Neutral Citation Number: [2020] EWHC 3147 (Admin)

Case No: CO/4688/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2020

Before:

SIR DUNCAN OUSELEY
Sitting as a High Court Judge

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Between:

SAFETY-KLEEN UK LTD	**Claimant**
- and -	
THE ENVIRONMENT AGENCY	**Defendant**

- -
- -

David Hart QC and Hannah Noyce (instructed by **Weightmans**) for the **Claimant**
Richard Moules (instructed by **the Environment Agency Legal Services Department**) for the **Defendant**

Hearing dates: 20 October 2020

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Approved Judgment

SIR DUNCAN OUSELEY:

1. Safety-Kleen UK Ltd, the Claimant, provides specialist mechanical parts washers, containing kerosene, to businesses, such as those undertaking automotive repairs and to small engineering businesses. They are used for cleaning the parts of heavy oil, grease, paint, ink, glues and resins. The machines enable a cleaning process by physical means, such as scrubbing and automatic agitation with kerosene, and by kerosene acting as a solvent. Safety-Kleen collects the used kerosene from its customers in drums and replaces it with cleaned kerosene. Safety-Kleen takes the drums of used kerosene back to a depot, empties them into a sump or reservoir and then rinses out the drums with used kerosene from the reservoir, to which the now re-used kerosene returns. From there, the re-used kerosene is pumped into the "dirty" tanks, whence it is tankered away to a different company for a specialised industrial waste recovery or regeneration process, by which the dirty kerosene is distilled and cleaned. The cleaned kerosene is returned to a Safety-Kleen depot, and placed into the cleaned drums. These are the drums which are then taken to customers, when it is time for the kerosene they have used to be removed once more.

2. There was no issue but that the dirty kerosene, when it reached the "dirty" tanks at the depot was "waste", within the Waste Framework Directive, 2008/98/EC, WFD, and remained waste when transferred to the depot for distillation and waste until it was cleaned for re-use by customers. Until 2017, there had been no issue between Safety-Kleen and the Environment Agency but that the used kerosene was waste when it was collected by Safety-Kleen from its customers' premises. However, in 2017, stimulated or not by the high cost of the application of the waste legislation, Safety-Kleen considered whether the used kerosene was truly waste at that stage. It concluded that it did not become waste until it had been used for the cleaning of the drums back at the depot, and was sent to the "dirty" tanks, to await removal for recovery or regeneration. The Environment Agency considered the case made by Safety-Kleen; it also inspected the drum cleaning process at a depot. But it decided in a written decision dated 24 August 2018, that the used kerosene became waste when collected from the customers' premises, and remained waste until cleaned. It is that decision which is now challenged by of way of judicial review.

3. Permission was refused on paper and on renewal by respectively Holgate and Lieven JJ. It was granted on appeal by Lewison LJ, in November 2019.

4. Mr Hart QC for Safety-Kleen raised three grounds of challenge. The Environment Agency was wrong to treat the used kerosene as waste when collected from the customers' premises. First, proper consideration of all the factors in this particular case, relating to the way in which Safety-Kleen used the kerosene back at the depots to rinse the drums, should have led to the conclusion, and should lead the Court to conclude, that it was not waste until it was sent to the "dirty" tanks. Second, the Environment Agency erred in its understanding of the cleaning process used by Safety-Kleen at its depots and of its similarity to the cleaning process at its customers' premises. Third, the Environment Agency had accepted that cloth wipes, impregnated with kerosene, which Safety-Kleen supplied to its customers were not waste when collected from them by Safety-Kleen for cleaning and re-use by its customers, and did not become waste until so used that they had to be thrown away. It was irrational to distinguish the cloth wipes, after use, from the kerosene, after use by the customers.

5. Mr Moules for the Environment Agency submitted that the issues had been carefully considered; the Environment Agency had formed a view on technical matters which deserved a wide margin of appreciation, and its conclusion was correct. There had been no error of fact and the cloth wipes were not comparable to the used kerosene, nor was that comparison useful in resolving the point at which the used kerosene became waste.

The nature of the issue before the Court

6. Although these are judicial review proceedings, they are unusual in this respect. The parties agreed that the question for the Court was not whether the decision of the Environment Agency was rational, or whether some material consideration had been ignored or an immaterial consideration had been taken into account. Nor was the question whether the EA had directed itself correctly on the meaning of the term "waste", and had reached a view as to its application which was reasonably open to it. It was instead for the Court to decide whether, in all the circumstances of the case, the used kerosene was "waste" when collected by Safety-Kleen from its customers, or "waste" only after it had been re-used in the cleaning of the drums at the depot. If the Environment Agency decision was right, it was lawful; and if wrong, it was unlawful. This meant that the Court, in reaching its own decision, could also consider material which was not before the Environment Agency when it made its decision.

7. This approach follows *R (OSS Group Ltd) v Environment Agency* [2007] EWCA Civ 611, [2007] Bus LR 1732. Carnwath LJ, with whom Sir Anthony Clarke MR and Maurice Kay LJ agreed, said at [59]: "What is required from the national court is a value judgment on the facts of the particular case in the light of those indicators." "Those indicators" are the objective indicators derived from the policy of the WFD.

8. Mr Moules emphasised that the concept of "waste" had to be interpreted and applied purposively having regard to the objectives behind the WFD. This was not controversial; see *ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting* C418 and 419/97 [2002] QB 646. The objectives are expressed differently to a degree in the 2008 WFD, although I accept that the objectives of the WFD mean that the concept of "waste" should not be interpreted restrictively in the light of the precautionary principle, and the need for a high level of environmental protection should be recognised. The recitals to the WFD note the need for greater clarity in definitions including that of "waste", but it is Article 1 which states the fundamental objective:

> "The Directive lays down measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste and by reducing overall impacts of resource use and improving the efficiency of such use."

9. Mr Moules also contended that, in reaching a value judgment on the facts, the Court ought to afford an enhanced margin of appreciation to the judgment of an expert regulator making a specialist judgment on issues of a scientific, technical or predictive nature, or on issues involving a balance between competing interests; see *R(Mott) v Environment Agency* [2016] EWCA Civ 562, [2016] 1 WLR 4338, at [74-82], Beatson LJ, with whom Lord Dyson MR and McFarlane LJ agreed. This was

said in the context of a rationality challenge, which is not the case here. However, Mr Hart did not contest the principle or that it should apply to the Environment Agency's views as to environmental risk, but he did not accept that all the views formed by the Environment Agency in the course of its decision, or in its consideration of subsequent evidence, could properly be regarded as technical, scientific, predictive judgments or as the result of a regulator making a decision weighing competing interests. This arose notably in the assessment of what happened during, and the significance of, the drum rinsing process.

The Waste Framework Directive and its interpretation

10. Although the Environment Permitting (England and Wales) Regulations 2016 S.I. 1154, transpose the WFD into domestic law, the important legislation for these purposes is the WFD itself. Safety-Kleen has the necessary permits for the waste operations which it carries out at its depot. The issue arises, in particular, over the collection and transportation of the used kerosene from customer to depot. If "waste", the used kerosene was "hazardous" within the scope of Annex III to the WFD as flammable, toxic, probably carcinogenic and perhaps more besides, depending on the contaminants. Clean kerosene is of course flammable and toxic, but it is not carcinogenic. The Hazardous Waste (England and Wales) Regulations 2005 S.I. No. 894, HWR, would apply, and, among other obligations, hazardous waste consignment notes would be required for each consignment of used kerosene. The fees for the hazardous waste consignment notes would cost Safety-Kleen in the order of £250000 a year. It intends, if the used kerosene is not waste, to seek the recovery of over £2m paid in back fees.

11. The resolution of the issue, of whether the used kerosene is "waste" when collected, takes one straight from the Environment Permitting Regulations to the WFD for the definition of waste and other relevant definitions. The definitions are in Article 3 WFD. "(1) 'Waste' means any substance or object which the holder discards or intends or is required to discard. (6) 'Waste holder' means the waste producer or the natural or legal person who is in possession of the waste."

12. This language has been considered by the CJEU and the Courts of the UK, mostly when the previous WFD 75/442 was in force, but nothing turns on that. First, *Scottish Power Generation Ltd v Scottish Environment Protection Agency* [2005] S.L.T. 98 (2004), Lord Reed in the Outer House. Sewage was processed into fuel pellets, and burnt with coal to generate electricity. SPGL argued that the fuel pellets were not "waste" within the definition of that term in the WFD 75/442, materially the same as now being considered. At [135-136, and 142] Lord Reed said:

> "135. Since any material is capable of constituting "waste" within the meaning of [the Directive], 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 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.
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> 142. The contrary arguments largely depend on giving "discard" its ordinary meaning. Scottish Power do not have the intention to "discard" the W, in the ordinary sense of the word. They pay for it, and use it for commercial purposes in order to generate electricity, and to obtain renewable energy certificates. It is apparent, that "discard" has a special meaning in the context of Directive 75/442. In consequence, the fact that the WDF has an economic value to Scottish Power, and the fact that it is produced to the specification, are not inconsistent with its being "discarded" and, in consequence, constituting waste. Equally, the argument that a material ceases to be "waste" when it is transferred to a holder who intends to put it to a beneficial use is inconsistent with the approach adopted by the European Court of Justice (e.g. in the cases of *ARCO Chemie Nederland* and *Mayer Parry*)."

13. Next, the *OSS Group* case, referred to already. Waste lubricating oil, not previously used as a fuel, was collected by the OSS Group and converted into recycled fuel oil, and then sold to industrial plants including power stations where it was burned. The Environment Agency decided that it remained waste until burned, and did not cease to be waste when converted to fuel oil. The Court of Appeal held that it was not possible to decide the issue one way or the other on that simple basis; it might or might not be waste; the decision depended on a consideration of all the circumstances. It judged the CJEU jurisprudence to be in places mysterious, Delphic and not always

comprehensible. Carnwath LJ referring back, at [13], to his earlier judgment in *Mayer Parry Recycling Ltd v Environment Agency* [1999]1 CMLR 963 at [24-30] concluded that the ordinary English meaning of the word "discard" was an imperfect guide to its significance in the definition of "waste"; he thought the following was a fair general indication of the intended meaning of "discard" taken on its own:

> "The general concept is now reasonably clear. The term 'discard' is used in a broad sense equivalent to 'get rid of'; but it is coloured by the examples of waste given in Annex I and the waste catalogue, which indicate that it is concerned in general with materials which have ceased to be required for their original purpose, normally because they are unsuitable, unwanted or surplus to requirements…."

14. Carnwath LJ then set out eight points, of which the following are relevant: the concept of "waste" cannot be interpreted restrictively; in its ordinary meaning, it is what falls away when one processes a material or object and is not the end product sought to be produced; it must be interpreted in the light of the aims of the WFD. It was apparent from other points that there were no criteria which definitively answered the questions whether a substance was waste if commercial re-use was made of it, or whether an operation was a waste recovery operation or normal industrial treatment, or whether a substance was a by-product or a production residue. He also expressed approval of what Lord Reed had said in *SPGL*.

15. After considering the *ARCO* and other cases, Carnwath LJ said at [55]:

> "As this review demonstrates, a search for logical coherence in the Luxembourg cases is probably doomed to failure. A fundamental problem is the court's professed adherence to the article 1 (1)(a) definition even when of no practical relevance. The subjective "intention to discard" may be a useful guide to the status of the material in the hands of the original producer. However, it is hard to apply to the status of the material in the hands of someone who buys it for recycling or reprocessing; or who puts to some other valuable use. In no ordinary sense is such a person "discarding" or "getting rid of" the material. Its intention is precisely the opposite."

16. Carnwath LJ pointed out that the CJEU had consistently declined invitations to develop workable criteria to determine the circumstances in which material might or might not cease to be waste when it came into the hands of someone who intended to use it, rather than to get rid of it.

17. Hence, his conclusion at [59], the end of which I have already cited in the context of the judicial approach to a regulator's decision that a substance was "waste":

> "In other words, although the court continues to pay lip-service to the "discarding" test, in practice its subordinates the subjective question implicit in that definition, to a series of objective indicators derived from the policy of the Directive.

> What is required from the national court is a value judgment on the facts of the particular case in the light of those indicators."

18. As if to endorse those comments, the CJEU decision in *Shell Nederland Verkoopmaatschappij BV* C-241/12, a preliminary ruling on a reference in a Netherlands criminal case, provided Safety-Kleen with its strongest authority. The WFD at issue was another predecessor to the one I am concerned with, but again it is not materially different. Much of it was relied on by Mr Hart while Mr Moules pointed to passages which went the other way. Shell had provided a customer with a consignment of diesel which had accidentally become mixed with a contaminant; the Belgian customer was therefore entitled to and did reject the consignment as in breach of the contractual specifications and safety requirements. The customer could not store the contaminated diesel, having regard to its environmental permit, nor sell it at the pump as it had intended. It was returned to Shell, which intended to mix it with other products and resell it. It was however marketable for much the same price, even without that further mixing. Was it "waste" in anyone's hands?

19. The CJEU said at [37]: "However, in accordance with settled case-law, a classification of a substance or object as waste is to be inferred *primarily* from the holder's actions and the meaning of the term 'discard'…." (My italics). It repeated the objectives of the WFD, namely that a high level of protection against harmful effects caused by waste management was required, particularly through the precautionary principle, which meant that "discard" could not be interpreted restrictively. Indeed, "discard" could cover both disposal and recovery of the substance. The existence of "waste" had to be determined in the light of all the circumstances, having regard to the aim of the directive and the need to ensure that its effectiveness was not undermined.

20. It continued:

> "41. Certain circumstances may constitute evidence that a substance or object has been discarded or of an intention requirement to discard it within the meaning of [the WFD].
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> 42. Firstly, particular attention must be paid to the fact that the object or substance in question is not or is no longer of any use to its holder such that that object or substance constitutes a burden which he will seek to discard…. If that is indeed the case, there is a risk that the holder will dispose of the object or substance in his possession in a way likely to cause harm to the environment, particularly by dumping it or disposing of it in an uncontrolled manner. That object or substance, because it falls within the concept of 'waste' [within the WFD] is subject to the provisions of that directive….
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> 43. [In this case] there was no absolute obligation to dispose of that consignment since it is not composed of a prohibited or illegal substance or of specified risk material of which the holder would be required to dispose…. As is apparent from the decision for reference, that consignment could be sold on the

market, without having been processed, in the condition in which it was when it was returned to Shell.

44. In its written observations, the Commission submits, nevertheless, that since, firstly, the consignment at issue was not suitable for the use intended for it by the Belgian client and, secondly, the Belgian client was not authorised to store it, due to its low flashpoint, that consignment was, so far as that client was concerned, a burden to which it intended, if it was not required, to discard.

45. Those facts alone do not, however, permit the conclusion that that consignment was 'waste' within the meaning of [the WFD]. It is necessary first to ascertain whether, by returning the consignment to Shell on the ground that it did not meet the contractual specifications, the Belgian client did effectively 'discard' it within the meaning of [the WFD].

46. In that regard, it is particularly important that the Belgian client returned the contaminated [diesel] to Shell, with a view to obtaining a refund, pursuant to the sale contract. By so acting, that client cannot be regarded as having intended to dispose of or recover the consignment at issue and, accordingly, it did not 'discard' it within the meaning of [the WFD]. Moreover, it is appropriate to add that, in circumstances such as those in the main proceedings, the risk that the holder will discard that consignment in a way likely to harm the environment is low. That is the case, a fortiori, where, as in the present case, the substance or object concerned has a significant commercial value.

47. In those circumstances, it remains to be ascertained whether Shell intended to 'discard' the consignment at issue, at the time the contamination was disclosed. Such an intention cannot be imputed to Shell before that time, since it was not aware at that time that it held a substance which did not meet the terms of the contract concluded with the Belgian client.

48. In that regard, the referring court, for which it is to ascertain whether the holder of the object or substance in question did in fact intend to 'discard' it, must take into account all the facts of the case, while ensuring compliance with the objective of [the WFD], which is to ensure that recovery and disposal operations will be carried out without endangering human health and without using processes or methods which could harm the environment.

49. With regard to the facts, referred to by the referring court, that, firstly, the consignment at issue could be sold on the market without being processed, in the condition in which it was when it was returned to Shell by the Belgian client and,

> secondly, the commercial value of the consignment at issue corresponds largely to that of a product which meets the agreed specifications, it is necessary to point out that, although those facts tend rather to refute the idea that that consignment was a burden which Shell would seek to 'discard' they cannot be decisive, since they do not show Shell's actual intention.
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> 50. Moreover, it is necessary to bear in mind in that regard that, in accordance with settled case-law, the concept of 'waste' must not be understood as excluding substances and objects which have a commercial value and which are capable of economic re-utilisation….
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> 51. Nor does the fact that the trade in products analogous to the consignment at issue is not, as a general rule, regarded as a trade in waste, permitted to be ruled out that Shell intended to 'discard' the consignment, although it constitutes additional evidence to suggest that that consignment is not waste.
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> 52. However, the fact that Shell took back the consignment at issue with the intention of blending it and placing it back on the market is of decisive importance in the present case.
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> 53. It would not be justified at all to make goods, substances or products which the holder intends to exploit in the market on economically advantageous terms in a subsequent recovery process subject to the provisions of [the WFD], which seek to ensure that recovery and disposal operations will be carried out without endangering human health and without using processes or methods which could harm the environment. However, having regard to the requirement to interpret the concept of 'waste' widely, the reasoning should be confined to situations in which the reuse of the goods or substance in question is not a mere possibility but a certainty, which it is for the referring court to ascertain, without the necessity of using any of the waste recovery processes referred to in [the WFD]….
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> 54. Having regard to all the foregoing considerations, the answer to the questions referred is that ['waste'] must be interpreted as meaning that, in a situation such as that at issue in the main proceedings, a consignment of diesel accidentally mixed with another substance is not covered by the concept of 'waste' provided that the holder of that consignment does actually intend to place that consignment, mixed with another product, back on the market, which it is for the referring court to ascertain."

The Environment Agency's 24 August 2019 Decision Letter

21. The Decision began by saying that the information on which it was based included that obtained on the site visit of 13 June. It summarised the facts as it saw them. It explained why it maintained its view that the kerosene was discarded:

> "The overriding reason for the removal of the used kerosene at the customer's premises is that the kerosene is a used/redundant substance that is losing/has lost its efficacy as a solvent degreaser and needs to be replaced; not in order that it can be reused back at your client's depots. The use at your client's depots is consequential. The customer, that is the holder or person in whose possession the used kerosene is, intends to get rid of the used kerosene. Although the used kerosene is not out of date or useless it is plainly no longer wanted by the customer/holder who has contracted with your client to be supplied with fresh kerosene.
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> There is no intention to reuse the kerosene for its original purpose on the open market after it is removed from your client's customers' premises. The cleaning solution is supplied by your client to its customers as part of a recirculating system unit that is designed for the solvent cleaning of small and medium-sized components. The use that your client makes of the used kerosene back at its depot is qualitatively different from the original purpose. Your client simply uses the used kerosene to rinse out the barrels that contained the used kerosene. What is being cleaned and how the cleaning takes place differ.
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> Your client's primary purpose is to supply its customers with kerosene. It does not intend to supply kerosene to its customers and also itself. The fact that your client makes some beneficial use of used kerosene is not determinative of its status. Your client makes a different use of the kerosene compared to its customers. The drums that are cleaned with the used kerosene are the same drums that were removed from the customers. Your client's use of the used kerosene is a consequence of the fact that the use kerosene and its container have been discarded by the customer and are no longer marketable for their original purpose. In reality your client's cleaning use is part of the process of resupplying your client's customers with a product that the customer wants, that is a recovered cleaning solution. It is also noted that by the time the discarded kerosene is used to rinse the drums it has already been treated by screening. Simply because the used kerosene is not immediately disposed of or recovered after collection from your client's customers' premises does not mean that it is not waste. The storage, treatment and use of the kerosene at your client's depots is part of the overall recovery of the kerosene. Until that recovery has taken place the aims of the Waste Framework Directive of a high level of protection of human health and the environment

> and the tracking of hazardous waste would be undermined without regulation."

22. The Decision Letter also dealt with a number of points raised by Safety-Kleen. It accepted that Safety-Kleen remained the legal owner of the kerosene at all times, but stated that its customers were the legal possessors of the kerosene when it was at their premises for their use, and it was they who discarded it by returning it to Safety-Kleen. That was not altered by the fact that it had an economic value to Safety-Kleen in its use in rinsing drums back at the depot. Certain factors relied on by Safety-Kleen were correct but not determinative in its favour: the used kerosene was not mixed with other waste; it was not a production residue; and its customers had no legal obligation to discard it.

23. It responded to the contention that it had been inconsistent in its treatment of the used kerosene and Safety-Kleen's cloth wipes, which it did not regard as waste when collected from customers or washing and re-use: the wipes were designed or used so that they could be reused, and so never became waste when in circulation as wipes, even when returned to Safety-Kleen for cleaning and redistribution for reuse. The key issue in relation to the kerosene, which admittedly became waste at some stage, was whether it was discarded by the customer when returned to Safety-Kleen.

The kerosene and the drums: the relevant facts about Safety-Kleen's operation

24. Safety-Kleen provides five models of washing equipment with various grades of kerosene. There are two differences across the range which need noting. In two of the models designed for manual operation, the drum of kerosene sits beneath the washing sink, which may be equipped with a hose and brush through which kerosene can be pumped. The kerosene can also be pumped from the drum into the sink. Cleaning can be by physical means and by solvent effect. The kerosene falls back into the drum for further use. At agreed "service intervals", the drum of kerosene, which the customer has been using, is collected by Safety-Kleen, which replaces it with a drum of cleaned kerosene. The drums of used kerosene are removed by vehicle to the depot. On the same trip, those vehicles may also transport what is accepted to be hazardous waste from customers, as part of a different service provided by Safety-Kleen.

25. In three other models, one manual and two automatic, and used to clean larger parts or larger numbers of smaller parts, there is both a sink for soaking and washing. The kerosene is contained in a reservoir below the sink. The parts to be cleaned can be placed in a basket brought up from the reservoir, and then lowered back into the reservoir, for soaking and mechanical agitation, somewhat in the manner of a dishwasher. The basket is then raised and the parts can be cleaned manually in the basket in the sink; a flow-through brush and hose can be used. The used kerosene drains back into the reservoir for further use. The reservoir is an integral part of the equipment. At the agreed "service intervals", Safety-Kleen collects the used kerosene, by siphoning it off into a drum, and refilling the reservoir with cleaned kerosene from another drum. The drum containing used kerosene is likewise returned to the depot.

26. There was no specific description, where no drum was removed, of how the part of the equipment, from which the used kerosene was removed, was itself then cleaned. However, the evidence of Mr Walker, UK Technical Manager at Safety-Kleen, was that residues from the integrated sump were removed into the drums, as I read his second witness statement [7e subpara]. I accept that is what happened, as it makes sense of the description of the operations, rather than for the residue to be left behind in the container into which the cleaned kerosene was to be poured, or left for the customer to clean out.

27. On the return of the drums to the depot, all the drums are emptied into the sump or reservoir through a coarse mesh. The rinsing process takes place behind a closed door, in a machine with the empty drum upside down over a static pressurised spray nozzle. Used kerosene from the reservoir is pumped up through the nozzle and sprayed over the inside of the drum. The process is automated, so no brushing is involved. The time set for the rinse is controlled by the Safety-Kleen operator, and is usually less than half a minute. If, on a visual inspection, a second rinse is required, the operator repeats the process. The kerosene and drum residues, of oily dirt and grime, drain back into the reservoir, again passing through the coarse mesh.

28. After the drums have been rinsed, and the re-used kerosene has drained back into the reservoir, it is pumped to the "dirty" tank. This tank is emptied approximately once a fortnight, but before it is full.

29. The rinsing process, to remove residues from the drum so as to make it fit for re-use as the container for cleaned kerosene, re-used the kerosene already used by the customer in what was called a "virtuous cycle". This was regardless of whether the drum had been an integral part of the operation of the manual machine or simply the container for the transport of used kerosene from automatic machines. The virtue from an environmental point of view was that it avoided the use of fresh kerosene, which would create further dirty kerosene to be cleaned, and it avoided the use of other cleaning liquids which could contaminate the kerosene, and increase the volume of waste to be treated. The Environment Agency accepted the advantages of this further use of the used kerosene. These too represented commercial advantages for Safety-Kleen, as the used kerosene could do what was required and new drums were not required for each consignment of cleaned kerosene. This use of the kerosene was not affected by the degree of contaminant in the returned kerosene, nor by the level of residue in the drum.

30. There were a few factual differences which I now turn to. First, I am satisfied that the kerosene is collected in drums from customers using the automatic machines, and returned in drums, and that all the collecting drums are rinsed with used kerosene from the reservoir at the depot in the same manner as the drums removed from the manually operated equipment. Safety-Kleen is accurate in its description of what actually happens in the collection of used kerosene from its customers, and what happens when the drums are returned to the depot. It has far greater familiarly with that process than the Environment Agency could have from one visit. And in the end, this was not the subject of serious contest. I am also satisfied that all the used kerosene was emptied into the reservoir from which the rinsing kerosene was drawn.

31. Second, the Environment Agency said that this was essentially a physical process in which the pressure of the liquid did the work of cleaning. Safety-Kleen said that there

was both a physical and a solvent effect; pressurised water would not have worked, quite apart from the increased waste volume which its use would have created. This was an issue because Safety-Kleen, in order to advance its submissions that the used kerosene was not "waste" until after its re-use, sought to draw similarities between the cleaning operations of its customers and those which it itself undertook with the kerosene and drums at its depots. Mr Walker said, in his first witness statement dated 20 November 2018, that physical agitation, by scrubbing or automatically, was the primary method of removing grease from parts, as it was with removing residues from the drums. Dr Hall, a Senior Adviser in the Waste Regulation team of the Environment and Business Directorate of the Environment Agency, expressed the view in his witness statement of 4 June 2020, by reference to his notes of a visit on 13 June 2018, before the Decision Letter, that the kerosene was used to "dislodge the solid residues off the bottom of the drums" or enough to enable the drums to be refilled with cleaned kerosene. He contrasted that with the aim which customers had of making their parts "sparklingly clean"; they used the kerosene with both a physical and chemical effect, whereas Safety-Kleen used it merely for a physical effect. Mr Walker responded to that in a second statement dated 22 June 2020: water would be no more effective in cleaning the drums of residues, than it would be when cleaning a car or a greasy frying pan without detergent. He produced a video which showed the effects of a 25 second wash of a drum with water compared with washing with kerosene. The majority of the grime remained after the wash with water, yet after the kerosene wash, the majority of the grime from that same drum had been removed. Therefore, the cleaning of the drums could not simply have been the result of any liquid forced under pressure into the drum; there must have been some solvent effect.

32. The difference is not large and, at its largest, it is not more than part of the overall argument. Safety-Kleen says the operation of the kerosene is "primarily physical" for both parts and drums, the Environment Agency says "solely physical" for the drums and a combination of physical and solvent reaction for the parts. This is not an issue upon which the Environment Agency's view merits any particular weight or margin of appreciation. Its view was not based on watching the actual operation of the drum cleaning, since that took place behind the closed door of the machine, nor was it based on any experimental comparison, nor could I see that any actual expertise which the Environment Agency had was involved.

33. I prefer the judgment of Safety-Kleen, which actually carries out the work as part of its business, and routinely sees the drums before and after rinsing. I also consider that some weight can be given to the experiment shown in the video, on which the Environment Agency had no further comment. It also seems unlikely that no part of the drum cleaning could be attributed to the qualities of the very product which was used to remove the grime from parts in the first place.

34. However, if, as Safety-Kleen says, the primary effect of the equipment supplied is to enable cleaning by physical means to take place, the solvent effect of the kerosene is nonetheless rather more important in cleaning parts than it is in cleaning drums. The parts, after cleaning, are likely to have to be more perfectly cleansed than the drums, "sparklingly clean" as Dr Hall expressed it. The process provides the opportunity for the parts to soak; the variable time taken in parts cleaning, including time for manual effort and visual inspection, with the visual clarity of the cleaning kerosene enabling an anxious scrutiny of the cleanliness of the parts, is likely often greatly to exceed

the half minute or so involved in rinsing the drums. That applies with still greater force to those drums used only for the transport of used kerosene compared with those which have held the kerosene, with its growing residue of grime, for the duration of the service interval.

35. Third, Dr Hall raised the question of whether drums, into which used kerosene from the automatic machines was decanted simply for transport to the depot, also needed rinsing. Indeed, Dr Hall doubted that the rinsing of any drums was "strictly necessary", or "significant or necessary": discolouration of the kerosene was not regarded by Safety-Kleen as material to its cleaning effectiveness, but rather as a means of avoiding rejection by customers of dirty-looking kerosene. This went rather beyond how the Decision Letter had treated the use of the kerosene for drum washing in the whole cycle. There is no evidence to show the extra degree of contamination, if any, of the kerosene before and after its use in rinsing out the drums.

36. Mr Walker's evidence was that all drums were rinsed. I accept that they were all rinsed, though there would probably have been rather less oily residue and grime, to be removed by pressurised washing, from the transportation drums. Rinsing of all drums was, in business terms, at least obviously sensible and useful, and environmentally beneficial. This rinsing was necessary for Safety-Kleen's business to supply customers with the product they wanted, on Dr Hall's own evidence. I am not sure by what measure the Environment Agency, which is not in the business at all, judges the rinsing of either group of drums not to be "necessary", or why necessity has any part to play in the judgment I have to make, where the practice of rinsing out dirty drums with solvent is beneficial to the operation of the business and, if they are to be rinsed at all, it is useful environmentally to rinse them with used kerosene. It seems an obviously sensible thing to do so that the cleaned kerosene is not immediately re-contaminated or discoloured to some degree. And if the drums are not cleaned each time, residues may build-up. It may be simply "good housekeeping", to get rid of anything which might have stuck to or remain in the drum. I infer that it has some value to the overall process of recovery and later re-use, as it takes time and some cost. There is no suggestion that this rinsing was merely a device to advance the argument that the used kerosene was not waste.

37. There is no evidence, however, that the used kerosene has any marketable value, though it has a value to Safety-Kleen because it avoids the use of fresh kerosene or water and detergent, and thus an increased waste volume to be disposed of.

38. Fourth, there was an issue over whether all of the returned kerosene was in fact used in the drum rinsing process, or whether it went straight from reservoir into the "dirty" tank. This is a rather more significant point, since any kerosene which went straightaway to the "dirty" tank could not benefit from Safety-Kleen's argument about the significance of its use in drum washing for its status as not "waste". It was also a new point, not raised in the Decision Letter, but raised in the Environment Agency's evidence of June 2020, with its disclosure of its notes of the site visit of June 2018.

39. Mr Sterry, of the Environment Agency, also a Senior Adviser in the Waste Regulation team in the Environment and Business Directorate, gave evidence in a witness statement dated 4 June 2020. He was brought in as "an expert in the definition of waste". He had been part of the team at the site visit in June 2018. His observations were that the time taken to rinse a drum was variable, and appeared to depend on

when the next drum was ready; the volume of kerosene used in the rinsing did not relate to the volume which the drum had contained; he considered that only a small volume of kerosene was required for a satisfactory washing. More kerosene was returned to the depot therefore than was in fact used to wash the drums: "An argument here to say that only a small fraction of the returned used kerosene has a continuation of the use or incidental use". Dr Hall agreed with the observation and thought it "very unlikely" that all the returned kerosene was used in the rinsing process.

40. Mr Walker responded in his second statement dated 22 June 2020. It was incorrect that some used kerosene returned to the depots was not used in the drum washing process. The most commonly used drum held 30 litres in a 60 litre capacity drum, another held 60 litres in a 120 litre capacity drum; drums used for transportation purposes held 90 litres, 120 litres in a 200 litre capacity drum, and 320 litres transported in two 200 litre drums. In fact, there were only three sizes of drum, 60, 120 and 200 litres. All fitted in the drum washer. On average, 700 litres of used kerosene arrived at each depot daily.

41. The sump or reservoir capacity at the depot was 900 litres which, when reached, triggered the sump float switch which swiftly pumped 760 litres into the "dirty" tank, bringing the level of used kerosene in it down to 140 litres. So, the average daily input to the reservoir would not trigger a flow straight away into the "dirty" tank. It was possible that if the sump were draining into the "dirty" tank at the moment when used kerosene was poured into the sump from a returned drum, that it could mix with kerosene that had already been used in the rinsing process and flow straight into the "dirty" tank. But it could only be a very small amount. The "dirty" tank had a capacity of 26000 litres.

42. It took 20-30 seconds on average to rinse a drum. Given the flow rate through the cleaning nozzle, about 100-150 litres of used kerosene were sprayed into each drum for rinsing. On average, about 23 drums a day were returned to each depot. That would require 2300-3450 litres of used kerosene. The equivalent of 700 or so litres would have been re-used on at least 3-5 occasions to rinse drums. It seems improbable in the extreme that any kerosene in the reservoir would have escaped re-use in rinsing, save perhaps for the small amount which might have been poured in while the sump was draining the full reservoir to the "dirty" tank. I accept, for all practical purposes and for the purpose of the issue in these proceedings, that all the returned used kerosene was used in rinsing the drums. Mr Sterry's surmise that only a small amount was so used seems ill-founded, as was Dr Hall's acceptance of it. There was no response to Mr Walker's evidence.

43. Fifth, the drums themselves were not regarded as waste because the rinsing operation was regarded as "so simple and superficial" as to be part of the drum emptying process, which was covered by Safety-Kleen's waste permit for the depots, as part of a "repackaging activity" before recovery. If drum cleaning were a specialised treatment process, it would require a separate permit rather than just being included in the repackaging part of Safety-Kleen's permit. I think that "simple" is a fair description of the drum cleaning process; it is certainly not a specialised treatment process. It does not involve a scrubbing so as to make the drums "sparklingly clean" or as clean as the kerosene washed mechanical parts are; it is a simple rinse with kerosene under pressure. I am not clear what "superficial" adds, other than an

adjective minimising what is done. Drums may need a second rinse but there was no evidence of the application of "elbow grease" on those occasions.

44. I turn to another point on which Mr Hart placed emphasis: the contractual position. The equipment is supplied under Safety-Kleen's standard terms and conditions. By clause 6.1, the "equipment", which, on the contractual definition includes the solvent, remains the property of Safety-Kleen at all times, and the only right which the customer has in it is the right "to use and possess" it. This ownership provision is necessary because of the status of the kerosene in Safety-Kleen's hands as a "tied oil". This status is of value as Safety-Kleen does not have to pay excise duty on it so long as it remains in Safety-Kleen's closed loop, so as to be put to an "eligible use", as this use is. It must remain the property of Safety-Kleen for that purpose. Nor could it be mixed with any other of its waste streams, including aqueous waste.

45. Clause 5 makes provision for the change of kerosene during the period of the contract. Mr Hart put considerable weight on the way in which that obligation was formulated, for his contentions about whether or not the customer "discarded" the used kerosene. It provides that a change of cleaning solvents is not at the customer's choice or judgment but that whether a change is required is a matter for "the reasonable opinion" of Safety-Kleen. Service visits were however required, in the number and frequency contractually agreed, for the purpose of assessing the condition of the equipment including the cleaning solution; this is the agreed "service interval".

46. The commercial reality behind those terms is however that, before customers sign the contract, Safety-Kleen gives them a free trial of the equipment to see how often the kerosene will need changing, i.e. what the service interval should be. There are standard service intervals of 4,8,12 or 26 weeks. Mr Walker said that it was Safety-Kleen which decided on the service interval. I think that that rather overstates the position. It is in reality the subject of agreement, as he said, in the light of a judgment as to what the customer needs for its own purposes after a trial use, before entering the usual 2-3 year contract. The replacement of the drums therefore is not an ad hoc arrangement, with each consignment of kerosene being examined during use for the point at which it ought to be changed; ad hoc replacements can be provided for an additional fee. Mr Walker also said that the timing of the change of kerosene, though agreed with the customer, took account of how Safety-Kleen intended to use the kerosene, on its return to the depot for rinsing the drums. But there is no evidence that that actually affected the service intervals in reality, measured in multiples of weeks as they are, in agreement with the customer.

47. The final factual point I need to cover concerns the controls which are in place for the transport of kerosene as clean kerosene and those for the transport of hazardous waste. The Environment Agency put considerable weight upon this difference in its consideration of the purpose of the WFD and what a purposive approach requires. It is accepted by Safety-Kleen that the used kerosene would be waste if it were to be taken from the customer's premises to the depot, and transferred to the reservoir or "dirty" tank without being used for rinsing the drums. If it were waste when removed by Safety-Kleen from the customer's premises, it is agreed that it would be hazardous waste. If Safety-Kleen is correct, for the journey from customer to depot, the used kerosene would be subject to the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009 S.I.No.1349. These are the same

Regulations which also would have applied to its carriage from depot to customer as cleaned kerosene in the first place.

48. Dr Hall described these as health and safety measures, providing e.g. for how goods were labelled and packaged, and for the training of the driver. They covered only the carriage of the kerosene, and did not cover what he described as the tracking and handling arrangements which were required under the HWR. His view was that, if it were not "waste", an environmentally dangerous substance would be inadequately regulated to protect human health and the environment. The HWR require a more detailed consignment note to be filled in by Safety-Kleen specifying the hazardous waste types being collected; the principal addition would be carcinogens in the used oils. The HWR require the waste to be carried by a registered waste carrier, as Safety-Kleen is, and it would have to be transported to a site specifically permitted to receive it, as Safety-Kleen's depots are. The consignment has to be formally handed over at the point of receipt at the depot. So there is a chain of responsibility from customer to depot. It has to be received, handled and stored in accordance with published guidance; and there is no suggestion that it is managed at the depots otherwise than in accordance with that guidance. However, if the HWR did not apply, there would be no legal obligation on Safety-Kleen to manage the used kerosene in accordance with them, and the related guidance, until the used kerosene left the reservoir for the "dirty" tanks.

Conclusions

49. The three grounds should be taken together. The second ground, concerning alleged misunderstandings of the way in which Safety-Kleen operated the cleaning process at the depot, and its comparison with the cleaning process carried out by its customers, are best resolved and weighed as part of the consideration of the factors relevant to the fundamental question: waste or not at the point of collection? There is no value in considering them as possible separate public law errors, and if errors, sending the decision back for reconsideration on the correct basis, when it is agreed that the decision is for me. The third ground, relating to cloth wipes and the asserted inconsistency in the Environment Agency's approach to the used kerosene, is likewise a matter which goes to an argument deployed in answering the fundamental question.

50. I consider that the judgment of the Environment Agency, to the extent to which it is based on a correct appraisal of how Safety-Kleen operates, is entitled of itself to be given considerable weight in my judgment as to how the fundamental question should be answered. This is not saying that, if it interpreted the law as to the meaning of "waste" correctly, and its application is reasonable for an expert regulator, it must succeed in this action. Rather, it is saying that its judgment is not just to be put to one side because the question is for me to answer. It is entitled to significant weight as the judgment of the expert and responsible regulator, familiar with the multifarious issues to which the language of the WFD can give rise, and in which it has to be applied. If the issue had been whether its judgment was rational, and took account only of the material facts, I would have upheld it without hesitation, whatever debates about side issues there might have been.

51. The weight to be given to the Environment Agency's view is particularly important when judging the significance of the used kerosene not being classified as a waste for the purpose of its transport from the customer to the depot, and handling there. Of

course, that is not to say that a purposive interpretation means that the WFD definition must be taken to cover whatever it ought to cover, regardless of its language. But it is an area where that view is of particular importance in judging the WFD purpose and whether the interpretation of "waste" in the WFD advanced by Safety-Kleen is contrary to its purposes.

52. Indeed, as will appear, having reached my own judgment, I find myself in agreement with the evaluation in the Decision Letter.

53. There are differences of fact which arise from subsequent evidence, and criticisms of some of the expressions, but these are not significant in my judgment. For the reasons I have already given, I approach my judgment on the basis that all the drums are rinsed, and that all the used kerosene is used in drum cleaning. This is for the commercially necessary or at least beneficial process of cleaning drums, for their re-use with clean kerosene, or even their disposal when too worn out for re-use. The use of the dirty kerosene for this purpose is also environmentally beneficial. The kerosene itself has a role to play in the rinsing process beyond the mere pressure of a cleaning liquid.

54. The starting and key point, in resolving the fundamental issue, is the status of the used kerosene in the hands of the customer when it is collected by Safety-Kleen: is it being discarded by the customer? The indicative factors all have to be considered; no single one is likely to be determinative.

55. Paragraph 37 of the *Shell* case makes it clear that its classification as waste or not is primarily to be inferred from the holder's intentions and actions. If it is waste upon discard by the holder, it would have to cease to be waste immediately upon receipt into the hands of Safety-Kleen, for Safety-Kleen to be successful.

56. I have no doubt but that the customer intends to discard it within the meaning of "waste" and does indeed discard it upon its collection. The customer is clearly the holder of it, because it has legal possession of it. The fact that Safety-Kleen retains ownership of the kerosene is nothing to the point, at this stage. The customer no longer needs it or wants it, and is indifferent to what beneficial use Safety-Kleen may be able to make of it back at the depot. All the customer wants is a drum of cleaned kerosene or for a basin to be refilled with clean kerosene. The fact that Safety-Kleen intends to make a beneficial use of it back at the depot cannot bear on the customer's intentions. Indeed, that is a commonplace of "waste". The kerosene is just as much discarded by the customer even though Safety-Kleen will use it back at the depot, as it would be if the kerosene for whatever reason went straight to the "dirty" tank.

57. I do not accept that this is altered by the fact that the service intervals are set in the contract, and that the customer does not seek a change at that specific time. The reality is that the kerosene is not changed against the will of the customer, or changed so that Safety-Kleen can make further use of its unexhausted properties. The service intervals are agreed, albeit that they are at set intervals which may mean that the usage could have carried on for a longer period. They are agreed after a free trial, the purpose of which is to enable the customer to see how often it needs the kerosene to be changed. It does not have the fresh kerosene foisted on it unwanted because Safety-Kleen can profit the more from that. In practical terms, the effect of the service intervals is that the customer has assessed and agreed with Safety-Kleen what are the

best times for the kerosene to be discarded by the customer to Safety-Kleen, and both plan accordingly. The fact that the level of contamination permits some further brief cleaning use to be made of it, is not significant in the picture. Should the kerosene need changing earlier, the change takes place on an ad hoc basis for a further fee; Safety-Kleen did not suggest that that involved a "discard"; it would be transported back in the same way and would go through precisely the same processes back at the depot.

58. This conclusion is supported by a more general point arising from the purposive approach. It would be waste on collection from the customer were it not for the rinsing process at the depot. It will by then contain containments which would make it hazardous waste, if waste at all. It would be hazardous waste, to which the HWR would apply, if it were not used at the depot for drum rinsing. The use of it at the depot does not create that hazardous nature. The used kerosene has admittedly become waste when leaving the reservoir at the depot, for the "dirty" tank. If there were two streams of kerosene, one re-used in rinsing and the other not, a distinction would thus have to be drawn between the two streams of kerosene in their consignment to the depot, transport and handling at the depot before use in drum rinsing, which would depend entirely on what happened at the depot, *after* the transportation, receipt and handling had taken place. That is not the outcome of a purposive approach to the WFD, but rather of an unduly narrow and legalistic approach. Distinctions which are important in practice should turn on factual differences of relevance and significance, and not on factual differences of no significance for the application of the WFD or HWR, or the distinction between the two transportation and handling regimes. Nor is it an answer that the regime operated, at the depot but not in transportation, complies with the statutory requirements for the handling of hazardous waste. The law should be applied because the facts come within its scope.

59. Another factor referred to in the jurisprudence is how the material in issue would be "commonly regarded." There is no evidence on this. I do not know whether this used kerosene would be "commonly regarded" as waste nor who or how many or of what degree of knowledge should be asked; perhaps an officious bystander would fit the bill. My merely impressionistic answer would be that it was waste and that most people would say so, because it has been used by the person who wanted clean kerosene, and who now wants fresh kerosene to replace it. The fact that Safety-Kleen had referred to the used kerosene as waste in its publicity material in 2016, does not assist on this point, any more than does the view expressed by Environment Agency staff on a site check that the used kerosene was not waste, a view which they said was based on incomplete information.

60. Mr Moules drew my attention to 2018 Government guidance as to what constituted waste. "Discarding" covered recycling and recovery operations, and extended beyond simply throwing things away. It instanced soil excavated in construction operations which could be re-used on another site. I did not find that this of real assistance in this context, though it reflects the position that re-use of discarded material for commercial purposes does not prevent it being waste. The guidance reflects the CJEU and domestic jurisprudence without being so detailed as to assist on this specific issue. And if it had been, it would still have been for me to decide the issue.

61. There is no evidence that used kerosene has a marketable value, even though put to beneficial and commercial use.

62. Mr Hart's essential submission, to counter the conclusion to which those factors lead, is that the used kerosene did not become waste in the hands of Safety-Kleen's customers, and they did not discard it; nor did it become waste upon collection into Safety-Kleen's hands. It only became waste when it was sent to the "dirty" tanks. He submitted that the system should be seen as a cycle in which beneficial cleaning use was made of the kerosene by both users, and that its use was controlled by Safety-Kleen so that it could be removed while there was still life left in the kerosene to enable its re-use at the depot for drum cleaning.

63. I do not accept this analysis. I have already dealt with the commercial reality of the selection of the service interval, the position of the customer in relation to the used kerosene, and the facts about the use made of the used kerosene at the depot for drum cleaning, including the probability that its effect is more than just the consequence of the pressure with which it is sprayed into the drums, and that all of it is used in drum cleaning and that all drums are thus cleaned. The remaining aspects for me to deal with are the comparison between the drum cleaning at the depot and the parts cleaning by the customer, and the significance of the drum cleaning in the overall operation.

64. I agree with the approach of the Environment Agency on these aspects. The use of the used kerosene is subordinate and incidental to that made of the kerosene by the holder/customer. The principal use of the kerosene is to clean parts of contaminants, up to the point where it can no longer fulfil that function as required by the customer. It is that use which, in reality, determines the customer's choice of kerosene as their cleaning agent, the need to start with fresh kerosene, how long it is used for, and when it is removed from the customer. It is in use for the service interval, albeit not continuously, and the shortest interval is 4 weeks. That is its primary use, and Safety-Kleen is in business to supply kerosene for that primary use. Safety-Kleen itself only uses it for a brief period measured in seconds. Fresh kerosene is not required for that rinsing at all. It is a sensible and environmentally beneficial use of the used kerosene on its way from depot to cleaning, but that does not make its use comparable to the use made of it by the customer/holder.

65. The rinsing is a useful, though distinctly subordinate, part of the whole cycle whereby used kerosene and drums are made fit for re-use, customers receive what they want, can see that it has been cleansed, and do not require virgin kerosene each time. It is useful, and the more subordinate, in the case of the rinsing of those drums which have merely been used for the transporting of the used kerosene from the customer to the nearest depot, which is a much shorter time for drums to become begrimed with settled side and bottom residues. I agree with the characterisation of the drum cleaning process as "simple", and that reflects the fact that, were a more specialised form of cleaning required, the drums themselves would be seen as waste by the Environment Agency. Drum rinsing is not remotely like the form of forced evaporation or distillation which the kerosene itself undergoes in the specialist cleaning process. The use of used kerosene in cleaning drums is an incident of the cycle of supply, use, collection and preparation for reuse of the kerosene and drum. It is but part of the larger process carried on at the depot and later at the specialised cleansing premises for making kerosene fit for resupply to customers and drums fit

for transporting it to them and, in many models, for containing cleaned kerosene there.

66. I accept that Safety-Kleen makes a beneficial use of the used kerosene, which has a commercial value to it, but that cannot be seen as part of a continuum of beneficial use with that made by the customer. The fact that such a use is made is not here a powerful factor against a substance being waste; it is a commonplace of waste. It is received as waste and remains waste, notwithstanding the intended beneficial use of it by Safety-Kleen, which receives it upon discard.

67. However, I shall say a little more about *Shell*, as it was the foundation for much of Safety-Kleen's argument. As I have said, *Shell* [37] shows that the primary question is as to the intentions and actions of the holder. This is emphasised in [42], where particular attention has to be paid to the fact that the substance is of no more use to the holder, such that he will seek to discard it. "Discard" here is being used in the special sense which it has acquired in the WFD. Also important was that it was not "absolutely" illegal to hold the substance, and it could be disposed of on the market by the Belgian customer, without being mixed with anything else; [43]. The fact that it was not suitable for use by the Belgian customer, who was not authorised to store and intended to return it to Shell, did not necessarily mean that the Belgian customer "discarded" it within the special meaning of that word in the WFD. The Court concluded that the Belgian customer did not in fact "discard" it, because it returned the substance to Shell for a refund of the purchase price, as it was contractually entitled to do. Thus, it did not intend to dispose of or to recover i.e. to "discard" the substance. The objective of the WFD in avoiding the risk of environmental harm through unregulated discard was low, but even more so where the substance had a significant commercial value; [46].

68. It was only once that conclusion had been reached, that the Court then turned to consider what the position of the substance was in the hands of Shell. Had it concluded that the Belgian customer intended to "discard" it, it would have been waste in its hands and would have come into Shell's hands as waste. It would not have been relevant then to go on and consider, as the Court did, whether Shell intended to "discard" it. Paragraphs 47-54 deal with the position of Shell as holder of the substance, and not with factors relevant to the position of the Belgian customer as its holder.

69. Safety-Kleen's argument was that the customer did not discard the used kerosene, and that it itself did not discard it until it was sent to the "dirty" tanks. In *Shell*, the CJEU decided that the Belgian customer did not discard the sub-specification diesel fuel; following that conclusion, it had to go on to consider whether Shell, who took back the fuel, had discarded it. It found that it had not discarded it, so the consignment never became waste in anyone's hands. That is rather different from the position of Safety-Kleen which accepts that the used kerosene became waste, but debates the stage at which that happened, and accepts that, without the rinsing use, it would have been waste upon collection from the customer.

70. The Court gave considerable weight to the commercial value of the fuel in Shell's hands, roughly the same as it would have been but for the accidental mixing. It recognised that that did not determine what Shell's subjective intentions were, and they were critical, given that "waste" could include items which had commercial

value, capable of economic utilisation. Trade in such substances would not generally be regarded as a trade in waste. What was decisive was that it was taken back by Shell for blending and sale on the market.

71. Mr Hart saw Safety-Kleen's customers in the position of the Belgian customer: they did not want the used kerosene; they were not going to discard it but returned it as contractually they were entitled and bound to do; there was a low risk of a disposal in a way which would harm the environment, and it would be of value to the recipient Safety-Kleen. He saw Safety-Kleen in the position of Shell: contractually entitled and obliged to take back the used kerosene, with the actual intention of making a commercial use of it before it became waste.

72. Mr Moules saw Safety-Kleen's customers as discarding the used kerosene, which was no longer marketable, even though Safety-Kleen might put it to some simple, brief, subordinate use, as part of the preparation of drums and used kerosene for recovery and reuse. It was destined for a recovery operation when collected from the customers. No refund was sought. Once it was discarded by its customers, it was waste in Safety-Kleen's hands and its subsequent intentions were not the point; and it was accepted that it became waste after the rinsing of the drums. By comparison, neither the Belgian customer nor Shell at any time discarded the oil.

73. I consider that Mr Hart's reliance on *Shell* is misplaced. In the first place, the Court considered the position of the Belgian customer and concluded that it did not discard the diesel. The first important feature was that the Belgian customer could sell the unused but contaminated diesel on the open market, and do so in the condition in which it had received the diesel from Shell. It did not have to rid itself of the diesel. The second important feature was that it could return the diesel to Shell for a refund, and so never intended to discard it. But there are also two important differences: (1) here the customers have used the kerosene to the point that it is no longer or not much longer useful to them; the Belgian customer did not use the diesel at all; (2) Shell's diesel fuel had a market value, in its present condition, in the Belgian customer's hands, and a value not very different from that of the fuel contracted for. The used kerosene has no value to Safety-Kleen's customers or to anyone but Safety-Kleen, and if Safety-Kleen did not take it back, its customers would have to dispose of a hazardous waste. I accept that Safety-Kleen are obliged to remove and replace it under the contract which provides a similarity to the position of Shell, but that does not overcome the distinction that the product has been used by the customer, as intended, and it is that used product which Safety-Kleen has contracted to remove.

74. Second, it was only once the Court had concluded that the Belgian customer did not discard the diesel that it went on to consider whether Shell discarded the oil. Mr Hart did not suggest that if Safety-Kleen's customers discarded the used kerosene, Safety-Kleen's intended use changed what was waste into non-waste. The Court in *Shell* found that, when Shell became the holder of the diesel, its commercial value in Shell's hands was relevant to whether the diesel was waste or not. But what was determinative was Shell's actual intention to blend it and place it back on the market. I do not see the fact of an intention to blend as critical of itself; it was the evidence of the actual intention to sell it on the open market as diesel which mattered. That is very different from the position of Safety-Kleen, which is not going to sell the used kerosene on the market. Nor is it going to use it to supply customers, which is what it is in business to do, without it undergoing a specialised industrial cleaning process. It

is going to be used for a brief, simple, albeit useful, cleansing process, before going off for specialised cleaning. That cleaning process is itself but part of the process enabling used kerosene to be prepared and transported to replace dirty kerosene. The use for cleaning brings about no significant change in the dirty nature of the kerosene, for better or worse. What Safety-Kleen does to the used kerosene before it goes to the "dirty" tank is no more than a short beneficial use of what it receives as waste. Still less could it change the used kerosene from waste into something other than waste before it is changed back again on going to the "dirty" tank.

75. Finally, I find no assistance in the parallels or distinctions with cloth wipes; I have to deal with the used kerosene. However, I did not find the judgment of the Environment Agency about the cloth wipes to be other than a reasonable and a justified distinction on the facts, with which I agree. If the cloth wipes and used kerosene are truly parallel, that could only show that the Environment Agency has treated the cloth wipes wrongly. They were designed for washing and re-use; they never became waste. The used kerosene admittedly became waste as it went to the tank. It was cleansed through a specialist process. If the kerosene had not been put to an incidental and subordinate use at the depots, it would have been waste when collected. Used kerosene is not like used cloth wipes although parallels could be drawn, to the disadvantage of Safety-Kleen's cloth wipes. I note in this context the distinction which the 2018 Government guidance drew between milk bottles, returned for washing and re-use, which were not waste, and drums which had contained chemicals and required specialist cleaning before re-use, which were waste. There are similarities and differences, but this simply serves to emphasise how each case turns on an appraisal of its own facts.

76. I do not regard drawing parallels or distinctions between such items as a useful approach. Searching for logical consistency in the application of the broad term "waste" to the many and varied situations which call for decision as to its application, risks a fool's errand. This is not because of any failings in the jurisprudence of the CJEU, but because the very exercise itself is misconceived. The situations are too varied for the Framework language to provide for all. Judgments, about specific substances and circumstances, based on the extent to which the purposes of the Directive are advanced or evaded by classification as waste or not waste, will never yield a logical consistency, agreeable to all those who, however rare, see logic as the touchstone for decision-making in this area. Instead, more valuable is a purposive judgment upon the facts relevant to the characterisation of the intentions and actions of the actual holder in relation to the substances at issue.

77. That disposes of the issues. I have set out the facts as I find them to be resolving such misunderstandings as I consider I should. Whatever misunderstandings there were of the processes back at the depot or at the customer, the primary considerations drawn from the essential language of the Directive and CJEU jurisprudence point convincingly in the direction of only one answer.

78. Accordingly, this application is dismissed.