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Judgment: approved by the Court for handing down | *Delivered:* **27/11/07**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL BY WAY OF CASE STATED UNDER THE MAGISTRATES COURTS (NORTHERN IRELAND) ORDER 1981

BETWEEN:

DEPARTMENT OF THE ENVIRONMENT AND HERITAGE SERVICE

Complainant/Appellant;

and

FELIX O'HARE & CO LTD and JAMES PHILLIPS t/a PHILLIPS CONTRACTS

Defendants/Respondents

GIRVAN LJ

[1] This appeal comes before the court by way of a case stated dated 15 December 2006 from a Resident Magistrate sitting at the Magistrates' Court in Downpatrick on 6 December 2006. The question posed by the Resident Magistrate in the case stated is as follows:

> "Whether I was correct in law in finding that soil and clay removed from a playing field site in advance of the erection of an extension to a building was not controlled waste under the Waste and Contaminated Land (Northern Ireland) Order 1997."

[2] The Department of the Environment ("the Department") laid complaints against Felix O'Hare & Co Ltd ("the first respondent") and James Phillips trading as Phillips Contracts ("the second respondent") and also Samuel Johnston alleging breaches of Article 4(1)(a), 4(6), Article 5(1)(a), 5(1)(c)(ii) and 5(8) of the Waste and Contaminated Land (Northern Ireland) Order 1997 ("the 1997 Order").

[3] The summonses against the respondents were heard at Downpatrick Magistrates' Court on 6 December 2007. The evidence before the Resident Magistrate was presented in the form of agreed written evidence. The factual

background to the matter can be shortly stated. The first named respondent entered into a contract with the Southern Education and Library Board to construct an extension to Saintfield High School on what had previously been a playing field. The second respondent entered into a subcontract with the first respondent to carry out the excavation of the playing field preparatory to the construction of the extension. In late December 2004 and early January 2005 the second respondent excavated the site. The stones were separated from the soil and clay on the site. The soil and clay were then removed by the second respondent and transferred by him to lands belonging to a third party Mr Samuel Johnston who used the material to erect a windbreak on his lands. Mr Johnston did not have a waste management licence or exemption entitling him to so use the soil if it constituted controlled waste.

[4] When interviewed under caution by an authorised officer of the Department the second respondent described the depositing of upwards of 1,000 tonnes of excavated soil on Mr Johnston's land. He did not ask if that site possessed a waste management licence or exemption. In fact it did not. He did not receive or generate waste transfer notices for the material. During his interview under caution Mr Gill, a Director of the first respondent, said that the first respondent had been engaged by the Board to construct an extension at the school. Phillips Contracts was engaged to excavate the playing field to reduce the levels. Phillips Contracts did not specifically state where the excavated material was going but it was the first respondent's understanding that they were going to deposit the material round the land or house of a farmer who was looking for material to make up levels at his land. He accepted that the first respondent did not receive or generate waste transfer notices for the material. The second respondent was paid to remove the material. The first respondent did not ask if the receiving site possessed a waste management licence or exemption.

[5] Article 4(1)(a) of the 1997 Order provides:

> "Subject to paragraphs (2) and (3) a person shall not –
>
> (a) deposit controlled waste, or knowingly cause or knowingly permit controlled waste to be deposited in or on any land unless a waste management licence authorising the deposit is enforce and the deposit is in accordance with the licence."

Article 4(2) and (3) are not relevant. Article 4(6) makes it an offence to contravene Article 4(1) or any condition of a waste management licence.

[6] Article 5(1)(a) and (c) provides:

> "(1) Subject to paragraph (2), any person who imports, produces, carries, keeps, treats or disposes of controlled waste or, as a broker, has control of such waste, shall take all such measures applicable to him in that capacity as are reasonable in the circumstances –
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> (a) to prevent any contravention by any other person of Article 4;
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> (b) …
>
> (c) on the transfer of the waste, to secure
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> (i) that the transfer is only to an authorised person or to a person for authorised transport purposes; and
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> (ii) that there is transferred such a written description of the waste as will enable other persons to avoid a contravention of that article and to comply with this paragraph as respects the escape of waste."

Article 5(2) is not material in the present context. Article 5(8) makes it an offence to contravene Article 5(1).

[7] Since the Department was seeking to prove that the respondents had infringed Article 4(1) and 5(1) and were thus guilty of offences under Article 4(6) and 5(8) it was incumbent on the Department to prove beyond reasonable doubt that the soil in question constituted "controlled waste" for the purposes of the 1997 Order. "Controlled waste" must be "waste" as defined which also falls within the definition of controlled waste. "Waste" is defined in Article 2(2) as:

> "Any substance or object in the categories set out in Schedule 1 which the holder discards or intends or is required to discard; and for the purposes of this definition
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> `holder' means the producer of the waste or the person who is in possession of it; and

> `producer' means any person whose activities produce waste or any person who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste."

Such waste is controlled if it constitutes "household, industrial or commercial or any such waste. Household waste includes waste from "premises forming part of a university or school or other educational establishment."

[8] Schedule 1 of the Order lists various categories of waste. Paragraphs 1 to 15 list various types of waste material such as material spilled or contaminated, products and substances of no further use, and residues from extracting or processing. Paragraph 16 refers to "any materials, substances or products which are not contained in the above categories."

[9] Article 2(3) empowers the Department to make regulations providing that waste of prescribed descriptions shall be treated for the purposes of the prescribed provisions of the Order as being or not being household waste or industrial waste or commercial waste. The Controlled Waste Regulations (Northern Ireland) 2003 Schedule 3 includes within the definition of "industrial waste":

> "6. Waste arising from tunnelling or from any other excavation.
>
> 7. Waste arising from works of construction or demolition including waste from works preparatory thereto."

[10] The 1997 Order forms part of the domestic legislation enacted to give effect to the United Kingdom's obligations under Council Directive 75/442/EEC of 15 July 1975 on waste. Article 1(a) of the Directive provides that "waste" means for the purposes of the Directive "any substance or object which the holder disposes of or is required to dispose of pursuant to the provisions of law in force." Waste comprises any substance or object of the categories in Annex 1 which the holder discards or intends or is required to discard. Schedule 1 of the 1997 Order contains the same categories of waste as those set out in Annex 1 of the directive.

[11] The Department argues that the domestic and European statutory definitions and authorities make it clear that waste is anything that the holder has discarded. The definition of waste in Article 2(2) of the 1997 Order and in particular paragraphs 11, 14 and 16 of Schedule 1 to the Order mean that the topsoil and clay in the present case constitute waste. Further it was argued that the soil and clay constituted industrial waste as defined in paragraph 6

and 7 of Schedule 3 to the 2002 Regulations and as industrial waste it is therefore controlled waste as defined by Article 2(2). Waste falls to be defined from the point of view of the person discarding the material and the fact that the discarded material may be used by another in a useful manner does not prevent it constituting waste and counsel relied on European case law that established in his argument that "the legal concept of waste extends to all objects and substances discarded by owners even if they are capable of economic reuse."

[12] The respondents relied strongly on the provisions at paragraph 15 of the Schedule to the 1997 Order which refers to "contaminated materials, substances or products resulting from remedial action with respect to land." Counsel argued that the topsoil and clay removed were not contaminated and therefore did not constitute waste. As the stones had been removed from the topsoil and clay the material was not covered by the List of Waste Regulations which was derived from the European Waste Catalogue. Counsel accepted that the Waste Catalogue was not an exhaustive list of waste but argued that it could be viewed as persuasive when looked at alongside other legislation. With regard to paragraph 16 of Schedule 1 to the 1997 Order it was argued that this definition must be set in context in the light of the definitions of waste in previous and present legislation. Previous legislation such as Article 36(2) of the Pollution Control and Local Government (Northern Ireland) Order 1978 specifically included soil moved from previous deposit sites in the definition of industrial waste. The omission from the 1997 Order was significant and the only reference to soil in the 1997 Order related to contaminated sites. The respondents contended that the soil and clay were still part of a commercial chain or cycle of utility. No processing or recovering operation was required before the material could be reused. The soil and clay was of direct use to a third party and therefore the material was not discarded.

[13] In the decision of the European Court of Justice in Tombesi [1997] All ER (639) the court held that the concept of waste in the directive is not to be understood as excluding substances capable of economic utilisation. The fact that a substance is classified as a reusable residue without its characteristics or purpose being defined is irrelevant. In Inter-Enviromnement Wallonie Asbl v Region Wallonie [1998] All ER (EC) 155 the ECJ held that the scope of the term "waste" turned on the meaning of the word discard which covered both disposal and recovery of a substance or object (see also Arco-Chemie Nederland Ltd v Minister Von Volkshuisvesting [2003] All ER (EC) 237. In Palin Granite Oy v Vekmassalon [2003] All ER (EC) 366 the court stated the material should only be regarded as a by-product as opposed to waste if its reuse was a certainty not a mere possibility and no further processing or treatment required prior to its reuse. In Van de Walle v Texaco Belgium [2004] EU ECJ C-1-03 the ECJ applied the same test as in Wallonie and held that the word "discard" must be interpreted in the light of the aim of the

directive which aids the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste and in light of the EC policy of ensuring a high level of protection for the environment based on a precautionary approach. The word discard therefore cannot be interpreted restrictively.

[14] Relevant domestic case law is to be found in cases such as Long v Brooke [1980] Crim LR 109, Kent County Council v Queensborough Rolling Mills Co Ltd [1990] 154 JP 442, Ashcroft v McErlain Ltd QB Eng 30 Jan 1985, Attorney General's Reference No 5-2000 [2001] EWCA 1077 and R (OSS Group Ltd) v Environment Agency [2007] EWCA Civ 611, Cheshire County Council v Armstrongs Transport (Wigan) Ltd [1995] Crim LR 162. The following principles can be deduced from these and the European authorities:

(i) The word "discard" when read in the light of the other language texts of the Directive points to the concept of getting rid of an unwanted object or substance (see in particular the judgment of Carnwath LJ in R (OSS Group Ltd) v Environmental Agency [2007] EWCA Civ 611 and the judgment of Butler-Sloss LJ in Cheshire County Council v Armstrongs Transport (Wigan) Ltd [1995] Crim LR 162.

(ii) A rational system of control points to the conclusion that the categorisation of materials as being waste or not being waste depends on the materials qualities and not on the qualities of their storage or use even if the storage or use is environmentally safe. (See Castle Cement Ltd v Environmental Agency & Lawther per Stanley Burton J.

(iii) The nature of the material has to be considered at the time of its removal from the original site (Kent County Council v Queensborough Rolling Mills Co Ltd [1990] 154 JP 442).

(iv) The definition of waste in the act must be taken from the point of view of the person disposing of the material (Long v Brooke [1980] Crim LR 109).

(v) Excavated soil is capable of being waste. Whether or not it is in any given case is a question of fact to be determined on the evidence adduced (Ashcroft v McErlain Ltd QB Eng 30 Jan 1985).

[15] The Resident Magistrate concluded that the soil in question did not constitute controlled waste. He did not give a reasoned decision to show how he reached that conclusion and one is left to speculate on what basis he reached it.

[16] On the undisputed evidence before the Resident Magistrate there was, however, only one logical conclusion to reach, namely that the soil did constitute controlled waste. In the course of carrying out the works on the

land beside the school preparing the site for the construction of the extension soil had to be removed. Traditionally soil and stones would not be regarded as waste material and frequently will not in fact be waste. However this soil when excavated represented material which had to be disposed of in some manner. It had to be got rid of or, in the terms of the Directive, "discarded". The definition of "waste" calls into play the categories set out in Schedule 1 of the 1997 Order which replicated Annex 1 of the Directive. It fell within paragraph 16 of the Schedule unless that paragraph is to be read as limited or qualified by the preceding paragraphs by the application of an ejusdem generis rule of construction. The preceding paragraphs do not in fact create a genus and in any event the ECJ case law points to a wide interpretation of the categories of waste. There is accordingly no reason why the word "waste" should be restrictively interpreted to exclude excavated soil produced as a result of site clearance. The material, which fell within the definition of waste, for the reasons indicated, constituted controlled waste if it was household, industrial or commercial waste as defined. The soil produced as a result of the excavation was from premises forming part of a school or educational establishment. It thus fell within the definition of household waste. If it did not, then it represented "industrial waste" since the definition of industrial waste was extended by the 2002 Regulations to include waste arising from excavation (paragraph 6 of Schedule 3) or waste arising from works preparatory to construction (paragraph 7 of Schedule 3).

[17] Accordingly the answer to the question posed in the case stated is "no". The appeal is accordingly allowed. The matter must be remitted to the Resident Magistrate to hear and determine in accordance with law in the light of this ruling.