

QUESTIONNAIRE ON NATIONAL CASE LAW REGARDING ISSUES OF WASTE

SECTION A: GENERAL ISSUES OF CASE LAW & IMPLEMENTATION

See attached details of *Scottish Power Generation Ltd v Scottish Environment Protection Agency*.

Extract from Opinion of Lord Reed in *Scottish Power Generation Ltd v Scottish Environment Protection Agency* [2004] Scot CS 272

SUMMARY AND CONCLUSIONS

[134] From the foregoing discussion of the Community legislation and the case law of the European Court of Justice, it appears to me that the relevant principles of Community law are sufficiently clear to enable a decision to be reached without it being necessary to make a preliminary reference to the Court. That was also a matter of agreement between the parties to the proceedings, although their agreement is not of course binding upon the court.

[135] Since any material is capable of constituting "waste" within the meaning of Article 1(a) of Directive 75/442, in the event that it is discarded, whether it constitutes waste depends not on the nature of the material itself but on whether it is "discarded" within the meaning of that provision. "Discard", in this context, has a special meaning. It encompasses such uses of waste as are mentioned in Article 3(1)(b) and Annexes IIA and IIB. It includes in particular the use of waste as a means of generating electricity, replacing the use of a primary fuel such as coal which would otherwise have been used for that purpose. It also includes the recycling of waste and the reclamation from it of substances which are intended for re-use. It follows that waste may be of economic value, and that its holder may be said to "discard" it notwithstanding that he puts it to some commercially valuable use.

[136] Directive 75/442 does not provide any decisive criteria for determining whether the holder of a substance intends to "discard" it within the meaning of the directive. Decisions must be taken on the basis of the circumstances of individual cases, and in the light of the aims of the directive, foremost among which is the protection of human health and the environment. The Court has indicated in its case law a number of factors from which it may be possible to infer whether the holder intends to "discard" the material in question. Most of these factors have been identified in cases concerned with the distinction between a production residue and a by-product, and have reflected that context: for example, whether the material is produced intentionally; whether further processing is required before the material can be used; and whether the material is certain to be used. Other factors which have been mentioned are of a more general nature: for example, whether the material is commonly regarded as waste; and whether, if it is used as fuel, its use as fuel is a common method of recovering waste. Since the status of a material has to be assessed on the basis of a comprehensive assessment of the circumstances of the particular case, it follows that none of the factors mentioned is conclusive in itself. The fact, for

example, that a material is produced intentionally, requires no further processing before it can be used, and is certain to be used, cannot be taken in isolation as determinative of its status.

[137] In a case where there is no doubt that a material was at one time waste, and the question is whether it has ceased to be waste, the evaluation required is different to some extent; but it is still directed towards deciding whether the material is "discarded", that decision being taken on the basis of the circumstances of the individual case, and in the light of the aims of the directive. The danger which is typical of waste is a danger of harm to human health or the environment caused by the manner of its disposal. The directive seeks to address that danger by making waste subject to supervision designed to ensure that it is recovered or disposed of in a manner which is controlled so as to protect human health and the environment. Once a material has been classified as waste, it therefore remains subject to that supervision at least until that objective has been achieved. It is only then that the material may cease to be waste within the meaning of the directive. When it is claimed that what was waste has ceased to be waste as the result of a complete recovery operation, and has become a material which can and will be used in the same way as a material which is not waste, and that it need therefore no longer be subject to such supervision, it is accordingly necessary to assess whether that claim is well-founded. That assessment requires consideration not only of whether the material in question can and will be used without further processing in the same way as a non-waste material, but also of whether the material can be used under the same conditions of environmental protection as the non-waste material with which it is otherwise comparable, without any greater danger of harm to human health or the environment. Other factors, including some of those mentioned above, may also be relevant in considering whether waste has been subjected to a recovery operation or merely to pre-treatment. One factor mentioned by Advocate General Jacobs is the direction in which payment is made: whether the person carrying on what is claimed to be a recovery operation pays for the operation or is paid for it.

SECTION B: SPECIFIC ISSUES OF CASE LAW & IMPLEMENTATION

Article 1(a)

1. The only case to have come before the courts in this jurisdiction is that of *Scottish Power*. Cases are ordinarily dealt with by the Scottish Environment Protection Agency, which is an administrative body, and only come before the civil courts in the event that that body's decision is challenged.

In the *Scottish Power* case, I found the definition of "waste" difficult to interpret and the ECJ case law difficult to analyse. The *Arco Chemie* decision was the most useful of the cases, and I attempted to follow it in reaching my decision.

2. My decision gave rise to much discussion in the media and in the Scottish Parliament. There was some criticism that the effect of the decision might be that

the existing practice of burning waste-derived fuel would end, to be replaced by landfill disposal, and that this would be more harmful to the environment. There was also criticism that such decisions were being made by the courts rather than on a policy-driven basis.

3. This issue has not been considered by the courts in this jurisdiction.
4. Yes. This was essentially the approach followed in the *Scottish Power* case.
5. In the *Scottish Power* case it was held that the waste-derived fuel had not ceased to be waste. The court considered whether the material could and would be used without further processing in the same way as a non-waste material, and whether it could be used under the same conditions of environmental protection as the non-waste material with which it was otherwise comparable, without any greater danger of harm to human health or the environment. The conclusion to which those criteria pointed was supported by a consideration of other factors which it was accepted might also be relevant: whether the person carrying on what was claimed to be a recovery operation paid for the operation or was paid for it; whether the operation claimed to be a recovery operation fell within any of the categories in Annex IIB or was analogous to any such operation; whether the waste-derived fuel would generally be considered to be waste; and whether the primary purpose of the production of the waste-derived fuel, and its burning to generate power, was in reality the disposal of sewage.
6. This issue has not been considered by the Scottish courts.
7. The more recent domestic legislation largely repeats the language of the EU legislation. The older domestic legislation used different language, which was more specific. That gave rise to problems in the *Scottish Power* litigation. After ruling that the waste-derived fuel was “waste” within the meaning of the EU legislation, I then had to decide, in further proceedings, whether it was also within the scope of the relevant national legislation. I decided that it was, partly by interpreting the national legislation so as to comply with the EU directives.

Other Questions

There is no Scottish case law bearing on the other questions.