence was committed with the consent or connivance of the defendant, or was attributable to the neglect of the defendant, within the meaning of regulation 55(1) of the UK 2007 Regulations.
4. On 14 and 15 November 2011 at the close of the prosecution case the judge ruled that there was evidence to go to the jury that each of the appellants (i) was involved in the transport (ii) of waste (iii) destined for recovery in Nigeria. The judge ruled (iv) that the offence was one which imposed strict liability in that the prosecution was not required to prove against any defendant knowledge that the product transported was waste within the meaning of regulation 23.
5. On 15 November, the appellants Godwin Ezeemo, Nnamdi Ezechukwu, Orient Export Limited and Reliance Export Limited changed their pleas as follows: Godwin Ezeemo pleaded guilty to counts 4, 8 and 14 (original indictment 12, 14 and 21 respectively). Nnamdi Ezechukwu pleaded guilty to counts 12, 16 and 19 (original indictment 16, 22 and 24). Orient Export Limited pleaded guilty to counts 3, 5, 7, 9, 13 and 20 (original indictment 1 – 4, 7 and 10). Reliance Export Limited pleaded guilty to counts 11, 15 and 17 (original indictment 5, 8 and 9). Those pleas of guilty were accepted by the prosecution and the jury was discharged from reaching further verdicts in the cases of those appellants. The trial proceeded in the cases of the appellants Chika Ezeemo, Joseph Benson and BJ Electronics Limited. On 28 November 2011 the jury returned the following verdicts: Chika Ezeema was found not guilty upon counts 3, 4, 5, 6, 7, and 8 (original indictment 1 – 3 and 12 – 14). He was found guilty upon counts 9, 13 and 20 (original indictment 4, 7 and 10). Joseph

Benson and BJ Electronics Limited were found guilty upon counts 1 and 17 (original indictment 9 and 32).

6. At a sentence hearing held on 13 December 2011 the appellants were sentenced as follows: Godwin Ezeemo, a fine of £1,000 upon each count (total £3,000), surcharge £15, 6 months imprisonment in default. He was ordered to pay £3,000 towards the prosecution costs. Chika Ezeemo received a conditional discharge upon each count. Orient Export Limited was fined £1,000 upon each count (total £6,000). Nnamdi Ezechukwu was fined £1,000 upon each count (total £3,000), ordered to pay the surcharge of £15, 6 months imprisonment in default, and ordered to pay £3,000 towards the costs of the prosecution. Reliance Export Limited was sentenced to fines of £1,000 (total £3,000) and ordered to pay £3,000 towards the costs of the prosecution. Joseph Benson was fined £7,000 upon count 1(9) and £4,000 upon count 17(32) (total £11,000) and was ordered to pay the surcharge of £15, 12 months imprisonment in default. He was ordered to pay £7,000 towards the costs of the prosecution. BJ Electronics Limited was ordered to pay identical fines and £7,000 towards the costs of the prosecution.
7. The trial judge granted a certificate pursuant to section 1(2)(b) Criminal Appeal Act 1968 in these terms:

"I certify that the case is a fit case for appeal against conviction on the ground that at the close of the prosecution case I ruled that regulation 23 Transfrontier Shipment of Waste Regulations 2007 (SI 2007/1711) created an offence of strict liability. The defence has submitted throughout that Parliament could not have intended to create an offence which could be committed by such a wide range of individuals and/or companies involved in the export of waste electrical items abroad without there being some degree of intention on the part of those involved. These regulations set out to criminalise the breach of article 36 of the European Union Waste Shipment Regulations 2006.

At the same time I made rulings on what, for the purposes of the Regulations, constituted 'waste' and the meaning of 'destined for recovery' both of which concepts are issues that the defence will seek to have determined by the Court of Appeal as part of the proceedings on appeal."

### **Issues in the appeal**

8. The issues which have been raised in this appeal which we shall describe as the grounds are:
  - (1) Was the judge correct to rule and to direct the jury that if they were sure the owner had discarded (got rid of) an electrical item at a civic amenity site (i) the item became waste for the purposes of the indictment and (ii) did not cease to be waste until something was done to it to stop it being waste, and (iii) when deciding whether something had been done to stop the item from being waste the intention of the defendant as to what should be done or was going to be done with the waste was immaterial?
  - (2) Was the judge correct to rule and to direct the jury that there was evidence capable of proving that the waste was destined for Nigeria for the purpose of "recovery"?

(3) Was the judge correct to rule that the offence was one of strict liability requiring no proof of knowledge that the product transported was waste or an intention to transport waste to Nigeria for recovery?

### The legislative background

9. For many years the European Community has taken steps to co-ordinate the efforts of Member States to secure the environmentally protective management of 'waste'. In his opinion to the European Court of Justice in *ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* ("ARCO") C – 418/97, [\[2002\] QB 646](#) at page 650, paragraph 8, Advocate General Alber said:

"The concept of waste underlying Community law on waste is defined in article 1(a) of Directive 75/442. According to that definition, "waste" means "any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard"."

In fact, the word used in the 1975 Directive was 'disposes'. It was changed to 'discards' by the amendment in Directive 91/156 to ensure common terminology in Member States (see the Opinion of Advocate General Jacobs in *Tomesi* (C-304) [1997] 3 CMLR 673 at page 676, paragraphs 7 and 12).

10. In 1989 the Parties to the Basel Convention lodged its text with the Secretary General of the United Nations. One of the objects of the Convention was to address the problems caused by the export of waste to developing countries. Council Regulation (EEC) No 259/93 was adopted on 1 February 1993. It required the supervision and control by Member States of shipments of waste within, into and out of the European Community. Adoption of the principles of the Basel Convention and subsequent amendments to EEC 259/93 led to its replacement by the EC 2006 Regulation. Art 50 of the EC 2006 Regulation provided:

"1. Member States shall lay down the rules on penalties applicable for infringement of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive...."

Art 36(1) provided:

"1. Exports from the Community of the following wastes destined for recovery in countries to which the OECD Decision does not apply are prohibited:

(a) wastes listed as hazardous in Annex V

.....

(d) mixtures of hazardous wastes and mixtures of hazardous wastes with non-hazardous wastes not classified under one single entry in Annex V..."

11. Pursuant to powers given by section 2(2) European Communities Act 1972 and Schedule 2, paragraph 1A and in compliance with the EC 2006 Regulation, the Secretary of State introduced the Transfrontier Shipment of Waste Regulations 2007, coming into force on 12 July 2007 ("UK 2007 Regulation"). Regulation 23 provides:

"23. A person commits an offence if, in breach of Article 36(1), he transports waste specified in that Article that is destined for recovery in a country to which the OECD Decision does not apply."

12. Regulation 5 explains the meaning of "transports":

"5(1) Any reference in these Regulations to transport includes consigning for transport.

(2) Any reference in these Regulations to a person who transports waste includes the following persons-

(a) the notifier;

(b) any transporter of waste, by land or otherwise-

(i) into or in the United Kingdom; or

(ii) from the United Kingdom;

(c) any freight-forwarder; or

(d) any other person involved in the shipment of waste."

Regulation 4(2) provides:

"(2) Expressions used in these Regulations that are also used in the Community Regulation have the same meaning in these Regulations as they have in the Community Regulation."

13. The definitions relevant for current purposes are to be found in Art 2 of the EC 2006 Regulation which incorporates several of the definitions provided in Art 1(1) of the Waste Framework Directive 2006/12/EC of 5 April 2006 ("WFD"):

By Art 1(1)(a) 'waste' means *"any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard"*. It will be noted that the European Community continues to adopt the definition of waste it has consistently applied since 1991 (see paragraph 9 above).

By Art 1(1)(b) 'producer' means *"anyone whose activities produce waste ('original producer') and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste"*.

By Art 1(1)(c) 'holder' means *"the producer of the waste or the natural or legal person who is in possession of it"*.

By Art 1(1)(f) 'recovery' means *"any of the operations provided for in Annex II B"*.

14. The recovery operations listed in Annex II B include "R4 Recycling/reclamation of metals and metal compounds" and "R5 Recycling/reclamation of other inorganic materials".

**The prosecution case and evidence at trial**

15. There was no dispute at trial that Nigeria was a non-OECD country (Organisation for Economic Cooperation and Development), or that the relevant objects were destined for Nigeria. The prosecution case was that between the 13<sup>th</sup> November 2008 and the 23<sup>rd</sup> October 2009 the defendants 'transported' mixed hazardous electrical waste for 'recovery' in Nigeria. The waste was shipped in eleven general purpose shipping containers (with a maximum payload of between 25,000 and 28,000 kilograms). Approximately 158,990 kilograms (159 tonnes) of hazardous waste was exported in the containers. The containers were loaded with hazardous cathode ray tube televisions and fridge/freezers containing ozone depleting substances and compressor oil. They had been collected from civic amenity or waste disposal sites and taken to collecting points where they were loaded into containers. Other non-hazardous items were found in some of the containers. Upon opening the containers the front rows of equipment were seen to be stacked and wrapped in cling film. This was 'a front' because the remainder of the items were packed without any means of protection from damage in transit. Seven of the containers destined for Nigeria were intercepted at Tilbury and Felixstowe prior to export. The other four containers were intercepted at Antwerp, Belgium. Eight of the containers were exported through the services of Orient Export Limited and its company 'officers' Godwin Ezeemo and Chika Ezeemo. The other three containers were sent through Reliance Export Limited and its company officer Nnamdi Ezechukwu who also worked for Orient Export Limited. BJ Electronics Limited and its company 'officer' Joseph Benson operated a site from which two of the containers were loaded for export.
16. Count 1 (Joseph Benson and BJ Electronics Limited): In the summer of 2008 Mr Vincent of Greenpeace met with Mr Mansfield, a Sky News journalist. They obtained an old cathode-ray television which was professionally disabled rendering it beyond economic repair in the UK. The television was fitted with a tracking device and left at a civic amenity site in Basingstoke at which members of the public were invited to dispose of unwanted electrical goods. The television was, with other items, collected by lorry and taken to BJ Electronics' warehouse in Walthamstow. At the yard it was placed in a shipping container and delivered to Tilbury docks. The container was shipped to Tin Can Island, Lagos, delivered to Alaba Market and unloaded. Alaba Market is the largest market for electrical goods in Lagos. There were many shacks around the market and Mr Mansfield visited three or four of them. He saw fairly skilled electrical engineering work being carried out on appliances. Mr Mansfield and Mr Vincent filmed the unloading, identified their television and purchased it as evidence.
17. There is a market for second-hand electrical appliances. Witnesses gave evidence that the practice in the trade was to PAT test (portable appliance test) an appliance. The purpose was to ensure that the appliance was properly earthed. A Sky engineer gave evidence that Mr Vincent's television could not be economically repaired in the UK. It would not produce a picture, only sound. However, by replacing the tube base panel and soldering wires into place it could be made to work.
18. Adebole Odugbesan, director of legal services of the National Standards Enforcement Agency in Nigeria gave evidence that the importation of cathode-ray televisions and used refrigerators, working or not, was unlawful if they contained ozone depleting substances. Used appliances were prohibited unless they were functional.

19. Counts 3 and 4 (Orient Export Limited, Godwin Ezeemo): Container ACLU9623438 was detained at Tilbury docks. It was subsequently examined at the yard in Dereham where it had been loaded. The first two rows of cathode-ray televisions, 42 in number, were neatly stacked and wrapped in cling-film. PAT labels were attached. The rest were neither stacked neatly nor protected. Some of the televisions were obviously damaged with broken or cracked screens, and/or power cables cut. Photographs of the contents were taken and exhibited. The shipment was booked by Orient Export Limited bound for Lagos. On the booking document the goods were described as "used households" and "non-hazardous". Three further containers containing what appeared to be waste electrical equipment were found at the Dereham site. They were owned by Orient Export Limited. The seller had dealt with "Godwin". The 'waste' was collected from civic amenity sites using 'waste transfer' notes. The waste was exported using Orient as shipping agents.
20. Count 5 (Orient Export Limited): Container GCNU4665711 was detained at Tilbury docks. When it was opened engineers found it full of used electrical equipment including cathode-ray televisions. The first three rows were PAT labelled. The rest of the load was loose and unpackaged. Several items were damaged and power cords were missing. The fact that an item was PAT tested did not imply that it was functional. The order for export was placed by Orient Export Limited for delivery to Lagos. The contents were described in the booking form as "used households" and "non-hazardous".
21. Counts 7 and 8 (Orient Export Limited and Godwin Ezeemo): Container INKU5619514 was inspected at Tilbury. It contained used cathode-ray televisions and computer equipment some of which were damaged. Detailed inspection of some items showed them to be either capable or incapable of repair at reasonable cost. Photographs were taken and exhibited. A further container was examined. It contained similar items. Some of the items had PAT labels attached to them. The majority of items were not protectively packaged and only the first three rows were labelled. Many had missing or cut power leads. The shipping agent for delivery to Lagos was Orient Export Limited. The booking form was completed as before.
22. Count 9 (Orient Export Limited and Chika Ezeemo): Container CAXU9276890 was examined. It was similarly packed. The shipping was booked by Orient Export Limited in similar terms.
23. Counts 11 and 12 (Reliance Export Limited and Nnamdi Ezechukwu): Containers GCNU4600644 and CAXU9591504 were examined at Tilbury docks. They were similarly loaded with used and damaged electrical and the unloading process was photographed. Some of the items were labelled as "Skip", "Faulty" or "Scrap". This time the shipping agent was Reliance Export Limited and the booking form was completed as had the others by Orient Export Limited. The Reliance contact was named as Nnamdi.
24. Counts 13 and 14 (Orient Export Limited, Godwin Ezeemo, Chika Ezeemo and Nnamdi Ezechukwu): A container, ZCSU8267631, was returned to Felixstowe from Antwerp where it was en route to Nigeria. On inspection the contents comprised used and damaged electrical equipment packaged as had been the earlier loads. They were

photographed and the photographs exhibited. The booking request was made by Orient Export Limited and the form similarly completed.

25. Counts 15 and 16 (Reliance Export Limited and Nnamdi Ezechukwu): Similar findings were made in respect of container ZCSU8503362, also returned by Belgian customs. The booking was made by Reliance Export Limited and the form similarly completed.
26. Counts 17 and 19 (BJ Electronics Limited, Joseph Benson and Nnamdi Ezechukwu): TRLU6766264 was another container returned from Belgium. The container was similarly packed although some items in the inner rows had been wrapped in cling-film. Photographs were taken and exhibited. The documents revealed that the container had been loaded at BJ Electronics Limited and the shipping agent was Reliance Export Limited. The booking form had been similarly completed by Reliance.
27. Counts 20 (Orient Export Limited and Chika Ezeemo): Container FCIU8745793 was the fourth to be returned by Belgian customs. On inspection it was found to be similarly packed. The contents were photographed and the photographs exhibited. The shipping agent was 'Chika' at Orient Export Limited and the booking form was similarly completed.
28. In each case the jury received evidence of examination by expert engineers of random contents of the containers. A significant proportion of the items examined were damaged beyond repair and some were said to be dangerous. We need not summarise the evidence concerning the responses of individual appellants. Neither Chika Ezeemo nor Joseph Benson gave evidence. It was Mr Benson's case that he was a dealer in used electrical equipment. He had employed a part time consultant, Mr O'Brien, to advise him in his relationship with the Environment Agency. Mr O'Brien gave evidence. He said he understood that Mr Benson was in the business of recycling electrical equipment.
29. Mr O'Brien agreed that when a television was taken to a waste disposal or civic amenity site it was waste from the original owner. A television of the cathode-ray tube type if waste at all was hazardous waste. If a discarded television was kept and nothing was done to it then it remained waste until something was done to change that state. He agreed that only functionality testing was adequate if the holder was to treat the item as non-waste. To his knowledge it had not been possible since 2002 to export electrical waste unless a functionality test had been carried out to demonstrate that the appliance functioned. He knew that Mr Benson had a licence to reuse and recycle televisions. He understood that damaged goods were sent to another waste management site. Mr Benson had told him that he was supplying re-usable goods to others. Mr O'Brien had advised him to 'improve his act' but both of them were still learning about the process and their intention was to improve over time. Mr O'Brien was shown Mr Benson's waste management licence application form of January 2007 which stated, "The delivery of all electronic equipment to be assessed, tested, sorted and stored into working material. Each and every component is tested for use or repair."

30. When Mr O'Brien first started to advise Mr Benson there was no PAT test carried out. He said that the PAT test was a step forward. In Mr O'Brien's opinion it had been permissible in March 2008 to export PAT tested goods to Nigeria. He accepted that the Environment Agency had never said that PAT testing would be sufficient, only that it would be an improvement. He accepted that a letter from the Agency in June 2008 did refer to the revised Correspondence Guidelines. The guidelines (paragraphs 12 to 16) set out what was required for testing and record-keeping.
31. It will be seen that there was an abundance of evidence that very substantial quantities of white electrical goods, in particular cathode-ray televisions and computer monitors, in various states of repair were being shipped by the defendants to Lagos in Nigeria. It was a plain inference that the loads were camouflaged by wrapping and labelling the first three or so rows within the containers, thus concealing a vast quantity of loose and damaged goods. Even if the cling-wrapped items had been PAT tested, that did not imply that they were in working order. The expert examinations which had taken place demonstrated that functionality testing would have revealed in many cases the opposite. It was an overwhelming inference that in substantial measure no functionality testing had taken place. The booking forms submitted to the shippers did not disclose the containers as waste but as used household items. The inference was available to the jury that those responsible for the export of the containers, while pretending that they were exporting usable electrical goods for re-sale, were in fact exporting hazardous waste. The jury could infer that the financial motivation for this export was a market in Lagos for white electrical goods capable of repair and/or for spare parts for that purpose.

#### **Ground 1: 'waste'**

32. It was not in dispute at trial that BJ Electronics and others were collecting waste from civic amenity and similar sites. The appellants' case was that by visual inspection and selection at the waste amenity sites and PAT testing at the yard, by the time the goods were consigned for delivery to Nigeria, they were no longer waste. The intermediate 'holder' of the waste had no intention of 'discarding' the electrical items collected. He processed and tested the electrical goods for re-use. Whether he achieved that aim was not in point. What mattered was whether he had discarded or intended to discard the goods within the meaning of Art 1(1)(a) of the EC 2006 WFD (paragraph 13 above). BJ Electronics was the only 'processor' before the court in the current trial. Not all of the electrical goods alleged in the indictment to have been waste had been collected by BJ Electronics (which was involved only in counts 1 and 17). Other collectors or 'holders' identified in the evidence were not before the court and none gave evidence. Upon counts 1 and 17 and upon each of the other counts in the trial indictment the prosecution relied upon an inference, from the condition of the goods on inspection of the contents of the containers in which they were consigned for shipping to Nigeria, that they remained waste in the hands of the collectors and shippers. The first issue for the learned judge was, therefore, whether there was evidence from which the jury could properly infer so that they were sure that in the hands of the collectors the electrical goods remained waste. The second issue was whether the prosecution was required to prove that the collector *intended to discard* the goods.
33. The meaning of the term "discards or intends...to discard" has been the subject of much discussion both in Luxembourg and the UK. The European authorities were

examined by Carnwath LJ, as he then was, in *R (OSS Group Limited) v Environment Agency and DEFRA* [2007] EWCA Civ 611, [2008] Env LR 8 (Lord Clarke MR, Carnwath and Maurice Kay LJ). Carnwath LJ noted at paragraph 55 of his judgment, with which the other members of the court agreed, that the use of the subjective test, while useful when examining the product in the hands of the 'producer' of waste, may not be apt to define the status of the material in the hands of a subsequent holder of the material for recycling or re-processing. At paragraph 57 Carnwath LJ noted with some irony the opinion of Advocate General Alber in *R (On the Appn of Mayer Parry Recycling Ltd) v Environment Agency* [Case C-444/00, [2004] Env LR 6, [2004] 1 WLR 2644 (paragraph 108, 109):

"108. 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.

109. 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 . . ."

34. At paragraph 13 of his judgment Carnwath LJ expressed the "general concept" of the discard of waste as getting rid of something which is unsuitable, unwanted or surplus to requirements. Examples are given in Annex 1 to the WFD and the Waste Catalogue 2000. The Waste Catalogue at 16.02 includes the hazardous residues of electrical goods (see also paragraph 40 below).
35. As to the "objective indicators" for the discard of goods Carnwath LJ listed at paragraph 14 the following conclusions reached by the European Court of Justice which we include for their full effect notwithstanding that not all are relevant in the present context:

"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* (Case C-9/00) [2002] Env LR 35, [2002] 1 WLR 2644, para.[32]).

iii) The term "discard" "covers" or "includes" disposal or recovery within the terms of Annex IIA and B (*Inter Environnement Wallonie* (Case C-129/96) [1997] ECR I-17411, [1998] Env LR 623, 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* paras [48]–[49]).

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* (Case C-206/88) [1990] E.C.R. I -1461 para.[9]) or "have a commercial value and are collected on a commercial basis for recycling, reclamation or re-use" (*Tombesi* (Case C-304/94) [1997] ECR 1-3561, [1998] Env LR 59, 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* paras [32]–[37]—see further below)."

36. Carnwath LJ summarised the effect of Luxembourg authority at paragraphs 56 and 59 of his judgment, and declared how the aims of the WFD should be applied in the courts of England and Wales:

"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 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....

59. In other words, 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."

37. In the view of the Court of Appeal in *OSS*, therefore, the test of whether goods or material remained waste in the hands of a holder subsequent to the original 'producer' was an objective one since otherwise the policy of the Directive would be defeated. The court's judgment in *OSS* has been the subject of examination and application in subsequent appeals in the criminal courts. In *Environment Agency v Thorn*

*International UK Ltd* [\[2008\] EWHC 2595 \(Admin\)](#), [\[2009\] Env LR 10](#) the prosecution appealed by way of case stated to the Divisional Court against the Magistrates Court's decision to acquit Thorn of keeping controlled waste contrary to section 33 Environmental Protection Act 1990. For the purpose of the section 'waste' had the same meaning as that provided in Art 1(1)(a) of the WFD. The justices found that Wincanton retrieved unwanted electrical goods from retailers who received them from customers buying new goods. Wincanton sorted the items into those which were functioning or capable of repair and those which were not. Those in the first category were offered for sale. Thorn inspected items in the first category, made their selection and took them to their workshops for repair or refurbishment as necessary. They were then offered to the public for sale. Any item found to be beyond economical repair was disposed of to a licensed waste carrier. The justices found that no hazardous waste was stored at Thorn's premises.

38. The Environment Agency argued that the justices could not properly have concluded that the items selected by Thorn were not waste. First, on the evidence they were undoubtedly waste when they were discarded by their owners on their purchase of new goods. Second, they remained waste until repaired or refurbished for resale.
39. Having considered *ARCO* and *OSS* Moses LJ, with whom Blake J agreed, pointed out that the question at issue in those cases was whether something which was waste had ceased to be waste. He continued at paragraph 21:

"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..."

The court was thus agreeing with Carnwath LJ's analysis in *OSS*. The issue whether a product ceased to be waste had to be judged upon objective criteria having regard to the policy aims of the WFD and not by the intention expressed at any particular moment of the holder of the product.

40. The court distinguished *ARCO* and *OSS* on the facts. Moses LJ continued at paragraph 21:

"21...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."

41. The court proceeded to hold that under the contractual arrangements between Wincanton's suppliers and their retail customers for receipt of the used goods, the details of which were not known, the justices were not *bound* to find that they had been discarded [22]. Even if they had been discarded it was open to the justices to find that by the time Thorn had undertaken its process of selection they were no longer waste [26].
42. We do not detect in the reasoning of the Divisional Court any support for the appellant's argument that the prosecution was required to prove that any subsequent holder of the goods intended to discard them as the original owner had discarded them. Moses LJ expressed the contrary view at paragraph 21 of his judgment (at paragraph 39 above). He found only that on the evidence the justices had been entitled to infer that goods had not been discarded by the consumers and that, if they had, they were entitled to infer that having undergone two processes of selection, first by Wincanton and second by Thorn, they were no longer waste.
43. The meaning of waste was again considered by the Divisional Court in *Environment Agency v Inglenorth* [2009] EWHC 670 (Admin), [2009] Env LR 33 (Sir Anthony May, President, and Dobbs J). The owner, Mr Evans, had demolished a large greenhouse at his garden centre in Standish. He engaged a haulier, the respondent, to carry the rubble to another garden centre site in his ownership in Cheadle in order to form the base of a car park. The haulier was charged with the unlawful deposit of controlled waste contrary to section 33 Environmental Protection Act 1990. The justices found that at no stage had the owner discarded the rubble as waste. He intended to retain and use it in the same form that in which it had left the Standish garden centre. The Environment Agency appealed. The court held that the justices were in the particular circumstances of the case entitled to find that the rubble was not waste because it could not be inferred the rubble had been discarded by its owner, Mr Evans. At paragraph 21 of his leading judgment, Sir Anthony May stated the question to be answered:

"21...the main question in the present case was whether the material delivered to Mr Evans' Cheadle site should be classified as waste and that the answer to that was primarily to be inferred from Mr Evans' actions and that those depend on whether or not he intended to discard the substances in question."

This is another case in which the point at issue was whether the owner or producer discarded or intended to discard the product. The justices were entitled to find that the product was not discarded. The haulier was simply performing the task of transferring the product for the use to which Mr Evans was putting it. It was not a case in which the court was considering the intention of a subsequent holder of the material.

44. In *W, C and C* [2010] EWCA Crim 927 the farm owners (C and C) and their manager (W) faced an indictment in the Crown Court charging them with offences of knowingly permitting the deposit of controlled waste and disposing or keeping controlled waste contrary to section 33(1) Environmental Protection Act 1990. Considerable quantities of soil and subsoil were excavated from a hotel development site and utilised by the defendants for constructing the base for an extension and a cattle shed on the farm owners' land. The trial judge found that there was no case to answer since the prosecution had not proved that the soil was waste. The prosecution appealed under section 58 Criminal Justice Act 2003. The issue for the Court of Appeal was whether the defendants had a case to answer. McCombe J, as he then was, gave the judgment of the court. Having considered the authorities he said at paragraph 34:

34. We conclude, like the Court of Appeal in Northern Ireland [in *Department of the Environment v Felix O'Hare and Another* [2007] NICA 45], 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 (*Inglenth*), 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".

45. The appeal was allowed because the trial judge had withdrawn both questions from the jury. At paragraph 36 McCombe J continued:

"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."

The court treated the issues for the jury as questions of objective fact, namely whether the soil had been discarded and, if so, whether anything had occurred subsequently in the hands of the respondents to change its status. That required an examination of the use to which it was put. Although the test to be applied was couched in terms of an intention to put the material to immediate use McCombe J was speaking of events which had taken place and the objective decision for the jury was whether in the light of those events the material had been and remained waste.

46. The decision in *W, C and C* was considered by the Court of Appeal in *Evan Jones and Another* [2011] EWCA Crim 3294. Surplus soil and subsoil from a pipeline excavation was hauled by the appellants to other land where it was tipped. The hauliers were convicted of depositing controlled waste contrary to section 33(1) of the Environmental Protection Act 1990. On appeal the complaint was that the judge had misdirected the jury by saying:

"In law, an intention to pass on to another that material for that other to use it, nor even an intention to sell, does not amount to such alteration of status by way of intended use as to remove the material from the category of waste. It remains waste in the hands of the haulier up to and including this deposit of it. Further, it remains waste thereafter unless and until some event happens which you can say there is a sufficient proportion to have altered it."

47. The court (Toulson LJ, Davis J and HH Judge Bevan) concluded that the jury had been misdirected. Toulson LJ explained at paragraph 13:

"13...In our judgment the correct analysis is, as was put by Davis J in argument and is supported by paragraph 36 of the judgment in *W, C and C*, that at the time when B is about to deposit the material on C's land, the conduct of B in bringing the material to that point, coupled with the purpose of C in receiving the material, is capable of bringing about a change in the status of the material for the purposes of the relevant statutory regime, so that at that time the material will have ceased to be waste, subject to the nature of the material and subject to the nature of the intended reuse and its potential environmental impact. Accordingly, we accept the submission that the judge's direction was a misdirection."

In both *Evan Jones* and *W, C, and C* the material had been deposited on other land. As we read the judgment in *W, C and C*, when the material had been re-used the question for the jury was whether its nature had been changed. This involved considerations such as the aims of the WFD. In this regard, we suggest, the court in *W, C and C* was following earlier authority, particularly *Palin Granit* and *ARCO* as explained by

Carnwath LJ in *OSS* (see paragraph 36 above). In *Evan Jones* the court was considering the status of the material in the hands of the *haulier*, not the owner of the land on which the material was deposited. Both the haulier's and the landowner's purpose in receiving the material was relevant to the jury question whether the status of the material had changed. That was a question of fact for the jury and not a question of law for the judge. The judge had elevated the 'indicators' which it was for the jury to assess to directions of law.

48. With this lengthy review of authority, we now consider the submissions made to the trial judge. First, Mr McGrath argued, as he did to this court on behalf of the appellants Godwin Ezeemo and Nnamdi Ezechukwu, that by reason of recital (5) to the EC 2006 Regulation (in light of OECD Council Decision C(2001)107/Final, "in order to harmonise waste lists with the Basel Convention and to revise certain other requirements, it is necessary to incorporate the content of the Decision in Community legislation"), the definition of waste used in Art 2 of the EC 2006 Regulation should be read with the definition of waste in the Basel Convention, incorporated by the OECD Council in its C(2004)/20 amendment to C(2001) 107/Final. The 2004 amendment to C(2001) 107/Final reads:

"WASTES are substances or objects...which:

- (i) are disposed of or are being recovered; or
- (ii) are intended to be disposed of or recovered; or
- (iii) are required, by the provisions of national law, to be disposed of or recovered."

Mr McGrath argued that since the edition of C(2001) 107/Final current at the time when the EC 2006 Regulation came into effect (14 June 2006) contained the 2004 amendment, the Regulation must be taken to have incorporated the amended definition of waste.

49. Mr McGrath explained what he submitted is the effect of such a construction of the Regulation. Annex IIA to the WFD describes 'Disposal Operations' and Annex IIB describes 'Recovery Operations'. If what the collectors and shipping agents were engaged in was simple re-use of electrical goods, that activity was not properly described as disposal or as recovery, in which case it was not waste within the meaning of the Basel Convention. The judge rejected this argument on two grounds, first that the UK 2007 Regulations were specific as to the meaning to be given to terms also used in the EC 2006 Regulation (see paragraph 12 above) and, second, that the OECD Decision dealt only with the management and movement of waste within and between OECD countries. We respectfully agree with the judge and reject Mr McGrath's argument. We would add an additional reason: the European Court has adopted an autonomous meaning for the term 'waste' which it has applied since 1991. It has held that re-use does *not* exclude material from the definition of waste (see paragraph 35(v) above and paragraph 58 below). If it had been the intention of the European Parliament and Council to abandon its historical definition of waste with the consequences for which Mr McGrath contends, we have no doubt it would have said so in Art 2 of the EC 2006 Regulation.

50. Secondly, Mr McGrath argued that the terms 'intends to discard' and 'intended to be disposed of or recovered' describe a state of mind of the holder of the goods or material for the time being. That is, he submits, a state of mind which requires proof. The other appellants, by Mr Ross on behalf of Chika Ezeemo, and by Mr Barry on behalf of Joseph Benson and BJ Electronics, join with Mr McGrath in arguing that the test to be applied by the jury was, at least in part, subjective. The judge found that there was evidence fit for the jury to conclude whether the person who left an electrical item at a civic amenity or waste disposal site was discarding it within the meaning of regulation 23 of the UK 2007 Regulations. There was, we have observed, no real dispute about this and we agree that it was an inevitable conclusion. The dispute arose upon the issue whether goods which had been discarded *remained* waste. As the judge put the appellants' case succinctly at page 8 of the transcript of his ruling:

"The defence contend that each of these cases [*Thorn* and *Inglenthorn*] is authority for the proposition that a waste item does not remain so until its character is changed by a process of, for example, recycling, and that process has been concluded; rather, depending on the circumstances, an item that is originally a waste item can change its status if it is the intention of the holder at the time to do something with it which will alter that status from waste to something else."

The judge concluded that *Thorn* and *Inglenthorn* were distinguishable from the present case on their facts. Having also considered, in particular, *OSS* and *W, C and C* the judge ruled that on the facts of the present case there was evidence fit to go to the jury for a decision whether the items recovered from the containers and removed to the collector's premises were waste and, furthermore, he informed counsel that he would direct the jury that the intention of the holder of the items for the time being was irrelevant.

51. We have already pointed to a consistent line of authority in which it has been held that once a substance or object has been discarded (and has therefore become waste) the question whether it has changed its status is one of objective fact. However, the fact of which the jury must be sure (by regulation 23 applying Art 2 of the EC 2006 Regulation) is that the substance or object is one which the "holder discards or intends...to discard". It will be seen that in composing suitable directions to the jury the scope for contradiction and confusion to which Carnwath LJ drew attention in *OSS* immediately arises. How is the trial judge to direct the jury as to the meaning of those terms when they do not at first sight mean what they say (see paragraphs 36 and 37 above)? The answer, it seems to us, is that the trial judge must adapt his directions to the jury so as eliminate the apparent contradictions between the words used and their purposeful interpretation. On the facts of the present case these collectors/holders had loaded the containers for consignment to Nigeria. The issue whether they had 'discarded or intended to discard' the objects within the containers could only be resolved by answering the question whether what they had done to those objects before loading rendered them non-waste. What matters is whether the holder takes some action or intends to take some action with respect to the items which has changed their status. Whether the holder discards or intends to discard the items is judged by what he did with them and not by his subjective belief that he was discarding them (or would be discarding them) or not.

52. The terms of appropriate directions upon the issue of waste will depend upon the circumstances of the case. In the present case there was little doubt, but it was for the jury to decide, that the original owner discarded or got rid of the electrical item as "unsuitable, unwanted or surplus to requirements" (paragraphs 34 and 40 above). In the cases of Joseph Benson and BJ Electronics Limited, it was argued that their process of selection and testing for re-use rendered the waste non-waste. They neither discarded the items (but selected and sold them for sale and re-use), nor intended to discard them (but to select them for sale and re-use). We agree with the trial judge that their intention in the abstract was immaterial. Their intention had to be judged against the results of the process to which they were subjected. What the jury had to decide was whether the process to which it was claimed the items were subjected did in fact have the effect of rendering them non-waste. If they did not, upon an objective consideration whether the holder had discarded the objects, there was only one possible conclusion – they were simply passing on the objects for sale in Nigeria and, therefore, discarding them.
53. The judge explained to the jury in ordinary language that the word 'discard' in context meant getting rid of unwanted household goods either because they did not work, or because they were outdated technologically, or because they no longer suited. He continued:

"If you find that you are satisfied so that you are sure that the items that ended up in the containers, the subject matter of these counts, were discarded by the original owner at the civic hall waste amenity site, I direct you as a matter of law that those items became waste at that moment and that they remained so until something was done to stop them from being waste."

The judge proceeded to direct the jury as to whether what they had seen of the contents of the containers assisted them in resolving the question whether the discarded items may have ceased to be waste. He said:

"It is perhaps not too surprising that a trade has grown up wherein household items which are discarded by the original owner but which can be used again are recovered ... either to be sold on in this country or to other countries around the world where the local population has not yet caught up with the same level of consumerism as more developed countries exhibit. There is nothing wrong in such a trade provided that the goods being sold on ... are in such a state that they are capable of performing the function for which they were first manufactured and that they are safe to be re-sold. A word which has been used to describe that throughout this trial is 'functional'.

54. The judge reminded the jury that it was the prosecution case that, unless the item concerned had undergone a process of selection and/or repair which ensured that it was functioning, it must have remained waste; that the prosecution relied upon the 'Correspondence Guidelines' to illustrate the kind of process which would bring that change about, namely visual inspection for damage and a functionality test and, if necessary, repair to ensure that it was working. It was, the judge said, for the jury to decide but:

"... if you are looking for something that provides you with a basis upon which you can make a decision whether or not electrical items have been shown to be functional you may well take the view that the revised correspondence guidelines, especially at paragraphs 12 to 16, provide you with that basis."

The jury was reminded that they had been invited to draw inferences from the contents of the containers which they had viewed in photographs and from the expert evidence as to what was found upon detailed inspection and testing. The judge concluded upon this issue:

"You must decide whether the prosecution evidence is sufficiently strong on these matters for you to draw the inferences that nothing was done to the items at the various sites where they were taken ... If it is not sufficiently strong you need to consider whether you can draw any inference and what that inference might be."

55. The judge helpfully provided the jury before they retired with a written route to verdict which, upon the issue of waste, read:

*"(2) Are you satisfied so that you are sure that the items in the container(s) in the count you are considering were 'waste' when they arrived at the collector's premises?"*

- If you find that the items were discarded by the original owner at the civic amenity waste site, I direct you that the items became waste at that moment; and
- That they remained so until something was done to them to stop them from being waste;
- The prosecution case is that visual inspection and selection would not be enough;
- The defence case is that a combination of visual inspection and selection is sufficient to alter the status of an item from 'waste' so that when it arrived at the collector's premises, it had ceased to be waste.
- If you are unsure, your decision must be not guilty
- However, if you are sure, move on to question 3

*(3) Has 'anything been done' to the items by the collectors that is sufficient in your judgment to change the status of the waste to non-waste?"*

- Prosecution and defence agree that if you find as a matter of fact that waste items were in the container, then the items were hazardous waste;
- As a matter of law, I direct you that the intention of any of the defendants as to what should be done or was going to be done with the waste is immaterial;
- The prosecution case is that PAT testing is not enough and there should be a test for functionality to determine whether the item is working

- The defence case is that visual inspection, PAT testing and selection by the buyers is sufficient to change the status of an item from waste;
- If you find that something was done, it must have been sufficient to bring the process within the list of recovery operations within Annex IIB of the Waste Framework Directive (copied to you by the prosecutor in his closing speech)
- If you are unsure, your decision must be not guilty;
- However, if you are sure, move on to question 4"

56. This document encapsulated the judge's ruling as to the law and left to the jury the competing cases as to whether on the facts the collectors had changed the status of the items from waste to non-waste. It seems to this court that the judge's directions were sufficient in law and fairly presented. The jury was not concerned with a stage in time before these electrical items were loaded into their containers and merely stored on site awaiting consignment. The evidence was focused upon the contents of containers which had already been loaded and consigned for shipment. The question was whether the items in the containers had been discarded. The jury was, therefore, examining the question not what it was intended should happen to them but what had happened to them before they had been loaded. This was a question of fact for the jury to resolve. We do not rule out that there will be cases in which proof of the *intention* of the holder is necessary. This, in our view, was not one of them. The judge rightly directed the jury that they should examine the question whether the items had been subjected to any process, such as inspection, testing and/or repair, which may have changed their status. Furthermore, and in any event, we have no doubt that the jury concluded that the appellants were passing on for sale large volumes of broken and hazardous electrical equipment which could lead to only one conclusion, namely that the holders discarded or intended to discard that equipment. We reject the first ground of appeal.

### **Ground 2: 'destined for recovery'**

57. The issue raised is whether the prosecution could prove that the process to which the items were 'destined' in Nigeria was 'recovery'. As we have said at paragraph 13, recovery means any of the operations provided for in Annex IIB of the WFD 2006. The operations listed in Annex IIB include recycling and reclamation of metals, metal compounds and other inorganic materials. The appellants contend that the prosecution was unable to establish that what occurred in Nigeria was a recovery operation rather than mere re-use. The prosecution contends that the list of operations in Annex IIB was to be construed generously so as to give to Art 36 its intended effect. We agree. The recitals to the EC 2006 Regulation include:

"(28) It is also necessary, in order to protect the environment of the countries concerned, to clarify the scope of the prohibition of exports of hazardous waste destined for recovery in a country to which the OECD Decision does not apply, also laid down in the Basel Convention. In particular, it is necessary to clarify the list of waste to which that prohibition applies and to ensure that it also includes the waste listed in Annex II to the Basel Convention, namely waste collected from households and residues from the incineration of household waste."

It was not in issue at trial that if the contents of the containers were waste within the meaning of regulation 23, it was hazardous waste.

58. The list of recovery operations in Annex IIB embraces the processes of reclamation, or of recycling, or of use for another purpose of wastes or the residue of wastes. Art 3 of the WFD requires Member States to take appropriate measures to encourage:

"(b)(i) the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials; or (ii) the use of waste as a source of energy".

Thus, contrary to the appellants' contention, the WFD recognises re-use of waste as a possible form of 'recovery' of waste. Art 5 requires Member States to take measures to ensure that its waste is recovered with minimum danger to health and the environment, and to prohibit the abandonment, dumping or uncontrolled disposal of waste. It seems clear that the objective of Art 36 of the EC 2006 Regulation is to protect non-OECD countries from the same dangers by prohibiting the export of hazardous waste to those countries for recovery.

59. The prosecution case was that significant numbers of waste electrical objects, packed into the containers, were destined for the market for second-hand goods in Nigeria. Contrary to the defence case the majority were not suitable for re-use without undergoing a process of reclamation comprising repair or regeneration. In the case of a cathode-ray tube television, for example, the reclamation of inorganic material within it would be achieved by enabling the television for continued use. We agree with the trial judge that generously and properly construed the operation on which the prosecution relied did fall within Annex IIB.
60. As to the evidence in support of the nature of the operation alleged by the prosecution the jury had the evidence of Mr Vincent and Mr Mansfield together with their video film. We agree with the judge that the jury was entitled to infer that all these containers were destined for a similar operation. Without it there would seem to have been no commercial sense in the export.

### **Ground 3: strict liability**

61. The respondent asserted that regulation 23 created a strict liability offence which required no proof that the transporter of waste knew, believed or suspected that the containers contained waste or that the waste was destined for Nigeria for recovery. The appellants' argument was advanced before us by Mr McGrath supported by Mr Ross and Mr Barry. They argue that the defendant must be proved to have known that the container contained waste and be proved to have 'predetermined a course of events which would lead to the item undergoing a recovery process in a non-OECD country".
62. For ease of reference we repeat the words of regulation 23:

"23. A person commits an offence if, in breach of Art 36(1), he transports waste specified in that Article that is destined for recovery in a country to which the OECD Decision does not apply."

Art 36 states that exports from the Community of identified wastes for recovery in non-OECD Decision countries "are prohibited".

63. There are four elements to the offence which, on the face of the words used, require proof: (1) transport by the defendant (2) of waste whose export from the Community is prohibited by Art 36, (3) that is destined for recovery (4) in a non-OECD country. No state of mind by the defendant, such as knowledge or suspicion is required by the words used unless it is to be presumed. The words used do not require that the defendant "predetermined a course of events", only that he transported waste that was "destined for recovery" etc. The word "transports" includes "consigning for transport" (regulation 5(1)) and a person who "transports" waste includes a notifier (the person who gives notification of the shipment under EC 2006 Regulation procedure), a transporter, a freight-forwarder, or any other person involved in the shipment of waste.

64. HH Judge Black gave interlocutory rulings as to the effect of regulation 23 which were the subject of appeal to the Court of Appeal in *KV and Others* [2011] EWCA Crim 2342 (Hughes LJ, Vice-President, Hickinbottom J and Cranston J). Giving the judgment of the court, Cranston J, at paragraph 2, identified the first issue:

"2. The issue before us is whether the judge was correct in ruling at a preparatory hearing for the trial that regulation 23 of the UK Regulations and article 36 of the EU Regulation catch all those who are involved in transporting waste for export, from the point of origin where waste is collected and stored for onward transmission to another country, through to the point where the waste is delivered to that country. In reaching that conclusion the judge rejected defence submissions that a defendant only exports waste at some later point, at the extreme when the waste shipped by him leaves the European Community. The judge also rejected submissions that regulation 23 is in breach of European Union law and is ultra vires, and that that regulation is disproportionate and consequently unlawful."

65. The court held that regulation 23 properly reflected the terms, aims and objectives of the EC 2006 Regulation. It covered all stages of an 'export' of waste "commencing once the waste is destined for [a non-OECD] country at its point of origin, and continuing until the waste reaches its ultimate destination".

66. The appellants, including the present appellants, also argued that:

"39...The creation of a strict liability offence, punishable by up to two years imprisonment, which can be committed by such a wide range of individuals and organisations, is not proportionate. The scope of regulation 5(2) would include arrangers, freight-forwarders, persons who transport waste to the point of embarkation, the operator of any port facility and their sub-contractors, those who load the container on a ship, and the shipping company and their employees. There is nothing in the UK Regulations, it is said, to protect individuals who are not culpable for the harm caused by any wrongful shipment of waste."

67. There was some reluctance at the Bar during the present appeal to accept that in the interlocutory appeal they were advancing the opposite argument from that for which they now contend, namely that regulation 23 does create an offence of strict liability. In view of the terms in which Cranston J expressed the arguments advanced we have difficulty accepting that this is not a new and contradictory argument. That does not mean that it should fail. The court proceeded on the assumption that a strict liability offence had been created, observing that the words of regulation 23 and Art 36 appeared to support such a construction. The court gave its conclusions on the issue of proportionality as follows:

"40. In general there is no issue of proportionality under EU law with respect to strict liability offences: Case C-326/88, Public Prosecutor v Hansen [1991] ICR 277, [14]. The defendants point out that there are none of the standard defences in the UK Regulations to the commission of an offence under regulation 23, which one would expect if regulation 23 was a strict liability offence: cf. Environmental Protection Act 1990, s. 33(7). Hansen, they point out, was a case involving a fine, not imprisonment. In response the prosecution refers to the offence which an employer commits under section 33(1)(a) of the Health and Safety at Work Act 1974 for failure to discharge any of the duties set out in sections 2-7 of that Act. We note, however, that some of those duties are qualified by terms such as reasonable practicability.

41. The judge assumed that strict liability was what was intended by the drafters of the UK Regulations. The phraseology of regulation 23 compared with, say, regulation 36 of the EU Regulations, quoted earlier, supports that conclusion. The contrary has not been argued before us. Assuming that this is an offence involving strict liability, it does not, in our judgment, fail for disproportionality for that reason. Sentence in a court in England or Wales is at large and discretionary; there is ample power in the court to avoid imprisonment, or indeed serious punishment, if a defendant has genuinely offended entirely without fault. The theoretical possibility of a transporter of waste being duped into transporting it without any means of knowing he is doing so would exist also if the offence were limited in the way contended for by the defendants to physical crossing of the last Member State boundary. For both environmental and public health reasons, the handling of waste is very closely managed under EU Regulation 1013/2006 and the international instruments to which we have referred, the Basel Convention and the OECD decision. That involves imposing considerable duties of supervision and enquiry on those who handle such material. Regulation 23 catches anyone breaching article 36(1), anyone involved in a prohibited export. That is a wider category than notifier, which is just one of the categories falling within regulation 5, where transport and person who transports are defined. As we have found, when regulation 23 prohibits transport of waste in breach of article 36(1), it states what article 36(1) intended. The UK regulations do not widen the scope of article 36(1) but merely give effect to it when read in conjunction with the definitions in article 2 of the EU Regulation. We are not persuaded by the defendants' arguments that regulation 23, coupled with regulation 5, is disproportionate."

68. The appellants now contend that it cannot have been the intention of Parliament to create an offence which, without fault, could result in criminal liability for all those

who contributed to the transport of an unlawful shipment. We observe that the imposition of precautionary duties upon those who are responsible for goods destined for export was regarded by the court in *KV and Others*, at paragraph 41, as a proportionate performance of the UK's duties under the EC 2006 Regulation.

69. It is a presumption of the law of England and Wales that an offence at common law or under statute requires *mens rea* unless by necessary implication *mens rea* is excluded. The principles to be applied when considering 'necessity' were summarised by Lord Scarman in *Gammon (Hong Kong) Ltd v Att-Gen of Hong Kong* [1985] AC 1 (PC):

"(1) [T]here is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence;

(2) the presumption is particularly strong where the offence is truly criminal in character;

(3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute;

(4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern. Public safety is such an issue;

(5) Even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."

The subject matter of the argument in *Gammon* was a Hong Kong Building Ordinance which, the Privy Council held, created offences of strict liability in pursuit of public safety which strict liability was calculated to promote.

70. As we have observed, the UK 2007 Regulations represent the performance by the UK of its Community obligations under the WFD and the EC 2006 Regulation, in particular Art 50 of the EC 2006 Regulation (paragraph 10 above). The EC 2006 Regulation created a procedural framework for the safe shipment of waste which included at Titles II and III requirements for prior written notification of a proposed shipment, the provision of information, the making of a written contract between the notifier and consignee, the provision of financial guarantees, conditions for consent by the competent authority, the keeping of documents, a requirement for take-back of an illegal shipment, and supervision and control of shipments by the competent authority. Title IV (including Art 36) created a series of prohibitions against export of waste to certain countries. Title V created a series of prohibitions against the import of waste from certain countries.

71. The scheme of the UK 2007 Regulations is to create a series of offences comprising breaches of the requirements of the EC 2006 Regulation. For example, regulation 17 provides that "a person commits an offence if he fails to comply with Art 49(1)" (which requires management of shipments of waste in an environmentally sound manner and without endangering human health). Arts 19 and 20 penalise a person who transports waste without meeting procedural requirements

of the EC 2006 Regulation. Art 21 provides that a person commits an offence if he transports waste destined for disposal in a third country in breach of Art 34 (which prohibits certain exports). Art 22 creates an offence if a person who transports waste fails to comply with Art 35 procedural requirements or destinations. Art 24 creates an offence if a person transports waste without complying with the procedural requirements of Art 38. Similar offences are created by regulations 25 – 35 for breaches of Arts 40-48. Regulations 37 - 39 provide that an operator of a facility commits an offence if he fails to meet certain procedural requirements of Arts 10, 15, 16, 18, 20 and 22. Parallel offences are created in respect of consignees, laboratory operators, notifiers and persons who arrange the shipment of waste.

72. All of these offences use the language of close regulation in pursuit of the safe management and shipment of waste. The offences are created for failure to take the procedural steps required by the EC 2006 Regulation or the taking of a step which is prohibited by the Regulation. In our judgment, this is the language of strict liability.

73. There are, however, notable exceptions. Regulation 36 provides:

"36. If the operator of a facility knows or has reasonable grounds to suspect that waste brought to that facility is an illegal shipment of waste, he must notify the competent authority immediately and comply with their instructions and failure to do so is an offence."

Regulation 53 creates an obstruction offence which may be committed by intentional obstruction, giving information known to be false or misleading, or failing without reasonable excuse to give assistance or information or to produce a record. Regulation 54 creates an offence of making statements known to be false or misleading for the purpose of obtaining consent to shipment or approval of a financial guarantee, or endeavouring to obtain such consent or approval by deception. Where, therefore, the offence is not constituted solely by a failure to take the necessary procedural step, or by the taking of a step which is prohibited, the draftsman has explicitly defined the *mens rea* required for the offence.

74. Finally, regulation 57 provides:

"57. Where the commission by any person of an offence under these Regulations is due to the act or default of some other person, that other person is guilty of the offence and a person may be charged with and convicted of an offence by virtue of this regulation whether or not proceedings are taken against the first mentioned person."

Regulation 57 implies that the first mentioned person may commit an offence under the regulation without fault on his own part, due to the act or failure to act by the second mentioned person. This is consistent with the respondent's case that at least some of these offences are offences of strict liability. Regulation 57 does not appear to be apt to apply to an offence which requires specific intent such as obstruction or falsely obtaining consent or approval. It may apply to failures contrary to regulation 36 and certainly seems apt to apply to breaches of procedure or prohibition which may arise due to the act or default of another. What the regulation does not do is

absolve the first mentioned person for his lack of fault. Regulation 57 permits the Environment Agency to charge either or both at its discretion.

75. By regulation 58, on summary conviction for an offence under the regulations, the sentence is a fine up to the statutory maximum or imprisonment not exceeding 3 months or both. On indictment the penalty is a fine or imprisonment not exceeding 2 years or both. By regulation 59, however, the Agency is authorised, in lieu of prosecution, to issue a fixed penalty notice by payment of which criminal liability is discharged. We conclude that the offences created by the regulations are truly regulatory in nature, not aimed at the public in general but at those who operate in the business of collection and disposal of waste. They are designed to protect the environment and public health.
76. We have considered the question what would be the *mens rea* required for the offence created by regulation 23 if the presumption is not displaced. The appellants contend that it must be knowledge of (1) the holder's discard of or the intention to discard the substance or item within the meaning of Art 1(1), (2) the process to which the substance or item was destined, and (3) its country of destination. In the absence of specific words defining a lesser culpability, such as "having reasonable cause to suspect" we agree that the *mens rea* of the transporter would have to be knowledge of these material facts. If that were so the offence could not be proved unless the prosecution could establish against any of those defined as transporters that he had personal knowledge of the intentions of others and/or had inspected the loads. In our judgment, if this were to be the requirement of regulation 23 the regulation would be substantially deprived of its intended effect, which was to deter those in the business of handling such material for export from taking risks with the environment.
77. In our respectful opinion, the provisional view expressed by the court in *KV and Others* is correct. The offence created by regulation 23 is an offence of strict liability. We recognise, as was submitted, that this construction has the effect of catching those who may have no personal knowledge that a container contains waste or that the contents of the container were destined for recovery in a non-OECD country. One of the reasons for imposing strict liability is, as Lord Scarman said in *Gammon* to promote greater vigilance among those who undertake activities which may cause harm to the public. The obligation which the regulations place upon transporters is to take care to acquire knowledge of the cargos they are transporting. If they do not they take the risk of breach.
78. We have been concerned at the breadth of reach of regulation 23 to those who may play a comparatively minor and innocent role in the transport of waste. In *Jackson* [2006] EWCA Crim 2380, Hooper LJ said:

"Whilst it is always possible to adumbrate situations which would appear to be covered by a statutory provision and yet could have manifestly unjust results, one has to rely on the good sense of Prosecuting Authorities and the overall supervisory role of the courts to avoid such a situation developing. Likewise of course the penalty actually imposed in any particular case can reflect the actual degree of culpability involved in a particular case."

We agree.

79. We conclude that the learned judge made no error of law and the verdicts are safe.  
The appeals are dismissed.

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