Appeal numbers: **TC/2013/00679, 01289 & 05254 (1)**
TC/2014/01464, 01468 & 06002 (2)
TC/2014/01438 (3)
TC/2014/01439 & 01440 (3) & (4)

Landfill tax – first and last layers of waste selected and laid to avoid damage to cell liner – whether "disposal with the intention of discarding" the material and "disposal made by way of landfill" – s 40 Finance Act 1996 – whether use of material falls within para 3(1)(g) of the Landfill Tax (Prescribed Landfill Site Activities) Order 2009

FIRST-TIER TRIBUNAL
TAX CHAMBER

DEVON WASTE MANAGEMENT LIMITED (1) **Appellants**
BIFFA WASTE SERVICES LIMITED (2)
VEOLIA ES LANDFILL LIMITED (3)
VEOLIA CLEANAWAY (UK) LIMITED (4)

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: **JUDGE KEVIN POOLE**
JOHN AGBOOLA FCCA

Sitting in public in the Royal Courts of Justice, London on 7 to 21 November 2016 (with subsequent written submissions)

Penny Hamilton QC and Zizhen Yang, instructed by KPMG LLP, for the First Appellant

Roderick Cordara QC and Zizhen Yang, instructed by Ernst & Young LLP, for the Second Appellant

Sam Grodzinski QC and David Yates, instructed by Simmons & Simmons LLP, for the Third and Fourth Appellants

Melanie Hall QC, Brendan McGurk and David Gregory, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. These appeals are concerned with Landfill Tax. The appellants maintain (in broad terms) that certain deposits of material in the "cells" of their landfill sites amount to the "use" of that material, which was accordingly not disposed of "as waste" or "by way of landfill"; accordingly those deposits are, the appellants say, not subject to Landfill Tax.

2. The material in question is deposited at the base of the cell, up its sloping sides and/or on top of the main body of landfilled waste before the cell is capped and restored for other uses. The nature of the material in question is generally ordinary domestic waste, called "black bag waste" in the waste disposal business. In these appeals, it has also been referred to as "fluff".

The facts

Introduction

3. The appellants either operate or are the representative members of groups of companies that operate landfill sites at various locations throughout England and Wales (though all of sites considered in detail in this appeal were in England). The details of the sites involved and of their respective operators are not relevant to this decision, though we will refer to certain specific sites at various points.

4. We made a site visit to the third appellant's landfill site at Ling Hall near Rugby to obtain a better understanding of the process involved in constructing and operating a landfill site.

5. We also received a large volume of documentary evidence (mostly covering the detailed regulatory arrangements applying to a sample of the appellants' landfill sites) and witness statements from Steven Hadley and Neil Browne (on behalf of the first appellant), Jacqueline Doone and John Beaman (on behalf of the second appellant), Donald Macphail and Vinod Mehroke (on behalf of the third and fourth appellants), HMRC officers Morris Graham and Richard Hart (on behalf of HMRC) and Darren Legge of the Environment Agency (also on behalf of HMRC). We also heard oral evidence from all the above witnesses apart from officers Graham and Hart.

6. We also received expert evidence in relation to the design and construction of landfill sites (in the form of witness statements, supplemented by oral evidence) from Stephen Hodges (on behalf of the appellants) and Daniel Riding (on behalf of HMRC); there was also an agreed joint report from both expert witnesses setting out briefly the areas on which they agreed and differed.

7. We find the following facts.

Regulatory background

8. The various landfill sites the subject of these appeals (like all landfill sites in England & Wales) are operated under a regulatory regime which has changed quite significantly over the years. Whilst the claims in question relate to various periods between November 2006 and December 2013 (when essentially the current regulatory regime was in force), the history of the regulatory regime has some bearing and a brief summary therefore follows. Most or all of the sites involved in these appeals were originally licensed under earlier regimes. Two (at Pitsea and Rainham, both in Essex) started operation over 100 years ago.

9. Under the Control of Pollution Act 1974, waste disposal licences were granted by local authorities, acting as "Waste Disposal Authorities"; then under the Environmental Protection Act 1990, local authorities granted waste management licences, acting as "Waste Management Authorities", before that function was centralised with the Environment Agency ("EA"). Then, following the passing of the EU Landfill Directive in 1999, the regime was overhauled again, tracking the UK's obligations under that Directive. The Pollution Prevention and Control Act 1999 and the Pollution Prevention and Control (England and Wales) Regulations 2000 introduced "Pollution Prevention and Control Permits" ("PPC Permits") issued by the EA to replace the previous licensing regime, in conjunction with the Landfill (England & Wales) Regulations 2002. This basic structure remains, though there have been amendments to the relevant legislation (the replacement of the PPC Regulations and the Landfill Regulations by the Environmental Permitting Regulations 2007 and the subsequent partial revocation and replacement of those regulations by the Environmental Permitting Regulations 2010, resulting in the re-naming of PPC Permits as Environmental Permits ("EPs")). Since 1 April 2013, the permitting function in Wales has been devolved and is administered by "Natural Resources Wales".

10. The regime of PPC Permits/EPs is, on its face, less prescriptive than the previous licensing regime. Instead of the EA laying down detailed requirements as to the construction and operation of landfill sites, the new regime is more focused on specifying the outcomes required and leaving it up to the landfill site operator to provide detailed documentation in support of its application which set out in detail how it will achieve those outcomes. When a permit is finally issued in respect of the application, it is a term of its issue that the operator will comply with all the detailed processes and procedures set out in the application documents; the end result is therefore similar to the previous licensing regime, but the operator is given a greater role in devising the precise means by which it will ensure that the required outcomes are achieved.

11. One of the key objectives of the regulatory regime (in its various forms) has been to minimise the environmental impact of landfill sites and one of the biggest concerns in that area is the risk of contamination of the environment around landfill sites by substances emanating from the landfilled waste, especially landfill gas (a mixture of mostly carbon dioxide and methane, generated from the decomposition of biodegradable waste) and leachate (the highly polluting liquid which is produced as a result of such decomposition, especially in combination with rainwater). As a result, a landfill site is not simply a dumping ground for waste; it is a carefully managed location

in which the design, construction and operation of the site all play a part in reducing its environmental impact.

Landfill site design

12. To that end, a landfill site is developed as a number of separate "cells", which generally follow a reasonably standard model in terms of their design, construction and operation.

13. Landfill sites are often located in worked-out quarries or mines, which provide a ready made cavity or void into which the cells can be built. Some sites (we understand generally older ones) do not follow this pattern, but instead involve depositing the waste onto land which has not previously been excavated in some way – in the industry, these sites are often called "landraise" or "land rise" rather than "landfill" sites. Many of the techniques applicable to them are similar, but in the absence of some natural side wall, they are built up in mounds which effectively lean against each other.

14. Taking an ordinary modern landfill site as the paradigm, the cells are constructed in a generally similar way. This involves a number of elements:

> (1) First, the underlying ground must be prepared. Depending on local groundwater characteristics, it may be necessary to install some subsoil drainage to prevent later damage to the cell from underneath by "heave" caused by pressurised groundwater. It will also generally be necessary to smooth the site for the next element, and some profiling may be required to assist in the collection of leachate. This is done by creating slopes in the floor of the cell which cause the leachate to flow naturally downwards towards a central sump or sumps, from which it can then be pumped out through appropriately designed piping which is sunk into the waste mass as it rises.
>
> (2) Generally it will be necessary to place a lining layer of compacted clay (or similarly impervious material), typically to a depth of 1 meter, in order to provide a barrier for any leachate released through damage to the superposed elements, so as to prevent pollution of any nearby groundwater sources. The seepage rate of pollutants through such a layer is sufficiently low for it to provide adequate protection for minor damage except in particularly sensitive locations (e.g. close to aquifers from which drinking water is abstracted). If the existing geological strata are sufficiently impermeable, this layer may sometimes not be necessary.
>
> (3) Once the compacted clay (or, if applicable, the underlying ground) has been appropriately profiled, flattened and smoothed, it is generally covered with a plastic membrane (known as a geomembrane).[1] This is made of high density polyethylene approximately 2mm thick, which is brought onto site in large rolls

[1] On some occasions, there may instead be a geosynthetic clay liner (a thin layer of clay bonded to a layer or layers of geotextile) or similar material which provides an equivalent degree of protection. In very occasional cases, there is no artificial barrier at all, the underlying clay being considered sufficiently impermeable.

and laid out like a carpet. It is then welded together into a single completely impermeable sheet covering the entire "floor" of the cell and as far up the sides as is necessary and practical. This is an extremely skilled and expensive process, and the integrity of this layer (known as the "liner") is central to the effectiveness of the entire cell in performing its environmental protection function. The liner for a single cell can cost up to £1.6 million on its own, sometimes more.

(4) Usually (though not, we understand, invariably) the plastic liner is then covered with a layer of a somewhat thicker (but permeable) synthetic material ("geotextile"), generally a non-woven needle-punched polypropylene, the purpose of which is to prevent damage to the plastic liner by the subsequent "drainage layer".

(5) In order to facilitate the later drainage of leachate, the whole floor surface is then covered by a drainage layer or "blanket" which, in spite of its name, in fact consists largely of gravel or natural stone of mixed diameter in a layer 300mm to 500mm deep; a drainage system is incorporated into this layer, in which perforated drain pipes in a herring bone pattern connect into spine drain pipes leading to the sump or sumps from which the leachate can be pumped out via "leachate wells".

(6) Up the sides of the cell there comes a point where it is no longer possible to extend the gravel drainage layer (Mr Macphail's evidence was that this was often about 2 meters up the side wall); we infer this is because the slope would render such a layer unstable. Instead, a layer of sand or similar material, of between 200mm and 500mm is generally placed on top of the liner.

(7) In some situations, a further thin synthetic filter layer is placed on top of the gravel drainage blanket. This is done when there is concern about fine particles of waste washing into and blocking up the drainage layer (whether because the gravel used in the drainage layer is smaller than the ideal size, or because the main body of waste is expected to yield a particularly large amount of fine particles).[2]

(8) The first layer of actual waste[3] is then laid. This is the layer referred to in these appeals as the "base fluff" layer. It commonly comprises ordinary domestic waste, deriving from regular collections direct from householders. As recycling has improved, the volumes of this waste (commonly called "black bag waste") have declined and operators have on occasion resorted to using other materials in its place. A key consideration in laying this first layer is to reduce the risk of puncture to the all-important liner. Where black bag waste is used,

[2] There is however some concern that such layers, if they become blocked by fine particles, may themselves stop the free flow of leachate into the drainage layer beneath. This phenomenon is known as "perching", wherever it occurs in the body of waste.

[3] We only use the word "waste" because that is the common parlance. We should not be taken, by using this word, to be prejudging the issue before us.

it is inspected as it is in the process of being laid, to ensure it contains no large, hard, sharp objects (though, by its nature, it is extremely unlikely to do so) or significant amounts of mobile fine particles that might block the drainage blanket; it is spread carefully across the whole base of the cell and "lightly" compacted into a layer of between 1 and 2.5 metres deep – using a low ground pressure bulldozer (in contrast to the later layers of waste, which are compacted much more heavily by a specialised heavy machine). It is also placed against the sides of the cell, in a ring around the main body of waste, and compacted in the same way (in which location it is sometimes referred to as "side fluff"). It is said that this "light" compaction improves its drainage characteristics (allowing leachate to flow through to the drainage blanket without perching), though there is less evidence to support this supposed secondary purpose.

(9) Once the first layer of waste has been laid, the cell is ready to receive more heterogenous waste of all types (though waste that is deemed hazardous is generally disposed of in special facilities). This waste is tipped and compacted in layers, using heavy compactor vehicles with toothed wheels which are designed to break up and compress the waste as it is laid so as to utilise the expensive void efficiently, maximise the stability of the waste body and make it as homogenous as possible. At the end of each day's operations, there is a regulatory requirement for "daily cover" (usually of inert soil-like material) to be laid over the freshly deposited waste.[4] As the level of waste rises, the wells for the extraction of leachate are set into it, so that in due course the leachate which settles to the bottom of the cell can be pumped away, treated and safely disposed of.

(10) The sides of a cell are also engineered to minimise leakage, though less elaborately than the base. There may not be a plastic membrane or geosynthetic clay liner extending all the way up the side walls, compacted clay instead providing the required degree of impermeability. Some protection is provided for the side walls by the layer of lightly compacted black bag waste referred to above.

(11) When the level of waste in the cell is nearing its final required height and profile (due allowance being made for settlement over time), consideration is given to "capping" it in order to insulate the restored earth surface above from contamination by the waste below, in order to minimise the flow of rainwater into the main body of waste (which would increase the amount of leachate generated by it which is then required to be drained away and treated) and to impede the escape of landfill gas (which is often captured and used for electricity generation).

[4] This is required in order to minimise the amount of windblown waste and to reduce smells and vermin. For more explanation of the details of "daily cover", see *Waste Recycling Group Ltd v HMRC*, referred to below.

(12) Commonly between one and two metres of fully compacted black bag waste[5] are placed on top of the final layer of general waste and smoothed flat, before a 300mm "regulating layer" of "fines" is generally placed on top.

(13) This latter layer is sometimes called the "regulation layer", though this does not refer to any particular legal regulation. It is generally required as a condition of the relevant permit. "Fines" consist of a soil-like material which acts to fill cavities and even out irregularities in the surface below and provide a smooth top surface to receive the next element in the capping system.

(14) This next element is often a further plastic membrane, though it can be a geosynthetic clay liner, or even a compacted layer of clay (if in plentiful local supply). Depending on the specific site and the other elements of the capping system, there may be other layers of protection above it, involving further geotextiles, geocomposites or fine soils.

(15) Finally, the top surface is restored with subsoil (or subsoil-like materials) and topsoil in accordance with the approvals relating to the site. This will include some kind of drainage management system for surface water. Wells for extraction of leachate and landfill gas will be accessed from the surface.

(16) As time goes by, notwithstanding the heavy compaction that is applied to the main body of waste as it is deposited, the contents of each landfill cell will settle, generally by 25% to 30%. Although the waste is laid and compacted carefully, invariably the settlement that occurs is differential, so that some parts of the cell settle more than others. This creates obvious strains on the capping system, but can also result in large hard sharp objects effectively starting to protrude as other waste around them sinks, and even rupture the capping system altogether.

The development of industry practice

15. Industry practice and expertise on the design, construction and operation of landfill sites has developed over the years. The most significant early document to which we were referred was the Department of the Environment's "Waste Management Paper No 26 – Landfilling Wastes", published in 1986 ("WMP26"). This paper ran to 236 pages and drew together the legislative framework and contemporaneous best practice into detailed guidance on the design, construction and operation of landfill sites. It was widely regarded in the industry as the "go to" document for authoritative advice on all the areas it covered.

16. The use of artificial liners for landfill cells was much less advanced at the time, but some of the risks were obvious, even then. As paragraph 4.66 of WMP26 said:

> "During the early phase of operation, particular care must be taken to ensure that traffic does not damage the liner…. Particular care should be

[5] Not all sites use black bag waste for this purpose.

taken in placing the first lift of refuse, and build up of water and leachate should also be controlled…"

17. Paragraph 5.56 of WMP26 then went on to say this:

> "No bulky items, even after crushing, should be present in the first lift of refuse deposited in a site lined with a polymeric membrane due to the risk of damaging the liner (see paragraph 4.64[6]). Similarly, bulky items should not be present in the final lift of waste in sites that are to be capped with a low permeability material since settlement of the refuse may result in large items piercing the cap. After-use of the land may also be adversely affected."

18. Finally, it said this about protection of the capping system in paragraph 6.26:

> "To assist in maintaining its integrity a cap should be protected on both its upper and lower surfaces. Accordingly, before a cap is emplaced the surface of deposited waste should be graded and any irregular objects should be removed. In providing a firm base to allow compaction of the cap and to minimise damage from below, a buffer layer should be installed. Where a synthetic material is to be used for capping, a buffer layer at least 0.5m thick is usually required. Inert material, which does not react with the waste or the cap, may be used as a buffer provided that it is free from large stones and lumps. At the same time it should not be so fine that it can permeate into the waste. Coarse or a mixture of coarse and fine gravel may be suitable."

19. As experience and expertise developed, it was felt appropriate to update WMP26 and accordingly a revised version "Waste Management Paper 26B – Landfill Design, Construction and Operational Practice" ("WMP26B") was developed in conjunction with the industry and released by the Department of the Environment in 1995.

20. WMP26B included the following passages:

> "7.47 Following the successful installation of the liner system there is a risk that damage will occur to the liner by a number of routes, such as
>
> - accidental damage…
>
> …
>
> 7.48 *Accidental damage* may arise where bulky difficult waste, for example, lighting columns or concrete lumps, is tipped carelessly onto the drainage or protection layer, and is able to puncture and damage a liner system, especially a flexible membrane…
>
> …

[6] This cross reference appears to have been an error, and should be to 4.66.

> 7.52 The designer should consider all possible causes of damage for the proposed site, and in conjunction with the operator ensure that appropriate measures are taken to avoid them. Precautionary measures may include
>
> - CQA[7] procedures for the initial waste infilling to minimise the risk of damage caused by waste
>
> …"

21. So far as protection of the cell capping system from damage by underlying waste was concerned, WMP26B contained nothing specific, only a general reference to the fact that "construction methods, materials specifications, testing and CQA procedures are essentially the same as those used for construction of the landfill liner (see Chapter 7)."

22. Other material is available which shows how industry practice was developing. In a Department of the Environment document entitled "The Technical Aspects of Controlled Waste Management – Research Report", issued in June 1996, the importance of protection for the flexible membrane liner was discussed, and (although the normal immediate cover for the membrane envisaged in that report was "a granular material such as sand or silt" in a normal minimum layer of 300mm, but with a trend of increasing thickness up to as much as 2 metres) it was specifically stated that "in addition, large sharp objects should be excluded from the first layer of waste".

23. Also included in our document bundle was a set of "Landfill Operational Guidelines" issued in 2010 by the International Solid Waste Association Working Group on Landfill. The ISWA is an international trade association for the waste industry. That document also emphasised the importance of the first layer of waste:

> "…The first layer of waste placed in a cell is crucial for the landfill operation. This layer needs to be placed as a loose cushion layer, sometimes referred to as a 'fluff' layer…
>
> This loose first layer is essential in order to avoid damage to the liner and leachate collection system as a result of equipment tracking, or the waste itself penetrating the liner components during initial cell filling. Damage to the base liner system can very easily occur if initial cell filling is not carefully managed and such damage can soon negate good design and construction, and compromise the containment performance of a landfill.
>
> …
>
> The correct procedure for the construction of the first waste layer is as follows:

[7] "CQA" stands for "Construction Quality Assurance", i.e. quality assurance procedures applicable to construction operations, to ensure they are carried out to the planned standard. It is common for a supervising engineer to oversee the operation of CQA procedures, either as an employee of the operator or as an independent contractor.

- The access road to the working face must be constructed from the top of the cell to the bottom in a way that ensures that the landfill vehicles will traffic over soil ramps and not the bottom of the landfill cell.

- At the end of the access road a relatively wide temporary area must be constructed for manoeuvring of trucks.

- The first trucks must dispose of the waste at the end of the access road or a temporary movement area formed on the landfill base.

- Bulky or hard wastes capable of puncturing the liner must be removed.

- Depending on the waste type, the first waste should be deposited at a vertical layer thickness of at least 50 cm (often up to 1m or more if bagged street collection of waste is used), and this layer must not be compacted, so it then constitutes a protection layer to the liner and leachate drainage system.

The above procedure ceases when the whole area of the landfill cell base is covered with waste to a depth of at least 50 cm (1m recommended), so that no landfill equipment can track in close proximity to the liner or the base drainage system of the landfill."

24. Part of the old licensing regime was a requirement to create a "Working Plan", referred to in WMP26 as "the central document for planning and disposal licence applications and also the blueprint for eventual operation of the site". This document was developed in consultation between the operator and the licensing authority, individually in relation to each site but based on common guidance and a library of standard clauses. Strict compliance with the agreed working plan was a condition of the relevant licence. Whilst the working plan could be changed (indeed, it was described as a "living document" which would need to be updated as circumstances changed), no change to it could be implemented until the licensing authority had consented.

25. The general guidance given in WMP26 and WMP26B was therefore fleshed out a great deal for individual sites, both in the site licence and in the underlying working plan.

Site licence and working plan requirements

26. In relation to the third/fourth appellant's site at Sandy Lane, Bromsgrove for example, the site licence dated 7 October 1994 contained the following specific conditions:

"Where an HDPE liner is installed, the deposit of the first layer (2.0 metres) of waste above or against the liner protection layer shall be subject to strict and continuous supervision by the licence holder. Prior to any deposit of wastes an inspection procedure shall be submitted and

> agreed in writing by the Waste Disposal Authority. The following minimum conditions shall be included in the agreed procedure: -
>
> (i) only domestic wastes collected by or on behalf of a Waste Collection Authority or "soft" commercial wastes shall be deposited in the first 2.0 metres. The source of these wastes shall be agreed in writing by the Waste Disposal Authority.
>
> (ii) The first layer of wastes shall be subject to minimum compaction.
>
> (iii) Any solid objects with a single dimension greater than 300mm shall be removed from the layer and re-deposited above the first layer of wastes…."

27. The working plan also contained relevant provisions. The March 2000 version contained the following provisions in Section 6 (entitled "Engineering Design") under the heading 6.3.3 "Inspection of the First Layer of Waste" (which repeated, with some alterations, similar provisions which had been contained in procedures specifically approved by the local authority shortly before deposit of waste commenced in July 2005):

> "The first 2.0m layer of waste will be only domestic or soft commercial and the source of the waste will *[sic]* subject to written approval by the EA. The EA will be notified prior to the placement of this waste.
>
> Any solid objects with a single dimension greater than 300mm shall be removed from the initial layer and re-deposited above the first layer of waste. Where on inspection the waste intended for the first 2.0m is thought to contain objects greater than 300mm, it will not be used in the first 2.0m layer and will be deposited in the usual manner described in Section 7. The soft waste will be spread using a tracked machine not a compactor to ensure it is subject to minimum compaction.
>
> A written and photographic record will be maintained to include:
>
> - Location
> - Vehicle types
> - Vehicle registration numbers
> - Types of waste and materials provided.
>
> This record shall be made available to the EA on request.
>
> A depth profile of the waste will be used to demonstrate that the thickness of low compacted material meets the required 2.0m thickness and the whole process will be carried out on *[sic]* the presence of a suitably qualified person."

28. In the same document, under heading 6.5 "Extent of Works for Cell Engineering", it was said that "[i]n summary those engineering works which will take place prior to

waste infilling will be…. [there followed a description of the various phases of cell construction, then]… "the deposit of the first 2m layer of waste as soft waste under a QA regime". We were referred to an incomplete earlier document dated January 1995 and entitled "Construction Quality Assurance Plan to be Implemented During the Installation of the Landfill Liner to Sandy Lane Landfill" as setting out the relevant QA (quality assurance) regime, in which the following section 6 appeared (after various other sections which related very clearly to the actual construction of the liner):

> "6. FIRST LIFT OF WASTE
>
> The placement of the first lift onto the base and sideslopes shall be supervised. This waste should consist of selected light office industrial waste processed in REL[8] waste material *[sic]* and should be loosely tipped.
>
> The Engineer, with the aid of landfill operators will ensure that material will be removed from the first waste lift which could push through the protective cover and puncture the liner eg. bed posts, steel reinforcing bars.
>
> The Engineer could be an appointed Engineer or Cleanaways[9] civil engineer representative."

29. The second appellant's working plan for its Skelton Grange landfill site near Leeds dated January 1999 included the following:

(1) In section 2.360, headed "Installation, Maintenance and Protection of Final Capping" (after setting out details of the engineered cap, subsoil and topsoil):

> "The final layer of wastes will be free from bulky items or other materials likely to give rise to damage to the capping layer."

(2) In section 4.520, headed "Waste Discharge and Emplacement" (and, in particular, under the heading "Waste Placement & Compaction", which described the operational methods to be used):

> "The first layer of waste placed over the engineered parts of the site will not contain large or bulky items in order to ensure that upon compaction the integrity of the basal liner and leachate collection system is not jeopardised. Crude domestic, commercial waste or other similarly generally homogeneous waste types free from bulky items will be used in the first lift placed over engineered parts of the site. Waste containing large or bulky items will not be placed within 2m of the top of the basal liner or within 2m of the flanks of the site."

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[8] REL apparently refers to "rear end loader", typically a normal domestic refuse collection lorry

[9] Cleanaway were the operators of Sandy Lane at the time.

30. The first appellant's site licence as at 31 July 1998 in respect of its Deep Moor site near Torrington included the following requirements:

> (1) In section 2, headed "Landfill Site Development and Operation", under subheading 2.17 "Preparation details" (which included detailed provisions about the installation of the membrane liner and the placement of a "protective covering" of 300mm of sand or other suitable material[10]):
>
> > "Measures shall be taken to ensure that there is no damage to the membrane at any time. This shall include the placement of 'selected wastes' to a depth of 1.0 metre on top of the protective sand layer. Selected wastes shall consist of domestic wastes or 'soft' commercial wastes, the source of which shall be agreed by the Authority prior to their deposit. The emplacement of this waste shall be under the strict and continuous supervision of the Resolution holder."
>
> (2) In section 4, headed "Landfill Restoration", under subheading 4.1, "Restoration Contours and Final Cover Layer":
>
> > "The final layer of waste deposited shall, to a depth of at least 1.0 metre, be kept free of materials likely to interfere with final restoration or subsequent after use."

PPC Permit provisions

31. In 2003-2006, a major exercise was undertaken in which all landfill sites with licences under the old regimes were required to obtain PPC Permits or cease operation. This required operators to make formal applications, which included answers to specific questions, including the following:

> "Are waste deposit and emplacement procedures in place for the installation, which ensure the following?
>
> > The first layers of waste in a new cell are selected and inspected during placement to ensure that these do not cause damage to the installed barriers and liners.
> >
> > …
> >
> > The final layers of waste are selected and inspected during placement to ensure that these do not cause damage to the final capping…"

32. We were not referred to any application in which any of the appellants had answered "no" to these questions[11], and we infer they alway answered "yes", unless

[10] We were informed that in fact gravel was used instead of sand, as part of the leachate drainage blanket

[11] With the exception of (a) the use of material to cover the disposal area during a short term cessation in landfill disposal activity;

there were special circumstances. The procedures themselves were then included in the documents supporting the application, and typically referred to some special procedures as, for example, in Appendix 1 to the PPC Permit application relating to second appellant's landfill site at Eye, near Peterborough:

> "The first layer of waste placed over the engineered parts of the site will not contain large or bulky items in order to ensure that upon compaction the integrity of the basal liner and leachate collection system is not jeopardised. The first 2m layer of waste placed over engineered parts of the site will comprise household and commercial, or other similar generally homogeneous waste types free from large or bulky items. The first 2m layer of wastes over the base and the first 2m laterally from the perimeter engineering (excluding the cap), will not comprise any special or difficult wastes.

33. In the "Site Management Systems" document dated September 2003 applicable to the third/fourth appellant's site at Candles near Telford, the following requirements were laid down under the heading "Waste Deposit and Emplacement":

> "5.2.2 Selection, Inspection and Deposit of Initial Layer of Waste
>
> Only selected waste, which excludes large, bulky or sharp items will be used to form the initial lift of waste in each cell immediately above the liner system.
>
> …
>
> The selected waste will be subject to a minimal amount of compaction and will be used to form a "buffer" layer approximately 2 metres in depth.
>
> …
>
> Selection and placement of the first layer of waste will be carried out under the supervision of a suitably trained member of the operational team, whose role will be to: -
>
> - Visually inspect all waste to be used in the initial layer immediately following discharge;
>
> - Identify any unsuitable materials, which may comprise large bulky or sharp items and ensure that such items are segregated and not placed in the initial waste lift;
>
> - Observe the compaction and spreading activities to ensure there is no damage to the lining system;

> …

d

- Advise the site manager in the event of damage being observed; and

- Ensure that waste deposit operations cease immediately in the event of any damage occurring.

The site manager or nominated deputy will be responsible for recording the placement of the first layers of waste and ensuring that the work is undertaken to the correct standard.

…

5.2.4 Prevention of Damage to Barriers, Liners, Leachate and Landfill Gas Management Systems

Action that will be taken during the deposit of waste to prevent damage to the basal barrier, lining system and leachate management system is described in Section 5.2.2.

The selected waste that is placed on the base of the site will be progressively extended up the sidewalls to protect the sidewall lining system. The selection, inspection and placement of these materials will be subject to the same procedures as outlined in Section 5.2.2.

In order to avoid inadvertent damage to leachate extraction and monitoring wells, a layer of construction or other selected waste, which will act as a buffer against subsequent damage by mobile plant, will be placed around the wells.

…

5.2.7 Selection and Inspection of Final Layer of Waste

In order to prevent damage to the final capping system, only selected waste which excludes large and bulky or sharp items will be used to form the final lift of waste in each cell immediately below the final capping layer.

…"

34. The first appellant's Working Plan dated January 2001 for its Deep Moor site was attached to its application for a PPC Permit and accordingly was formed the basis of the management system it was required to operate at the site under its PPC Permit. The Working Plan contained no reference to any specific procedures for placement of first or final layers of waste.

Procedures actually followed in laying first and last layers of waste

35. We are satisfied from the evidence before us that all the appellants, in line with what they understood to be standard industry practice, followed reasonably strict procedures, over the periods concerning these appeals, in laying the first layer of waste

in a newly engineered landfill cell so as to minimise the risk of damage to the lining system from operations subsequent to its installation.

36. Whilst domestic waste appears to have been the material of choice, other materials have on occasion been used – either experimentally or because of an insufficient supply of domestic waste (the volumes of which have reduced sharply as recycling has improved). Mr Mehroke, for example, gave evidence that the shortage of available domestic and municipal waste resulted in the use of non-hazardous soils (sometimes combined with trommelled[12] non-hazardous industrial waste) to form the last lift of waste before the regulating layer, and Mr MacPhail gave evidence that if there was insufficient domestic waste available, certain types of non-hazardous commercial and industrial waste could be (and had been) used.

37. As the market evolves and less black bag waste is available, operators are exploring the possible use of other materials for the first lift of waste as well. Whilst soils would generally be expected to "clog" the drainage of leachate, Mr Mehroke mentioned that the use of "fines" (having somewhat larger particle sizes) combined with a layer of synthetic material called "Terram" immediately above the drainage blanket was being considered for some future operations; and Mr McPhail mentioned that "MRF residue" (the residue from their materials recycling facility comprising common household recycling that could not in fact be recycled, such as crisp packets, certain types of paper and cellophane packaging) had been tried at the fourth appellant's Blue Haze site. He also mentioned that at the same site, it was much more difficult to source domestic waste due to a local authority policy of incinerating waste; so when the incinerator was out of action and domestic waste was routed to Blue Haze, some was stockpiled and covered, ready for later deposit as the first layer of waste in a new cell. A similar process was followed at its Sandy Lane site.

38. We are also satisfied that the appellants all took similar care in laying waste against the sides of landfill cells and at the top of the body of landfilled waste, immediately below the regulating layer. For the purposes of the final layer, however, there was clearly no risk of damaging the underlying liner; the concerns were more with accommodating differential settlement and ensuring a smooth and consistent base layer to accept the regulating layer above, so there was no problem with the final layer being fully compacted (though it appears the top surface of it would generally then be smoothed using a tracked vehicle before the regulating layer was placed on top).

39. For the purposes of this hearing, we were not being asked to adjudicate on the amounts of material deposited as fluff by any of the appellants in pursuance of their various practices; we were being asked to adjudicate in principle upon the liability or otherwise of such deposits to tax. Accordingly we are not required to make detailed findings of fact as to the specific procedures followed by each appellant in relation to each of the sites under consideration in this appeal, or as to the amounts of material so deposited.

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[12] Trommelling was described as a mechanical process to break up the waste into particles no larger than 100 mm across

40. As to the detail of the processes by which the fluff was actually deposited – and in particular as to precisely who disposed of it into the landfill cells, whether such disposal was made on behalf of some other person (including at the request of, or in pursuance of a contract with, another person), we were not asked to make any findings of fact; this is because no such findings were required by reason of the agreement reached between the parties, in relation to these proceedings alone, as recorded at [76] to [80] below.

41. In view of the arguments which were strongly pursued by HMRC in written submissions following the release of the judgment of the Court of Appeal in *Patersons of Greenoakhill Limited v HMRC*[13], however, we should explain that the evidence around the precise logistics of deposit of the fluff layers was somewhat sketchy (as this was not thought at the time to be relevant to the issues to be decided by the Tribunal). Mr McPhail's evidence (for the third and fourth appellants) was the clearest on this. At the very start of tipping into a new cell, the vehicles delivering the waste would deposit it adjacent to the cell and that material would be used by Veolia operatives to create an area within the cell upon which a ramp or tipping platform could be formed (inspecting the material as this was done, in order to ensure no potentially harmful items were in it). After the cell bund had been appropriately thickened, a running surface would be created out of soil and crushed aggregate to allow vehicles to enter the cell and deposit their loads there. The material would then be moved into position using a tracked bulldozer or excavator, being checked for potentially harmful items whilst being moved. We infer that in view of the absolute prohibition against vehicles running directly over the drainage blanket, a similar practice was followed by all the appellants.

42. Thus whatever the detailed arrangements for the deposit of the fluff layers, we are satisfied that they were first deposited (either adjacent to, or more commonly in, the cells) for inspection and were only finally emplaced in the cells by the appellants' operatives after that inspection had taken place.

43. It is also clear that the appellants intended that all the waste (whether domestic or commercial) received at their landfill sites which was suitable for use as fluff would be placed in the landfill cells. That which was not used as fluff would simply be deposited as part of the main body of waste. The contracts with the respective customers did not differentiate between material which was suitable for use as fluff and that which was not.

Environment Agency views concerning fluff and its communication with HMRC on the matter

44. Mr Legge had made a reasonably lengthy witness statement which focused mainly on the regulatory background, the role of the Environment Agency and his understanding of typical design and operation considerations at a landfill site. Whilst Mr Grodzinski cross examined him at some length (and in particular wished to explore the history of contact between HMRC and the Environment Agency on matters relating to fluff), we found neither Mr Legge's witness statement nor the outcome of the cross

[13] [2016] EWCA Civ 1250, [2017] 1WLR 1219, [2017] STC 225

examination to be of any material assistance to us in the matters which fall to be decided by this Tribunal, however relevant they might be to other proceedings involving these appellants.

The legislation

45. The legislative provision at the heart of these appeals is subsection 40(2) Finance Act 1996 ("FA96"), which defines what is a "taxable disposal" for the purposes of landfill tax as follows:

> "A disposal is a taxable disposal if –
>
> (a) it is a disposal of material as waste,
>
> (b) it is made by way of landfill,
>
> (c) it is made at a landfill site, and
>
> (d) it is made on or after 1st October 1996."

46. Section 64 goes on to provide some assistance in interpreting subsection 40(2)(a) (one of the pivotal subsections in these appeals) as follows:

> "**64 Disposal of material as waste**
>
> (1) A disposal of material is a disposal of it as waste if the person making the disposal does so with the intention of discarding the material.
>
> (2) The fact that the person making the disposal or any other person could benefit from or make use of the material is irrelevant.
>
> (3) Where a person makes a disposal on behalf of another person, for the purposes of subsections (1) and (2) above the person on whose behalf the disposal is made shall be treated as making the disposal.
>
> (4) The references in subsection (3) above to a disposal on behalf of another person includes reference to a disposal –
>
> (a) at the request of another person;
>
> (b) in pursuance of a contract with another person."

47. Section 65 carries out a similar function in relation to subsection 40(2)(b):

> "**65 Disposal by way of landfill**
>
> (1) There is a disposal of material by way of landfill if –
>
> (a) it is deposited on the surface of land or on a structure set into the surface, or
>
> (b) it is deposited under the surface of land.

(2) Subsection (1) above applies whether or not the material is placed in a container before it is deposited.

(3) Subsection (1)(b) above applies whether the material –

(a) is covered with earth after it is deposited, or

(b) is deposited in a cavity (such as a cavern or mine).

(4) If material is deposited on the surface of land (or on a structure set into the surface) with a view to it being covered with earth the disposal must be treated as made when the material is deposited and not when it is covered.

…

(8) In this section "earth" includes similar matter (such as sand or rocks).

48. In addition, section 65A FA96 (which came into force on 21 July 2009), provides as follows:

"**65A – Prescribed landfill site activities to be treated as disposals**

(1) An order may prescribe a landfill site activity for the purposes of this section.

(2) If a prescribed landfill site activity is carried out at a landfill site, the activity is to be treated –

(a) as a disposal at the landfill site of the material involved in the activity,

(b) as a disposal of that material as waste, and

(c) as a disposal of that material made by way of landfill.

…

(9) In this section –

…

'landfill site activity' means any of the following descriptions of activity, or an activity that falls within any of the following descriptions –

(a) using or otherwise dealing with material at a landfill site;

(b) storing or otherwise having material at a landfill site."

49. Pursuant to s 65A, the Landfill Tax (Prescribed Landfill Site Activities) Order 2009 ("the 2009 Order") was made, coming into effect on 1 September 2009.

Paragraph 3(1) of that Order designated as a "prescribed landfill site activity" for the purposes of s 65A, amongst other things:

> "(a) the use of material to cover the disposal area during a short term cessation in landfill disposal activity;
>
> …
>
> (g) the use of material placed against the drainage layer or liner of the disposal area to prevent damage to that layer or liner;"

The issues

50. It is agreed that if the various deposits the subject of these appeals are "taxable disposals" within the meaning of that phrase in subsection 40(2) FA96, then the appeals must be dismissed. It is also agreed that the deposits all fall within subsections 40(2)(c) and (d) and therefore the only dispute between the parties is whether those deposits fall within subsection 40(2)(a) and (b) (interpreted by reference to sections 64 and 65 respectively).

51. The main questions for determination by the Tribunal are therefore:

(1) Was the placement of fluff a "disposal of material as waste"?

(2) Was the placement of fluff "made by way of landfill"?

52. If the Tribunal found in favour of the appellants on either of these two questions (such that the deposits in question did not, in terms of the primary legislation, amount to "taxable disposals"), then the further issue arose as to whether Regulation 3(1)(g) of the 2009 Order took effect so as to bring the "top fluff" layer into charge to tax from 1 September 2009 (it being accepted that it did bring the base and side fluff layers into charge from that date).

The arguments in outline

53. The appellants submitted separate skeleton arguments. The first appellant's skeleton ran to 29 pages, the second appellant's to 27 pages (in terms which followed closely the first appellant's skeleton) and the third & fourth appellants' skeleton ran to 23 pages.[14] HMRC's skeleton argument ran to 52 pages. It is therefore not possible to give a full exposition of all the detailed arguments employed on both sides, but the key arguments are summarised as follows.

The appellants' outline arguments

54. The appellants argued, in outline, as follows:

[14] In addition, the appellants submitted a further joint skeleton argument of 15 pages in response to HMRC's EU law arguments in their skeleton argument

(1) There is clear and binding authority that there is no disposal of material "as waste" if it is "used" (see *Waste Recycling Group Limited v HMRC* [2008] EWCA Civ 849, [2009] STC 200).

(2) The material comprising the fluff layers was "used" and therefore was not disposed of "as waste". The condition in section 40(2)(a) was therefore not satisfied. This was because the material formed an integral part of the landfill containment and barrier system, and was specifically selected and inspected, and its placement supervised, for that purpose. The fluff was indistinguishable, from a legal point of view, from the daily cover in respect of which the Court of Appeal in *WRG* had found there to have been no disposal "as waste".

(3) As the fluff was deposited for a useful purpose (again, equivalent to the material used for road construction and daily cover in *WRG*), it was not "disposed of by way of landfill". The condition in section 40(2)(b) was therefore not satisfied either.

55. As to the effect of the 2009 Order, the appellants argued that since the "top fluff" layer was not "placed against the liner" (being separated from it by the regulating layer, and having been put in place before either that layer or the capping liner), the wording of the 2009 Order simply did not encompass it.

HMRC's outline arguments

56. Essentially, Ms Hall argued that the appellants' deposits of fluff amounted to "nothing more than the careful management of material…deploying waste deposit and emplacement procedures which are appropriate for black bag domestic waste being deposited and emplaced at that stage of the landfilling process. Those procedures minimise the risk of damaging the containment system, which in turn minimises the risk of harming human health and the environment. In that regard, the procedures are materially indistinguishable from those that apply to all landfilled waste." During the hearing, Ms Hall expressed the argument very concisely when she said:

> "The mere fact that you can deposit and emplace waste in a manner which serves a useful function does not lead to the conclusion that you do not intend to abandon it."

57. In response to the three main limbs of the appellants' arguments Ms Hall, in outline, argued that:

(1) by asking whether the fluff had been "used", the appellants were posing the wrong question. Effectively they were imposing an unwarranted gloss on the statutory phrase "disposal… with the intention of discarding the material".

(2) in any event, the fluff had not been "used" in any relevant sense, nor did the "use" which the appellants sought to rely on negate their intention to discard the material. Rather than simply focusing on the question of "use", the Chancellor in *WRG* had specifically used the phrase "retention and use", which clearly had some wider meaning than simply "used".

(3) viewed in the wider context of the EU and UK waste legislation, the deposits of fluff in this case were clearly "made by way of landfill" and "as waste".

58. There was at one stage the possibility of HMRC seeking to argue that the Tribunal should consider the "intention" of local authorities and other suppliers of fluff, but this line of argument was dropped (see [76] to [80] below).

59. As to the argument on the 2009 Order, Ms Hall's response was that paragraph 3(g) was concerned with the function of the relevant material, namely protection of the liner; the word "against" must therefore be construed with that purpose in mind; that whilst the fluff might not be immediately adjacent to the liner, its purpose was clearly to protect the liner in the same way as an overcoat might protect the skin from cold, even though not directly adjacent to it; and in any event the liner and the regulating layer should be seen for these purposes as a single entity, which the top fluff was intended to protect.

Discussion and decision

Introduction

60. There are two main questions to be decided in this case. The first is whether, in the circumstances described above, the fluff was disposed of "as waste", in particular whether the disposal was made "with the intention of discarding" it. The second is whether the disposals were "by way of landfill".

61. The Chancellor in *WRG* at [29] gave a strong reminder that each case must be determined on the basis of its own facts by reference to the legislation, and not by seeking to apply past judgements to the facts of the current case:

> "Whether or not there is a liability to landfill tax in respect of the materials to which this appeal relates depends on the proper interpretation and application of the provisions of Part III of the 1996 Act. We are bound by the decision of this court in *Customs and Excise Comrs v Parkwood Landfill Ltd*[15] in respect of the aspects of interpretation with which it dealt. But we are not concerned with the applicability to the facts of this case of the judgement of this court in the *Parkwood* case or of Moses J in *Customs and Excise Comrs v Darfish Ltd.* in my view the decisions of both the tribunal and Barling J are open to the criticism that too much time was taken up with the application of those judgements to the 11 categories which I have mentioned and not enough to the application of the legislation to the facts of this case."

62. That said, the above passage also highlights that we must derive such general guidance as is possible from the earlier cases in seeking to interpret the words of the legislation in applying them to the present case.

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[15] [2002] EWCA Civ 1707, [2002] STC 1536

63. It is clear (see the Court of Appeal in *Parkwood* at [22], confirmed by the Court of Appeal in *WRG* at [30] and noted by the Court of Appeal in *Patersons of Greenoakhill v HMRC*[16] at [17] and [19]) that all four conditions for liability specified in subsection 40(2) FA 96 must be satisfied at the same time and that that time must be when the last of them is satisfied, which is likely to be the moment when the material is actually disposed of. None of the parties disagreed with this as a general proposition, or argued that we should apply the statutory test at any time other than the moment of deposit of the fluff in the landfill cells. There was no material argument before us about whether that moment would be the moment of initial unloading of the material (typically from the vehicle delivering it into the cell) or the moment when the material was manoeuvred into its final position by the appellants' operatives. We consider the latter to be the relevant moment, on the basis that the earlier physical deposit was clearly intended not as the final emplacement of the material but only as a step towards such final emplacement.

The relevance of policy and of EU law in interpreting the legislation

64. One preliminary point of interpretation is the extent to which we should have regard to the apparent policy behind the legislation or the various EU law provisions to which we were directed when applying this piece of UK legislation to the facts of these appeals.

65. In *Parkwood*, the Court of Appeal set out its view of the policy underlying the legislation:

> "[9] landfill tax was introduced as from 1 October 1996 by the Finance Act 1996. The tax is a creature of domestic statute in that it is not a tax required under any provisions of Community law. However the United Kingdom does have obligations in Community law to take appropriate steps to encourage the prevention, recycling and processing of waste under EC Council Directive 75/442 of 15 July 1975 on waste (OJ L194 25.07.75 p 39). The Environmental Protection Act 1990 is the key piece of domestic legislation enacted to meet this obligation. Landfill tax can therefore be seen as a separate domestic initiative aimed at protecting the environment and securing the ambitions of the directive.
>
> [10] A government White Paper of December 1995 entitled *Making Waste Work* (CM3040) preceded the imposition of landfill tax. It examined the strategies to be adopted to reduce the environmental impact of waste disposal. So far as landfill was concerned, three main objectives were set out. First, to reduce the amount of waste, second to reduce the amount of material going to landfill and third to place the cost of landfill on the person disposing of the waste. In that way waste producers would become aware of the cost of their activities. The central purpose of the landfill tax was stated (at para 1.68) to be –
>
> '… to ensure that landfill costs reflect environmental impact thereby encouraging business and consumers, in a cost effective and non-

[16] [2016] EWCA Civ 1250. [2017] STC 225

> regulatory manner, to produce less waste; to recover value from more of the waste that is produced; and to dispose of less waste in landfill sites.'"

66. In *Patersons*, the Upper Tribunal[17] said that the policy was of little weight in the interpretation of legislation. Arden LJ in the Court of Appeal agreed "in principle", but also said that as the 'central purpose' described above included the production of less waste, it was "open to the UT to hold that activities which encourage the supply of waste to the LSO *[i.e. landfill site operator]* did not further the purpose of the legislation, and to say that remained so even if by-products from the deposited material were later recycled."

67. Ms Hall argued that if the appellants succeeded in their appeal, the effect would be to encourage the landfilling of domestic waste, making it commercially attractive not to divert waste from landfill. This, she submitted, was clearly contrary to the stated policy. The appellants on the other hand argued that some kind of protection layer was required for the cell liner and it was preferable, in line with the stated policy, to "recruit" material that was already on its way to landfill to fulfil that function, rather than to use virgin material, thereby increasing the overall amount of material going to landfill.

68. To us, these arguments illustrate graphically the extremely limited usefulness of applying "policy" in attempting to interpret this legislation in the present context. We therefore give it little or no weight in our consideration. We note, however, that the appellants' argument on the matter proceeded on the premise that the material in question was destined for landfill in any event.

69. So far as EU law is concerned, Ms Hall sought to persuade us that there were three core reasons why we should consider EU law in interpreting the UK legislation:

> (1) One of the policy aims of landfill tax is to achieve EU law targets in the reduction of waste sent to landfill.
>
> (2) EU law imposes a general obligation to interpret national law as a whole to achieve the aims of EU law, such as the Landfill Directive.
>
> (3) Where domestic law incorporates concepts of EU law, regard must be had to the EU law interpretation of those concepts "to ensure a uniform interpretation of domestic and EU legal instruments". In the present case, "waste", "disposal by way of landfill" and "at a landfill site" were all concepts derived from the EU Waste Framework and Landfill directives.

70. The appellants argued that even if Ms Hall were right, it would not advance HMRC's case; and in any event she was wrong. They observed that the Court of Appeal in *Patersons* had stated at the outset that they did not wish to hear any EU law submissions, and none were made. Whilst we simply do not know whether this was the case, none of the judgements of the Court of Appeal contain any reference to it. Nor did it feature materially in any of the earlier decisions.

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[17] [2014] UKUT 225 (TCC), [2014] STC 2178

71. Whether or not landfill tax is a response to the U.K.'s obligations under the EU directives mentioned above, it is clear that they do not require the imposition of a landfill tax (indeed HMRC did not dispute the appellants' assertion that 11 EU member states have no such tax), still less can they be regarded as having anything meaningful to say about the interpretation of what is an entirely domestic tax. Ms Hall referred us to *Pontina Ambiente SRL v Regione Lazio* [2010] 3 CMLR 1, in which the CJEU found that if a member state chose to introduce a landfill levy (as Italy had in that case), the levy had to comply with the requirements of Article 10 of the Landfill Directive 1999/31, which included the following text:

> "Member States shall take measures to ensure that all of the costs involved in the setting up and operation of a landfill site, including as far as possible the cost of the financial security or its equivalent referred to in Article 8(a)(iv), and the estimated costs of the closure and after-care of the site for a period of at least 30 years shall be covered by the price to be charged by the operator for the disposal of any type of waste in that site."

72. In that case, the Italian landfill site operator was obliged to account to the regional authority for a landfill levy on waste disposed of at its sites. Its customers, local councils, were obliged to pay the operator for disposing of their waste, including the cost of the levy. There were many problems with late payment (and possibly even non-payment) of fees by the councils, as a result of which the operator was unable to pay the levy on time and was accordingly penalised. It appealed against the enforcement of the levy and the penalties, and its appeal became the subject of a reference to the CJEU, to resolve the question of whether the Italian legislation requiring payment of the levy and penalties for late payment, irrespective of the failure of the councils to pay the operator, was incompatible with the above provision.

73. The CJEU held that it could be (the actual decision being one for the national court):

> "In the light of the foregoing, the answer to the first question must be that Article 10 of Directive 1999/31 must be interpreted as meaning that it does not preclude a national provision, such as that at issue in the main proceedings, which makes the operator of a landfill site subject to a levy to be reimbursed by the local authority depositing the waste and which provides for financial penalties to be imposed on that operator for late payment of the levy, on condition that those rules are accompanied by measures to ensure that the levy is actually reimbursed within a short time and that all the costs of recovery, and in particular, the costs resulting from late payment of amounts which that authority owes to the site operator on that account, including costs incurred in order to avoid any financial penalty which might be imposed on the site operator, are passed on in the price to be paid by the authority to that operator. It is for the national court to ascertain whether those conditions have been satisfied."

74. In other words, the CJEU found that the imposition of a landfill levy was an acceptable way of achieving (wholly or partly) compliance with Article 10, but as that levy was part of the costs of the operator, it would only be permissible if its terms were

such that the cost of paying the levy and any associated penalties fell on the local authorities (as the entities actually responsible for sending the waste to landfill and meeting the full costs of landfilling under the "polluter pays" principle).

75. We do not consider this decision advances Ms Hall's argument in any way, and we find nothing of any relevance to the dispute before us in the various EU law provisions or cases to which she referred us. It may well be the case that FA 96 borrows the language of waste management used in the EU provisions, but we do not see how that logically leads on to the argument that FA 96 should be interpreted so as to bring fluff within the scope of landfill tax for the purposes of these appeals.

Was the fluff disposed of as waste?

Whose "intention" is relevant for the purposes of sub-s 64(1) FA 96?

76. As is provided in sub-s 64(1) FA 96, a "disposal of material is a disposal of it as waste if the person making the disposal does so with the intention of discarding the material". The first obvious point arising from this provision is that it is the intention of "the person making the disposal" which determines whether the material is disposed of "as waste". There is a slight gloss on this (see sub-s 64(3) FA 96) where someone makes a disposal "on behalf of another person" (including "at the request of another person" or "in pursuance of a contract with another person" – see sub-s 64(4) FA 96).

77. In the present case, HMRC's skeleton argument, delivered shortly before the hearing, explicitly raised for the first time an argument which had not previously been canvassed. They referred to the detailed practical arrangements for placing the fluff in the cells and sought, for the first time, to advance an argument that it was the intention of the local authorities who delivered the material to the landfill sites that was the relevant intention for the purposes of sub-s 64(1) FA 96.

78. Previously unaware that HMRC wished to advance this argument, the appellants had made no preparations to meet it, either by argument or by gathering of detailed evidence relevant to the point.

79. There was some disagreement as to where responsibility lay for this point arising so late in the day. Ultimately, faced with the risk of derailing the whole hearing, HMRC withdrew this point on the basis of the following undertaking:

> "HMRC undertake that they will not, in these appeals, raise any argument to the effect that the relevant intention for the purposes of Finance Act 1996, section 64, was that of any person other than the Appellants. In particular, HMRC will not raise any argument to the effect that Local Authorities or other customers were the persons making the disposals for the purposes of section 64. This undertaking applies to all stages of these appeals, including any appeals to the Upper Tribunal, Court of Appeal or Supreme Court."

80. Accordingly, this Tribunal is required to assume that the "intention" to be considered by reference to sub-s 64(1) is that of the respective appellant in each case

(or, where relevant, that of the relevant landfill site operator within the appellant's group which actually operates the site). For the sake of simplicity, in the remainder of this decision we shall refer only to the intentions of "the appellants", intending to include, where relevant, the intention of any associated site operator.

What was the intention of the appellants when the fluff was deposited?

81. So when the fluff was deposited, did the appellants have the intention of discarding it?

82. *Parkwood* does not really assist us in answering that question, because in that case HMRC did not dispute Parkwood's claim that it did not intend to discard the relevant material (see [13] – [14]), where Aldous LJ said this:

> "…they *[i.e. Parkwood]* submitted that the condition in subsection (2)(a) of section 40 was not satisfied as the disposal was not "as waste". As the definition of waste in section 64(1) makes clear, material used for roads and the like is not waste as the person making the disposal, Parkwood, did not intend to discard the material.
>
> [14] The Commissioners accept the submission of Parkwood in so far as it goes, but they submitted that Parkwood's submission concentrated upon the wrong disposal. Upon the facts as found, the city council disposed of the material."

83. In *Parkwood*, the appellant company operated the landfill site and its subsidiary company, Parkwood Recycling Limited ("Recycling"), carried on the business of recycling waste. The material in question in that case was mainly derived from waste from highway works carried out by the local authority, though some other waste was mixed in with it. The VAT & Duties Tribunal[18] (at [22]) described the process applied to the material as follows:

> "For present purposes, the materials deposited at the recycling plant are first divided into waste and recyclable material. Those in the latter category are recycled into aggregates and fines. Aggregates are concrete and other materials sorted, crushed and mixed so as to form mixed aggregate in pieces of 70 mm, or less, in diameter. Fines are a soil like material produced by sorting and mixing suitable materials to form a product which has the appearance and many of the characteristics of soil, including the ability to support the growth of plants, and consists of pieces of material of 12 mm, or less, in diameter. (That diameter has now been increased to 25 mm or less)."

84. The tribunal went on to give more detail of the materials involved and what happened to them. The material received from the local authority was "loads consisting entirely, or almost entirely, of concrete, brick, tarmac and soil." When received by Recycling:

[18] [2001] Decision L00011

> "…it is first sorted by hand to ensure that true waste materials such as plastic, wood and paper are removed from it. They are dispatched to landfill. Brick and tarmac are also removed by hand as they too are unsuitable for recycling purposes. (Crushed brick is however suitable as a base for informal footpaths, and crushed tarmac (planings) is predominantly used for under surfaces of footpaths. Consequently, there is a market for both materials of which Recycling takes advantage). The remaining material is then subjected to primary screening over the first screening station. That which is too big to pass through the screen is passed through the primary crusher, and is then fit for use as a coarse road sub-base. The material which has passed through the screen is separated into aggregates and fines…"

85. These aggregates and fines were then passed on to Parkwood and used by it for landscaping (the tribunal referred specifically to "intermediate blinding" and "final site restoration work") and road making.

86. *Parkwood* was mainly concerned with whether the person making the relevant disposal of material was Parkwood or the city council, and whether the presumed intention of the city council to discard the material at an earlier point in time could satisfy condition (a) in sub-s 40(2) FA 96 whilst leaving conditions (b), (c) and (d) to be satisfied when the material was later deposited at Parkwood's landfill site. In holding that all four conditions had to be satisfied at the same time in relation to the same disposal, the Court of Appeal held (at [31]) that:

> "The tribunal were correct to concentrate upon the disposal at Parkwood's landfill site because it was that disposal which was made by way of landfill. They rightly held that that was not a disposal as waste.[19]"

87. So, having identified that the relevant disposal was made when the material was actually deposited by Parkwood, it was Parkwood's intention that was determinative. HMRC had not disputed Parkwood's assertion that "material used for roads and the like is not waste as the person making the disposal, Parkwood, did not intend to discard the material"; but even if they had, the above passage shows that the Court was clearly of the same view. So the Court of Appeal must have agreed that use for "road making and landscaping purposes" by Parkwood showed it had no "intention of discarding" the material in question.

88. The other conclusion that can clearly be drawn from *Parkwood* is that there is no rule that once material has been discarded as waste by somebody, it remains "waste" for the purposes of any subsequent disposals (this was described by Mr Cordara before us as "the once waste, always waste heresy", echoing the comment of the Chancellor in *WRG* referred to at [92] below). As Aldous LJ said (at [27]):

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[19] In fact, the VAT & Duties Tribunal had made no such finding; they held that the relevant disposal was that from Parkwood Recycling Limited to Parkwood Landfill Limited (see [56] and [60] of their decision)

> "The commissioners also submitted that there was nothing in the statute which suggested that material which had been discarded as waste ceased to be waste because it had been successfully recycled. That submission is contrary to common sense. Take material which is thrown away. That is waste. Melt it down and mould it into a spare part for a machine and it is not waste. There need be no change in chemical substance to convert waste into a useful product. It is the act of recycling which is important."

89. This was summed up by the statement (at [28]) that "The purpose of the legislation was to tax waste material deposited at landfill sites and not to tax deposits at landfill sites of useful material produced from waste material", which was in turn reinforced by the decision of the Court of Appeal in *WRG* (see below).

90. Matters moved on a little in *WRG*, to which we now turn.

91. That case was concerned with the taxability of inert waste used by WRG either to provide daily cover for the active waste deposited in its landfill cells (as required by the terms of its licence) or in the construction of roads on its landfill sites[20]. The material in question was all sourced by WRG through its own waste transfer stations (to which local authorities and businesses brought their waste) and civic amenity sites which it operated under agreements with local authorities (to which members of the public brought their waste). The VAT and Duties Tribunal found that some of the material used for site engineering and daily cover was "accepted by WRG mixed with other inert material, and WRG itself extracts the material suitable for the purposes identified, while putting the remainder into the site as taxable landfill". In other words, WRG had, by a process of separation, created material that was useful to it out of waste.

92. By the time the material was deposited at its landfill sites, ownership of it had passed to WRG. The Chancellor (in a judgement with which Arden LJ and Smith LJ agreed) held as follows (at [33] – [34]):

> "[33] In those circumstances, in my view, it is clear that, assuming there to have been a disposal at all, the disposal relevant for the purposes of s 40(2)(a) was made by WRG on its own behalf. So the question posed by s 64(1) is whether WRG then intended to discard the materials. The word 'discard' appears to me to be used in its ordinary meaning of 'cast aside', 'reject' or 'abandon' and does not comprehend the retention and use of the material for the purposes of the owner of it. I agree with counsel for WRG that s 64(2) does not apply in such circumstances because there is, at the relevant time, either no disposal or no disposal with the intention of discarding the material.

[20] The VAT & Duties Tribunal had referred at [3] to "site engineering purposes, particularly the construction of roads within the site which lorries may use in order to reach the point at which their loads are to be discharged." This suggested that some further, unspecified, "site engineering purposes" might have been mentioned to it. The Chancellor in the Court of Appeal however (at [1]) referred only to "daily cover… or… the construction of roads", without mentioning anything else to indicate that other "site engineering" uses were also in contemplation.

> [34] It follows from this conclusion that the relevant intention may well not be that of the original producer of the materials. There is no principle that material once labelled as 'waste' is always 'waste' just because the original producer of it threw it away. That is not the relevant time at which the satisfaction of the condition imposed by s 40(2) is to be considered. Recycling may indicate a change in the relevant intention but it is not an essential prerequisite; re-use by the owner of the material for the time being may do likewise."

93. The precise wording of paragraph [33] of the Chancellor's decision, in particular his comments about the meaning of the word "discard" and his related comments about "retention and use" was the subject of extensive debate before us, indeed in many ways the appeals revolved largely around that paragraph.

94. In summary, the appellants sought to persuade us that "use" was the antonym of "discard" (largely on the basis of that paragraph); that the evidence showed the appellants quite clearly "used" the fluff for the purpose of protecting the cell liner and cap (indeed, Ms Hall conceded as much); and that accordingly such "use" necessarily negated any suggestion that the appellants had "the intention of discarding" the fluff. They pointed to the fact that the daily cover in *WRG*, which ended up in the cell, was held not to have been put there with the intention of discarding it.

95. Ms Hall sought to persuade us that when considered in context, the Chancellor's decision in *WRG* was not intended to lay down any general test of "use" as the means by which to assess whether there was an "intention to discard"; he had in any event referred to "retention and use", rather than "use" alone; the fluff was not "used" in any relevant sense (being itself part of the biodegradable waste that the cells were intended to contain); and in any event the purported "use" that the appellants sought to rely on did not negate the otherwise clear intention to discard. In effect, the "use" argued for by the appellants was no more than the careful management and emplacement of waste material.

96. It is clearly appropriate to interpret what the Chancellor said in *WRG* about "disposal with the intention of discarding" and "use" in its proper context. He was considering whether the use of inert material "for daily cover… or in the construction of roads" could amount to a "disposal… with the intention of discarding the material". He recited the VAT and Duties Tribunal's finding that:

> "One *[licence]* condition which, I understood, applies in every case is that the operator must keep sufficient stocks of inert material or suitable substitutes for use as daily cover…"

Thus it must clearly have been in the Chancellor's mind that material intended for use as daily cover would generally be stockpiled (though of course there might be occasions when incoming waste would be used as daily cover without first being stockpiled).

97. In the nature of site engineering, particularly the construction of roads, this is likely to be an activity involving times of great activity (e.g. the construction of a new cell or laying of new haul roads) and times of little or no activity. Thus it is to be

expected that materials to be used for such purposes, if sourced out of incoming waste streams, are also likely to be stockpiled pending later use.

98. So whether considering site engineering or daily cover, he clearly contemplated the relevant material generally being in some way held back or set aside before it was actually used (or re-used) for its intended purpose. In that context, the significance of his comment (at [33]) that

> "the word 'discard' appears to me to be used in its ordinary meaning of 'cast aside', 'reject' or 'abandon' and does not comprehend the retention and use of the material for the purposes of the owner of it"

becomes clearer. It does not in our view establish (or even support) the proposition, as the appellants argue, that "use" is the antonym of "discard"; it merely emphasises that "retention and use" of material in the manner under consideration in *WRG* does not amount to "discarding" such material.

99. Further light is cast on the Chancellor's thinking by the fact that he was quite clearly in doubt as to whether WRG's actions amounted to a "disposal" at all, let alone a disposal with the intention of discarding (as he explicitly phrased his reason for disregarding s 64(2) as being "because there is, at the relevant time, either no disposal or no disposal with the intention of discarding the material." *[Emphasis added]*)

100. We note that in *Patersons* (considered further below), Rose J in the Upper Tribunal said this at [42]:

> "I do not read the Court of Appeal's decision in *WRG* as requiring that some act of 'retention' or separation out of a part from the rest of the whole must be identified before an operator can be said not to be discarding the waste for the purposes of s 64."

101. Mr Grodzinski in particular urged us to regard this passage as making it clear that no separate "act of retention" was required in order to demonstrate an intention not to discard the relevant material. At this point in her decision, Rose J was considering whether the fact that the biomass was not segregated in any way from the inert waste should be seen as implying that the biomass was simply "discarded" as part of the whole load of mixed waste. HMRC had sought to argue that because the biomass had not been so segregated, it had clearly not been "retained and used" (as referred to by the Chancellor in *WRG*) and therefore must have been disposed of as waste. All that Rose J was saying in the above passage was that she did not consider the Court of Appeal to have laid down a specific requirement in *WRG* that some identifiable act of retention or separation was required before part of a larger body of waste could be regarded as "used" rather than "discarded". Nonetheless, she went on to say that she regarded the lack of segregation or retention as "an indicator" (but no more) that there was no intention to use the relevant part of the overall material, only to discard it.

102. The above discussion brings into sharp focus the Chancellor's warning (at [29]) that the task before us is to consider "the application of the legislation to the facts of this case".

103. We now turn to consider *Patersons* in more detail. At the time of the hearing, the Court of Appeal decision in that case was awaited. After it was issued, we took written submissions from the parties on its significance to this appeal.

104. It will be recalled that the context in *Patersons* was different again. The appeal was concerned with the applicability of landfill tax to some proportion of biodegradable waste that was disposed of by way of landfill. The argument was that because the taxpayer intended to use the landfill gas generated by the waste it had deposited in producing electricity, "at least one of the criteria under section 40(2) Finance Act 1996 is not fulfilled and no tax is due."[21]

105. The Upper Tribunal (Rose J) in *Patersons* held at [45] as follows:

> "In my judgement, the concept of intending to use something, as the antithesis of intending to cast it aside or abandon it, involves some action to harness the properties of an item and direct them towards a purpose of the user."

The appellants, of course, seize on this passage and point to the particular properties of fluff, and their supposed harnessing of those properties in order to protect the liner from damage.

106. Rose J then went on to say that the biomass had not been "used",

> "because all that happens is that the biomass decomposes in the normal course and generates the gas…. I therefore hold that the biomass is not 'used' to make methane because the methane production is an inevitable consequence of tipping biomass into the landfill site and will occur whether the methane is collected or not and whether it is flared or not."

107. The Court of Appeal saw things somewhat differently. So far as Arden LJ was concerned (at [51]), the appeal fell to be decided "on the meaning of 'material'… rather than on the basis of 'use'…". By this, she meant that the "material" which had been disposed of was the biomass, and Patersons could not be said to have any intention to use that material; its intention was to use "all that that may become" (at [43]). The "material" referred to in the legislation was the material which was deposited, and Patersons had no intention to use that material, only the gas that was ultimately derived from it. To summarise (as Black LJ put it at [69]), "the material was the biomass and the biomass, as such, was discarded".

108. As she considered the appeal should be decided on this basis, Arden LJ did not need to address arguments about "use".

109. King LJ agreed with Arden LJ, but also said this:

> "In so agreeing I would not however wish it to be thought that I do not recognise that a consideration of 'use' may in some circumstances be a valuable point in determining whether, per s 64(1), a disposal has been

[21] As recited at [6] and supplemented at [8] in the decision of the FTT.

> made 'with the intention of discarding it'. *WRG* is an example of the importance of this."

110. Black LJ was less certain than Arden LJ that "use" could be disregarded. Mr Cordara had offered an example of a seed, which was not in his submission discarded when it was placed in the ground, but used in order to derive benefit later when it grows. In effect, the seed was being "used" to produce a later harvest. Black LJ said this (at [72]):

> "Although the question is certainly not without difficulty, I would, on balance, conclude that Patersons cannot be said to use the material, the biomass, by virtue of harvesting methane produced in the course of its decomposition. As I see it, Patersons was intending to get rid of the material by way of landfill and the methane came naturally, and inevitably, as a later by-product of that activity. To revert to the seed example, they were not planting the seed but dumping it."

111. The appellants submitted that the Court of Appeal's "key reasoning" was of no application in the present appeals. In their submission, however, it was noteworthy that the decision contained no consideration of EU law (indeed it repeated the earlier statement in *Parkwood* that landfill tax is a domestic tax that is not a tax required under EU law), and that there was no indication of "retention" being a relevant consideration alongside "use".

112. Ms Hall for HMRC submitted, most significantly, that the Court of Appeal's emphasis on the nature of the material in question at the moment of its disposal was highly relevant, as in the present appeals the fluff only acquired its crucial characteristics (its suitability for protecting the liner, etc) as a result of its inspection and the consequent removal of any large, heavy and sharp objects after it had been deposited (whether directly into the cell or adjacent to it) but before its final emplacement. Thus at the moment of deposit, it was only of potential use as fluff, and was rendered properly suitable for that use only by means of the further process which it underwent after its initial deposit. In that sense, it was similar to the undifferentiated biomass in *Patersons*, which was not the material which the taxpayer intended ultimately to use.

113. We consider that the *ratio* of the Court of Appeal's decision in *Patersons* is only of marginal relevance to the present appeals. In focusing on the difference between the "material" that was deposited and the "material" that was intended to be used, they were comparing two very different things: the bulk of the biomass at the moment of deposit when it had not started to decompose to any material extent; and the landfill gas that would eventually emanate from the biomass as a result of prolonged chemical reactions. At its highest, Ms Hall would ask us to draw a similar contrast between two almost identical things: the black bag waste as first deposited and the same waste a few moments later after any offending items had been removed following inspection (and, where relevant, after it had been manoeuvred into place and compacted). We decline to do so. We consider there was insufficient change to the "material" by reason of that process to transform the material initially deposited into some entirely different material in the same way as happened in *Patersons*. Furthermore, as we have said at [63] above,

if the moment of initial deposit (for inspection) is to be differentiated in this way from the moment of ultimate emplacement (after inspection), the initial deposit could not in our view be regarded as a "disposal by way of landfill", the site operator necessarily having the intention to make a further deposit of the suitable material in its final resting place in the cell after the inspection had taken place and all large, hard or sharp items had been removed. Following this to its logical conclusion, at the relevant moment of deposit, the inspection would have taken place and the material in question would have acquired its defining characteristic as argued by the appellants.

114. But the Court of Appeal's comments about "use", such as they are, make it clear that use is "only an indicator" (albeit a potentially valuable one), and not determinative. (See King LJ's comment at [109] above.) This makes it clear that not everything that could be characterised as "use" is sufficient to negate an intention to discard. It is appropriate to look at the wider economic and other circumstances to reach a view. As Barling J said in the High Court in *WRG*[22] at [50] (in a passage tacitly approved by the Court of Appeal in *WRG* at [35]):

> "No factors which serve to indicate as a matter of fact whether material is being discarded by the person concerned should be excluded from consideration unless such an interpretation of the provision is unavoidable."

115. We also note that sub-s 64(2) FA 96 provides that "the fact that the person making the disposal or any other person could benefit from or make use of the material is irrelevant" to the question of whether the material in question is disposed of as waste. Ms Hall submitted, in the following terms, that this provision applied directly to the present case:

> "…it is not known at the point of deposit whether in fact the material that has been deposited can be used as fluff. The material that comes through the gate is only potentially useful, this is the core of the appellants' case. It is only potentially useful because it is of no use to these appellants if it contains large, hard or sharp objects. That is the very reason that they remove them.
>
> So at the point of deposit, at the point of making the disposal, the deposit into the cell, it is … not known whether it will be useful, it will be put to use or could benefit the appellants. It could. It depends what is in the bag. That is why it is said that there are checkers or spotters or whatever they are called. The gentleman to which Mr Hodges referred at Ling Hall was in the cell, asking himself the question essentially: is this material right for fluff? Some of it was, some of it wasn't.
>
> So with respect, the appellants can't have their cake and eat it. They were either selecting and inspecting to take out the large, hard and sharp objects so as to make the fluff usable, or they were using all of the waste

[22] [2007] EWHC 3014 (Ch), [2008] STC 1037

> which means they are simply putting landfilled waste to a useful purpose."

116. We note that in the Court of Appeal in *WRG* at [33], the Chancellor said sub-s 64(2) FA 96 "does not apply" in a case where there has been "retention and use of the material for the purposes of the owner of it… because there is, at the relevant time, either no disposal or no disposal with the intention of discarding the material". These comments were made (and must be understood and interpreted) in the context of the facts of that case, as summarised at [96] above. In saying this, he was not disagreeing with what had been said by Barling J in the High Court (at [38] and [50]), to the effect that a finding of material being discarded as waste renders irrelevant any question of its potential future usefulness. Having decided that the relevant moment of deposit was, in each case, when the relevant material was finally emplaced following inspection, we consider Ms Hall's argument based on sub-s 64(2) cannot offer a "knock-out blow" for these appeals. The underlying question remains as to whether the material in question, when it was finally emplaced, was the subject of a disposal with the intention of discarding it.

117. In one sense, it is clear that the material (typically black bag waste) is "used" to protect the lining system – indeed Ms Hall accepted this was the case. But as we have identified above, that is not the end of the matter. It is clear that all the material was destined for landfill in any event, in the main body of landfilled waste if not as "fluff". During the hearing, we raised the example of someone who had some waste bubble wrap and a broken glass and wrapped the glass in the bubble wrap before throwing it away, in order to avoid the glass cutting through the bin liner. When asked whether the bubble wrap should be regarded as "discarded" in this situation, Mr Grodzinski said this:

> "It is not discarded because if you didn't have the bubble wrap, you would nonetheless have to find some other material with which to wrap the broken glass and protect whoever picks up the bin bag from the bin from cutting themselves on the side of the glass. So you are not discarding it and you are using it."

118. This example was of course concerned with a specific item of waste (the broken glass) which offered a quite clear and specific threat of damage to the bin liner in which it was to be placed. The position in these appeals is somewhat different. It is known that in general the overall body of waste to be placed in a cell will almost inevitably contain items which offer a threat of damage to the liner or capping system. In order to minimise the risk of such damage, the overall process of disposal into a cell is required to be managed so that such items are placed a safe distance from the vulnerable liner and cap. In practice, operators have found that an effective means of achieving this is to deposit domestic (or sometimes commercial, and occasionally other) waste streams as the first and last layers of waste; such streams are, in effect, pre-sorted by reason of their source so that they almost never contain items which represent a risk to the liner or cap and any residual risk is (hopefully) eliminated by the visual inspection to which they are subjected as they are laid. Going back to the domestic bin analogy, it is as if the householder appreciates that he or she may well be putting sharp objects into the bin which could cut the bin liner, and is therefore careful to ensure that when

filling the bin he or she first places items in it which offer no risk of cutting the liner and afford a degree of "padding" to prevent any sharp objects later disposed of from doing so.

119. Mr Grodzinski pointed to the fact that site operators, unlike householders, plan their tipping operations around the use of the relevant material as "fluff", so that an intention to deposit it for that purpose is formed, in reasonably specific terms, well in advance of its actual arrival on site; this, in his submission, reinforced the argument that the appellants had formed an intention to "use" as opposed to "discard" the material. Whatever semantic arguments there may be around what is actually meant by "use" of the material, we do not consider "use" to be the antonym of "discard" as the appellants submitted, for the reasons set out above, and therefore we consider this submission to be based on a false premise. "Use" is an indicator to be taken into account, but no more than that. The statutory question remains: when the appellants made the disposals in question, did they do so with the intention of discarding the material disposed of? In our view, the answer to this question is that they did, and the fact that the material continued to serve a useful function after such disposal does not affect this conclusion. They were simply disposing of the material carefully, as the regulatory regime required them to.

120. It should not be forgotten that the vast majority of the documents we were referred to, both in terms of industry-wide guidance and those produced by the appellant specifically in relation to its own operations, referred to the material in question in one way or another as "waste" or "refuse", and its deposit as being the first (or last/final) layer (or lift) of it. See, for example, [16], [17], [20] and [26] to [33] above.

121. Mr Cordara would of course accuse us of falling into the "once waste, always waste heresy" by viewing matters in this way. We do not consider such an accusation would be justified. All of the relevant material is being disposed of into the cell, whether or not it is "needed" for "use" in the "fluff" or "protection" layer. There is no physical difference between the material used as fluff and the rest of the similar material which is simply landfilled along with all other general waste in the cell, apart from the fact that items posing a potential threat to the liner or cap have been removed from it. The only other difference is the "use" to which it is supposedly put and the different way in which it is accordingly emplaced. We do not consider that to be sufficient to negate the otherwise obvious intention to discard the material.

Were the disposals made "by way of landfill"?

122. One point that was not in issue in *WRG* was whether the condition in sub-s 40(2)(b) FA96 was satisfied, i.e. that the relevant disposal was "made by way of landfill"; that point had been conceded by WRG. The Chancellor however expressed doubts about whether this concession had been correct (at [31]):

> "WRG concedes that the material with which this appeal is concerned was disposed of by way of landfill as defined in s 65 because the provisions of sub-s (1) were literally complied with. Whether that concession is rightly made I leave to another case. For my part I entertain some doubt because although the definition in sub-s (1) is, in terms,

> exhaustive and unqualified it is coloured by the qualification introduced into the defined term itself by the words 'by way of landfill', see, for example, *Delaney v Staples* [1992] 1 All ER 944 at 947, [1992] 1 AC 687 at 692 and 44(1) *Halsbury's Laws* (4th edn reissue) para 1389. Indeed sub-s (4), though primarily dealing with timing, might be thought to draw a distinction between the material deposited as waste and the earth or other inert material with which it was covered so as to exclude the letter from being deposited by way of landfill. If that is so then why should material used for daily cover be regarded as disposed of by way of landfill, particularly if so used more than once? Material used in road building might be regarded as more obviously not disposed of by way of landfill notwithstanding that it is necessarily deposited on the surface of the landfill site."

123. Smith LJ did not comment on this point, whilst agreeing generally with the Chancellor's judgement. Arden LJ specifically expressed "no view on the correctness or otherwise of the concession" by WRG.

124. It is clear therefore, that *WRG* does not actually decide that the use of inert material for road making and daily cover is not a "disposal by way of landfill". So what of the doubts expressed by the Chancellor, and seized on by the appellants in this case?

125. All parties are agreed that the above comments were *obiter*, and as such they are not binding on this Tribunal, though of course due consideration must be given to them.

126. The appellants argued, on the strength of the comments made by the Chancellor, that where material is used (rather than simply discarded), it is entirely inapt to regard it as having been disposed of "by way of landfill". Ms Hall argued that the comments made by the Chancellor in relation to the construction of site roads and the laying of daily cover did not apply to the deposit of fluff. The construction of site roads took place entirely outside the cells, and his comments in relation to daily cover were "rooted" in s 65(4) FA 96, which itself appeared to draw a clear distinction between deposited material and the cover that was placed over it.

127. We take a different view of the significance of s 65. On its face, its purpose is to clarify the concept of "landfill" and the time when a disposal by way of landfill takes place. "Landfill" is a composite word, denoting the "filling" of land, thus implying some kind of cavity or depression to be filled. It is true that landfill sites often do take advantage of either natural or man-made cavities and depressions (which will generally be depressions on the surface but can be totally subterranean cavities – s 65 itself refers to "a cavern or mine"); they can however take the form of "land rise" sites, such as Pitsea (referred to above), which take advantage of neither. We see s 65 primarily as an interpretation provision which is intended to ensure that disposal into any of these types of facilities will count as a disposal "by way of landfill". To head off any argument that no land has been "filled" with material until the land surface over it has been reinstated by covering that material with earth, sub-s 65(4) then makes it clear that the moment of deposit (rather than the moment of covering) is what generates the tax.

128. For what it is worth, we do not consider that the reference to being "covered with earth" in either sub-s 65(3) or (4) is (or can properly be construed as) a reference to daily cover but to the ultimate covering of the waste mass as a whole; just because as a matter of good practice and statutory regulation all waste in a conventional landfill site must be temporarily covered at the end of each day, that does not in our view mean that each deposit is made "with a view to it being covered" with such daily cover. Additionally, as was made clear in the evidence before us, a great many different materials may be used for daily cover, only some of which would fall within the definition of "earth" in sub-s 65(8).

129. We do however accept that the simple act of depositing material on the ground anywhere in a landfill site cannot have been intended to constitute a "disposal by way of landfill". To take an absurd example, the workman who builds a security hut inside the entrance to the site, cannot reasonably be said to have disposed of the building materials by way of landfill, even though the bare wording of s 65 might be said to have been satisfied. Similarly, the stockpiling of materials of any kind for later use would, in our view, not amount to a disposal by way of landfill, for the reasons expressed by the Chancellor in *WRG*.

130. In our view, in line with the Chancellor's comments in *WRG*, the qualification inherent in the phrase "by way of landfill" allows a filter of common sense to be applied, to exclude deposits which are clearly <u>not</u> by way of landfill on any sensible interpretation. Landfill sites are designed to accommodate the landfilled material permanently in cells and not elsewhere, and we consider that the deposit of material into a landfill cell is an indicator that the material is being disposed of by way of landfill for the purposes of s 65, deposit outside such a cell being an indicator that there is no such disposal taking place. There will no doubt be some exceptions to this (the infrastructure for capturing landfill gas or pumping away leachate springs to mind), but we do not consider the deposit in a landfill cell of black bag waste which is intended to remain there permanently to be one of those exceptions. Arguments around the purpose for which the material was deposited and the intention associated with such purpose are, in our view, addressed purely by reference to sub-s 40(2)(a) and s 64 and have no place in a consideration of sub-s 40(2)(b) and s 65. Were it otherwise, the arguments as to the applicability of the two sub-sections have a large degree of overlap (as effectively happened in the hearing before us), which cannot have been the draftsman's intention.

131. We therefore find that the deposits of fluff were all made by way of landfill within the meaning of s 65 FA 96.

Paragraph 3(g) of the 2009 Order

132. As when interpreting any legislative provision, we must do so in accordance with its purpose. That purpose must generally be discerned from the wording actually used in the relevant context; only if the purpose still remains unclear after doing so is it permissible to look further in order to discern that purpose.

133. We consider that the language of paragraph 3(g) was quite clearly drafted with base fluff and side fluff in mind. It specifically and directly applies in those two cases, as Ms Hall accepted. It expressly contemplates there being an existing "drainage layer or liner" against which the material is placed, not the subsequent placement of a "drainage layer or liner" after the material in question has been deposited, still less the subsequent placement of a liner with a regulating layer interposed (invariably, according to the evidence) before doing so.

134. Also, as the draftsman was sufficiently acquainted with the detailed design of landfill cells to refer specifically to both the liner and the drainage layer, it can be assumed that if the protection layer beneath the regulation layer had been intended to be included, he would have had no difficulty in including appropriate wording to do so.

135. We therefore conclude that if we are wrong in our view that base, side and top fluff falls within the charge to landfill tax under the general wording of sections 40, 64 and 65 FA96, paragraph 3(g) of the 2009 Order does not take effect to bring top fluff back into the charge to tax.

Summary and conclusion

136. We consider the various deposits of base, side and top fluff were all made with the intention of discarding it as waste (see [119] above).

137. We consider that those same deposits were all made by way of landfill (see [131] above).

138. If we are wrong on either of those two points, we do not consider that s 65A FA96 and paragraph 3(g) of the 2009 Order bring deposits of top fluff back into the charge to landfill tax from 1 September 2009 (see [135] above).

139. Accordingly the appeal is DISMISSED.

140. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 11 APRIL 2018