



What next for waste?

By Tim Green and Beatrice Graham

This article provides an overview of the issues and trends that confront regulatory practitioners in the discrete field of environmental waste work. In particular, we take account of the continuing debate around what is and what is not waste and the Home Office’s intention to deal with waste crime. We hope to give practitioners an indication as to the likelihood of trial and appellate work in this field over the short and medium term.

Independent review into serious and organised crimes in the waste sector (‘the Report’)

1. In November 2018 the Home Office published the “Independent review into serious and organised crime in the waste sector”. The Report found that each year, approximately 200 million tonnes of waste are produced in the UK, just 4.2 million of which are exported. The legal waste industry is of huge value to the UK economy: with a gross value of £6.8 billion. However, waste crime costs England alone £600 million annually.
2. Waste crime tends to arise in two forms: (i) illegal operation, that is otherwise legitimate concerns that operate without the appropriate licences or registration; and, (ii) subversion of legitimate process, that is organised crime but operating with appropriate licences to create a veil behind which criminal activity can take place (such as misdescription of waste).

3. At the same time as waste crime is a mounting concern for regulators, the media and political interest in developing a sustainable “green” economy drives the treatment of waste up the political agenda.

Why waste matters – trends in enforcement and the industry

4. At first glance, the introduction of the landfill tax in 1996 appears to have been a success with the amount of waste consigned to landfill since that date being reduced by 73%. On the flip side, whilst landfill tax has encouraged recycling it has created opportunities for criminal gangs to illegally dispose of waste without paying landfill tax.
5. In the last decade, tonnage of waste being presented at landfill has steadily reduced as has the tax income generated from the landfill tax. However, it is not clear how much of this trend can be accounted for by increased environmental awareness and social changes in production of waste at a household level and how much is due to an increase in illegal dumping of waste.
6. Waste management in England is the responsibility of the Environment Agency. It is also the Agency that has the power to prosecute waste crime.
7. Where waste is being treated lawfully, the Environmental Permitting Regulations create a framework of regulation with which businesses must comply. This regulation includes having the appropriate environmental permits issued by the Agency; complying with the onerous conditions contained in the environmental permits; dealing regular Agency inspections; and producing and storing of waste transfer notes to document the movement of waste.
8. In terms of unlawful waste operation, according to the Report: *“Between 2011 and 2017, the Agency stopped the operation of over 1,800 illegal waste sites*

assessed as posing the highest risks. This secured 947 successful prosecutions, 37 prison sentences and 71 confiscation orders collectively worth £5 million. Current investigations involve large-scale fraud, illegal dumping, burial of hazardous chemicals and illegal export of waste.”

9. Despite these significant figures, the Report identified issues in the Agency’s ability to monitor and investigate waste crime and enforce waste regulations. The Report recommended (*inter alia*) the establishment of the Join Unit for Waste Crime (‘JUWC’) in an effort to enable collaboration across responsible entities from Police and Crime Commissioners to Local Authorities.
10. The JUWC was established on 16 January 2020. The timing is prescient. It was as recently as August 2018 that Greta Thunberg launched her School Strike for the Climate. Recent years have seen ever increasing popular support for environmental regulation with campaigns focussing around everything from ocean plastics to wet wipes whilst reusable coffee cups and non-plastic straws have become the ‘new normal’. Waste creation and disposal is, more than ever, at the forefront of the public consciousness.

What is waste – definitions at law

11. The starting point for the definition of waste is Article 3.1 of the European Framework Directive (2008/98/EC) defines waste as "*any substance or object which the holder discards or intends or is required to discard.*" This definition largely mirrors the definition contained in an earlier Waste Framework Directive.
12. The “discard” test remains the cornerstone of the definition of waste in any particular context. A useful summary of the case law concerning how the discard test has been applied was provided in paragraphs 22 to 25 of the

recent case Northern Ireland Court of Appeal case of *R v Morrow* [2019] NICA 71. The difficulty for regulators, practitioners and for Courts has been how to apply the “discard” in any given situation from the creation of surplus soil on a building site, to the by-products of complex industrial processes, and materials no longer wanted by consumer. Practitioners will know this question – when has an item been truly discarded – has given rise to a number of judgements both in England & Wales and the European Courts.

13. In particular, the need to apply the definition of waste in various contexts has given rise to these two particular questions:
- a. Firstly, when does waste cease to be waste? This is an area of law known as ‘end-of-waste’ and arises from the fact that that waste to one person, might well be a precious resource to another. For example, even the residue from recycling household waste can be compressed and turned into Refuse Derived Fuel which can be burned in certain power stations. The question is at what point the household waste ceased to be waste and became a valuable fuel?
 - b. Secondly, when are goods which disposed of by one consumer, but which retain value in the eyes of another consumer considered waste? For example, if a consumer has old fridge in good working order but of a tired design and they wish to have a new model, does the old fridge become waste simply because it is discarded for a new, more fashionable model?

End-of waste

14. According to Article 6 (1) and (2) of the Waste Framework Directive 2008/98/EC, certain specified waste shall cease to be waste when it has undergone a recovery (including recycling) operation and complies with specific criteria to be developed in line with certain legal conditions, in particular: (a) the substance or object is commonly used for specific purposes;

(b) there is an existing market or demand for the substance or object; (c) the use is lawful (the substance or object fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products); and (d) the use will not lead to overall adverse environmental or human health impacts.

15. Practitioners will also be well aware there is extensive case law dealing with “end of waste” in specific applications which cannot easily be summarised here, save to say in the light of the need for the law to retain flexibility to deal with changes in technology and the economy, the “end of waste” debate looks like to continue.

Consumer waste

16. *Environment Agency v Thorn International Limited* [2008] EWHC 2595 (Admin) remains the leading authority in the treatment of consumer waste. Lord Justice Moses judgement held that electrical appliances awaiting repair, having been exchanged by consumers, were not “waste” within the meaning of sections 33 and 75 of the 1990 Act and Directive. They were still required for their original purpose, so had not been discarded; since they had not been discarded, the fact that they had not yet been repaired did not mean that they were waste.
17. The treatment of consumer waste was considered in the recent ruling of the CJEU in *Openbaar Ministerie v Tronex BV* C-624/17 (Judgment of the Court (Second Chamber) of 4 July 2019). This case arose out the export of white goods to developing countries. At [43] the CJEU held that:

“The shipment to a third country of a consignment of electrical and electronic appliances, such as those at issue in the main proceedings, which had been initially intended for retail sale but which were returned by the consumer or which, for various reasons, were sent

back by the retailer to its supplier, is to be regarded as a ‘shipment of waste’ within the meaning of Article 1(1) of Regulation No 1013/2006, read in conjunction with Article 2(1) thereof, and Article 3(1) of Directive 2008/98, where that consignment contains appliances the good working condition of which has not been previously ascertained or which are not adequately protected from transport damage. Such goods which have become redundant in the seller’s product range and which are in their unopened original packaging, on the other hand, must not, without indications to the contrary, be regarded as waste.”

18. This section of the judgement in *Tronex* appears to define waste more restrictively so that a shipment of used electrical goods to a third country would amount to waste and only consumer goods which are in their unopened/unused condition are deemed not to be waste.

19. However, it is important to note that in the same Judgement the CJEU cautioned that [29]:

“the concept of ‘waste’ must not be understood as excluding substances and objects which have a commercial value and which are capable of economic reutilisation (judgment of 12 December 2013, Shell Nederland, C-241/12 and C-242/12, EU:C:2013:821, paragraph 50 and the case-law cited).”

20. Thus, if an object has a commercial value and it capable of reuse, this will be an important factor indicating it is not consumer waste. This section of the judgement is thus consistent with the Administrative Court decision in *Thorn*. It may be that *Tronex* has to be viewed in its context, namely the transport of used electrical goods to third party developing countries where policy arguments to closely regulate such trade have more weight. When it comes to the determining what it and what is not consumer waste within the UK, *Thorn* remains good law.

21. What will continue to concern practitioners is that, as both end-of waste, and consumer waste examples show, the question of what is and what is not waste remains opaque. Whilst this creates uncertainty and makes it harder to advise clients on the stance the Agency and other regulators might take when considering waste in a particular scenario, it also creates opportunities for new precedent based on particular facts.

Waste and enforcement – policy, sentencing, director disqualification and proceeds of crime

22. Whilst there may be well-intended debate concerning the regulation of certain commercial activities, and whether or not they concern waste, the Report suggested that the organised dumping of waste has become a species of organised economic crime. Sir James Bevan, the chief executive of the Agency, was even quoted in the Report as describing the increasing threat of waste crime as the ‘new narcotics’.

23. The Report highlighted the failure of the Agency so far, to adequately tackle organised waste crime and concluded with six action points to give the Agency greater enforcement strength. In particular, the Report focused on how regulators must be ready to use The Proceeds of Crime Act 2002 (“POCA”) and confiscation as a tool to extract ill-gotten gains from waste crime.

24. In fact, the Agency has been trying to use POCA in Agency enforcement work for some years but with mixed results.

25. According to the Report, between “2011 and 2017, the Agency stopped the operation of over 1,800 illegal waste sites assessed as posing the highest risks. This secured 947 successful prosecutions, 37 prison sentences and 71 confiscation orders collectively worth £5 million.” This sounds positive but the Report goes

on to comment “Typically, the Agency terminates 800 illegal sites in a year, half of these within 90 days of the sites being identified. However, the number of illegal sites operating in England has not reduced in the last four years.... New illegal sites appear as fast as old ones are closed...Overall, few cases reach prosecution and even fewer generate meaningful recovery of costs using the Proceeds of Crime Act 2002.”

26. One of the most important proceeds of crime authorities in the environmental context is *R v Powell* [2016] EWCA Crim 1043. On appeal the prosecution contended that, in the context of admitted waste crime by a company and its directors, the gross turnover of the guilty companies should be equivalent to the criminal benefit where two directors were convicted of consenting or conniving as directors in a company's failure to comply with the conditions of an environmental permit
27. The Court of Appeal considered the operation of the corporate veil on confiscation proceedings against company officers and the decisions in *R. v Seager (Mornington Stafford)* [2009] EWCA Crim 1303, *Petrodel Resources Ltd v Prest* [2013] UKSC 34, [2013] 2 AC 415 and *R v Boyle Transport (Northern Ireland) Ltd* [2016] EWCA Crim 19. The judgment of Treacy LJ in *Powell* is thus essential reading for practitioners confronted with confiscation in the context of regulatory crime.
28. Treacy LJ held that it was only appropriate to pierce the corporate veil when there was evidence that the company had been used to conceal crime or evade lawful responsibility by the directors. In essence, criminal benefit would only equate to the turnover of the company where the corporate veil was used to disguise crime. In *Powell* the two directors were not the sole controllers or owners of the relevant company and the company did have a legitimate purpose, notwithstanding its offending. Thus, in *Powell* there was

insufficient evidence that either the concealment or the evasion principle were engaged. The Court of Appeal held that the criminal benefit against the directors should then be limited to their own individual receipts and not be equivalent to the gross turnover of the appellant companies. The confiscation orders of £200,000 and £30,000 respectively were upheld, despite comparing unhappily with the costs to the Ministry of Defence £1.125 million to clean the site.

29. So confiscation is a useful tool for the regulation of waste crime but is something of a blunt instrument. As *Powell* shows, strict liability environmental offences can provide a basis for confiscating criminal profits but in the case of individuals the scope of confiscation is likely to be limited the particular benefit of directors.
30. It is worth noting that in *Morrow* the appellant was successful in defeating the confiscation order because he contested the Agency had exaggerated the value of waste deposited and the Circuit Judge had failed to conduct a full Newton hearing to settle the issue. *Morrow* is then a useful authority, not just for a summary of relevant case law on end of waste, but because it shows how important it is that the Agency conduct a thorough investigation of the nature and scope of the waste in question if confiscation is to be sustained at the sentencing stage. *Morrow* is also another authority and to the effect that the Courts must adopt Newton hearings as the proper criminal process for resolving disputes of fact at sentence including in the context of environmental offending.
31. The establishment of the JUWC will probably lead to greater use of POCA by the Agency. Whether this leads to more assets being confiscated will also depend on whether the Agency invests sufficient resources in the original investigation so that it can prove to the full scope of offending to the criminal

standard. It will also depend on the ever-changing landscape of proceeds of crime law.

An important win for the Agency

32. A notable recent success for the Agency concerns the prosecution of industry heavyweight Biffa Waste Services Limited (*R. v Biffa Waste Services Limited* [2019] EWCA Crim 20). In May and June 2015, the Agency intercepted two consignments of waste leaving Biffa's Edmonton recycling facility, destined for China. Labelled as 'mixed waste paper' the consignments an extraordinary range of items: soiled nappies and sanitary wear, sealed bags of excrement, clothing, food packaging, plastic bottles, shoes, condoms, laminate flooring, women's underwear, metal pipes and, to the delight of the newspapers that have covered the story, a damaged copy of a 12-inch record by 1990s dance music trio Deee-Lite.
33. Biffa was indicted under Regulation 23 of the Transfrontier Shipment of Waste Regulations 2007: "*A person commits an offence if, in breach of Article 36(1) [Regulation 1013/2006 (the Waste Shipment Regulation)], he transports waste specified in that Article that is destined for recovery in a country to which the OECD Decision does not apply.*" China is such a country and, tracking through the complex web of annexes, "*waste collected from households*" (Annex V Pt 3, item Y46) a type of waste specified.
34. The appeal concerned a ruling made by the trial judge at a preparatory hearing. The point for consideration was what the prosecution needed to prove for a breach of Article 36(1)(b) of the Waste Shipment Regulation 1013/2006 (prohibited export of certain waste to a country to which the OECD Decision does not apply). The question was whether the prosecution needed to prove only that the waste being exported was 'household waste'

or whether it also needed to prove that it was also contaminated such that recovery in a legally sound manner was not possible. The judge held that the prosecution only needed to prove the former.

35. The Court of Appeal dismissed the appeal, stating at [34]:

“Accordingly, whether there was sufficient household waste contamination for these consignments properly to be styled as Y46 household waste (rather than the B3020 mixed paper designation given in the export documentation) was a matter of fact and degree for the jury. To seek further to introduce the subject-matter of the chapeau [paragraph 3 of the Introductory Notes of the Regulation was styled as “the chapeau”] into a case of this particular kind, given the nature of the prosecution here undertaken, would in our view be to introduce an irrelevant and complicating distraction (we note in fact that Mr Travers QC rather struggled in argument to formulate appropriate jury directions when pressed on the point). The judge, we consider, was right to reject the argument.”

36. When the case came to trial in the summer of 2019, Biffa was found guilty. In September 2019 it was fined £350,000, ordered to pay prosecution costs of £240,000 and handed a confiscation order.

37. Furthermore, there are signs that the Courts are more willing to consider director disqualification in the context of waste crime. In *R. v McIntosh (Edward)* [2019] EWCA Crim 231, the Appellant appealed his sentence as director of the business having pleaded guilty to offences under the Environmental Permitting Offences 2010 (*inter alia*). He had been the director of a waste company which operated two sites one permitted for operating a household commercial and industrial waste transfer station and the other with an exemption for a limited area for depositing wood waste.

38. The Court of Appeal upheld the sentence of the Judge below: a community order with unpaid work requirement, a five-year director disqualification, and a prosecution costs order in the sum of c.£36,000 and added further costs

from the appeal. The Appellant could only meet this by selling or re-mortgaging his property.

Waste, enforcement and future trends

39. In our view, the treatment of waste in environmental law remains a fertile area for trials and appellate work for the foreseeable future. The trend can be explained for two reasons:

- a. Firstly, the definition of “waste” has to be sufficiently flexible to deal with an almost limitless number of situations. This means it has become an ambiguous term ripe for interpretation and litigation.
- b. Secondly, the Agency is being driven to adopt a more assertive stance to waste crime, particularly at the stage of sentence and confiscation. In particular, the export of waste to developing countries is a key concern of the Agency as the *Biffa* case shows and we can expect energy and resources to become a focus in this area.

40. Otherwise, as the pandemic eases and the media focus returns to environmental concerns including organised fly-tipping, expect waste to be front and centre in the work of regulatory practitioners.

Tim Green & Beatrice Graham

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