Neutral Citation Number: [2021] EWCA Civ 584

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
(Mr Justice Fancourt and Judge Timothy Herrington)
[2020] UKUT 1 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/04/2021

Before :

LORD JUSTICE NEWEY
LADY ROSE OF COLMWORTH DBE
and
LORD JUSTICE NUGEE

- -

Case No: A3/2020/0482

Between:

THE COMMISSIONERS FOR HER MAJESTY'S CUSTOMS AND EXCISE **Appellants**

- and -

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

Case No: A3/2020/0480

THE COMMISSIONERS FOR HER MAJESTY'S CUSTOMS AND EXCISE

Appellants

- and-

BIFFA WASTE SERVICES LIMITED

Respondent

- -
- -

Melanie Hall QC, Brendan McGurk and David Gregory (instructed by the General Counsel and Solicitor to HM Revenue and Customs) for the Appellants in both appeals

Roderick Cordara QC and Zizhen Yang (instructed by KPMG LLP) for the First Respondent in the First Appeal and instructed by Ernst & Young LLP) for the Second Respondent in the First Appeal and for the Respondent in the Second Appeal
Sam Grodzinski QC (instructed by Simmons and Simmons LLP) for the Third and Fourth Respondents in the First Appeal

Hearing dates: 23, 24, 25 and 26 March 2021

- -

Approved Judgments

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 22 April 2021 at 10.30 a.m.

Lady Rose:

Introduction

1. The old saying "Where there's muck, there's brass" certainly holds true for all the parties to these two appeals concerning the application of landfill tax: for the Respondents because their business is the operation of landfill sites, charging customers for taking their unwanted material off their hands and for the Appellants, HMRC, because they collect landfill tax on every tonne of taxable waste disposed of at those sites.

2. The appeals concern whether certain material, referred to as black bag waste or "fluff", is taxable because it is disposed of as waste by way of landfill. The landfill sites with which we are concerned contain one or more 'cells' which are typically large holes in the ground into which waste is tipped. The bottom of the cell has to be lined with a thick, impermeable membrane to stop a highly polluting liquid called leachate produced by the decomposing waste from seeping into the surrounding earth. In order to ensure that the membrane is not pierced or otherwise damaged by the waste to be placed in a new cell, the landfill site operators (LSOs) make sure that the first thick layer of material placed on top of the membrane and part way up the sides of a new cell is fluff. They do this because fluff is unlikely to contain any large, sharp objects that might damage the membrane lining the bottom of the cell. When putting this layer of black bag waste into the cell, the LSO operatives inspect it carefully to make sure that there are no such potentially damaging objects. This first layer of fluff at the bottom of the cell is then lightly compacted with a bulldozer before more general waste is placed into the cell. That general waste may well contain large, hard or sharp objects but because of the buffering layer of fluff, they pose no risk to the membrane. The general waste can then be compacted down more forcefully to maximise the amount of waste that can be deposited in the cell and to ensure that the waste is as stable as it can be. This compacting of the general layers of waste can be done safely because the buffering layer of fluff just above the membrane protects the membrane from damage from the process of compaction and from the very heavy machinery used to achieve it.

3. At the end of the landfill cell's life, when it is full of rubbish it needs to be capped and sealed prior, typically, to being landscaped. The liners and other infrastructure used for capping the completed cell are also at risk of being damaged by sharp objects protruding from the surface of the general body of waste in the cell, particularly as the general waste pile settles and decomposes over time, shrinking down and exposing any sharp objects lying near the surface. The LSOs place a thick layer of compacted fluff on top of the general waste to protect the cap from such damage.

4. Liability for landfill tax is governed by Part III of the Finance Act 1996. Section 40 provides that tax shall be charged on a taxable disposal. One condition for a disposal to be a taxable disposal is that it is "a disposal of material as waste". Section 64(1) provides that 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 Respondents argue in these appeals that the case law construing section 64(1) establishes that if the person making the disposal uses the material being disposed of, then that negates any intention on his part to discard that material so that the disposal is not taxable.

5. The Respondents say in the first appeal that when they put the black bag waste into the new cell, they are using it to protect the membrane lining the cell from any damage that might be caused by sharp objects in the general body of waste. Similarly with the fluff forming the protective layer on the top of the general waste when the cell is full up. The Respondents say that they are using that layer to protect the infrastructure of the sealing cap. The Respondents argue that all this use of the fluff negates any intention on their part to discard the fluff. That in turn means that the disposal of the fluff is not taxable.

6. HMRC argue that the Respondents are not really using the fluff to do anything; they are simply placing all the waste, including these first and last layers of fluff, carefully into the landfill cell so as not to damage the infrastructure of the cell. That either does not amount to use for this purpose or, if it does in a sense mean that they are using the fluff, that use is not sufficient to negate the Respondents' intention to discard the waste. HMRC contend that the disposal of the fluff is still a disposal of the material as waste and is taxable as such.

7. The second appeal concerns EVP which is black bag waste which has been shredded. The acronym stands for "engineered into the void permanently". The single Respondent to this appeal does not put ordinary black bag waste or fluff on top of the general waste in the cell but puts EVP there instead. The EVP, the Respondent says, has properties that make it better able to protect the cap infrastructure from damage. Again, therefore, the Respondent says that it is using this layer of EVP to protect the infrastructure of the sealing cap covering the completed cell and that this negates any intention on its part to discard the EVP. HMRC say that the Respondent intends to discard the EVP as waste; it is just doing so carefully to maintain the integrity of the cap on top of the completed cell.

8. The appeals relate, in the case of fluff, to HMRC's decision to reject claims for the repayment of landfill tax and in the case of EVP to tax assessments covering various periods between November 2006 and December 2013.

9. The First-tier Tribunal (Judge Poole and Mr Agboola FCCA) ('the FTT') decided the issues in favour of HMRC, holding that the disposals of fluff and of EVP were taxable disposals: see *Devon Waste Management and others v HMRC* [2018] UKFTT 181 (TC) which I shall refer to as the *Fluff* decision and *Biffa Waste Services Ltd v HMRC* [2018] UKFTT 199 (TC) which I shall refer to as the *EVP* decision. Both decisions were issued on 11 April 2018. The *Fluff* decision involves four different LSOs. The *EVP* decision concerns only Biffa Waste Services Ltd.

10. The Upper Tribunal (Fancourt J and Judge Herrington) issued one decision dealing with both appeals: [2020] UKUT 1 (TCC), [2020] STC 220. The Upper Tribunal reversed the FTT's decisions and held that the Respondents were using the fluff and the EVP and that this meant that they did not have any intention to discard it so that it was not taxable. Permission to appeal to this court was granted on some grounds by the Upper Tribunal on 6 February 2020 and on additional grounds by Lewison LJ on 2 July 2020.

The legislation

11. Section 39 of the Finance Act 1996 provides that a tax, to be known as landfill tax, shall be charged in accordance with Part III and shall be under the care and management of HMRC. Section 40, as in force at the time, provided for the charge to tax as follows:

> "**40.— Charge to tax**.
>
> (1) Tax shall be charged on a taxable disposal.
>
> (2) 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.
>
> (3) For this purpose a disposal is made at a landfill site if the land on or under which it is made constitutes or falls within land which is a landfill site at the time of the disposal."

12. According to section 41, the person liable to pay tax charged on a taxable disposal is the landfill site operator, that is to say, the person who is at the time of the disposal the operator of the landfill site which constitutes or contains the land on or under which the disposal is made. A landfill site is defined in section 66 as a site in relation to which a licence which is a site licence for the purposes of Part II of the Environmental Protection Act 1990 (or the corresponding provisions in Scotland and Northern Ireland) is in force and which authorises disposals in or on the land.

13. Section 42 sets the amount of tax charged. At the relevant time this was set at £56 per tonne disposed of. However, if the material disposed of consists of qualifying material then the rate of tax is reduced to £2.50. Qualifying material is specified in an order but is intended to be inert or inactive material, that is to say it does not contain biodegradable material. There are various exceptions to the imposition of the tax. Section 43 provides that the tax does not apply to material removed from water, for example material dredged from a river or a harbour in the interests of navigation; section 44 excepts material resulting from commercial mining operations and section 45 excepts pet cemeteries. Section 68 provides that the weight of the material disposed of in a taxable disposal shall be determined in accordance with regulations.

14. Sections 64 and 65 are important provisions which expand on the meaning of the terms used in section 40(2)(a) and (b). At the relevant time they provided 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.
>
> **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)."

15. Section 70 defines various terms used in Part III. 'Material' is defined as 'material of all kinds, including objects, substances and products of all kinds.' It does not therefore distinguish between processed and non-processed material.

16. For the sake of completeness I should mention section 65A which was inserted into Part III by the Finance Act 2009. It confers on HM Treasury a power to prescribe by order a landfill site activity which is to be treated as a disposal at the landfill site of the material as waste by way of landfill. The Landfill Tax (Prescribed Landfill Site

Activities) Order 2009 (SI 2009/1929) was made in July 2009 and came 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:

> "3(1)(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;"

17. The Respondents accepted that the effect of regulation 3(1)(g) was that fluff placed at the bottom and up the sides of the landfill cell was a taxable disposal as from September 2009. That still left open two questions, first, whether it was a taxable disposal before that date and secondly whether fluff or EVP placed at the top of the cell was brought into tax by regulation 3(1)(g) if it was not already caught. The FTT held that the fluff and EVP were caught by the provisions without HMRC needing to rely on regulation 3(1)(g). They went on to say that if that was wrong, the fluff and EVP were not caught by regulation 3(1)(g). The Upper Tribunal overturned the FTT on the first point but HMRC had not appealed against the FTT's conclusion that fluff or EVP at the top of the cell was not covered by regulation 3(1)(g) and that issue is not before us.

The earlier cases on landfill tax

18. There are four principal authorities applying these provisions to different kinds of material which have been brought onto landfill sites.

19. The first is *Darfish Ltd v Commissioners for Customs and Excise* [2000] Env. L.R. 3 ('*Darfish*'). The Appellant Darfish Ltd operated a landfill site and was granted outline planning permission to develop the land at the site for industrial purposes. Darfish needed to acquire topsoil and sub soil to level out the ground to provide a flat area for the construction of buildings needed as part of the development. A subsidiary of Darfish, DNS, entered into contracts with two other companies, Wilson Bowden and Hallamshire, for those two companies to sell earth materials to DNS which DNS would take away from their sites. DNS then transported the earth material from Wilson Bowden's and Hallamshire's sites to Darfish's land where it was placed on the landfill site to create flat areas as part of the development of the site. The Commissioners assessed that earth material as taxable, having been discarded as waste. The tribunal allowed Darfish's appeal against that assessment, holding that Darfish did not intend to discard the earth material as waste: [1998] Lexis citation 7125. The Commissioners appealed and Moses J allowed the appeal. The question posed by the judge as the main issue for his decision was on whose behalf was the deposit of earth at Darfish's site made: was it made by DNS on behalf of Darfish which he said the tribunal had found or was it made on behalf of Wilson Bowden and Hallamshire as the Commissioners contended? That aspect of his decision is not relevant to the present appeals since it is common ground that the Respondents here were disposing of the fluff and EVP on their own behalf. The Respondents rely, however, on what Moses J said about the concept of a disposal. HMRC also rely on that aspect of the judgment, arguing that Moses J regarded the 'disposal' as being different from the 'deposit' and as including removal

and transportation as well as the ultimate deposit of the material. Moses J held that the reference to 'disposal' in the Act was not confined to the moment of deposit:

> "15. … Disposal seems to me, in the context of these provisions, to connote the parting with or alienation of something. It is a term wider than discarding, since the statute contemplates that someone may dispose of something without discarding it leading to the conclusion that the material was not disposed of as waste. It is also a term wider than deposit, otherwise there is no reason why the statute does not use the word "deposit" throughout. Disposal will include, but not be confined to, any of the processes of removal, transport and deposit. It must include deposit because it is the deposit which triggers the tax and also identifies the time when the landfill site operator must be identified as such, but disposal is not limited to the process of deposit."

20. When considering who had disposed of the earth material, Moses J said:

> "18 Since it appears that the Tribunal found that the deposit (and possibly the transport) were made on behalf of Darfish, it is argued that its intention was the only intention which the Tribunal was required to consider. I disagree. I have construed disposal as the antonym of retention. The focus of the provisions is upon the person getting rid of something, not upon the person retaining or acquiring something. DNS was not making a disposal, on my construction, on behalf of Darfish. It was assisting in the acquisition and retention of the material on behalf of Darfish. But it was making a disposal on behalf of Wilson Bowden and Hallamshire, and it is their intention which should have been determined by the Tribunal."

21. He therefore remitted the case to the tribunal to make the necessary findings.

22. The second relevant case is *Parkwood Landfill Ltd v Commissioners of Customs and Excise* [2002] EWCA Civ 1707, [2003] 1 WLR 697 ('*Parkwood*'). In this case the Sheffield City Council disposed of material from its highways works to a recycling company, Parkwood Recycling Ltd ('Recycling'). The Council paid Recycling to take the material. Recycling crushed and sorted it into saleable material and unusable material. The unusable material was sent to landfill at the site of Parkwood Landfill Ltd ('Parkwood') and the appropriate tax paid. Some of the recycled material produced by Recycling was aggregates and fines which was sold by Recycling to various companies including to Parkwood (on an arm's length basis). The aggregates and fines were then used by the purchasers including Parkwood for landscaping and road making purposes, in Parkwood's case, at the landfill site.

23. The tribunal held ([2001] 6 WLUK 51) that there was no disposal of the material as waste by either the Council or by Parkwood. Although the Council had no need of the material delivered to Recycling, that was "far removed from saying that it is useless, (defined in the Shorter Oxford English Dictionary as being of no use)." As the material was capable of being recycled and was in fact recycled, it was not disposed of as waste

by the Council. The relevant disposal was however not the disposal by the Council to Recycling but rather the disposal by Recycling to Parkwood. The tribunal held that there was "no question of the material comprised in that disposal being waste" without elaborating on the reasons why not. They went on to find that the material was deposited by way of landfill within the meaning of section 65(1), even though it was used for landscaping and road making. The Tribunal also considered at length two other points that the parties in that case raised; the question whether the Council derived financial benefit from its disposal to Recycling and the extent to which the material supplied by Recycling to Parkwood was different from that provided by the Council to Recycling. They concluded as to the first point that the Council did derive benefit from its supply, both because it was cheaper to dispose of the material for recycling than to dispose of it to landfill and because the Council held an interest in Recycling and was entitled to dividends from its profits. As to the second point, they held that the material was different and that it was just as well fitted to the tasks of roadmaking and landscaping as newly quarried materials which Parkwood would have had to use if the materials provided by Recycling were not available: [60].

24. The Commissioners appealed and the appeal was heard by Sir Andrew Morritt V-C: [2002] EWHC 47 (Ch), [2002] STC 417. He allowed the appeal, disagreeing with most of the conclusions drawn by the tribunal as to how to apply the provisions. The taxpayer appealed further and the Court of Appeal reversed the decision of the Vice-Chancellor, disagreeing with most of his conclusions on the proper construction of the provisions. The substantive judgment was given by Aldous LJ with whom Jonathan Parker LJ and Aikens J agreed. Aldous LJ referred to EU Council Directive 75/442/EEC stating that although landfill tax is not a tax required by any provisions of EU law, the United Kingdom did have obligations in EU law to take appropriate steps to encourage the prevention, recycling and processing of waste. He described landfill tax as "a separate domestic initiative aimed at protecting the environment and securing the ambitions of the Directive": [9].

25. Aldous LJ noted that Parkwood accepted that they had made a disposal of material at their landfill site and that, in light of the definition in section 65(1), the disposal of the material was 'by way of landfill': [13]. Parkwood contended that it was not a disposal of the material 'as waste' because material used for roads and the like is not waste as the person making the disposal, Parkwood, did not intend to discard it. The Commissioners in their turn accepted those submissions but argued that the relevant disposal was that of the Council not that of Parkwood. They submitted that the first condition in section 40(2)(a) was satisfied when the Council deposited the material at Recycling's premises. The Commissioners recognised that the Council's disposal did not satisfy the conditions in section 40(2)(b) (by way of landfill) or (c) (at a landfill site) but those two conditions were satisfied later when either Recycling or Parkwood disposed of the material at Parkwood's premises. The appeal therefore turned on the question whether section 40(2) requires the disposal to satisfy all the conditions at the same time. Aldous LJ held that the Vice-Chancellor had erred in accepting the Commissioners' submissions:

> "20. … The Act must, in my view, be construed against the background of its purpose. There is no dispute that one of the purposes of the Act was to promote recycling and to reduce the amount of waste going to landfill. To tax recycled material used

> for road making and the like at landfill sites would be contrary to that purpose. If that had been part of the scheme of the Act, then I would have expected there to be a clearer indication in the relevant sections."

26. Aldous LJ held that the natural meaning of section 40(2) was that the disposal had to satisfy all the conditions at the same time. The contrary construction could not, he held, have been intended by Parliament: [24]

> "It would mean that once there was a disposal of material as waste by somebody, tax became payable by the site operator if the material was deposited on the ground in a landfill site. Thus liability to pay tax, which in practice will be passed on by the site operator, can depend upon the intention of a person unknown to the site operator at an unknown time, even before 1 October 1996."

27. The suggestion, rejected in *Parkwood*, that a disposal of material is a disposal of waste if someone at some point in the chain of supply of the material had the intention of discarding it was referred to by the parties before us as the 'once waste always waste heresy'. Aldous LJ held that material was not necessarily waste at the time it was disposed of by way of landfill just because someone had previously disposed of it otherwise than by way of landfill but with the intention of discarding it. Parliament could not have intended to impose the tax on recycled material "with the necessity that the history of the material had to be checked to ascertain whether anybody had the required intention": [26]. He held that the tribunal had been correct to concentrate upon the disposal by Parkwood at Parkwood's landfill site because that was the disposal which was made by way of landfill. That was not a disposal as waste and the tax was not payable.

28. The case on which the Respondents relied most strongly was *Waste Recycling Group v Revenue and Customs Commissioners* [2008] EWCA Civ 849, [2009] STC 200 ('*WRG*'). WRG was a member of the group of companies which operated a large number of landfill sites. A condition of their operating licence was that they must lay inert material over each site daily to prevent the waste deposited that day from blowing away, giving off odour or attracting vermin ('daily cover'). Inert material was also used by them for site engineering including building roads within the site. The tribunal was asked to consider whether material used for daily cover or for road building was waste. 11 different scenarios were envisaged, distinguished for example by whether the inert material was bought by WRG, or whether the customer paid WRG to take the material away and if so whether the transaction was profitable for WRG or not. The FTT (Judge Colin Bishopp) held that all the material concerned was disposed of as waste and properly subject to tax: [2007] V&DR 370. The taxpayer appealed and the appeal was allowed by Barling J: [2007] EWHC 3014 (Ch). Barling J in *WRG* correctly identified the full import of this court's decision in *Parkwood*, namely that the relevant disposal had been that of Parkwood and not that of either the Council or Recycling:

> "33. In my view both the Tribunal and [counsel for HMRC] have failed to attribute its full effect to the decision of the Court of Appeal in *Parkwood*. In the light of that decision it is clear that if a disposal is to be a taxable disposal then the material must be

> being disposed of "as waste" at the time of its deposit at the landfill site. As we have seen, whether that condition is satisfied depends upon whose is the governing intention and what that intention is. In *Parkwood* the governing intention was held to be not that of the original waste producer, but of someone else ("the disposer at the site") who did not intend to dispose of the material "as waste". This was because the material had been recycled (sorted, mixed and/or crushed) and was no longer being disposed of "as waste". Aldous LJ treated recycling and discarding as mutually exclusive (see paragraph 30, last sentence). However I do not consider that the Court of Appeal were intending to limit the concept of recycling in the way the Tribunal and [counsel for HMRC] have stated. In the hypothetical example discussed at paragraphs 29 and 30 of the judgment of Aldous LJ the material was not even stated to have been subject to separation or sorting, yet it was regarded by the Court as being "recycled" rather than discarded because it was sold to the landfill site for roadmaking."

29. Barling J gave an explanation, with which I respectfully agree, as to why section 64(2) did not assist HMRC:

> "38. It is no answer to the above to point to sub-section 64(2). The effect of this provision is simply that if a person would otherwise be considered to be disposing of material "as waste" because he or she is discarding it, the potential usefulness of the material to the disposer or to someone else cannot be taken as affecting that finding. It does not deal with the separate question of whether the fact of recycling (or indeed any other aspect of the evidence) shows that there is no intention to discard."

30. Barling J concluded that the effect of *Parkwood* was that the relevant question was whether any process had taken place (including sorting or separating out) to produce useful material from waste at any time up to the disposal of the material at the landfill site. If the answer was that such process had indeed taken place, then that would bring the disposal at the site within the scope of *Parkwood.* Barling J went on to consider a further argument relied on by WRG, that it was sufficient for the material to be re-used to bring it within the concept of 'recycling'; in other words one need have regard merely to what happened to the material at the landfill site without it having to be processed in any way. Barling J rejected that argument:

> "41. I do not think that this is correct. If it were then in *Parkwood* the Court of Appeal would not have needed to consider the circumstances in which the waste material came to be recycled prior to being brought to the landfill site for engineering purposes. It would have been sufficient just to look at the use made of the material at the site. I do not consider that it is right to exclude the possibility that material can be re-used at the landfill site yet still be disposed of there "as waste", nor (which amounts to much the same thing) that without looking at all the surrounding circumstances one can exclude the possibility that, notwithstanding engineering use at the site, the governing

> intention is of someone who is not the landfill site operator and who intends to discard."

31. Barling J then turned to WRG's fourth ground of appeal which was that if there was some financial benefit to the disposer, for example that he was exploiting the inherent value of the material by obtaining payment for it or by paying less for the disposal than he otherwise would have paid, that was sufficient to establish that the material was not being disposed of as waste. HMRC countered that economic consequences of the disposal were irrelevant. Judge Bishopp had held that such economic consequences were irrelevant and indeed he would have held that the material was disposed of as waste, even if WRG had had to buy it. Barling J held this had been an error of law:

> "50. In my view the Tribunal erred in law in holding that the economic circumstances of a transaction represent an impermissible consideration by virtue of section 64(2). 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. As I have already said, the effect of section 64(2) is that if the material is in fact being discarded a mere potential for usefulness is not to be taken as changing the position. However it is not the inherent usefulness of the material which is being put forward by WRG as relevant to an intention to discard, but the behaviour of the parties to the transaction as reflected in the financial consequences thereof. The latter are not, in my view, excluded from consideration by section 64(2)."

32. Barling J's decision in *WRG* was upheld by the Court of Appeal. The main judgment was given by Sir Andrew Morritt C with whom Arden and Smith LJJ agreed. The Chancellor first sounded a warning note about the approach taken to the interpretation of these statutory provisions:

> "29. 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 Finance Act 1996. We are bound by the decision of this court in *Parkwood* 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 judgment of this court in *Parkwood* or of Moses J in *Darfish***.** 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 judgments to the 11 categories which I have mentioned and not enough to the application of the legislation to the facts of this case."

33. He saw *Parkwood* as establishing that all four conditions in section 40(2) must be satisfied at the same time. That moment must be the time at which the last of them is satisfied and that is likely to be the moment when the material is disposed of as landfill in accordance with section 65. He noted that WRG had conceded that the material had been disposed of by way of landfill. He expressed a doubt as to whether that concession was rightly made. Although the provisions of sub-section (1) 'were literally complied

with', the term 'is coloured by the qualification introduced into the defined term itself by the words "by way of landfill"'. He referred at [31] to section 65(4) which provides that if material is deposited on the surface of land 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. The Chancellor said that this:

> "… 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 latter 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."

34. Sir Andrew held that assuming that there was a disposal, the only question was whether WRG intended to discard the daily cover and road making material. He went on:

> "33. … 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.
>
> 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 conditions imposed by s.40(2) is to be considered. Recycling may indicate a change in the relevant intention but is not an essential prerequisite; re-use by the owner of the material for the time being may do likewise. Thus although the passing of title is not conclusive, it is, in my view, of greater relevance than Moses J, the Tribunal or Barling J were prepared to attribute to it.
>
> 35. It may be that the economic circumstances surrounding the acquisition of the materials in question by the ultimate disposer of them will cast light on his intention at the relevant time. They cannot, as I see it, affect the decision on this appeal because the use of the relevant materials by WRG is clear and such use is conclusive of its intention at the relevant time by whatever means and on whatever terms WRG acquired them."

35. Thus, the Chancellor in *WRG* went further than Barling J had been prepared to go and held that reuse could be enough to negate the intention to discard without the need for any recycling process to have been applied to the material to render it useful.

36. Finally, there is the case of *Patersons of Greenoakhill Ltd v HMRC* [2016] EWCA Civ 1250, [2017] WLR 1210 ('*Patersons*'). That case arose from the fact that when biodegradable material deposited at a landfill site decomposed, it produced methane gas which the LSO collected and used to generate electricity which it sold. The question was whether that biodegradable material was therefore being used by the LSO such that a deduction should be made from the tonnage on which tax was paid to reflect the proportion of the tonnage comprising such material. The FTT rejected the claim and I upheld that rejection on appeal: [2014] UKUT 225 (TCC), [2014] STC 2178. Having considered *Parkwood* and *WRG* I concluded at [34] that (a) the fact that material went into the void by way of landfill did not of itself mean that it was discarded for the purposes of section 40; (b) the fact that the use made of the material was pursuant to a regulatory obligation does not prevent there being an intention to use rather than an intention to discard; (c) the fact that the material would be left in the void after it had performed the useful function for which it was put there and would therefore at that point be abandoned did not mean that there was an intention to discard it at the moment it was put into the void. That still left open the question whether the biomass tipped into the void was being discarded by Patersons. I held that it was. I did not regard the Court of Appeal's decision in *WRG* as deciding that some act of retention or separation of a part of the material from the whole was necessary before an operator could be said not to be discarding the waste: [42]. However, if there was such separation and retention, that would be an indication that there was some intention to use the retained material for a different purpose. Conversely, the fact that the biomass was not segregated or retained before being put in the cell was an indicator that Patersons intended to discard it, but it was not determinative. The main factor relevant there was the inevitability of landfill gas production and that Patersons did not do and did not need to do anything to bring this about:

> "45. In my judgment, 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. If a gardener sets up a water butt to collect rainwater from the roof and guttering, she then uses that rainwater to water the plants if during the summer she transfers the water into a watering can and waters the garden. But one would not normally say that the gardener 'uses' the rain to water the garden during the winter when all that happens is the rain falls onto the garden and soaks the plants. She certainly benefits from the natural falling of the rain but she is not 'using' the rain in the ordinary sense of that word. In the present case, there is no 'use' of the biomass to produce landfill gas by Patersons because all that happens is that the biomass decomposes in the normal course and generates the gas. This would happen whether Patersons used the methane to make electricity or disposed of the gas by flaring. The fact that it may 'use' the methane does not mean that it uses the biomass since the methane is not what is tipped into the void and either discarded or not. It is the biomass that is disposed of by way of landfill, not the methane."

37. One of Paterson's grounds of appeal before me was that the FTT had wrongly relied on the apparent difficulty of quantifying the proportion of biomass included in the rubbish tipped into the void as supporting the argument that there must be an intention to discard. I held that that was an irrelevant consideration because it was open to HMRC to use formulae, assumptions and estimations in computing the amount of tax due, without having to work out how much biomass was actually in each tonne of rubbish or how much would turn into methane: [74].

38. The decision in *Patersons* was upheld by the Court of Appeal though the analysis of the three judges was rather different. Arden LJ focused not on whether the biodegradable material was used by Patersons but on the word 'material'. The material that was being used by Patersons was not, or at least was not limited to, the deposited biomass but included the gas which that material had to become before it became useful. She went on to agree that absence of separation was relevant as an indicative but not a determinative factor: [55]. She disagreed with my conclusion about the relevance of the difficulty of computing the tax. Even if it was possible to circumvent the inability to measure the tonnage of biomass in the waste, the fact that the tax was assessed by weight was an indication that the tax was dealing with material which existed at the time of deposit: [62]. Black LJ was doubtful whether Arden LJ was right to base her decision entirely on the fact that the methane was not capable of use by Patersons at the time of landfill. She did therefore briefly address the arguments about use:

> "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. Or in the language of section 64(1), they made "the disposal [of the biomass] with the intention of discarding it" and thus it was "a disposal of material as waste" within section 40(2)(a)."

39. King LJ agreed with Arden LJ but also agreed that the fact that Patersons profited from their regulatory obligation to collect the landfill gas did not change the nature of the initial disposal of the biomass from one of discarding the material to one of using the material.

The decisions below

40. The FTT held two hearings consecutively, dealing first with the trial of the *Fluff* matter and then with the *EVP* matter. They described in detail the regulatory and licensing regimes in place, noting that one of the key objectives has been to minimise the environmental impact of landfill sites, in particular by preventing contamination of the environment around the site by landfill gases and leachate. As a result, they said, 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: [11]. They then described the cells and how a cell is prepared, including the geomembrane covering the bottom of the cell. This is made of high density polyethylene, about 2mm thick which is 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. They commented: [14(3)]

> "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."

41. The laying of the geomembrane is followed by the laying of a further plastic liner, a gravel layer incorporating drainage pipes and a further thin synthetic filter layer. The first layer of actual material is then laid. This is the layer referred to as base fluff and which is the subject of the appeal. It commonly comprises ordinary domestic waste, deriving from regular collections direct from householders, although sometimes other material is used. The FTT said: [14(8)]

> "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, 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."

42. Once that first layer of fluff has been laid, the cell can receive more general waste which is tipped and compacted in layers using heavy compactor vehicles with spiked wheels designed to break up and compress the waste as it is laid. When the cell is nearly full, between one and two metres of fully compacted black bag waste fluff are placed at the top of the general waste and smoothed flat. Then a 300 mm layer of fines is placed on top of that, commonly referred to as the "regulating layer" before the plastic membrane and/or compacted clay is used to cap the cell.

43. The issues before the FTT included some which were no longer contentious before us. The main issue for our purposes is how the FTT dealt with the question whether the fluff was disposed of as waste. The FTT referred to the reminder of the Chancellor in *WRG* at [29] that each case must be determined on the basis of its own facts by reference to the legislation and that tribunals should not seek to apply past judgments to the facts of the current case. They recorded submissions made by the parties about the policy behind the legislation but concluded at [68] that this was of 'extremely limited usefulness'. They discussed *Parkwood* and *WRG* in detail, including the 'once waste always waste heresy'. They referred to the context in which the Chancellor had been

considering the intention to discard and use in *WRG*, namely in the handling and use of material for daily cover. That cast light, they thought, on the significance of his comment that the word 'discard' is 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. In that context, the FTT concluded:

> "[*WRG*] does not in our view establish (or even support) the proposition … 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" the material."

44. The FTT also considered the judgments in *Patersons*. The Court of Appeal's judgments in that case also make it clear, the FTT held, that use is only an indicator, albeit a potentially valuable one, and not determinative. 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: [114]. The FTT held that in one sense the material (typically black bag waste) was "used" to protect the lining system – indeed Mrs Hall QC appearing for HMRC accepted this was the case. But that was not the end of the matter. The FTT then gave 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. They had asked Mr Grodzinski QC appearing for the Veolia Respondents before them whether the bubble wrap should be regarded as "discarded" in that situation. He had replied that it should not because it was being used to protect whoever picks up the bin bag from cutting themselves. The FTT disagreed. They expressed their conclusion as follows:

> "118. … 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."

45. They rejected any accusation that they were committing the once waste always waste heresy. There was no physical difference between the material used for fluff and the rest of the similar material that was simply landfilled among the general waste. The only difference was the use to which it was supposedly put and the different way in which it was accordingly emplaced. That was not sufficient, the FTT held, to negate the otherwise obvious intention to discard the material: [121].

46. In the *EVP* decision, the FTT repeated much of the analysis from the *Fluff* decision. They described the layer of shredded black bag waste placed on top of the general waste but below the regulating layer beneath the ultimate cap. They set out the dimensions of the particles to which the material had been shredded at various times. The FTT then repeated their analysis of *Parkwood* and *WRG* and their conclusion from those cases and from the Court of Appeal's decision in *Patersons* that use is only an indicator and not determinative – not everything that could be characterised as use is sufficient to negate an intention to discard: [129]. They repeated their broken glass and bubble wrap analogy and their decision that the Respondent had intended to discard the EVP even though the EVP continued to serve a useful function after the disposal: the Respondent was simply disposing of the material carefully as the regulatory regime required it to do: [133].

47. As I have said, the Upper Tribunal issued a single decision in both appeals. By the time the matter came before the Upper Tribunal, the Respondents had accepted that the disposal of the fluff and EVP was made by way of landfill at a landfill site within the meaning of section 65(1). The sole issue was whether it was disposed of as waste, that is with the intention of discarding it.

48. The Upper Tribunal discussed *Darfish*, *Parkwood*, and *WRG*. As regards the Chancellor's decision in *WRG*, the Upper Tribunal said at [52] that it was clear that the Chancellor "held that the word "discard" meant the opposite of retain and use. An owner of material does not discard it, within the meaning of the statutory provisions if he keeps and uses it for his own purposes." The Upper Tribunal expressed its conclusion on *WRG* in the following terms:

> "66. The only relevant question is whether, at the time of disposing of the material by way of landfill at a landfill site, the operator intended to discard it. In our view, *WRG* decides, as a matter of principle, that if a site operator disposes of material at a landfill site, but in doing so intends to and does make use of its properties for his own purposes, including compliance with regulations, licenses, permits or any other requirements for the site, that use means that the operator does not make the disposal with the intention of discarding the material. That is so regardless of whether the material is recycled or sorted before being deposited on the landfill site, and even though the disposal is acknowledged to be "by way of landfill" within the meaning of s 65(1) of FA 1996.
>
> "67. We reject the Commissioners' arguments that the Court of Appeal in *WRG* decided only that what amounted to use would vary from case to case. Although the Chancellor did not define "use" – because it is not a word found in any relevant statutory provision – he did decide what "discard" meant. He said that its meaning did not comprehend retention and use. The effect of that decision is that use of the properties of materials for the operator's own purposes will not be a disposal with the intention of discarding them, and so not a disposal of the materials "as waste"."

49. They held that the FTT had erred because it wrongly held that *WRG* established only that re-use of materials was an indicator to be taken into account, but no more than that. This error arose from the FTT's analysis of what the Chancellor said at [33] of his judgment as referable only to the facts of the case before him whereas the Upper Tribunal regarded it as a general statement of the law. Having identified that error of law as being fundamental to the FTT's decision, the Upper Tribunal went on to remake the decision:

> "75. Applying the ratio of *WRG* to the facts of this case, the clear conclusion is that the taxpayer companies, when disposing of fluff at their landfill sites, intended to and did make use of the properties of the fluff for their own purposes, namely providing a layer of protection for the geomembrane and drainage layer in the cell and the cap of the cell, thereby complying with the regulatory requirements for use of the landfill cell. The careful inspection of the fluff layer (to ensure that no sharp or large objects were contained in the bags) and the different compaction used on the fluff emphasise that the fluff is being used by the taxpayer companies in a particular way, in contradistinction to other black bags that are disposed of as waste. The fact that the black bags were not recycled and only sorted to a limited extent at the time of emplacement makes no difference in principle. As in the *WRG* case, the use that is made of the fluff is clear and compels the conclusion that the taxpayer companies did not

> intend to discard it. There is no distinction in this respect between base or side fluff and top fluff."

50. Turning to the *EVP* appeal, the Upper Tribunal again found that the FTT erred as a matter of law in identifying the ratio of *WRG* and in applying it to the facts that it found. The FTT had committed the 'once waste always waste heresy' by relying on the fact that all the black bag waste whether fluff or not was destined for landfill. On the facts, the Upper Tribunal held at [97] that in preparing and using EVP Biffa "intended to make use of the properties of the EVP for its own purposes and so did not intend to discard the material".

The grounds of appeal

51. HMRC rely on eight grounds of appeal, those grounds being the same in both the *Fluff* and *EVP* appeals. The grounds can be grouped together in three topics. Grounds 2, 3, 4 and 5 assert that the Upper Tribunal misinterpreted the Finance Act 1996, erred as to the ratio of *WRG*, misunderstood what the FTT had decided and created an unworkable test by effectively holding that any activity that can be described as use of the material precludes the disposal of that material being a taxable disposal of waste. Grounds 1, 6 and 7 criticise the Upper Tribunal's treatment of the facts, alleging that they ignored some fundamental facts and that this vitiated their decision. Ground 8 complains that the Upper Tribunal shut out argument about the policy or purpose of the Finance Act on the grounds that the argument had not been pleaded, whereas, HMRC say, such reliance on legislative policy is a necessary, standard tool of statutory construction that does not need to be pleaded.

52. The Respondents in both appeals served a Respondents' Notice. In both appeals, they submitted that if the Upper Tribunal had been wrong to hold that use by itself was determinative of their lack of intention to discard, the outcome should be upheld because the material here was indistinguishable from the daily cover held not to be taxable in *WRG*. They set out various reasons why fluff was the same as daily cover or why use of fluff was even clearer and more extensive than use of daily cover.

53. I consider first the criticisms of the Upper Tribunal's legal analysis in Grounds 2, 3, 4 and 5. In my judgment those criticisms are well founded. I have come to the firm conclusion that the FTT was right in its application of the statutory provisions in this case and that such use as the Respondents make of the fluff and EVP is, as the FTT said, insufficient to negate their otherwise obvious intention to discard the material. *WRG* and the other authorities which have construed these provisions and applied them to different facts do not mandate a different answer. I agree further with HMRC's characterisation of what the Respondents are doing here. The Respondents are carefully disposing of all this material as waste by putting it into the cell in a way that does not damage the cell infrastructure and that reduces the likelihood of problems arising in the cell either during filling or once it is capped and sealed. Given that the Respondents accept that the other conditions of section 40(2) are satisfied here, these are all taxable disposals.

54. The FTT was right to take as its starting point the 'strong reminder' given by the Chancellor at [29] of *WRG*. The FTT was also right to say that, having issued that warning, the Chancellor's formulation of the issue for decision in *WRG* was informed by the facts of that case and did not purport to be some general recasting or elaboration

of the statutory words to be applied instead of the wording of section 64 in all future cases. That is why the Chancellor expressed his disapproval of the 11 categories of transactions presented by the parties in *WRG* as being neither appropriate nor helpful because "all cases depend on their own relevant facts": [17]. It is important to focus on the wording of the legislation and not become distracted by too close an analysis of individual words in the case law or by applying the judgments and not the wording of the legislation. The statutory question is not whether the Respondents used the fluff or the EVP but whether they disposed of it as waste because they disposed of it with the intention of discarding it.

55. The Chancellor in *WRG* criticised the decisions of the tribunal and Barling J for taking up too much time in applying those earlier judgments and not enough time in applying the wording of the legislation. Unfortunately, his own judgment appears to have added yet further distraction from the application of the legislation with the dissection of what did he really mean by saying that the word discard "does not comprehend retention and use of the material"; with puzzling over the significance of his reference to the possibility of daily cover being "used more than once"; and with trying to decide why he said that though passing of title was not conclusive, it was relevant.

56. I do not agree with the Upper Tribunal that the ratio of *WRG* is that any kind of use of the material necessarily rules out an intention to discard it. There is no support either in *WRG* or the other cases for the proposition that the only point that arises in any case is whether the taxpayer can describe some activity it carries out as amounting to a use of the material. On the contrary,

    i) Aldous LJ said in *Parkwood* that the Act must be construed against the background of its purpose: [20]. That suggests that various indicators will be relevant, depending on the facts.

    ii) Barling J held at [50] of *WRG* that the tribunal had erred in law in holding that the economic circumstances of the transaction were an impermissible consideration.

    iii) The Chancellor at [34] of *WRG* noted that although the passing of title to the material was not conclusive, it was of greater relevance than Moses J in *Darfish* or the tribunal and Barling J in *WRG* had been prepared to attribute to it.

    iv) The Chancellor said further at [35] of *WRG* that economic circumstances surrounding the acquisition of the material by the disposer "will cast light on his intention at the relevant time". In the case before him that factor was not relevant, he found, because of the use that had been made, but he was certainly not stating that the existence or absence of use was the sole relevant factor.

    v) In *Patersons* I held that the lack of segregation or retention prior to the disposal into the void was not fatal to an assertion that there had been no intention to discard. I went on to say at [43] that the fact that there is initial separation and retention of some material from the mass is an indication of an intention to use which might negate an intention to discard. Conversely the absence of any segregation or retention is an indicator that Patersons was not intending to use but was not determinative of an intention to discard.

vi) King LJ in *Patersons* said that a consideration of 'use' may in some circumstances be a valuable pointer in determining whether, per section 64(1), a disposal has been made "with the intention of discarding it" and that *WRG* was an example of this: see [75]. Black LJ also said at [73] that she had taken the other indicators relied on by Patersons in that case carefully into consideration but they did not alter her view that the biomass had been discarded. She did not say that none of those considerations could be relevant because they preceded the moment at which the biomass was tipped into the void or because use was the only relevant consideration.

57. We know from *Parkwood* that all the conditions set out in section 40(2) must be satisfied at the same time. The time at which the relevant intention must be established will often be the time at which the material arrives in its final resting place in the cell. The intention will therefore usually be that of the LSO unless section 64(3) is engaged and it is common ground that it is not engaged in this case. That does not mean that everything that happens in respect of the material before the moment when it is placed in the cell is irrelevant when ascertaining whether the intention of the disposer at that moment is to discard the material. When considering who is the relevant disposer and what his intention was at that time, various factors may need to be weighed up, depending on the circumstances of the case. These include (non-exhaustively) whether it is being placed somewhere within the perimeter of the landfill site but not being placed in the cell; whether it is processed in some way by or on behalf of the LSO; whether it is separated out from the main body of waste and stored for a time or conversely whether it is placed in the cell immediately or soon after it arrives at the landfill site; whether it is put into the cell with the expectation that it will stay there permanently; whether there has been a passage of title to the disposer; and the economic circumstances surrounding the acquisition of the materials in question – who paid whom for the material and whether the disposer would need to buy in alternative material if there was not enough of the material in dispute. The practicality of applying or disapplying the tax to the material in question is also relevant. I agree with Barling J's statement at [50] of his judgment in *WRG* that "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." All or some of those factors may, in any particular case, help the tribunal to decide whether Parliament intended that this activity in relation to this material manifests an intention to discard the material so as to satisfy the condition in section 40(2)(a).

58. By considering those factors, one does not necessarily fall into the trap of the once waste always waste heresy and I do not agree that the FTT fell into that trap here. They said in a footnote that although they described the black bag waste as 'waste', they were not prejudging the issue before them and I see no indication that they did so prejudge it. They took into account the fact that the fluff was exactly the same material as other black bag waste later put into the cell in the general body of waste and, further, the fact that any fluff not needed in the first layer or in the protection layer would be disposed of in the general body of waste. Those were in my judgment relevant factors and the FTT were not thereby committing that heresy. They were merely pointing up a distinction between this case and other cases where a relevant factor had been the processing and transformation of the material by or on behalf of the LSO. The FTT

were rightly regarding the absence of any such processing or transformation of the fluff as a factor at play here.

59. That factor is also important in my judgment, because of the difficulty of working out how much fluff is really needed at the bottom of the cell. The FTT described the fluff layer as being between 1 and 2.5 metres. But given the very substantial surface area covered by the geomembrane liner, that difference in depth could represent a considerable tonnage of black bag waste on which no tax was payable if the Respondents were right. Mrs Hall pointed out that the permitting regime operated by the Environment Agency does not specify the depth of fluff that must be used, specifying rather the outcome that the LSO must achieve. This means that there is no mechanism for determining how deep the fluff layer needs to be or where the fluff layer should be regarded as having stopped and general taxable waste started. Similarly, a difference between 1 and 2 metres in the EVP layer may represent a very large amount of EVP given that the surface area of the top of the cell is much greater than the surface area of the bottom. Who is to say what depth of shredded material is really needed in each cell to protect the cap infrastructure? The difficulty of assessing what black bag waste or EVP should be treated as being used to protect the geomembrane or the cap is another factor which makes it unlikely that Parliament intended that such a nice distinction should be determinative.

60. The decisions below in this case and some of the earlier judgments in the four authorities have sought to find assistance from synonyms for 'discard' such as 'reject', 'cast off' or 'abandon' and from supposed antonyms such as 'retention' and 'use'. I recognise that my judgment in *Patersons* may be an example of this tendency. Sometimes considering synonyms and antonyms can be helpful but they must not divert attention from construing the word 'discard' in its context in the legislation. Although 'discard' is an ordinary word, the context is important when considering its scope in this particular provision. One might think that everything that goes into the cell at the landfill site has been discarded because there is certainly no expectation or intention that it will ever be retrieved from the site - what goes into the cell by and large stays in the cell. Parliament cannot have intended that to be the correct scope of 'discard' here, however, because the cell geomembrane, the gravel drainage layers and the piping placed in the cell for drainage or for collecting and evacuating the methane gas are also deposited in the cell and destined to remain in the cell forever. The tonnage of those components of the cell infrastructure is clearly not intended to be subject to landfill tax.

61. Conversely, to discard something or abandon it may in ordinary usage connote an intention to give up ownership or possession of it, as when a householder leaves rubbish by the side of the road to be collected by the local authority or puts unwanted items by the kerbside inviting any passer-by to take them. But Parliament cannot have intended to exclude from the tax any material which is not discarded in that sense because title in and possession of all the waste material deposited in the cell typically remain with the LSO until well after any relevant disposal has taken place. If 'discard' must be shorn of any such connotation of intention to part with title or possession in order to make sense of these provisions, it is not helpful to treat 'retention' as an antonym of discard if that causes one to lose sight of that. It cannot be that any material that is retained by the LSO in that sense falls outside the tax.

62. Similarly the analogies that pepper submissions and the earlier judgments (including my own in *Patersons*) of seeds, rainwater, bananas, chairs, pieces of broken glass in

bubble wrap and so forth can be illuminating as long as one bears in mind the context in which the word 'discard' appears in this legislation. The question posed by the FTT to the Respondents about whether a piece of bubble wrap used to wrap up a broken glass before it is put in the household rubbish bag was helpful because it made clear how far the Respondents' concept of 'use' had to be pushed for them to achieve the result they needed. Mr Grodzinski has to say that the bubble wrap is not being discarded even though, to my mind, it clearly is. But analogies with household waste are problematic because of the householder's expectation and intention that the broken glass and bubble wrap will soon be handed over to someone else whereas, as I have explained, the LSO keeps title and possession of the material on the site permanently.

63. Turning to the facts of the present case, I can see no error in the FTT's analysis at [117] – [119]. They were right to step back from the semantics of whether an activity could properly be described as a 'use' and then whether such a 'use' negated an intention to 'discard' and to ask the statutory question. They were also right, in my judgment, in coming to the answer they came to for the reasons they gave. I am unconvinced by the factors listed in the Respondents' Notice in the *Fluff* or *EVP* appeals. I consider the decision in *WRG* about daily cover to be very close to the boundary between what is material discarded as waste and what is not. I accept of course that this court held that it fell on the right side of that line so far as the LSOs were concerned, though that position has been reversed by regulation 3(1)(a) of the 2009 Order I referred to earlier. But it is misconceived to argue that because, for example, both fluff and daily cover eventually remain in the cell or that they are both sometimes kept back and stored before being placed in the cell means that they must necessarily be treated the same way.

64. So far as the *EVP* appeal is concerned, the FTT dealt with the additional factor here that the black bag waste was shredded before being placed on top of the general waste in the cell. The FTT did not make any findings about the efficacy of the shredding in improving the desirable properties of the fluff. They recorded at [72] Mr Cordara QC's submissions for the Biffa Respondent that shredding had a three-fold benefit in (i) reducing the risk of any large, sharp items being left in the material as it was laid, (ii) buffering the differential settlement of the waste as it starts to decompose, and (iii) making it easier to install and compact the EVP using standard mobile plant. The FTT did not say whether they found that such benefits did actually arise or were significant. They described the shredding as simply going "one step further" but held that it did not make any difference to the outcome: [132]. The Upper Tribunal agreed that the shredding did not make any difference to the outcome though of course they differed as to what that outcome should be. I also do not consider that the shredding makes any difference, whether or not it makes the fluff more effective at protecting the sealing cap. It is still being discarded as waste.

65. I would allow HMRC's appeal on grounds 2, 3, 4 and 5.

66. I therefore do not need to determine the challenges to the Upper Tribunal's treatment of the facts in Grounds 1, 6 and 7 and there is little that I can usefully say about them. The facts which are relevant to the issue to be decided are not complex although they do show that there is much more involved in the business of operating a landfill site than simply being paid to tip rubbish into a big hole. There were some disputes of fact at the periphery, such as whether the protective function performed by the fluff at the bottom of the cell was of a short duration or lasted for many years or how likely it was that LSOs would ever have to buy in some alternative protective material (referred to

as super-duper bubble wrap) if there was insufficient black bag waste arriving at the site to cover the geomembrane or to place on top of the general waste. None of the factual issues which emerged during argument or which were referred to in HMRC's written submissions seems to me to have been significant.

67. Finally as to ground 8, HMRC complain that the Upper Tribunal wrongly refused to consider their submissions on the policy or purpose of the Finance Act 1996. At [30] the Upper Tribunal observed that no Respondents' notice had been served by HMRC seeking to uphold the FTT's decision on any additional basis. This included, they said, the argument which Mrs Hall sought to advance that the legislative policy underlying Part III of the 1996 Act supported a finding that the Respondents intended to discard the material. The Upper Tribunal noted that the FTT had concluded that referring to policy arguments as an aid to construing the legislation was of limited usefulness. This alludes to [67] of the FTT's decision in *Fluff* rejecting each side's argument that a win for them would further the policy of the landfill tax by discouraging waste into landfill. The Upper Tribunal made a similar comment in disposing of the *EVP* appeal at [92] and [93], stating that no application was pursued by the Commissioners for permission out of time to rely on additional arguments and that no permission had been granted by them.

68. It is not entirely clear to me what arguments HMRC were seeking to make that were closed down by the Upper Tribunal. Mrs Hall referred to two kinds of policy that might be relevant here, the environmental policy pursued by the imposition of the landfill tax and the policy of the legislation in the sense of Parliament's purpose in enacting the particular wording of these provisions. As to environmental policy there are, as the FTT said, limits to the assistance that can be derived from that in this particular case. In some of the earlier cases I have described, the underlying policy of discouraging disposal into landfill was helpful in determining the scope of the tax, see for example per Aldous LJ in *Parkwood* at [20] set out at paragraph 24 above. However, such broad brush policy goals are not usually helpful in determining where more precisely the line was intended to be drawn by Parliament between what is a taxable disposal and what is not.

69. As regards the policy behind the legislation, it is part and parcel of the ordinary canons of statutory construction for the court to have regard to the need to interpret legislative provisions so as to give effect to Parliament's purpose. That involves looking at the provisions in the context of the statute as a whole. That much should be uncontroversial: see Lord Bingham of Cornhill in *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13, [2003] 2 AC 687 at [8] cited recently in the context of a taxing statute in *HMRC v News Corp UK and another* [2021] EWCA Civ 91, [55]. A party does not need to raise such arguments in its pleaded case or in a Respondent's notice before it is entitled to refer the court or tribunal to other provisions of the statute or to rely on other pointers to what Parliament intended by the words used. HMRC did not need to challenge formally the statement by the FTT at [68] of *Fluff* or [87] of *EVP* that it had found policy arguments of little assistance; it is up to every tribunal and court to form its own view about what canons of construction it finds useful to deploy in arriving at Parliament's intention.

70. In the light of my conclusions I would allow HMRC's appeal against the Upper Tribunal's decision in relation to both fluff and EVP.

71. Since preparing this judgment I have had the opportunity of reading in draft the judgment of Lord Justice Nugee and I agree with what he has written.

Lord Justice Nugee:

72. I am very grateful to Lady Rose for her comprehensive and compelling judgment with which I entirely agree. I add a few comments of my own not because I disagree with anything that she says, but to highlight some points that the present case illustrates. I will refer to the FTT's two decisions as *Fluff* and *EVP*, and to the Upper Tribunal's decision as *UT*.

73. Whether tax is payable in any particular case depends on two things: what the facts are, and whether the relevant taxing statute imposes a charge to tax on that factual situation. The facts are a matter for the fact-finding tribunal, which is the FTT. Here the FTT duly made careful and extensive findings of fact, extending in *Fluff* from [8] to [44] and in *EVP* from [6] to [59].

74. The essential facts however are not difficult to state. The cases concern material that is placed into the landfill cells, either as the first layer on the bottom of the cell (base fluff), or up the sloping sides of the cell (side fluff), or as the last layer at the top before the 'regulating layer' (top fluff, or EVP as the case may be). In the case of fluff this material is generally ordinary domestic waste or 'black bag waste' (*Fluff* at [2]); in the case of EVP this is shredded to various sizes but is otherwise essentially the same as fluff (*EVP* at [2]). Fluff is inspected as it is in the process of being laid to ensure it contains no large, hard, sharp objects, although it is by its nature extremely unlikely to do so (*Fluff* at [14(8)]). In the case of base and side fluff it is lightly compacted (*Fluff* at [14(8)]); top fluff however is fully compacted (*Fluff* at [14(12)]). In *EVP*, the appellant Biffa substituted EVP for some or all of the black bag waste used for top fluff (*EVP* at [32]); because it is shredded, the use of EVP obviated the need for inspection to remove large, sharp or bulky items (*EVP* at [45], referring specifically to material known as Leicester Floc, but the same is implicitly the case with other EVP).

75. Those were the basic facts found by the FTT as to what the LSOs did. The FTT also made findings as to why they did it. Again the essential facts are not difficult to state. It was (in the case of base and side fluff) to "reduce the risk of puncture to the all-important liner" (*Fluff* at [14(8)]); or (in the case of top fluff and EVP) to minimise damage to the capping system (eg *Fluff* at [17], [18], [29]; *EVP* at [16], [17], [23]). There was a secondary suggested purpose, which was that the light compaction improved fluff's drainage characteristics, but the FTT said there was less evidence to support it (*Fluff* at [14(8)]). In the case of EVP it was suggested that shredding also had other advantages, but the FTT did not make any findings about them: see per Lady Rose at paragraph 64 above.

76. That is effectively all that one needs to know in the way of facts. I agree with Lady Rose (paragraph 66 above) that other issues of fact were "at the periphery", and that none of the issues of fact which emerged during argument or were addressed in HMRC's written submissions were significant.

77. The remaining question therefore is whether on those facts there is a liability to tax. That depends on the terms of the relevant statute, in this case the Finance Act 1996. We received wide-ranging and elaborate submissions on various aspects of the

legislation, but the actual issue in the present case is a narrow one. By s. 40 tax is payable on a taxable disposal. As it stood at the relevant time, that required the four conditions in s. 40(2)(a)-(d) to be satisfied: see paragraph 11 above. There has never been any doubt that the third and fourth conditions (disposal at a landfill site, and on or after 1 October 1996) were satisfied. There was before the FTT argument about the second condition (disposal made by way of landfill), but the FTT held that the relevant material was disposed of by way of landfill (*Fluff* at [131], *EVP* at [145]), and that was not disputed before the UT. It is therefore unnecessary to consider the scope of the second condition, and the effect of s. 65, although for what it is worth I agree with the analysis of the FTT in *Fluff* at [127] that s. 65 is primarily designed to ensure that disposal into various types of facilities will count as disposal by way of landfill.

78. The remaining condition, and the only one in issue on these appeals, is the first condition in s. 40(2)(a) that the disposal is "a disposal of material as waste". By s. 64(1) (as it stood at the relevant time) this will be the case if "the person making the disposal does so with the intention of discarding the material": see paragraph 14 above. There is no dispute that for these purposes in the present cases the "person making the disposal" is the LSO; that the only relevant intention is that of the LSO; and that this condition needs to be fulfilled at the same time as the other conditions, that is when the material is deposited in the cell. The questions that arose in some of the earlier cases as to which was the relevant person making the disposal, and whose intention was relevant, do not arise.

79. The resolution of these appeals turns therefore on a single question: when the LSOs disposed of the fluff, or the EVP, into the cell, did they intend to discard it? One might have expected therefore that argument would be concentrated on what it is to discard something. But in fact very little of the argument was directly concerned with this. Much of it was concerned with a rather different question which was whether the LSOs "used" fluff or EVP, and whether that meant – not as a question of fact, but as a question of law to be derived from the previous authorities, in particular from the judgment of Sir Andrew Morritt C in *WRG*, which was subjected to a minute textual analysis – that such use was incompatible with an intention to discard.

80. That seemed to me at the time, and after due reflection still seems to me, rather odd. As I have already referred to, the process of deciding if there is a taxable disposal consists, or ought in principle to consist, of applying the statutory language to the facts as found. The relevant statutory language here says nothing about "use", a word which does not feature in any of the relevant provisions. It does appear in s. 64(2) (see paragraph 14 above), but I do not think s. 64(2) is of any relevance to the present case. I read it as saying no more than that a person can intend to discard something (and hence dispose of it as waste) even if *could* be used – so if I throw away a perfectly usable item, I have still thrown it away even if I, or someone else, could have made use of it: see per Barling J in *WRG* in the High Court at [38], cited with approval by Lady Rose at paragraph 29 above. So it seems a distraction to ask whether, or in what sense, the LSOs "used" fluff or EVP; or, as the UT did, to ask whether an LSO "makes use of its properties" (*UT* at [66]), which may be a slightly different question. The question should be: did they intend to discard it? Or indeed, since there is no reason to think that they did not achieve what they intended to, did they discard it?

81. "Discard" is an ordinary English word. It is not suggested that it has any technical meaning in the context of landfill site operations. It is not defined in the statute. In the

absence of any statutory definition, or any reason to think it is being given a special meaning, Parliament is assumed to have intended it to bear its ordinary meaning. Of course it has to be read in its context, and I accept the points made by Lady Rose in paragraphs 60 and 61 above that that context includes the fact that not everything put in a landfill cell by an LSO is to be regarded as discarded, nor can the touchstone be whether the LSO has parted with title or possession as ordinarily it will not do so (unless title to the land, and hence to material incorporated into the land, happens to be vested in another company in the same group). But subject to reading it in context, no reason has been suggested why discard should not be given its ordinary meaning.

82. There is certainly nothing in the judgment of the Chancellor in *WRG* to suggest otherwise. As set out by Lady Rose at paragraph 34 above he said at [33] that:

> "The word 'discard' appears to me to be used in its ordinary meaning of 'cast aside', 'reject' or 'abandon'."

That is what I too would understand by the ordinary meaning of "discard", although in the context of waste, the paraphrase that comes to my mind is the simple one of saying that to discard something is to throw it away. All these substitutes (cast aside, reject, abandon, throw away) are near synonyms for discard but not exact ones; most English words have shades of meaning and nuances of usage that mean they are not precise substitutes for other words however close.[1] But the present case does not turn on any subtle difference between "discard" or "cast aside" or "throw away". The core concept is clear enough. It is the same idea as was expressed by Butler-Sloss LJ in a statement, cited in some of the authorities before us, in *Cheshire County Council v Armstrongs Transport (Wigan) Ltd* [1995] Env LR 62 at 65 as follows:

> "It has to be that which is disposed of, discarded, got rid of, not needed any more by the person who is in the process of discarding it or disposing of it. It is to be of no further use to that person who has possibly produced it but is certainly discarding the material."

83. Some caution is no doubt needed as that was said in the context of other legislation, and we do not have the report before us, nor the terms of that other legislation, nor even know the context; but subject to those caveats, that too seems to me to express what it is to discard something as a matter of ordinary language.

84. The FTT duly asked themselves the right question, namely whether the LSOs intended to discard the fluff or EVP: see *Fluff* at [119], cited by Lady Rose at paragraph 44 above, which was repeated verbatim (apart from adapting it to cater for there being only one appellant) in *EVP* at [133]. They thought the answer was obvious: see *Fluff* at [121], repeated verbatim in *EVP* at [135], where they referred to the "use" not being sufficient to negate "the otherwise obvious intention to discard the material": see per Lady Rose at paragraph 45 above.

85. That seems obvious to me as well, although strictly speaking I think that is neither here nor there. My understanding of the law is as follows. Whether a word in a statute has

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[1] There is nothing new in this. Lord Reid said the same in *Brutus v Cozens* [1973] AC 854 at 861G: "Few words have exact synonyms. The overtones are almost always different."

its ordinary meaning or some special meaning is a question of construction of the statute and hence a question of law. But once it has been decided that such a word does have its ordinary meaning, what that ordinary meaning is is a question of fact; and it is also a question of fact, and hence a matter for the tribunal that decides the case to consider, "whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved" (per Lord Reid in *Brutus v Cozens* [1973] AC 854 at 861D). This was not cited to us but the principles it expresses are well-known and fundamental.

86. It follows in my view that considerable care needs to be taken in this area in the proper use that can be made of prior authorities. There is a tendency to regard anything said by a judge in deciding a prior case as if it laid down a principle of law. The result in my experience is that the argument frequently proceeds by minute analysis of what was said by judge A in case A, what was said by judge B in case B, and what was said by judge C in case C about what judges A and B said and how their statements can be reconciled. The end result is that the resolution of a case proceeds only after examining a long chain of authority, and forging yet another link in the chain to add to the process. Counsel and judges are well used to this process, and many of them are very skilful at it, and there is undoubtedly an intellectual satisfaction in reading, analysing, understanding and reconciling previous cases. I have frequently sought to do it myself, and it is often unavoidable. And yet it can cause problems, of which the present case seems to me a good example.

87. I entirely accept that the citation of previous authority is an essential part of the litigation process and that there are compelling reasons for it. First, the Court is of course obliged to follow binding authority. Second, even if not binding, the Court needs to be informed of relevant decisions in order for it to understand the current state of the law (and often how it has evolved), and so that its decision can be made against the backdrop of what has already been decided. This is important to ensure that the law develops in a logical and rational way and helps to make the law coherent, clear, certain and predictable. These are important objectives, which are undeniably in the public interest; this is obvious in a field such as taxation where taxpayers and their advisers need to understand what the law is and how it applies, but similar considerations no doubt apply to any statute of general application, as indeed public acts generally are.

88. Third, reading prior cases is often very helpful to the Court, especially if the area of law is unfamiliar or arcane, which the law of landfill taxation is to most of us. Our discursive and full style of judgment writing regularly conveys a mass of background information about practice in a particular field that helps to immerse the Court in, and give it a feel for, an area of law. And previous judges who have grappled with similar issues frequently have insights and analyses, comments and observations which are an invaluable source of guidance and assistance.

89. For all these reasons, I do not seek in any way to discourage the citation of authority: our decision-making processes would be immeasurably poorer without it. My concern is not with the citation of authority, but with the proper use of it. As I have said, it is all too easy to fall into the mistake of thinking that because a prior decision is, as a matter of the doctrine of precedent, binding, it follows that every statement made by the judge in giving the reasoning of the Court lays down a principle of law. But this is not so.

90. Take the present case. One of the points argued before us, at some length, was whether the Chancellor in *WRG* posed as the opposite, or antonym, of "discard" either "retention and use" (which is the phrase he used at [33]) or mere "use" (which is the word he used at [35]): see the extract set out by Lady Rose at paragraph 34 above. But which he meant can only be significant if he was thereby laying down a principle of law, as only principles of law are binding for subsequent cases. In my view however he was not laying down any principle of law at all. Whether "retention and use" or "use" is a better candidate as an antonym for "discard" does not seem to me a legal question. It is a question of the ordinary meaning of the word "discard", and as I have already said, the ordinary meaning of an ordinary English word is a matter of fact. In fact I do not think that either "use" or "retention and use" is a precise antonym of "discard". "Use" is not, as it is easy to posit examples of things that are not used, but are not discarded either. If I read a book and put it back on my shelf, I have certainly not discarded it, but I would not normally be said to be using it (except in a very strained sense of the word use in which keeping a book in case I wanted to read it again is "using" it). But "retention" is not a good candidate either. There are many things which I do not retain but do not discard: if I give a book I have finished reading to a friend, I have plainly not retained it, but it would be odd, and somewhat insulting, to say that I had discarded it. And as already referred to, in the context of putting black bag rubbish into a landfill cell, retention in the sense of retaining title or possession cannot be the antonym of discard, as all the waste in the cell is usually retained in this sense. Indeed I do not think there is anything peculiar about the context of a landfill site in this. If I had a large garden and dumped a broken bit of furniture at the bottom of the garden, there would be nothing odd about saying I had discarded it, even though I would have retained both ownership and possession of it.

91. This illustrates that care should be taken to identify what principle of law a previous case establishes. It is trite law that a case is only authority for what it decides, that judgments are not to be read as if they were statutes, that every judgment has to be read in the context of the facts of the case and the issues argued, and that it is dangerous to take words of a judgment and apply them uncritically to other facts and different issues.

92. The reasoning of the Chancellor in *WRG* is set out by Lady Rose at paragraphs 32 to 34 above. I do not propose to embark on another close analysis of it. Some of the things he says are undoubtedly propositions of law, such as the statement that all four conditions in s. 40(2) must be satisfied at the same time (established in *Parkwood*), and the statement I have already referred to that "discard" is used in the statute with its ordinary meaning. Others are equally clearly not, such as the statement that on the factual findings of the tribunal title had already passed to WRG. Others are mixed or more doubtful such as the conclusion that it was disposing of the material on its own behalf not on behalf of another, and hence that it was its intention alone that was relevant. But the conclusion that because WRG was going to use the material for roadbuilding or for daily cover it did not intend to discard them does not seem to me to be, or involve, a proposition of law. It seems to me a factual conclusion based on what the facts in that case were, and the ordinary meaning of "discard" which, to repeat myself, is also a question of fact.

93. So in my judgment what the FTT should have done is decide whether, on the facts of this case, the fact that LSOs inspect the first and last lifts of waste for large, hard, sharp objects, or in Biffa's case placed shredded EVP at the top of the cell, meant that they

had not discarded the fluff or EVP, applying the ordinary meaning of discard. That is what they did, and they concluded that those facts did not mean that the LSOs had not discarded the fluff or EVP. I agree with Lady Rose (paragraph 63 above) that there was no flaw in their reasoning or conclusion. The fact that the Chancellor in *WRG* concluded on different facts that WRG did not discard the material used for roadbuilding or daily cover did not compel them to conclude that fluff and EVP were not discarded here. And they were right to say that the fact that the LSOs could be said to "use" the fluff and EVP was not determinative as it was not inconsistent with it being discarded. Of course in most cases if a person is using something, it follows he is not discarding it, as normally to use something is inconsistent with throwing it away at the same time. But the example the FTT gave of a householder using some waste bubble wrap to wrap a broken glass before throwing both away is a neat illustration that there is nothing necessarily inconsistent about a person throwing something away, but doing so in such a way as to make use of some of its properties for his own purposes.

94. For these reasons I agree that the FTT's decisions were not legally flawed. I agree that the appeals should be allowed and the decisions of the FTT restored.

Lord Justice Newey:

95. I too consider that the appeals should be allowed for the reasons given by Lady Rose. As Nugee LJ points out, the appeals turn on a single question, namely, whether the LSOs intended to "discard" the fluff and EVP when they disposed of it in the cells. In my view, the FTT was right to conclude that they did. I agree with Lady Rose that such use as the LSOs made of the material was insufficient to negate their otherwise obvious intention to discard it. Like Nugee LJ, the analogy of the bubble wrap and the broken glass strikes me as apt. The fact that a thing might be said to be being used in some way need not mean that it is not being discarded. Nor did the Chancellor hold otherwise in *WRG*.