Neutral Citation Number: [2016] EWCA Civ 1250

Case No: A3/2014/2725

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(Tax and Chancery Chamber)
Mrs Justice Rose
[2014] UKUT 0225 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/12/2016

Before:

LADY JUSTICE ARDEN
LADY JUSTICE BLACK
and
LADY JUSTICE KING

- -

Between:

Patersons of Greenoakhill Limited **Appellant**

- and -

The Commissioners for Her Majesty's Revenue & Customs **Respondent**

- -
- -

Roderick Cordara QC and Zizhen Yang (instructed by **KPMG LLP**) for the **Appellant**
Melanie Hall QC and Simon Charles (instructed by **HMRC**) for the **Respondents**

Hearing dates: 14 -15 June 2016

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Approved Judgment

LADY JUSTICE ARDEN:

1. This appeal is about the liability to landfill tax ("LT") of a landfill site operator ("LSO") where biodegradable material (material which decomposes through the action of microbes) is deposited at the landfill site, and produces methane which the LSO can extract and turn to account in making electricity. Normally, LSOs have to pay LT on any material which is disposed of "as waste" on their landfill site (Finance Act 1996 ("FA 96"), section 40(2)(a)). An LSO, however, which uses materials, rather than placing them into the landfill site as waste, is in general not liable to LT. This is because a person is treated as disposing of material as waste if, and only if, he disposes of it "with the intention of discarding the material" (FA 96, section 64). In *HMRC v Waste Recycling Group Ltd* ("*WRG*") [2009] STC 200, this Court interpreted this provision so that waste does not include inert material received at a landfill site but used as a protective cover ("daily cover") over the waste at the end of the working day, or for constructing roads on the site. This Court has not previously considered the situation where the material is not inert but biodegradable, and is not itself extracted from the site, but produces methane which can be removed.

2. In this case, the LSO, the appellant ("Patersons"), acquired both biodegradable and inert materials for landfilling at its site near Glasgow. It was obliged to remove the methane as a term of its licence and use it to create electricity. It now seeks a repayment of LT paid in respect of the biodegradable material for the three years (2006 to 2009) when biodegradable materials were deposited into the landfill site and produced methane. Patersons installed machinery which enabled it to convert that methane into electricity and sell it to the National Grid.

3. The First-tier Tribunal ("FTT") (Judge Demack and Roger Freeston FRICS) by order dated 21 July 2009, and the Upper Tribunal ("UT") by order dated 22 May 2014, ruled against Patersons. The full facts may be found in their decisions. The FTT made some critical findings about the process whereby methane is produced. In particular, the FTT found that methane is produced by microbes when they cause the biodegradable material to decompose (FTT Decision, §3). The process of decomposition is triggered by deposit into landfill (FTT Decision, §98). There is no more to which I need refer for the purposes of this judgment.

4. In my judgment, for the reasons given below, they were right to do so. The question whether Patersons disposed of the material as waste for the purposes of section 40(2)(a) must be decided at the date of deposit by reference to the material in the form it then was. At that time, there was no methane. That came later. Therefore, I would dismiss this appeal.

5. This judgment first outlines the relevant legislation and case law about LT and then summarises the decisions of the FTT and UT so far as material. After that I will summarise the submissions. Finally, I shall state my reasons for my conclusion.

RELEVANT LEGISLATION ABOUT LT

6. Landfill tax is governed by Part III of the Finance Act 1996. It is a domestic tax in that it is not a tax required under EU law (*Customs & Excise Commissioners v Parkwood Landfill Ltd* [2003] 1 WLR 697, §9). All references below to sections are to sections of that Act unless it otherwise appears. Tax is charged on a taxable

disposal, and since 1 April 2015, the disposal must occur in England and Wales or Northern Ireland.

7. Section 40(2) sets out four conditions that have to be established for a disposal to be a taxable disposal. This appeal concerns only the first condition. Section 40(2) provides:

> (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.

8. Unless the context otherwise requires, "material" means material of all kinds, including objects, substances and products of all kinds (section 70(1)).

9. Section 41 provides that the person liable to pay the landfill tax charged on a taxable disposal is the landfill site operator. The amount of tax is set out in section 42.

10. Section 64 explains what is meant by "a disposal of material as waste" and so far as material it provides that:

> (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….

11. Section 41 provides that it is not the original producer of the waste which pays LT but the LSO. The amount is generally determined by the weight of the material deposited, but it may be determined in other ways. There are no specific mechanics for working out "rebates" for recycling.

12. In sum, LT is set out in simply-worded text. As is usual, no practical examples are given. The Tribunals and this Court have had to work out how these provisions apply in cases where there are several persons involved in a disposal. These cases are fundamental to an understanding of LT and to the arguments in this appeal. They are the building blocks on which Patersons has built its case in the Tribunals and in this Court. So, before I set out the Tribunals' decisions in this case, I will summarise that case law.

RELEVANT LANDFILL TAX CASE LAW

13. The most basic question at issue in this appeal is whether Patersons has disposed of the biodegradable element of the materials it acquired from customers as waste if at the time of deposit on the landfill site it intended to extract methane from those materials when they have decomposed.

14. The trail begins with *HMRC v Darfish* [2002] B.T.C. 8003, where an LSO, Darfish, bought soil for use as site engineering. Darfish used a group company to obtain topsoil and deposit it on its landfill site. The previous owners of the topsoil intended to dispose of it as waste but the LSO did not. Moses J held that disposal was different from deposit and that section 64 envisaged that a person might dispose of waste without discarding it. The intention of the owners was to dispose of the soil, and, in the judgment of the judge, the soil had been deposited in the landfill site for them. It was their intention which was relevant, not that of the LSO.

15. The next relevant case is *Parkwood*. Here the LSO's subsidiary bought waste for deposit on the LSO's landfill site, from which it extracted inert materials for use as site engineering on the LSO's landfill site, and also bought in other material for the same purpose. I will call all this material "RM" (recyclable material), and the separation out of RM from other waste "the RM separation factor".

16. In *Parkwood,* HMRC contended that the relevant disposal was that made by the customer from which the LSO's subsidiary acquired the waste, that the conditions in section 40(2) could be satisfied sequentially and that the disposal would include RM.

17. This Court rejected HMRC's case. This Court held that all four conditions in section 40(2) had to be satisfied at the same time. Otherwise the liability might depend on the intention of previous owners of the waste which was not known to the LSO. By the time of the deposit in the landfill site in this case, the RM was not being disposed of as waste, and was therefore outside the charge to LT. It would be inconsistent with the purpose of the legislation if LT was payable on the RM since the legislation had as part of its purpose the aim of promoting recycling waste material. This case, therefore, establishes that LT is a tax on *landfill waste*. Where materials are recycled, there was no liability to LT. Aldous LJ held:

> 27 The commissioners also submitted that there was nothing in the statute which suggested that material which had been discarded as waste ceased to be waste because it had been successfully recycled. That submission is contrary to common sense. Take material which is thrown away. That is waste. Melt it down and mould it into a spare part for a machine and it is not waste. There need be no change in chemical substance to convert waste into a useful product. It is the act of recycling which is important. This is recognised by Parliament in its drive to promote recycling rather than disposal and is recognised by the cumulative effect of section 40(2).
>
> 28 The commissioners accept that their argument leads to the result that companies such as Parkwood will be liable for tax if they use recycled material for site engineering or building

> purposes, whereas they would not be liable for tax if they used fresh materials. That cannot have been the intention of Parliament when they introduced the landfill tax. The purpose of the legislation was to tax waste material deposited at landfill sites and not to tax deposits at landfill sites of useful material produced from waste material.
>
> …
>
> 30….. the tax bites upon the person who discards not who recycles.

18. In the present case, this Court is concerned with an LSO which discards *and* recycles the same material or a product from it.

19. In *WRG*, this Court again considered the question of disposal of inert material as waste. Sir Andrew Morritt C, whose judgment in *Parkwood* had been overruled by this Court, gave the leading judgment, and the other members of the Court, including myself, agreed. As a result of *Parkwood*, all the conditions had to be satisfied at the same time. In *WRG*, all the conditions in section 40(2) other than condition (a) were fulfilled or were conceded to have been fulfilled at the time of deposit. In addition, WRG, the LSO, had become the owner of the waste in question, so (applying *Parkwood*) it was its intention which was critical.

20. WRG did not accept that condition (a) was fulfilled because it had recycled some of the inert material conceded to have been disposed of at the site for use as daily cover and for use in roadmaking. This Court held that, insofar as WRG intended to recycle the material, by using it to make roads etc, there was no disposal as "waste" for the purposes of condition (a), and LT was not payable. Sir Andrew Morritt C held:

> ...the question posed by s.64(1) is whether WRG then intended to discard the materials. The word "discard" appears to me to be used in its ordinary meaning of "cast aside", "reject" or "abandon" and does not comprehend the retention and use of the material for the purposes of the owner of it. I agree with counsel for WRG that s.64(2) does not apply in such circumstances because there is, at the relevant time, either no disposal or no disposal with the intention of discarding the material…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….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.

21. The evolution of the case law has thrown a spotlight on the intention of the owner of the materials at the moment of deposit to ascertain whether there has been a disposal

of those materials as waste. Other circumstances may be relevant to deciding what this intention was.

22. The principles developed in the cases have led Patersons to focus its argument on the intention of the LSO and the character of the material at the time of deposit, that is, the biodegradable materials which decompose and produce methane. In a nutshell, HMRC seeks to meet these arguments by emphasising the physical character at that date. This helps to explain the sometimes labyrinthine and abstract points made in the decisions of the Tribunals and arguments on this appeal.

DECISIONS OF THE TRIBUNALS

Decision of the FTT

23. The FTT's essential conclusions were as follows:

i) *Parkwood* and *WRG* were distinguishable because they dealt with inert material which could be separately identified (FTT Decision, §232).

ii) Patersons' case was weaker than those of the LSOs in those cases because the process of decomposition does not reduce the amount of landfill (FTT Decision, §233).

iii) The biodegradable material is not recycled and methane is a by-product of it which may not occur without the addition of leachate (FTT Decision, §§234, 235).

iv) "Material" must be tangible (FTT Decision, §236).

v) The fact that Patersons uses the methane does not mean that it uses the materials deposited in the landfill (FTT Decision, §237).

vi) *WRG* is also distinguishable because it does not deal with the situation where the material in the landfill site is not used (FTT Decision, §238).

vii) Patersons makes a profit out of what its regulatory obligation requires it to do (FTT Decision, §239).

viii) Exemption in the circumstances of this case would defeat the object of LT (FTT Decision, §240).

ix) It would be too difficult to assess the amount of tax due in respect of landfill if Mr Cordara is correct (FTT Decision, §242). Patersons' proposals here were "unworthy of consideration" (FTT Decision, §243).

x) Patersons' submissions would mean that it would simultaneously have two intentions: to acquire waste from its customer for landfill to put it in the void, and to use it to make electricity. It cannot have two different intentions at the same time (FTT Decision, §§244-5).

The UT's decision

24. The UT dismissed the appeal on the ground that Patersons did not use the material it deposited at its landfill site to generate electricity. The generation of electricity was the inevitable result of decomposition (UT Decision, §§40, 44-46).

25. The UT gave the following reasons for rejecting Patersons' arguments:

    i) As the FTT held, *Parkwood* was distinguishable. *WRG* was also distinguishable because the material in that case was used.

    ii) As in *WRG*, the material in this case was the biodegradable material which occupied "mass and space" (UT Decision, §33).

    iii) It was not, as the FTT held, diverted from landfill in *WRG* because it was used as daily cover in the void (UT Decision, §34).

    iv) Three relevant propositions could be deduced from *WRG*:

        (a) the fact that material goes into the void by way of landfill does not of itself mean that it is discarded for the purposes of section 40;

        (b) the fact that the LSO uses material to comply with a regulatory obligation does not of itself mean that it has no intention to discard it, nor does it prevent an intention to use the material rather than to discard it; and

        (c) the fact that the material will be left in the void after it has performed the useful function for which it was put in there and is therefore, at that point, abandoned does not mean that there is an intention to discard at the moment it is put into the void (UT Decision, §34).

    v) Section 64 FA 96 did not require the LSO to retain or separate out some part of the material from the rest before it can be said not to be discarding the waste (UT Decision, §42). The RM separation factor was only an indication that there is an intention to use that retained matter for a different purpose (UT Decision, §43).

    vi) If Patersons had "used" the deposited material, Patersons was required to use the methane under the terms of its licence. The FTT had made an unassailable finding that all its actions were pursuant to its obligations under the licence (UT Decision, §§49 to 62). However, Patersons could "use" material even though it was acting under an obligation in its licence (UT Decision, §64).

    vii) It was not relevant that there was no exemption for biodegradable material (UT Decision, §66).

    viii) It was not relevant to take into account the difficulties of assessing the amount of the tax. The UT accepted that it would be virtually impossible to work out precisely for each actual tonne of material how much was biodegradable but a formula could be used (UT Decision, §§68 to 77).

    ix) Environmental policy had only a limited role to play in the construction of the clear wording of the statute. Patersons' activity did not achieve the primary policy goal behind landfill tax, which is to reduce the amount of waste

> deposited in landfill. In so far as there is a policy that landfill gas should go to generating electricity rather than being flared, that goal was achieved both by imposing a requirement for landfill site operators to do so and by allowing them to keep the money made from the profitable sale of the gas. There is no other policy reason to give them the additional benefit of a tax relief. It is regarded as more beneficial to the environment if biomass is diverted from landfill and used to generate electricity either in incinerators or in anaerobic digesters (UT Decision, §§78 to 81).

26. The chain of reasoning in the Tribunals was the springboard for the intricate arguments addressed to this Court.

SUBMISSIONS AND CONCLUSIONS

27. The main challenge by Mr Roderick Cordara QC, for Patersons, to the UT decision is to the holding that Patersons could not show that it intended to use the biodegradable material to make the methane. It had to show this to show that condition (a) in section 40(2) was satisfied. It could not do so in the view of the UT because the process where methane was released was a natural process not requiring any action on Patersons' part.

28. Mr Cordara skilfully amplifies that argument in a number of ways. He submits that Patersons intended to use the biodegradable material to create electricity at the time of deposit. The inevitability of the production of methane does not stop Patersons having that intention. He does this by criticising an example given by the UT of the gardener with the water butt:

> 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. (Judgment, paragraph 45)

29. Mr Cordara submits that, even if the gardener does not "use" the rain when the rain flows naturally into the water butt, the gardener does use the water in the water butt when she waters the garden. So too, Patersons uses the methane that is exuded by the biodegradable material.

30. Moreover, submits Mr Cordara, Patersons could have this intention even if the resulting product could not be separated out at the time of the deposit of the materials on to the landfill site. Paragraph 43 of the UT decision supports Patersons' case here since the UT accepted that the RM separation factor was only an indication of the intention to use the material.

31. Furthermore, submits Mr Cordara, passivity is no bar to use. So Patersons could still intend to use a product even if it is the result of an intervening process, as when rain naturally collects in a water butt. The UT was wrong to hold that some action was required on its part. Mr Cordara relies here on the meaning of "material". This includes all kinds of material so it can include methane as well as the original biodegradable material.

32. Mr Cordara submits that *Parkwood* assists Patersons' case. He submits that in *Parkwood* the issue was one of whose intention mattered and not when the intention had to be shown. He submits that in that case the material must have been put into the landfill for the question at issue to arise. Unlike this case, the material never came out of the void, so this case is a stronger case than *Parkwood*.

33. Mr Cordara submits that the meaning given to dispose of "as waste" in *WRG* at paragraph 33 imposes impossible burdens on LSOs and is inconsistent with the FA 96. He submits that, while the intention had to be shown at the moment of deposit, a person cannot be said to discard something if to his knowledge it will automatically mutate into something else for which he has a use. The intention to discard can involve an element as to the future. There is no reason to "freeze frame" it in the condition in which it was at the time of disposal. If there is an intention as to the future, there is no intention to discard. The test is: at the moment of deposit, is the LSO going to make any use of the biodegradable material being deposited?

34. The mutation, explains Mr Cordara, simply means that there is a change of form or change of atoms. This does not matter because there has been no break in the chain of causation. The same occurs where Patersons burns biodegradable material and produces ash which can be used as fertiliser. Patersons does not abandon the biodegradable material. It recovers the biodegradable material by using the substance into which it has meanwhile been converted. It would destroy the purpose of LT if the material has to stay the same.

35. Moreover, Mr Cordara submits, insofar as the UT relied on the finding by the FTT that Patersons did no more than it was obliged to do under its licence, the UT was wrong to focus on this. It was irrelevant to the question of use.

36. Ms Melanie Hall QC, for HMRC, submits that Patersons is not using the landfill material when it uses the methane to generate electricity. Landfill material is the biodegradable material which it deposited. The production of methane is a natural process, which creates a danger and pollutant which the LSO has to remove. Patersons' actions are merely a response to that situation and a performance of its obligations under the licence. There is no reason why Parliament should treat Patersons as not intending to discard material simply because it takes steps it had to take in any event to manage the methane. The process of producing the methane was an inevitable natural process.

37. Ms Hall submits that, since the intention not to discard has to be shown to have existed at the time of the deposit, the relevant "material" has to exist at the same date. Therefore, submits Ms Hall, it is not enough that the deposited material contained atoms some of which may become methane.

38. I will now set out my reasons for my conclusion that this appeal must be dismissed.

39. The UT's approach was to ask whether Patersons had used the material and so not discarded the biodegradable material for the purposes of sections 40(2) and 64 of the FA 96. That question was to be resolved through refining the case law, particularly *Parkwood* and *WRG*.

40. I prefer to adopt Ms Hall's approach of considering the meaning of "material" in the context of sections 40(2)(a) and 64(1), which are the two principal provisions applicable in this appeal. There is nothing in either of those provisions to exclude or vary the meaning of "material" given in section 70(1) (see paragraph 8 above).

41. The way Ms Hall puts it is that that "material" must be given meaning in its context and in the light of the fact that, as interpreted by this Court, those provisions are not primarily dealing with the whole sequence of events from the producer to the LSO but with the intention at the date of deposit of the material on the landfill site. This follows from the decision of this Court in *Parkwood* that all the conditions must be satisfied at the same time.

42. As this is a taxing statute, it must be assumed that Parliament enacted a provision that would be certain at that point in time. If "material" means the material in the form it may exist at any time, then it would be uncertain. Patersons' argument recognises this because it has sought to avoid uncertainty by directing the focus to the biodegradable material and contending that the production of methane and electricity is causally linked to that material, like the water collected in a water butt which a person then uses in his garden.

43. I accept that it is possible to use a product that arises from a natural process, such as the process whereby blue cheese is created or the collection of water in a water butt. But it is not possible for Patersons to avoid the point that, on its causal approach, the "material" which it intends to use is not limited to the biodegradable material that is deposited but has to include all that that may become. If it were limited to the biodegradable material at the time of deposit, Patersons' argument would be bound to fail. To achieve the result for which Patersons contend, the "material" has to be material for the time being and at any time.

44. When Parliament wants to be sure that a word will not have a static meaning, and will have a meaning at a particular point in time in the future, it can specifically adopt the word "for the time being" or words to that effect. So, for example, section 43(2) of the Inheritance Tax Act 1984 defines a "settlement" as:

> any disposition or dispositions of property, whether effected by instrument, by parol or by operation of law, or partly in one way and partly in another, whereby the property is for the time being—
>
> (a) held in trust for persons in succession…

45. But there is no such wording in this case.

46. Likewise, there are particular words which of their nature connote a changing body of constituents. The right of a person to fish in a stretch of river is unlikely to be limited to the fish in the river at the time of grant.

47. Similarly, a collective noun may sometimes be used to make this clear, as where statute refers to a herd of animals or to a collection of items. Such words may well mean the herd or collection as it happens to be from time to time.

48. Here, however, the drafter has used a word, "material", which is not a plural noun so that the connotation of a moving group of items does not come into play. In other words, in my judgment, the word "material" does not on its natural meaning include future by-products from it.

49. The next question is whether the context requires any wider meaning to be given to "material". In my judgment, since section 40(2)(a) and 64(1) are dealing with the satisfaction of conditions at the moment of deposit of the material, the word "material" must be given its usual static meaning of material in the form it exists at the date of the relevant deposit on the landfill site.

50. It may be that in a particular context in Part III the word "material" includes within it by-products such as landfill gas. This may, for instance, be so where the provision is looking to a future moment in time after deposit when that gas is likely to have formed. Section 64(2), discussed in paragraph 64 below, is one such provision.

51. It follows that I would decide this case on the meaning of "material" in sections 40(2)(a) and 64(1), rather than on the basis of "use", as the UT did. The methane, which is a by-product of the material once landfilled, is not capable of use by Patersons with the result that its value cannot be abstracted from the LT due on the tonnage of the deposited waste from which the methane was produced.

52. It further follows that I need not address Mr Cordara's various arguments about use. I agree with Ms Hall that the prior decisions of this Court in *Parkwood* and *WRG* are not determinative of this appeal, though they are important background in understanding LT.

53. As to the properties of "material", I agree with the UT and Ms Hall that material deposited on a landfill site will generally have mass and occupy space, and not be an intangible item. But I would not, and need not, hold that it must always have these properties since it may, for example, be possible to deposit partly-decomposed material containing landfill gas which perhaps has been removed from some other site.

54. There are a number of other grounds raised by Patersons with which I can now deal more shortly.

55. First, Patersons contends that the UT was in error in giving "undue weight" to the separation factor. Mr Cordara rightly did not press this because the UT (at §43 of the UT Decision) accepted that non-separation of the materials into biodegradable material and inert material was not determinative. The fact that the UT considered the problems of quantifying the LT due if Patersons succeeded shows that the UT accepted that non-separation was not a bar. If non-separation was relevant, I agree with the UT that it was an indicative not a determinative factor.

56. Second, Mr Cordara submits that the UT gave "undue weight" to the inevitable decomposition. I do not consider that this point can assist Patersons because, while the UT held that a person could not be said to use something that comes into existence naturally, it also accepted that a person could use something which had come into existence as a result of a naturally-occurring process (such as rainfall, which leads to water being collected in a water butt which someone can then use).

57. That particular challenge is linked to a third complaint that in its decision the UT asked a question without answering it, namely "Do [Patersons'] engines [for converting methane into electricity] establish that Patersons is using the methane and hence that it is not discarding the biomass?" Mr Cordara submits that this point was that one of the reasons why Patersons could be said to use the material was that it had installed some substantial machinery for safely extracting the methane and converting it into energy.

58. As I read the UT's judgment, the UT's answer to this question may have been the next paragraph. But, leaving that point aside, the question did not raise any new issue that the UT had not covered in relation to use.

59. Fourth, another ground of challenge is that the UT misstated a finding of fact by the FTT in relation to the pricing of purchases of material from customers but nothing turns on that point.

60. Fifth, Patersons dispute the UT's statements about the policy of the relevant legislation. The UT said that the policy was of little weight in the interpretation of legislation. In principle I agree, though this Court in *Parkwood* relied on what they held was the purpose of the legislation. They held:

> 9. Landfill tax was introduced as from 1 October 1996 by the Finance Act 1996 . The tax is a creature of domestic statute in that it is not a tax required under any provisions of Community law. However the United Kingdom does have obligations in Community law to take appropriate steps to encourage the prevention, recycling and processing of waste under Council Directive 75/442/EEC . The Environmental Protection Act 1990 is the key piece of domestic legislation enacted to meet this obligation. Landfill tax can therefore be seen as a separate domestic initiative aimed at protecting the environment and securing the ambitions of the Directive.
>
> 10 A government White Paper of December 1995 entitled "Making Waste Work" (Cm 3040) preceded the imposition of landfill tax. It examined the strategies to be adopted to reduce the environmental impact of waste disposal. So far as landfill was concerned, three main objectives were set out. First, to reduce the amount of waste; second to reduce the amount of material going to landfill and third to place the cost of landfill on the person disposing of the waste. In that way waste producers would become aware of the cost of their activities. The central purpose of the landfill tax was stated to be
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> > "to ensure that landfill costs reflect environmental impact thereby encouraging business and consumers in a cost effective and non-regulatory manner, to produce less waste; to recover value from more of the waste that is produced; and to dispose of less waste in landfill sites."

61. The "central purpose" there described includes the production of less waste. It was therefore open to the UT to hold that activities which encourage the supply of waste to the LSO did not further the purpose of the legislation, and to say that remained so even if by-products from the deposited material were later recycled.

62. Ms Hall also relies on the difficulties of computing tax. The UT held that while it was virtually impossible the problem could be circumvented by using formulae. But, as I see it, even accepting the UT's point, the position remains that no formulae have been referred to in the legislation, so it would appear that Parliament did not envisage any difficulty requiring that approach. So I agree with Ms Hall and the FTT that this is an indication (no more) that Patersons' interpretation must be wrong. In addition, under section 68, tax is generally payable by reference to the weight of the material being deposited and that is an indication that the tax is dealing with material which then exists. But these points are not determinative on their own.

63. Ms Hall also argued that the UT was wrong to say that the LSO could use material by an action it was obliged to take under the terms of its licences. On my approach that question does not arise on this appeal and accordingly I propose to say nothing about it.

64. Finally, in argument, both counsel relied on section 64(2) (set out in paragraph 10 above). Section 64(2) provides that it is irrelevant whether the person making the disposal or any other person could benefit from or make use of the material. Potential benefits are therefore required to be ignored. Both counsel argued that this provision applied to a case where an LSO sought to avoid LT by arguing that some benefit might be exploited in the future. Ms Hall goes further and submits that section 64(2) supports the conclusion that the relevant intention must exist at the time of disposal in relation to material that has then been deposited. I consider that section 64(2) provides some assistance in that direction. On my interpretation of the word "material", section 64(2) is unnecessary if the material in question is a by-product of the material that was deposited, and not the material itself. Section 64(2) therefore has a purpose in addressing a problem that could arise if there was a present intention possibly to use the deposited material in the future. That is excluded by this provision and so the LSO cannot avoid LT on that basis.

65. In my judgment, this appeal falls to be resolved as a question of statutory interpretation of the word "material" and without reference to these additional arguments.

66. I would dismiss this appeal. Some of Ms Hall's points were advanced by a respondent's notice, which I would allow in part.

Lady Justice Black

67. I agree that the appeal should be dismissed.

68. The decision of this court in *Parkwood* establishes that the four conditions in section 40(2) must be satisfied at the same time. The focus is therefore upon the point at which the material is disposed of by way of landfill at the landfill site. The disposal of the material will be "a disposal of material as waste", as required by section 40(2)(a), "if the person making the disposal does so with the intention of discarding the

material", see section 64(1). Arden LJ would accept Ms Hall's submission that "the material" in question in this case was the biomass deposited and not the methane which is a by-product that will be produced as it decomposes. I would agree.

69. Mr Cordara's argument was that Patersons did not intend to discard the material, as required by section 64(1), because it intended to use it to generate electricity, harnessing the methane that it would produce. In this way, the spotlight was turned upon the question of "use" of the material, because someone who intended to use material could not be said to intend to discard it. Arden LJ considers (§51) that as the methane was not capable of use by Patersons at the time of the landfill, an intention to use the methane does not assist in determining whether the disposal was done "with the intention of discarding the material". She is of the view that this is determinative of the appeal – the material was the biomass and the biomass, as such, was discarded.

70. Arden LJ may be right about this, but I hesitate in accepting that the fact that the material which the statute has in its sights is the biomass and not the methane is the complete answer to the appeal. If the methane were wholly unrelated to the biomass, it would be, but the biomass and the methane are not unrelated. Putting it in relatively neutral terms, it is the presence of one, the biomass, that accounts for the presence of the other, the methane. That is what enabled Mr Cordara to advance his argument that Patersons are using the biomass. A liberal helping of examples attended the argument in the case, amongst them that of a seed, which perhaps illustrates why I hesitate as I do. Mr Cordara argued that the seed was not discarded when put into the ground, but used in order to derive benefit later when it grows. So, he would say, the material (biomass here, or seed in the example) is used to produce a later harvest (methane from which electricity can be made here, or a crop in the seed example).

71. In case, therefore, there remains mileage in Mr Cordara's use argument, I will express my view about it. However, as Arden LJ and King LJ agree that the appeal is resolved without the need to address the question, I will do so only very briefly.

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).

73. I acknowledge that Mr Cordara's submissions ranged over a number of features which he argued indicated that Patersons intended to use the material, including the pricing structure for the deposit of waste which took account of its potential to produce landfill gas and the fact that Patersons went to the expense of installing gas engines at the site which were connected to the national grid. Although I took the points he made carefully into consideration, they did not alter my ultimate view of matters.

Lady Justice King:

74. I agree with the judgment of Arden LJ and further agree that for the purposes of this appeal it is unnecessary to go further than her analysis pithily summarised by Black

LJ in her judgment as "the material was the biomass and the biomass, as such, was discarded"

75. In so agreeing I would not however wish it to be thought that I do not recognise that a consideration of 'use' may in some circumstances be a valuable pointer in determining whether, per section 64(1), a disposal has been made "with the intention of discarding it". *WRG* is an example of the importance of this.

76. I agree with Black LJ that, in the present case, Mr Cordara's 'continuum' argument and supporting "seed" analogy do not take the matter any further; the sole purpose of planting a seed is to grow a plant, this is in contrast to Paterson's intention at the date of disposal which was, as Black LJ puts it, "to get rid of the material by way of landfill". The fact that Patersons had the business acumen to invest in the engines which generate the electricity and, in doing so, were able to make compliance with the regulatory requirements highly profitable, does not in my judgment, change the nature of the initial disposal of the biomass from one of "discarding" the material to one of "using" the material.