[2021] UKFTT 0440 (TC)

TC 08324

PROCEDURE – admissibility of expert report which included law, opinion on legal issues and opinion on statutory question – parts of the report ruled to be inadmissible

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/03806
TC/2019/04185

BETWEEN

(1) SINGLETON BIRCH LIMITED
(2) FCC RECYLING (UK) LIMITED

Appellants

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE GERAINT WILLIAMS

The hearing took place on 1 December 2020.

With the consent of the parties the form of the hearing was a video hearing using the Tribunal video platform. A face to face hearing was not held due to the Covid-19 pandemic.

I was provided with a hearing bundle (234 pages), a supplementary bundle (325 pages), an authorities bundle (457 pages), Appellants Statement of Objections, Skeleton Argument and Supplemental Skeleton Argument and HMRC's Skeleton Argument and Speaking Note all in electronic format. Prior notice of the hearing had been published on the gov.uk website together with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such , the hearing was held in public.

Akash Nawbatt QC, counsel, instructed by Stewarts LLP for the Appellants

James Puzey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This decision concerns the Respondents' ("HMRC") application for permission to admit expert evidence on matters concerning the classification of the waste in issue in the appeal. The substantive appeal concerns the correct Landfill Tax ("LT") treatment of certain waste ("the FCC waste"). Singleton Birch Limited ("SB") is a landfill site operator and accepts waste from two businesses, FCC Environment Limited ("FCC") and Cristal Pigment UK Limited ("Cristal"). The waste is processed via one waste stream by FCC and via another stream by Cristal. The issue in the appeal is whether the FCC waste received by SB from FCC falls within the definition of Group 6(i) and Note 9(a) of The Landfill Tax (Qualifying Material) Order 2011 ("QMO") as "calcium based reaction wastes from titanium dioxide production" and could be accounted for at the lower rate of LT.

2. The expert evidence, which is the subject of HMRC's application, is a report dated 9 July 2020 by Dr Andrew Godley, a Principal Consultant in the Due Diligence group of the Waste and Resources Management business practice at Ricardo Energy and Environment. HMRC submit that it is necessary for the report to be admitted to reply to the witness evidence and exhibits of Mr Ian Martin, the general manager of FCC, as his evidence and exhibits address in detail the technical processes of the production of the FCC and Cristal waste, their chemical composition, the production and chemical composition of Air Pollution Control Residue ("APCr") waste, a comparison of the FCC and Cristal waste chemical composition and comments on the regulatory regime for LT. HMRC argue that Dr Godley's report addresses matters that are likely to be central to the determination of the appeal and are matters of a complex, technical and scientific nature.

3. The Appellants objected to the application on the following inter-related grounds: (i) HMRC had failed to follow the correct procedure/were premature in instructing Dr Godley; (ii) the questions posed to Dr Godley are variously inappropriate, irrelevant or too vague and usurp the role of the Tribunal; (iii) the 'equality of arms' claim by HMRC does not arise; (iv) HMRC has not established that Dr Godley has the necessary knowledge to answer and/or there is a reliable body of knowledge or experience to underpin his evidence on each of the questions raised; there is a relevant area of expertise or that Dr Godley has relevant expertise; (v) Dr Godley's report is not independent and impartial; and (vi) the majority of Dr Godley's report is irrelevant or unnecessary for the resolution of the issues in the appeal.

LAW

Tribunal Rules

4. It is convenient at this point to set out the relevant provisions of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (" the Tribunal Rules").

5. Rule 2 of the Tribunal Rules provides for the overriding objective and parties' obligation to co-operate with the Tribunal and provides where relevant:

> "(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes-
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and resources of the parties;
>
> …
>
> (3) The Tribunal must seek to give effect to the overriding objective when it-

(a) exercises any power under the Rules; or

(b) interprets any rule or practice direction.

(4) Parties must-

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally."

6. Rule 15 of the Tribunal Rules deals with evidence and submissions and provides where relevant:

> "(1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Tribunal may give directions as to—
>
> (a) issues on which it requires evidence or submissions;
>
> (b) the nature of the evidence or submissions it requires;
>
> (c) whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence;
>
> (d) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;
>
> …
>
> (2) The Tribunal may—
>
> (a) admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom; or
>
> (b) exclude evidence that would otherwise be admissible where—
>
> …
>
> iii) it would otherwise be unfair to admit the evidence."

Case law

7. The parties took me to various cases on the subject of admissibility of expert evidence, the procedure to be followed for a party to rely upon expert evidence, admissibility of matters of law and of mixed fact and law and the question of whether the report should be admitted or excluded in its entirety or the Tribunal should carry out the task of deleting inadmissible sections of the report. I have referred to the cases that were relevant to determine the Respondents' application.

8. The Appellants' starting point was CPR Part 35.1- Duty to restrict expert evidence which provides that "Expert evidence shall be restricted to that which is reasonably required to resolve proceedings." The underlying policy objective explained in CPR Part 35.1.1 is to reduce the "incidence of the inappropriate use of experts to bolster cases", an aim that furthered the overriding objective, *British Airways plc v Paul Spencer and 11 Others (Present Trustees of the Airways Pension Scheme)* [2015] EWHC 2477 (Ch) at [22]. At [25] in *British Airways* Warren J stated "I do not suggest that there is any tension between the overriding objective and the restriction of expert evidence to that which is reasonably required to resolve the proceedings. But I do suggest that what is reasonably required is informed by the overriding objective and that the court should not be over-zealous in excluding evidence in order to save time and cost."

9. The Appellants rightly accepted that whilst there is no specific rule in the Tribunal Rules that mirrored CPR Part 35.1, it considered it was relevant and the Tribunal should take account of the case law based on the rule in CPR Part 35.1 given the overlap between the underlying policy objective of the CPR rules and the overriding objective of the Tribunal Rules. The Tribunal in *Deloitte LLP v The Commissioners for HM Revenue & Customs* [2016] UKFTT 479 (TC) after having considered the case law based on the rule in CPR Part 35.1 said at [21]: "Given the extra time, cost and complexity involved in proceedings which involve expert evidence, the admission of expert evidence which is not reasonably required to resolve the proceedings is unlikely to be consistent with the tribunal's overriding objective."

10. The Respondents position is that whilst the strict application of CPR Part 35.1 is not applicable to the Tribunal, Dr Godley's report would, nevertheless, satisfy the tests set out in the case law based on the rule in CPR Part 35.1.

11. In *Mobile Export/Shelford IT Limited v The Commissioners for HM Revenue & Customs* [2009] EWHC 797 (Ch) where Sir Andrew Park at [17(2)(b)] said:

> "In any case the Value Added Tax Tribunal rules provide as follows in para.28:
>
> > ''28. Evidence at a hearing
> >
> > > (1) . . . a tribunal may direct or allow evidence of any facts [*sic*] to be given in any manner it may think fit and shall not refuse evidence tendered to it on the grounds only that such evidence would be inadmissible in a court of law.''
>
> This rule is not an open sesame for any party to an appeal to call anyone to give evidence on anything. It does however relax, and in my judgment is intended to relax, some of the more rigid evidential rules which can arise in High Court proceedings."

12. It should be noted that Rule 28 of the Value Added Tax Tribunal Rules ("VATR") referred to by Sir Andrew Park was replaced by Rule 15 of the Tribunal Rules. Rule 15 differs from Rule 28 VATR in that it does not provide that the Tribunal shall not refuse evidence tendered solely on the grounds that such evidence would be inadmissible in a court of law but is permissive and may admit or exclude such evidence.

13. In *Megantic Services Limited v The Commissioners for HM Revenue & Customs* [2013] UKFTT 492 (TC). At [38] and [39] the Tribunal, having considered the decision of Sir Andrew Park in *Mobile Export/Shelford IT Limited v The Commissioners for HM Revenue & Customs* [2009] EWHC 797 (Ch), said:

> "In common with Sir Andrew Park, we do not consider that a finding that Mr Fletcher was not an expert would have precluded his evidence from being admitted. As we have described, the tribunal may admit opinion evidence even if that evidence is not given by an expert. If it does, then there will be a question of weight. If the evidence is not given by an expert, or if it is given by an expert, but relevant safeguards have not been observed, that may go to the weight that the tribunal may give to the evidence. But neither of those matters compels a conclusion that the evidence, if it is relevant, should not be admitted.
>
> This, we consider, is the extent of the role that CPR 35 can play in tribunal proceedings. There is no such rule in the tribunal's rules. Nonetheless, the principles that underlie CPR 35 are relevant to consideration by the tribunal of the quality, and thus probative value, of the evidence. It is therefore likely to assist the tribunal if an expert giving evidence complies with CPR 35 and states that he has done so (see *Chandanmal*, per Judge Mosedale at [12] and [13]). But a failure to do so will not, unless the tribunal

considers that such evidence will only be acceptable in particular circumstances if full compliance is demonstrated, necessarily result in the evidence being excluded; such failure will instead raise questions of weight."

14. The Appellants highlighted what was said in *Megantic* at [18] which it says makes clear that the Tribunal was addressing the opinion evidence of a non-expert: "The purpose of the tribunal's rules is to relax the normal civil procedure rules to enable evidence to be admitted that could not otherwise be admitted. That includes the opinion evidence of a non-expert. It would be contrary to the intention of the rules to import as a general matter the same restraints on non-expert opinion evidence as would apply to expert evidence, unless in a particular case the interests of fairness and justice would demand it."

15. The Respondents additionally referred me to [49] – [51] in *Megantic* where the Tribunal said:

> "49. Having found that Mr Fletcher is an expert for this purpose, we should add that we do not consider there to be any requirement in this tribunal for permission to be given for the service of expert evidence. That is a question that has divided tribunals in the First-tier. In *Chandanmal*, Judge Mosedale (at [13]) expressed the view that it was arguable that rule 15(1)(c) of the tribunal's Rules:
>
> > "… the tribunal may give directions as to … whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence"
>
> required such permission to be obtained. The tribunal in *JDI* took this a step further, stating (at [75]) that it was apparent that the tribunal's Rules envisaged that a direction should be sought for permission to adduce expert evidence before serving a statement of an expert witness. On the other hand, the tribunal in *Libra Tech* refused to follow that interpretation, reasoning (at [31]) that rule 15(1)(c) could not be construed as imposing a mandatory requirement to seek such permission.
>
> 50. We agree with the tribunal in *Libra Tech*. Although we accept, as Mr Patchett-Joyce submitted, that in the higher courts there is an express duty to restrict expert evidence to that which is reasonably required to resolve the proceedings (CPR 35.1), that does not itself translate into a mandatory requirement for permission to be obtained before that evidence is adduced; but if such evidence is served without permission, and it is found to be have been unnecessary, the costs of that evidence may be irrecoverable. That does not, therefore, provide for support for an interpretation of the tribunal's Rules as imposing a requirement for permission.
>
> 51. Rule 15(1)(c) must be construed and applied in the usual way, that is having regard to the overriding objective of dealing with cases fairly and justly (rule 2(3)). The language of rule 15 is not mandatory but permissive. It contains no requirement, such as can be found where relevant in other parts of the Rules, for any application to be made. Its context is that of the exercises of case management powers generally in relation to evidence and submissions, none of which powers are susceptible to construction as a mandatory requirement. The tribunal is given power to intervene and make directions as to evidence, including expert evidence, but there is no requirement (and it is not possible in our view to infer one) that expert evidence can be served only if the tribunal gives permission."

16. In *Chandanmal & Ors (t/a Narain Bros) v The Commissioners for HM Revenue & Customs* [2012] UKFTT 188 (TC) at [13] Judge Mosedale stated:

"That such a direction has not been given in this case is likely to be because leave to serve an expert witness statement was not sought by HMRC. Although no point is taken on this, arguably under Rule 15(1)(c) such leave should have been obtained before serving Mr Fletcher's statement."

17. In *JDI Trading Limited v The Commissioners for HM Revenue & Customs* [2012] UKFTT 642 (TC) the Tribunal (Judge Brooks and Gill Hunter) said at [75] and [76]:

"75. Comparing the Tribunal Rules with the Value Added Tax Tribunal Rules it is apparent, as noted by Judge Mosedale in *Chandanmal* at [13] (see paragraph 68, above) that the Tribunal Rules envisage that a direction should be sought for permission to adduce expert evidence before serving a statement of an expert witness.

76. Also, under the Value Added Tax Tribunal Rules the use of the word "shall" meant that the Tribunal could not "refuse evidence tendered to it on the grounds only that such evidence would be inadmissible in a court of law" whereas the Tribunal Rules, by the use of the word "may", allows evidence to be admitted at the discretion of the Tribunal "whether or not the evidence would be admissible in a civil trial in the United Kingdom." Therefore, the starting point for the Tribunal in considering whether to admit evidence must be to determine whether or not it would be admissible in civil proceedings. If it was not admissible it would then be for the Tribunal, having regard to the overriding objective, to exercise its discretion and, if appropriate to do so, admit the evidence."

18. The Appellants relied upon the authorities of *JP Morgan Chase Bank and Ors v Springwell Navigation Corporation* [2006] EWHC 2755 (Comm), *Barings plc (In Liquidation) and ANR v Coopers & Lybrand and Ors* [2001] EWHC Ch 17 and *British Airways* and both parties relied upon *Kennedy v Cordia (Services Limited)* [2016] 1 WLR. The Tribunal in *Deloitte,* having reviewed the case law based on the rule in CPR Part 35.1 (including *JP Morgan, Barings, British Airway*s and *Kennedy*), set out the following principles at [22]:

"(1) Relevant evidence should be admitted unless there are compelling reasons not to. The prejudice to each party of respectively admitting/not admitting the evidence should be weighed. (*Mobile Export365 and Atlantic Electronic).*

(2) An expert's evidence of opinion is admissible because it is the product of a special expertise which the tribunal does not possess, or even if it does, which is not its function to apply *(Hoyle*).

(3) Expert reports are not rendered inadmissible because they refer to legislation, matters of law or indeed the very issue before the court or tribunal. Tribunal panels (who are not lay finders of fact) can be credited with the ability to distinguish between inadmissible/ admissible matters in a report and to know that they have to reach their own view on the legal question before them. (*JP Morgan Chase Bank*, and *Kennedy).*

(4) Even if reports contain inadmissible expert evidence of fact they can be admitted and should be admitted without requiring excision particularly if the admissible/inadmissible evidence of fact is intertwined (*Hoyle*).

I accept and adopt those principles.

19. In *Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg (No.3)* [2001] 1 WLR, decided shortly after *Barings,* Evans-Lombe J at [7] referred to his previous judgment in *Barings* and provided a slightly different formulation of the principles to the ones he expounded in *Barings*. At [8] he stated "The second stage turns on the nature of the evidence sought to be given. Thus, where the question is one of law, expert evidence will be excluded

because that is within the expertise of the court and expert evidence does not assist: see *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1979] Ch 384."

20. The Appellants highlighted that *Barings* was cited with approval by the Court of Appeal in *Esure Insurance Limited v Direct Line Insurance plc* [2008] EWCA Civ 842. The Respondents referred me to what was said in *Esure* by Jacob LJ at [75] and [76]:

> "It is, of course, permissible for an expert to opine on the ultimate question if it is one of fact, not law, as I said in my judgment (with the concurrence of the other members of the Court) in *Rockwater v Coflexip*, [2004] EWCA Civ 381, [2004] RPC 46. I repeat part of it here:
>
>> [13] But it also is permissible for an expert witness to opine on an "ultimate question" which is not one of law. I so held in Routestone Ltd v Minories Finance Ltd [1997] B.C.C. 180 and see s.3 of the Civil Evidence Act 1972.
>>
>> [14] But just because the opinion is admissible, it by no means follows that the court must follow it. On its own (unless uncontested) it would be 'a mere bit of empty rhetoric' Wigmore, Evidence (Chadbourn rev) para.1920. What really matters in most cases is the reasons given for the opinion. As a practical matter a well-constructed expert's report containing opinion evidence sets out the opinion and the reasons for it. If the reasons stand up the opinion does, if not, not.
>
> Assertions of the sort I have set out seem to me to fall within that vivid phrase, "empty rhetoric" and are of no value."

21. The Appellants referred me to *De Sena v Notaro* [2020] EWHC 1031 (Ch) as a recent example of the High Court applying the principles established in case law based on the rule in CPR Part 35.1. In *De Sena* a shareholder in a family company alleged that she had entered into a demerger transaction as a result of undue influence and brought claims of breach of duty against the accountants and solicitors involved in the transaction. The High Court disregarded the expert accountancy evidence advanced in respect of the practice relating to demerger transactions on the basis that the parties' witnesses did not have sufficient expertise in such transactions to give expert evidence. Matthews J at [156] to [157] having considered in detail the experts' *curricula vitae* stated:

> "I am afraid that this simply does not demonstrate expertise in demerger transactions, even though I accept that he will have had the opportunity to see one or more such transactions, and may even have participated in them. But that does not make you an expert in demergers. And it is for the expert witness tendered to demonstrate the expertise, not for the court to assume it.
>
> In these circumstances, I do not see how either Mr Mesher or Mr Plaha has acquired sufficient experience in carrying out demerger transactions as to be able to claim an expertise in it. I emphasise that it is just not enough to be a 'forensic accountant'. It is not the experience of giving 'expert' evidence in court that makes you an expert. Those firms that provide expert witness services really ought to have learned by now that expertise is acquired by doing the thing in question, usually over many years, and that merely being an accountant (or anything else) for a long time does not mean that you thereby become an expert in everything that accountants (or whatever it may be) commonly do."

22. At [163], after having disregarded both parties' experts' reports, the High Court warned that "Permission to adduce expert evidence on a topic by calling an accountant (or anyone else),

is not a licence to ignore the rules as to what expert evidence is, and who can give it, or the conditions under which it is admissible in legal proceedings."

23. In *Hastings Insurance Services Limited v The Commissioners for HM Revenue & Customs* [2018] UKFTT 27 (TC) the Tribunal applied the principles identified in CPR Part 35 and excluded the majority of the expert's report that was sought to be relied upon by the Respondents. The Appellants highlighted what was said about the expert report at [57] – [60]:

> "Our view was that the majority of Mr Kendall's report was inadmissible whether on the basis that it was legal opinion, which ought properly to be addressed by way of legal submission, or that it sought to address the very issues for the tribunal thereby usurping the tribunal's proper function … We can see that where the required fact finding and legal analysis takes place in the context of a particular industry which employs concepts, terms and practices specific to that industry, the view of a person with particular expertise and knowledge of those terms and practices as generally applied in that industry, may in some circumstances, assist the tribunal in finding the relevant facts and making its assessment. Mr Kendall's evidence, however, was largely not addressed to any such matters. … On the face of it, given the way the questions he was asked to address were phrased (being the very VAT questions the tribunal has to answer) and the manner in which he expressed his conclusions, in many sections he appeared to address the very legal question before the tribunal on the basis of his own view of the facts and law."

24. The Respondents highlighted that in *Hastings* at [62] the approach of the Tribunal was not to exclude the expert report in its entirety but to admit limited parts of the report.

Dr Godley's report

25. In order to determine the Respondents' application and the Appellants detailed objections it has been necessary to consider Dr Godley's report in considerable detail.

26. Dr Godley's report is 62 pages in length with four annexures totalling 21 pages. The report is set out as follows: Summary, A. Introduction, B. Overview of Waste Classification and Waste Legislation, C. Opinion in regard to FCC Waste, D. Declaration, Signature. The four annexures are: A. cv of Dr Andrew Godley, B. Instructions, C. Documents relied upon and D. Glossary of terms.

27. The Summary confirms that Dr Godley is instructed by HMRC, briefly sets out the Appellants' position and then provides his main conclusions. Section A begins with a summary of Dr Godley's qualifications with his full cv set out at Annex A. Section A continues with a section headed "Opinion" which sets out Dr Godley's instructions (Annex B), the documents that he has been provided (Annex C) and the acronyms used in his report, (Annex D). Annex C lists the documents that Dr Godley was provided and which are exhibited as Exhibits ARG1/01-ARG1/06. The exhibits total a further 28 pages.

28. Section B is headed "Overview of Waste Classification and Waste Legislation". In this section Dr Godley provides an overview of the EWC waste classification system in response to the first part of question (vii) asked by HMRC – "vii) An explanation of the EWC classification system and how the FCC waste should be classified for the purposes of the EWC". The second part of question (vii) is dealt with in Section C of his report. Section B also sets out a description of the waste legislation and regulation with particular focus on the classification of waste which Dr Godley considers relevant to answer question (viii) – "Any other matters which you consider relevant in addressing the issues set out above."

29. In paragraphs 27-96 of Section B Dr Godley summarises and highlights parts of the EWC Directives, Regulations and Decisions that he has identified and considers key to the determination of the appeal.

30. The next part of the report is headed "Classification of waste". At paragraphs 97-109 Dr Godley sets out his views on the process of classifying wastes in accordance with the legislation, directives and regulations that he identified as relevant and summarised in the preceding 66 paragraph. He offers the view that the classification of waste can be summarised as requiring two stages. Stage 1 is the determination of the EWC code including as assessment of whether the waste is hazardous or not and Stage 2 is the determination (in the case of non-hazardous wastes) of whether the waste qualifies for the lower LFT rate.

31. He then sets out five steps to determine Stage 1. The steps are: Step 1 – Identification by Waste Source, Step 2 – Identification by Waste Type, Step 3 – Waste not otherwise specified, Step 4- Non-Specific wastes, Step 5- Hazardous Waste Classification.

32. At paragraph 107-109 Dr Godley sets out the steps that are "in my opinion required to confirm whether a non-hazardous waste qualifies for the lower rate of LFT". At paragraph 109 Dr Godley considers Step 2 of his two stage test and sets out what should be considered when comparing the waste with the description of wastes that qualify in QMO 2011 and the associated conditions and requirements described in Excise Notice LFT1 Guidance. At the third point of his three points for consideration Dr Godley opines that, in determining whether a waste has a low potential for producing greenhouse gases and a low polluting potential in landfill, this requires consideration of the waste characteristics under the inert WAC tests and the landfill type that the waste is deposited in.

33. In Section C he provides his opinion on questions (i)-(vi). He explains that because the FCC waste is formed by a reaction between Cristal $FeCl_3$ waste and APCr from an incineration process, an explanation of what incineration bottom ash, fly-ash and APCr wastes are is required, paragraphs 111-120. At paragraphs 114-120 Dr Godley explains in technical detail how APCr is used to remove polluting materials from exhaust flue gas and how, in the case of acidic gases these are removed by the addition of an alkaline material, typically slaked lime. Dr Godley sets out the chemical reactions to confirm that the slaked lime is used up and lost in the reactions and states his view that in most incinerators an excess of slaked lime is used to counteract the variation in the amount of acid gases produced from the incineration of mixed waste and that this is an important point as it means that the neutralising capability of APCr, i.e. as represented by the unused excess slaked lime, is much lower compared with the amount of slaked lime used.

34. At paragraphs 121-125 Dr Godley sets out how the appropriate EWC code for APCr would be determined and his view (based upon data taken from the publicly available Environment Agency Waste interrogator) is that the APCr waste delivered to FCC had an absolute hazardous waste classification.

35. At paragraphs 126-128 Dr Godley considers APCr disposal and states his view that it is normal practice to mix the APCr waste with water to reduce its potential to produce dust when handled and to solidify it to reduce leaching when it is landfilled.

36. On page 39 of his report Dr Godley sets out question (i). In paragraphs 129 to 132 Dr Godley provides an overview of the Cristal and FCC wastes, noting how Cristal treats the majority of its waste stream (aqueous acidic ferrous chloride ($FeCl_3$)) on site whilst some is taken by FCC in tankers to its waste treatment at Knostrop where it is treated with ACPr. Dr Godley highlights that Mr Martin in his evidence refers to the ACPr as a "calcium hydroxide [containing] waste" or "waste calcium hydroxide" to produce the "FCC waste". He notes that Mr Martin's evidence confirms that the lower rate of LFT is declared for the FCC waste.

37. At paragraph 133-153 Dr Godley sets out in detail the Cristal waste production process. He describes the chemical processes for the production of titanium oxide production and the waste streams produced, particularly the $FeCl_3$ waste. He sets out the chemical composition of the $FeCl_3$ waste relying upon Mr Martin's exhibit IM6 noting that the $FeCl_3$ waste is hazardous and described on the WTN as absolute hazardous waste. He paraphrases Mr Martins's evidence of the process at Cristal and in a footnote to paragraph 140 of Dr Godley's report sets out his disagreement with Mr Martin's evidence – "the reactivity of the commercial pure $Ca(OH)_2$ slaked lime reagent could not possibly be surpassed by the partially use slaked lime in the APCr waste on a comparable like-for-like basis". At paragraphs 143-150 Dr Godley sets out his view that confusion has been caused by Mr Martin comparing different calcium compounds and suggests such confusion can be avoided by making the comparison based on the Ca element. He sets out his assumptions and the calculations used to determine Ca content of the slaked lime used to treat the $FeCl_3$ waste and, following this assessment concludes that the $FeCl_3$ waste is being treated with a relatively small proportion of commercially available $Ca(OH)_2$ to produce the Cristal waste stream. He further concludes that as the $FeCl_3$ is being treated with a commercially available reagent product it is not a waste and no potential issues arise when the $FeCl_3$ is mixed with another waste i.e. APCr.

38. At paragraphs 151-153 Dr Godley opines that the Cristal waste is included as qualifying waste in the QMO 2011 and qualifies for the lower rate of LFT.

39. Dr Godley next considers the use of APCr to neutralise the Cristal waste and the chemical composition of the APCr waste. Dr Godley refers to the scientific paper from the journal Waste Management titled "Element composition and mineralogical characterisation of air pollution control residue from UK energy-from-waste facilities" relied upon by Mr Martin in his witness evidence. The paper is incorrectly referred to as "Bugash" by Dr Godley throughout his report, the correct reference is "Bogush". Dr Godley relies upon Mr Martin's Exhibit IM14, laboratory Test Certificates of various analyses of APCr used by FCC, and provides a table (having recalculated the Ca content), Table 4, summarising the data from the Bogush paper and the APCr test results. He concludes that this indicates that a substantial amount of the APCr waste would be contaminating material and that this contaminating material in the FCC waste is not associated with waste from TiO_2 production. He opines that a greater quantity of partially reacted slaked lime in the APCr would be required to neutralise the same quantity of $FeCl_3$ compared to the commercial slaked lime used in the Cristal process and he relies upon Mr Martin's evidence and the Bogush paper in support of his view. Dr Godley highlights the presence of substantial amounts of LOI (loss on ignition) in the APCr and identifies this as a key factor in classifying the waste and opines that it should be classified as hazardous.

40. At paragraphs 165-168 Dr Godley sets out the FCC $FeCl_3$ waste treatment process by adopting Mr Martin's evidence. At paragraphs 169-183 Dr Godley estimates the proportion of APCr waste used treat the $FeCl_3$ waste in the FCC process concluding that the proportion of APCr waste in the FCC waste is much greater than the proportion of slaked lime in the Cristal waste. Following this conclusion he expresses the view that the FCC waste should be considered as a treated APCr waste rather than a "calcium-based reaction waste from titanium dioxide production".

41. At paragraphs 184-195 Dr Godley sets out his view on how the FCC waste should be classified under EWC Chapter 19. His report then sets out the process for classifying the FCC waste. He confirms that he has not see any detailed analysis of the APCr waste or a hazardous waste assessment but proceeds on the basis of his view that the APCr contains heavy metal and dioxins from the activated charcoal concluding that the waste might still in his view be classified as hazardous. He considers the statement contained in a report appended to Mr

Martin's statement, Exhibit IM9 and concludes by expressing the view that the FCC waste is not similar to the Cristal waste.

42. At paragraphs 196-198 Dr Godley considers the description of the FCC waste used in the WTNs and opines that the description used is inaccurate. He further opines that his preferred waste description is required to comply with the Duty of Care responsibilities and Defra guidance.

43. At paragraphs 199-202 under the heading of "Qualification for the lower rate of LFT" Dr Godley provides his answer to question (i) stating his view that, in light of the preceding description of the FCC process and his previous conclusions, "it can only be concluded" that the FCC waste would not qualify for the lower rate of LFT due to the presence of so much other material in the FCC waste.

44. At paragraph 205 he confirms in answer to question (ii) that he has described the processes by which the Cristal and FCC wastes are produced and restates his opinion that the Cristal waste is made by treating the $FeCl_3$ waste with a small proportion of commercial slaked lime and the FCC waste is made by mixing a small proportion of $FeCl_3$ waste with APCr waste. A table is provided that summarises the two processes and the key differences.

45. At paragraphs 207-213 Dr Godley provides a "no" in answers to questions (iii) to (vi) by reference to his answers to questions (i) and (ii).

46. At paragraph 214 Dr Godley confirms that he has examined all the information provided by the Appellants and that he has provided a summary of his conclusions in the report Summary. At Section D. Declaration, Dr Godley declares that he has prepared his report in accordance with the current requirements of the Civil Procedure Rules as they apply to expert witnesses and appends his signature.

Parties' arguments

47. Mr Puzey, for HMRC, submitted that, despite the Appellants previously maintained view that the dispute was factual, the issue before the Tribunal was one of mixed fact and law, and the Tribunal was entitled to receive expert evidence to assist the Tribunal in its determination of those issues, (*Kennedy*). The issue before the Tribunal is whether the FCC waste is " calcium based reaction wastes from titanium dioxide production", the Tribunal will determine whether the FCC waste comes within the meaning of the words to Note 9a to Group 6 of the schedule to QMO 2011 but a suitably qualified expert is entitled to say, as a matter of fact, whether the FCC waste comes within the ordinary meaning of those words. Dr Godley, as an expert, is entitled to address the ultimate issues of fact, (*Esure and Deloitte*). *Kennedy* confirmed at [47] that "If skilled evidence of fact would be likely to assist the efficient determination of the case, the judge should admit it."

48. There is a distinction between the CPR and Tribunal Rules and the strict approach to expert evidence contained in the CPR is not the approach in the Tribunal, but, even if it were, Dr Godley's report would still be admissible, (*Megantic*). In *Deloitte* at [22] the Tribunal confirmed that "relevant evidence should admitted unless there are compelling reasons not to" and "Tribunal panels (who are not lay finders of fact) can be credited with the ability to distinguish between inadmissible/admissible matters in a report and to know that they have to reach their own view on the legal question before them, (*JP Morgan Chase Bank, and Kennedy*)." If Dr Godley's report does trespasses into areas of law the Tribunal is well equipped to address that. HMRC have not breached the Tribunal rules by not making an application for permission to serve Dr Godley's report as permission is not required under the Tribunal Rules, (*Megantic*).

49. Mr Puzey confirmed that it was not agreed between the parties that the FCC waste is "*calcium based reaction waste*" as a matter of fact. This had been put in issue in the Respondents' Statement of Case at paragraph 24 and Dr Godley has stated in terms in his report that the FCC waste is not a calcium based reaction waste because of its composition, (paragraphs 211-213).

50. Mr Martin's witness evidence repeatedly draws a comparison between Cristal waste and FCC waste and expresses the view that the FCC waste should be taxed at the lower rate of LFT. His evidence contains opinion evidence on detailed scientific and technical issues, no different to those of an expert, and repeated references to the similarity in the chemical composition of the FCC and Cristal wastes. There is clear scientific and technical disagreement between the parties on the chemical composition of the FCC and Cristal wastes and the "resolution of that issue is pre-eminently a matter for expert evidence from a recognised discipline requiring scientific and technical knowledge outside of that ordinarily possessed by the Court, namely the treatment and procession of both organic and inorganic wastes, (*Kennedy* at [55]).

51. Dr Godley is well-qualified to assist the Tribunal, his cv confirms that he is a trained scientist with 40 years experience and has for the last 20 years specialised as a consultant in the waste management industry. He has, despite the Appellants characterisation of his experience as being limited to organic waste, extensive experience as a consultant dealing with both inorganic and organic wastes produced by industrial processes. A significant part of the appeal is concerned with APCr to which organic waste is a notable contributor. It is evident from his report that Dr Godley is a highly experienced and competent scientist.

52. The Appellants are wrong in seeking to characterise Dr Godley as giving evidence on the legal meaning and proper construction of QMO 2011 as he is properly addressing the scientific and technical issues raised by the Appellants and the comparisons that Mr Martin makes between the FCC and Cristal wastes in his witness evidence. It is also wrong to suggest, as the Appellants do, that Mr Martin does not give opinion evidence in his witness evidence as he variously opines: that the FCC waste would qualify for the lower rate of LFT. In contrast, Dr Godley's provides a scientific and technical analysis of the evidence relied upon by the Appellants which, on any view, is the work of a skilled expert.

53. Dr Godley has been criticised for including the regulatory regime in Section B of his report however, this is required in order to explain the regulatory basis for Mr Martin's evidence and to explain Dr Godley's conclusion that in regulatory terms the Cristal and FCC wastes are not similar. Dr Godley has not duplicated or based much of his report on Mr Martin's evidence as there are considerable differences and Dr Godley addresses issues that are not present in Mr Martin's evidence.

54. In respect of the questions asked of Dr Godley, questions (iii) to (v) are taken from the legislation and question (vi) addresses the question of how the FCC waste should be described. Questions (i) and (ii) are not objected to by the Appellants. Questions (iii) to (v) are factual responses and are not supplanting the role of the Tribunal by interpreting the legislation.

55. The Appellants suggest that the report should be excluded in its entirety and a statement of agreed facts and issues agreed, in both *Hastings* and *Deloitte* the Tribunal did not wholly exclude the expert evidence.

56. Mr Nawbatt QC, for the Appellants, emphasised that they were not seeking to apply the strict requirements of CPR Part 35 to the Tribunal but were adopting the approach of the Tribunal in *Deloitte* and excluding evidence that is not reasonably required to determine the appeal, such an approach is in furtherance of the overriding objective of the Tribunal to deal with cases fairly and justly and avoid extra time, cost and complexity.

57. The majority of the questions addressed by Dr Godley's report are the central questions of law or mixed fact and law that fall to be determined by the Tribunal and, in answering those questions, Dr Godley is usurping and supplanting the role of the Tribunal as ultimate decision-maker. The burden of proof is on HMRC to establish that there is both a relevant area of expertise and that Dr Godley possesses that relevant expertise – neither are established.

58. HMRC only confirmed at the CMH that they are disputing that the FCC waste is a "calcium based reaction waste", this is in contradiction to HMRC's stated Review Conclusion letter, this is not apparent from the pleaded Statement of Case and the instructions to Dr Godley confirm that HMRC have accepted that the FCC waste is a "calcium based reaction wastes" but have not accepted that the waste is from "titanium dioxide production". *Deloitte* at [70]-[72] provides a practical way of addressing the application – reject admission of those sections of the report which contain a significant degree of matters more appropriate for legal submissions but at the same time direct that the parties agree a Statement of Agreed Facts and Issues ("SOAFI") and further direct that both parties be permitted to serve further evidence (both lay and expert evidence) addressing the facts and issues in dispute. An agreed SOAFI would avoid the duplication of Mr Martin's evidence in Dr Godley's report and reduce the unnecessary complexity and length of the hearing saving both time and costs.

59. If the Respondents had followed the correct procedure and sought permission to rely upon expert evidence before instructing and serving Dr Godley's report the issues in dispute would have been identified and a appropriate directions given by the Tribunal.

Discussion

60. In order to determine the application it is appropriate to consider first the issues in dispute and then Dr Godley's report in light of the stated objections and case law.

Issues in Dispute

61. HMRC confirmed in their oral submissions and speaking note that it was not agreed that the FCC waste was "calcium based reaction wastes" and that this was apparent from paragraph 24 of their Statement of Case and that Dr Godley has stated in terms in his report that the FCC waste is not a calcium based reaction waste because of its composition, (paragraphs 211-213). Paragraph 24 of the Statement of Case states "The waste for which the lower rate of landfill tax is claimed in this case is not a calcium based reaction waste from the production of titanium dioxide. It is the product of the reaction at the waste treatment facility of FCC between ferric oxide (which is a hazardous waste from titanium dioxide production) and another hazardous waste, namely Air Pollution Control residue (APCr). The resultant waste deposited at SBL's landfill site is the product of a waste treatment process involving two waste streams." The Review Conclusion Letter ("RCL") dated 24 April 2018 stated "Although the content of the waste accepted by you does contain these chemicals as shown by the chemical analysis conducted by FCC, and although this is through a calcium based reaction, this is not created directly through titanium production. Rather it is a calcium based reaction of two waste products." Under the heading of "My Conclusion" it was stated "Although the waste is then treated, and a calcium based reaction occurs, the reaction is not directly from the production of titanium dioxide – it's the reaction of two waste products."

62. It is clear from the RCL that HMRC accepted that there was calcium based reaction waste but did not accept that the calcium based reaction waste was the direct product from the production of titanium dioxide. That understanding was reflected in the Appellants Notice of Appeal and Grounds of Appeal that were filed on 22 May 2019. Paragraph 3 of the Grounds of Appeal stated "… whether the waste deposited by FCC at SB's site and subject of the Assessment is a calcium based reaction waste from titanium dioxide production as the Appellants contend or whilst a calcium based reaction waste, the waste is not from titanium

dioxide production as HMRC contends." Paragraph 21 sets out the Appellants understanding in clear terms – "HMRC accepts (at least following the Review) that the FCC Waste is a "*calcium based reaction waste*" but does not accept that the waste is "*from titanium dioxide production*".

63. On 20 January 2020 the Appellants wrote to HMRC seeking clarification of HMRC's Statement of Case dated 12 August 2019 and an explanation as to why HMRC considered that expert evidence was required. The Appellants stated " …you have raised the prospect of each party filing expert evidence, but have not provided any reasoning as to why any such evidence is considered necessary and/or would otherwise assist the Tribunal … we consider that …HMRC accepts that the FCC Waste is a calcium-based reaction waste but does not accept that the waste is from titanium dioxide production … HMRC considers that the FCC Waste is not from titanium dioxide production because it is waste that occurs as result of a process involving two waste products and it is this sub-issue which falls for determination by the Tribunal … In light of the above we have not provided, at least at this stage, a direction for provision of expert evidence. We do however consider it would be helpful for the Tribunal for the parties to seek to agree a Statement of Agreed Facts and Issues".

64. On 7 February 2020 HMRC clarified their position as follows. At paragraph 5 and 6 it was stated:

> "5. Dealing with the matters in paragraphs 5 and 6 of your letter together, as they must be to work through them logically and properly, we consider the better approach is not the 2 limb test you suggest, but rather to approach this issue by logical progression, resulting in the following <u>three questions</u>:
>
> i. Is the FCC waste, waste from titanium oxide production?
>
> ii. Is the FCC waste, <u>reaction</u> waste from titanium oxide production?
>
> iii. Is the FCC waste <u>calcium-based</u> reaction waste from titanium oxide production?
>
> This position is wholly consistent with the decision of the Commissioners dated 24 April 2019 and their pleaded case: see paragraph 15 of the SoC. The Commissioners have accepted that when ferrous chloride is treated with virgin calcium hydroxide the resultant compound is calcium based reaction waste from titanium dioxide production. However, when FCC waste is treated with a material containing non-virgin calcium hydroxide, i.e. the APCR waste, the description "calcium based reaction waste from titanium oxide production" cannot be applied. This description does not properly, and accurately, describe the waste, because of the inclusion of other elements within the APCr waste. Every time waste moves from one 'person' to another it has to be described. It is not accurate to describe the FCC waste as "calcium based reaction waste from titanium dioxide production" because that does not reflect either the process or the result of the waste treatment undertaken by FCC at Knostrop.
>
> 6. As addressed at paragraph 24 of the SoC, the FCC waste is the result of a waste treatment process involving two waste streams, one of which is from titanium dioxide production and one which is not. The APCr waste is hazardous waste in its own right and would be disposed of as such but for the process it undergoes to produce the FCC waste."

65. Paragraph 13 stated:

> "13. <u>Expert evidence</u>
>
> As is clear from the above, the Commissioners view is that the issues in this appeal include whether

i) the FCC waste can be said to be from titanium dioxide production?;

ii) Is the FCC waste, reaction waste from titanium oxide production?

iii) Is the FCC waste calcium-based reaction waste from titanium oxide production?

This is likely to involve the Tribunal understanding what the FCC waste is in fact and what it contains. Furthermore, the issue of the description of the waste (paragraph 27 of the SOC) involves a judgment as to whether the description applied by the Appellants to the FCC waste is accurate in terms of the waste treatment processes applied, the constituent elements and the results.

It is the Respondents' current view, informed by the state of present discussions in our correspondence, that the Tribunal would likely benefit from expert assistance on these matters. We intend to explore whether there is an appropriately qualified expert who is available and can assist on these matters. We shall revert when our enquiries are concluded."

66. The Appellants confirmed their position on 6 March 2020 stating "We note what is said regarding expert evidence and your intention to revert following further enquiries. To avoid doubt, it remains our clients' position that this case does not require expert evidence. We consider that the 'question of judgment' for the Tribunal is whether the FCC waste falls within the statutory description. As this is a question of law, expert evidence will not assist the Tribunal in making such judgment. For completeness, we do not consider that an "understanding what the FCC waste is in fact and what it contains" is a matter for expert evidence. We note that significant material has been provided to HMRC by our clients as part of the previous review process as to what the FCC waste is and what it contains. Further we note in this regard that the review officer clearly stated that the FCC Waste was a calcium based reaction waste."

67. HMRC submitted that it was entitled to resile from the position stated in the RCL as it had not had the scientific evidence when it made its review conclusion and that it was not bound by that view and could advance as reasons the matters set out in their Statement of Case. After the hearing HMRC e-mailed the Tribunal and Appellants a decision of the High Court in *The Commissioners of Customs & Excise v Alzitrans SL* [2003] EWHC 75 (Ch) in support of their position. The Appellants submitted that that was little point in HMRC carrying out a review if they then resile from it, not in an open or honest manner, but in terms or by implication. The Appellants accepted at the hearing that, if it was disputed that the FCC waste was not a "calcium based reaction waste" then expert evidence of the chemical composition and classification of the FCC waste could be relevant.

68. I accept per *Alzitrans SL* [at 38] that HMRC are not bound for all time by the reasons given originally in the RCL and are entitled to advance a different reason(s) in their Statement of Case. Having reviewed the correspondence and the Statement of Case it is my view that the issue of whether the FCC waste is 'calcium based reaction wastes' was put in issue in the Statement of Case albeit it could have been stated more clearly without the need for clarification in correspondence. The Appellants response to HMRC's Statement of Case was to seek clarification of HMRC's case to understand the case it must meet and request an explanation of why HMRC considered that expert evidence was required. Clarification of HMRC's case would not have been sought unless the Appellants considered that the Statement of Case indicated that HMRC's position had changed since the RCL. I agree with the Appellants that the issue could have been more clearly pleaded however it is my view that Statement of Case and the subsequent correspondence confirmed HMRC's change of position.

Objections to Dr Godley's report

69. Dr Godley's needs to be considered in the light of the now confirmed issues in dispute between the parties and the detailed objections contained in the Appellants' statement of objections. The objections are not considered in the same order that they were raised by the Appellants.

Objection 1 HMRC failed to follow the correct procedure prior to instructing Dr Godley and usurped the role of the Tribunal.

70. HMRC highlighted that the Appellants had not pursued in oral submissions their first objection that HMRC had breached Tribunal Rules by not making an application for permission to rely upon expert evidence before serving Dr Godley's report. The Appellants confirmed that the objection was still pursued. As confirmed at paragraphs 15-17 above, the issue of whether permission of the Tribunal is required before expert evidence is served has divided Tribunals.

71. HMRC's position is that *Megantic* disposes of the Appellants' objection that HMRC circumvented the Tribunal Rules and did not seek the permission of the Tribunal to rely upon expert evidence. In *Megantic* the Tribunal having considered the various Tribunal decisions in *Chandamnal*, *JDI* and *Libra Tech* stated at [50]-[51]:

> "50. We agree with the tribunal in *Libra Tech*. Although we accept, as Mr Patchett-Joyce submitted, that in the higher courts there is an express duty to restrict expert evidence to that which is reasonably required to resolve the proceedings (CPR 35.1), that does not itself translate into a mandatory requirement for permission to be obtained before that evidence is adduced; but if such evidence is served without permission, and it is found to be have been unnecessary, the costs of that evidence may be irrecoverable. That does not, therefore, provide for support for an interpretation of the tribunal's Rules as imposing a requirement for permission.
>
> 51. Rule 15(1)(c) must be construed and applied in the usual way, that is having regard to the overriding objective of dealing with cases fairly and justly (rule 2(3)). The language of rule 15 is not mandatory but permissive. It contains no requirement, such as can be found where relevant in other parts of the Rules, for any application to be made. Its context is that of the exercises of case management powers generally in relation to evidence and submissions, none of which powers are susceptible to construction as a mandatory requirement. The tribunal is given power to intervene and make directions as to evidence, including expert evidence, but there is no requirement (and it is not possible in our view to infer one) that expert evidence can be served only if the tribunal gives permission."

72. In *Chandamnal* Judge Mosedale at [13] expressed the view that it was arguable that Rule 15(1)(c) required permission to be obtained, in *JDI* the Tribunal took this view a step further stating at [75] "it was apparent that the tribunal's Rules envisaged that a direction should be sought for permission to adduce expert evidence before serving a statement of an expert witness." In *Libra Tech* the Tribunal disagreed with the decision in *JDI* stating at [31]:

> "The Tribunal disagrees with the view expressed in *JDI Trading Ltd* that rule 15(1)(c) of Tribunal Rules envisaged that a direction should be sought for permission to adduce expert evidence before serving a statement of an expert witness. The use of the words, *may give a direction* in rule 15(1) go against a construction of a mandatory requirement to seek the Tribunal's leave to adduce expert evidence. The Tribunal considers that the purpose of rule 15(1)(c) is primarily directed at controlling the proliferation of expert witness evidence."

73. The Appellants position is that Rule 15(1)(c) provides a mechanism to control what, if any expert evidence is required, on what issues and in what form (i.e. single or joint expert) and it is clear from Rule 15(1)(c) that a party should apply for permission to rely upon expert evidence before instructing an expert otherwise the reference to the appointment of a joint expert would be otiose.

74. I would respectfully disagree with the decisions of the Tribunal in *Megantic* and *Libre Tech* and agree with the Tribunal in *JDI* and *Chandamnal* that permission of the Tribunal is required for a party to adduce expert evidence. In *Libra Tech* at [31] it was stated "The Tribunal considers that the purpose of rule 15(1)(c) is primarily directed at controlling the proliferation of expert witness evidence." I agree with that proposition which is no different to the underlying policy objective in the CPR and explained in *British Airways* at [22] – "The underlying policy object explained in CPR Part 35.1.1 is to reduce the "incidence of the inappropriate use of experts to bolster cases", an aim that furthered the overriding objective; however, it is difficult to see how the "proliferation of expert witness evidence" could be controlled if permission to adduce expert evidence is not required." I accept the Appellants submission that if permission to adduce expert evidence were not required then the reference to the appointment of a single or joint expert would be otiose. The Tribunal in *Libra* at [31] and *Megantic* at [51] identified that Rule 15(1)(c) is permissive and the Tribunal <u>may</u> give directions as to whether the parties are permitted or required to provide expert evidence. The decision whether or not to admit evidence is a matter for the Tribunal exercising its discretion in accordance with the overriding objective to deal with cases fairly and justly. That position may be contrasted with the predecessor VATR which provided at [28] that the Tribunal "shall not refuse evidence tendered to it on grounds only that such evidence would be inadmissible in a court of law."

75. The Appellants submitted that it is good practice and in accordance with the overriding objective that the parties seek to agree the position before an application for permission to rely upon expert evidence is made and that HMRC had "circumvented the safeguards inherent in the permission process". The Appellants highlight that acceptance of that good practice is indicated by HMRC's response dated 7 February 2020 to the Appellants request on 20 January 2020 that HMRC provide their reasoning why expert evidence was required/necessary which stated at paragraph 13 "It is the Respondents' current view, informed by the state of present discussions in our correspondence, that the Tribunal would likely benefit from expert assistance on these matters. We intend to explore whether there is an appropriately qualified expert who is available and can assist on these matters. We shall revert when our enquiries are concluded."

76. The Appellants confirmed on 6 March 2020 that they noted what was said by HMRC regarding expert evidence and that they would revert following further enquiries and reiterated that "it remains our clients' position that this case does not require expert evidence." The good practice referred to by the Appellants is in my view the practical application of the requirement in Rule 2(4) that the parties must help the Tribunal to further the overriding objective and co-operate with the Tribunal generally.

77. HMRC have sought to characterise the Appellants' response on 6 March 2020 as confirmation that the Appellants would oppose any application for expert evidence and it was pointless to try and agree the terms of such evidence before serving it. On 9 July 2020 HMRC served the witness evidence of Dr Godley together with an application for permission to rely upon expert evidence. I cannot see that on a plain reading of the Appellants' response dated 6 March 2020 that it is possible to so characterise the Appellants' response. The response confirmed the Appellants previously stated position and noted that HMRC would revert once they had concluded their enquiries as to whether there was an appropriately qualified expert who could assist.

78. HMRC submitted that the "Tribunal could not in a case of this complexity be asked reasonably to rule on the scope and extent of expert evidence "in a vacuum", i.e. without sight of what is proposed to be adduced." I agree that it would be extremely difficult for the Tribunal to determine any application, let alone an application for permission to rely upon expert evidence, "in a vacuum". HMRC are well aware that when an application to the Tribunal is made by a party the Tribunal will first consider whether sufficient reasons or explanation in support of the application have been made and, if not, direct that further details are provided and then request a response to the application from the other party. An application for permission with detailed reasons and a similarly detailed response to the application would clearly identify to the Tribunal, and also to the parties, the basis for the application and the issues that the application is intended to address. Any confusion or disagreement over the issues, such as in this appeal, would be identified at that stage enabling the Tribunal to issue appropriate case management directions in the absence of the application being agreed by the parties. It is disingenuous for HMRC to suggest that the Tribunal, in a complex appeal, would be unable to determine an application for permission to adduce expert evidence without first having sight of the expert report. Such an approach would be clearly be illogical and disproportionate in terms of time and costs. It is my view that if HMRC had, in accordance with the overriding objective and the duty contained in Rule 2(4) to (a) help the Tribunal to further the overriding objective and (b) co-operate with the Tribunal generally, followed good practice and sought to agree the position/areas of disagreement after having identified a suitable expert and before making the application, it is highly likely that a contested Case Management Hearing would not have been necessary to determine whether expert evidence is required and the issues to be addressed by that evidence.

79. For the reasons set out above it is my view that HMRC failed to follow the correct procedure by not making an application for permission to adduce expert evidence before serving the report of Dr Godley.

Objection 2 'Equality of Arms'

80. HMRC in their application at paragraph 11 state that expert evidence is required in light of Mr Martin's evidence "in order for there to be equality of arms in this appeal". Mr Martin's evidence is presented as a witness of professional and scientific credentials who is giving detailed technical and scientific evidence and, as a witness of fact, is entitled to give opinion evidence which is admissible pursuant to Rule (15)(2) and this illustrates that Mr Martin is not simply giving evidence of fact. The Appellants' position is that Mr Martin is giving factual evidence in his capacity as General Manager of the FC Knostrop facility based upon his personal involvement and responsibility for the relevant treatment process. He does not answer or purport to answer the questions of law or mixed fact and law which are the subject of the appeal and therefore Dr Godley's evidence is not required to ensure 'equality of arms' as Mr Martin is a witness of fact and HMRC's application is for permission to rely on independent expert advice.

81. Mr Martin's witness statement is 24 pages long with 25 exhibits totalling 294 pages. Paragraph 4 of his witness statement confirms that "I hold a BSC Hons in Environmental Science and Occupational Hygiene, a MSC in Public Health Engineering, Certificates of Technical Competence in Hazardous Waste Treat and Transfer and professional membership of the Royal Society of Chemistry, Chartered Institute of Waste Management and the Chartered Institute of Water and Environmental Management."

82. Mr Martin's witness statement confirms at paragraph 3 that he was originally employed as an Operations Manager in 1993 by FCC or its predecessor companies, in 1999 he became General Manager and in 2015 he became responsible for a further 20 plus treatment facilities

located around the UK dealing with landfill leachate. I consider it unsurprising that, in his role as General Manager with responsibility for FCC Knostrop and 20 plus other treatment facilities, he would be highly qualified and possess professional scientific qualifications and membership of relevant professional bodies.

83. His evidence sets out the treatment process for the FCC Waste at Knostrop together with details of the treatment process of the Cristal Waste treatment process both of which he has personal knowledge. His witness statement is set out as follows: Introduction, Background, Consultation – Modernising Landfill Tax Legislation, The Cristal Waste, The FCC Waste with the sub-headings: Pre-development of the Knostrop Treatment Facility, 2013 Discussions with HMRC, Development of Knostrop Treatment Facility, FCC Treatment Process, Cristal Waste – FCC Waste Comparison.

84. Mr Martin's witness statement contains detailed scientific and technical evidence referring variously to: detailed scientific description is given of the Cristal Waste with reference to the Safety Data Sheet information and Consignment Notes (paragraph 28), details of how the ferrous chloride is treated at Stallingborough Acid Waste Treatment Plant (paragraphs 30-32), how APCr is produced in Energy from Waste facilities and the chemical composition and the chemical composition of the wastes (paragraphs 40-46), detailed explanation of the Ca and chemical reactions used to produce the FCC waste (paragraphs 63-66,) and a detailed chemical comparisons of FCC and Cristal waste by reference to charts and tables comparing the chemical composition of the Cristal and FCC wastes (paragraphs 67-70). His witness statement contains opinion evidence based upon his detailed scientific and technical evidence, see for example paragraphs 21, 49, 51, 64 and 65.

85. The exhibits to his witness statement refer variously to: Guidance and classification and assessment of waste technical guidance (IM10), the Bogush scientific paper (IM13), the spectrometry analysis of the FCC waste (IM14) and Defra guidance on applying the waste hierarchy (IM22). I accept that Mr Martin's evidence would naturally be of a technical and scientific nature reflecting his role as General Manager of the Knostrop waste processing and treatment site and his scientific background; however, the examples from his witness statement confirm that, although Mr Martin is a witness of fact, he is providing evidence of a detailed technical and scientific nature that goes beyond a factual explanation of the process carried out at Knostrop. His evidence repeatedly draws a comparison between the Cristal waste and the FCC waste and, contrary to the Appellants' submissions, does, following his technical and scientific analysis of the FCC waste composition, opine that the FCC waste similarly falls within the criteria for lower rated material (the very issue to be determined by the Tribunal).

86. The Appellants position is that much of Mr Martin's evidence was only considered necessary because of the uncertainty as to whether HMRC accepted that the FCC waste was "a calcium based reaction waste". That position has been clarified and, upon that basis, the entirety of Mr Martin's evidence is relevant. Reference was made to the respective lengths of Mr Martin's witness statement and Dr Godley's report I do not consider that comparing the respective length of the witness statements is at all helpful in determining whether Dr Godley's evidence is responding to Mr Martin's evidence, what is of relevance is the content not the length. In any event, although Mr Martin's witness statement is only 24 pages the exhibits total 294 pages.

87. It was suggested that Dr Godley's report was not responding to Mr Martin's evidence as the Letter of Instruction was drafted before the Appellants served Mr Martin's witness evidence. It is clear that parts of the Letter of Instruction were written before Mr Martin's witness evidence was served however, the instructions and questions confirm that Dr Godley was instructed to address and respond to Mr Martin's evidence.

88. ‘Equality of arms’ requires that each party to the proceedings be treated fairly and even-handedly and not placed at an unfair disadvantage, such principles are, in my view, encapsulated in the requirement in Rule 2 that the overriding objective of the Tribunal Rules is to enable the Tribunal to deal with cases fairly and justly and dealing with a case fairly and justly includes “ensuring, so far as practicable, that the parties are able to participate fully in the proceedings”. As indicated above, it is clear that Mr Martin, although described as a witness of fact, is giving evidence akin to that of an expert by providing opinion evidence and evidence of a scientific and technical nature. His evidence may be admitted by the Tribunal pursuant to Rule 15(2) and it will be a question of the weight to be attached to that evidence. Rule 15 gives the Tribunal the discretion whether to permit the parties to rely upon expert evidence, such case management power to be exercised in accordance with the overriding objective. The relevant considerations for the Tribunal is whether granting permission for a party to rely upon expert evidence accords with the overriding objective to deal with cases fairly and justly and not that permission can only be granted on the basis of like-for-like evidence. *Deloitte* at [22] confirmed that “(1) Relevant evidence should be admitted unless there are compelling reasons not to. The prejudice to each party of respectively admitting/not admitting the evidence should be weighed, (*Mobile Export365* and *Atlantic Electronic*)”. I do not consider that compelling reasons to exclude the evidence have been made out by the Appellants If the evidence is not admitted HMRC would be prejudiced by not being able to properly advance its case that there are clear differences of a scientific and technical nature between the parties on the composition and classification of the FCC waste. I consider that that, having regard to the overriding objective and the prejudice to HMRC in not admitting the evidence, it is appropriate to allow HMRC’s application for permission to adduce Dr Godley’s report to the extent set out below. Furthermore, the Tribunal’s determination of the appeal would be assisted by expert evidence addressing the technical and scientific issues in dispute between the parties.

Objection 3 The questions posed to Dr Godley are variously, inappropriate, irrelevant or too vague.

89. Following HMRC’s clarification at the hearing that it was disputed that the FCC waste was a ‘calcium based reaction waste’, the Appellants accepted that questions (i) and (ii) would be relevant to the determination of the issues under appeal. Question (i) asked: “What are the constituent elements of the FCC waste and of the Cristal waste and their respective proportions? In addressing this question please consider the description of the production process and component elements of these wastes described in the Appellants’ witness statement of Ian Martin, dated 28 May 2020 and the associated exhibits.” Question (ii) asked: “By what process or processes are they created? As before, please consider, in particular, the statements and exhibits of Mr Martin, in this regard.” I accept that questions (i) and (ii) will be relevant and assist the Tribunal in determining the constituent elements of the FCC waste and whether it is “calcium based reaction wastes from titanium dioxide production”. As identified above at paragraph 78 above, agreement on questions (i) and (ii) could have reached before HMRC’s application and expert report were served. Whilst I have accepted that questions (i) and (ii) are relevant to the determination of the appeal, the issues whether Dr Godley has appropriately answered those questions or is qualified to answer is considered below.

90. The Appellants submit that questions (iii) to (vi) should be excluded as these are the central questions of law or mixed fact and law that fall to be determined by the Tribunal and Dr Godley, in answering those questions, Dr Godley is usurping the role of the Tribunal as ultimate decision maker. Questions (iii) to (vi) are as follows:

> iii) In light of your answers to i and ii above whether the FCC waste can be said to be <u>from</u> titanium dioxide production;

iv) In light of your answers to i and ii above whether the FCC waste is reaction waste from titanium oxide production?

v) In light of your answers to i and ii above whether the FCC waste is calcium-based reaction waste from titanium oxide production?

vi) Is the description applied to the FCC waste by SBL accurate or not? If not how is it most accurately described?

[underlining provided]

91. HMRC's position is that Dr Godley, as an expert, is entitled to give his opinion upon the ultimate issues of fact per *Esure* at [75] and *Deloitte* at [21]. His opinion on questions (iii) to (vi) is framed and intended as answers to the issues of fact raised by those questions and are not opinions on the law. In *Esure* Jacob LJ at [75] and [76] stated:

> "It is, of course, permissible for an expert to opine on the ultimate question if it is one of fact, not law, as I said in my judgment (with the concurrence of the other members of the Court) in *Rockwater v Coflexip*, [2004] EWCA Civ 381, [2004] RPC 46. I repeat part of it here:
>
> > [13] But it also is permissible for an expert witness to opine on an "ultimate question" which is not one of law."

In *Deloitte* at [21] the Tribunal stated:

> "(3) Expert reports are not rendered inadmissible because they refer to legislation, matters of law or indeed the very issue before the court or tribunal. Tribunal panels (who are not lay finders of fact) can be credited with the ability to distinguish between inadmissible/admissible matters in a report and to know that they have to reach their own view on the legal question before them. (*JP Morgan Chase Bank, and Kennedy*)"

92. Both *Esure* and *Deloitte* confirm that an expert may give his opinion on the ultimate issues of facts. The question that the Tribunal is required to determine is a question of mixed fact and law - whether the FCC waste is 'calcium based reaction wastes from titanium dioxide production'. Questions (iii) to (vi) are all different formulations of the principal question of law that the Tribunal has to determine. In *Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg (No.3)* [2001] 1 WLR, decided shortly after *Barings,* Evans-Lombe J at [7] referred to his previous judgment in *Barings* and provided a slightly different formulation of the principles to the ones he expounded in *Barings.* At [8] he stated:

> "The second stage turns on the nature of the evidence sought to be given. Thus, where the question is one of law, expert evidence will be excluded because that is within the expertise of the court and expert evidence does not assist: see *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1979] Ch 384."

93. In *Hastings* at [45] it was stated:

> "The appellant noted that the "usurpation" principle referred to in *Kennedy* was recognised in the *Deloitte* case where the tribunal drew a distinction between opinions "whose foundation is built on matters which are outside the tribunal's expertise" and opinions "whose foundation itself rests on legal matters which are properly for the tribunal to reach a conclusion on with the benefit of the relevant facts and legal submission" (see [52] and [65])."

94. The underlined words in the questions (iii) to (v) are taken from the statutory question of law which the Tribunal is required to determine and the answers given by Dr Godley to questions (iii) to (vi) are all based upon the application of his answers to questions (i) and (ii)

to the statutory test, a clear usurpation of the Tribunal's role. As such those questions, as identified in *Deloitte* above, fall within "opinions whose foundation itself rests on legal matters which are properly for the tribunal to reach a conclusion on".

95. I accept that the Tribunal is entitled to receive expert evidence that assists it in determining the issues (*Kennedy* at [46]-[47]; however, that assistance will provided to the Tribunal by Dr Godley's answers to questions (i) and (ii) and it will then be a matter for the Tribunal to consider the evidence and submissions when determining the statutory test. In my judgement questions (iii) to (vi) are inadmissible as those questions seek to address the very issues that the Tribunal is required to determine and usurp the Tribunal's proper function. Excluding parts of a report as inadmissible is not unusual and was the approach of the Tribunal in *Deloitte* and *Hastings* when excluding parts of the reports addressing the very issue before the Tribunal.

96. Question (vii) of Dr Godley's instructions states: "An explanation of the EWC classification system and how the FCC waste should be classified for the purposes of the EWC". The Appellants objected to the inclusion of this question on the basis that HMRC have not identified its relevance to the appeal. HMRC argue that it is relevant to the determination of the appeal as the FCC waste is not correctly classified in accordance with the EWC. Mr Martin at paragraph 68g in his witness statement refers to the issue of waste classification by reference to the waste hierarchy which is exhibited to his witness statement as IM22. Dr Godley, as confirmed at paragraph 29 above, sets out a summary of the EWC dating back to 1998. That summary is contained in paragraphs 30-96 of his report. It is asserted that the relevance of its inclusion is to respond to Mr Martin's witness evidence that the FCC waste is correctly classified in accordance with the waste hierarchy and disposed of in accordance with FCC's permit to dispose of waste provided by the Environment Agency. The issue of whether the FCC waste has been correctly classified in accordance with the EWC is in dispute between the parties and may be relevant for the determination of the appeal but that is not a basis for the inclusion of 15 pages in Dr Godley's report summarising the EWC . It was suggested by HMRC it was "setting the scene" although it was conceded that it could be in an appendix to the report. Dr Godley in paragraphs 30-96 is providing his summation of what he has identified as "key definitions", the objectives of the legislation and his interpretation of the legislation including the QMO. The Tribunal stated in *Deloitte* at [49] and [50]:

> "49. As regards 1) [excerpts/recitation of law], putting aside the question of foreign law, evidence does not need to be called for the tribunal to take notice of the law. This is clear in relation to Acts (s3 Interpretation Act 1978) and is clear from practice in relation to secondary legislation and rules such as the FSA or FCA Handbook rules made under statutory rule-making powers where courts and tribunals routinely get on with the job of identifying and resolving relevant questions of law by the parties' representatives putting the relevant law before them and without evidence from experts or other witnesses.
>
> 50. In my judgment the question of whether such materials should be admitted, and the presumption that relevant evidence must be admitted is not on point; issues of what the law is, are plainly not matters of evidence. The Tribunal Rules, which draw a distinction between evidence and submissions refer to expert evidence and the flexibility to admit or exclude under Rule 15(2) is in relation to admission or exclusion of evidence. The rules do not need to deal with the admission or exclusion of law because they do not envisage that evidence will be relevant to proving what the law is."

97. The added difficulty for the Tribunal and the Appellants is, as recognised in *Deloitte*, identifying in Dr Godley's summary of the EWC when legal submissions have been made on

the purpose or interpretation of the legislation. Identifying those submissions will be time consuming and add to the length and complexity of the hearing, supporting the conclusion that they should be excluded from Dr Godley's report. Dr Godley's summary of the EWC is clearly not evidence but excerpts/recitation of the legislation and regulatory requirements with submissions on their relevance, purpose and interpretations and paragraphs 30-96 should be excluded from his report.

Objection 4 HMRC has not established that there is a relevant area of expertise or that Dr Godley has relevant expertise.

98. The Appellants submit that the burden of proof falls upon HMRC to identify and establish that Dr Godley has sufficient relevant personal experience and expertise to answer the questions posed in his letter of instruction. In addition, HMRC must establish that there is a reliable body of knowledge underpinning the expert evidence per *Barings, Bonython, Kennedy* and *De Sana*. HMRC's position is that the Appellants' objections are wholly unjustified and that it is apparent from Dr Godley's cv that he is an expert in a recognised field, waste management and disposal, and possesses relevant experience.

99. Dr Godley's qualifications and experience are briefly set out at paragraphs 11-16 of his report and his full cv is contained at annexure A. The Appellants accepted in their Statement of Objections that it is apparent from his cv that Dr Godley is "an experienced microbiologist with a PhD in anaerobic microbiology …an experienced "expert witness" … that he has some knowledge of waste classification but not in the area with which the appeal is concerned, i.e. the treatment and/or disposal of inorganic wastes."

100. The starting point is to consider whether Dr Godley's evidence falls within a recognised area of expertise. Dr Godley's cv and qualifications confirm that he is an experienced environmental scientist and has extensive experience of dealing with microbiological activities associated with environmental issues, waste and wastewater treatment and soil and groundwater protection. His cv demonstrates that he has an extensive background of scientific and technical experience in the waste management industry, he worked as a research scientist for Shell Global Solutions for 25 years and for the last 19 years has worked as an Environmental Consultant "principally in the area of waste treatment processes".

101. In *Kennedy* at [43] the Supreme Court cited the following passage from the South Australian case of *R v Bonython* (1984) 38 SASR 45 with approval:

> "Before admitting the opinion of a witness into evidence as expert testimony, the judge must consider and decide two questions. The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This first question may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court."

102. Dr Godley's cv confirms that he has previously provided expert evidence in a criminal case and a planning enquiry. His cv does not specify the basis of his expert evidence and the fact that his evidence was accepted as expert evidence is not determinative in establishing that the treatment and management of waste is accepted as a reliable body of knowledge or

experience. In *De Sana* the High Court warned at [157] that the giving of expert evidence does not make you an expert.

103. Mr Martin in his witness statement at paragraphs 41-46 relies upon a scientific paper, the "Bogush paper, titled "Element composition and mineralogical characterisation of air pollution control residue from UK energy-from-waste facilities" by Anna Bogush, Julia A. Stegemann, Ian Wood and Amitava Roy published in the journal "Waste Management". The authors are all academics variously at Centre for Resource Efficiency & the Environment (CREE), Department of Civil, Environmental & Geomatic Engineering (CEGE), University College London (UCL) (Bogush and Stegemann), Department of Earth Sciences, University College London (UCL) (Wood) and J. Bennett Johnston, Sr., Center for Advanced Microstructures & Devices, Louisiana State University (Roy). Throughout the Bogush paper reference is made to other scientific papers and research in the field of waste management. The section headed "References" at the end of the paper provides details of approximately 40 published scientific papers in the field of waste management.

104. I further note that Mr Martin in paragraph 3 of his witness statement states that he holds "professional membership of the … Chartered Institute of Waste[sic] Management and the Chartered Institute of Water and Environmental Management." For the avoidance of doubt, Dr Godley does not in his cv claim to be a member of either Chartered Institute, but the existence of two such professional bodies, particularly the Chartered Institute of Wastes Management, confirm that waste management is a recognised field of professional expertise with a relevant body of knowledge. I am satisfied that waste management is a field of professional expertise with a relevant body of knowledge per (b) in *Bonython* cited in *Kennedy* at [45] above.

105. The next point to consider is whether Dr Godley possesses the relevant expertise to provide expert evidence in this appeal. The Appellants position is that Dr Godley only has experience of the treatment of organic waste and is criticised for the correctness of his findings and conclusions. HMRC submit that this criticism is wholly unjustified and prejudicial to the fair determination of the application and that such criticism or challenges to Dr Godley's findings and conclusions are more appropriate for the hearing when Dr Godley can respond to those challenges.

106. Dr Godley's cv indicates in his "Profile" that his main area of expertise is in the waste and disposal of organic waste and the design and operation of mechanical and biological ("MBT") facilities for waste. In paragraph 14 of Dr Godley's report he explains why he considers he is competent to give expert evidence in this dispute:

> "I have been working as an Environmental Consultant, principally in the area of waste treatment processes, since 2001 which has included assessing the composition of incinerator bottom ash from Guernsey and whether it was hazardous waste. I also have provided expert opinion (including being cross-examined) in a wide variety of disputes including several involving hazardous wastes:
>
> > • Whether contaminated soil extracted from an old railway siding was hazardous waste or not.
> >
> > • Whether the disposal of hazardous waste from a container vessel that had caught fire in mid Atlantic was carried out appropriately.
> >
> > • The disposal of hazardous liquid wastes from an industrial chemical manufacturing plant."

HMRC clarified that the above confirms that Dr Godley's expertise has been sought in relation to inorganic waste: the land filling of hazardous waste and the classification of inorganic wastes, composition and classification of incinerator bottom ash, whether extracted soils are

classified as hazardous or not and the treatment of inorganic slag from a lead battery recycling plant. HMRC's case is concerned to a significant extent with the chemical content of APCr which is one of the waste streams used to treat the FCC waste. Dr Godley's view is that the test results for APCr (Exhibit IM 14 to Mr Martin's witness statement) all refer to a loss of ignition (L.O.I) which he considers indicates the presence of unburnt carbon – an organic compound which the Appellants accept he is qualified to provide expert evidence on.

107. HMRC and Dr Godley have both asserted that he possesses the relevant expertise and knowledge, as evidenced by his experience, cv and report, and Dr Godley has signed the declaration that his report and evidence satisfies the requirements of Part 35 CPR and he is aware of his duties to the Tribunal. On the basis of the information before me I consider that Dr Godley has relevant experience of the treatment and disposal of inorganic matter and the classification of whether such matter is hazardous and leads me to conclude that Dr Godley would appear to posses the appropriate expertise and knowledge to provide expert evidence on the production, composition and classification of the FCC waste. The Appellants' challenges to Dr Godley's relevant expertise and experience can be put to him in cross-examination and during submissions at the hearing. Similarly, the criticism of Dr Godley's findings and conclusions relied upon by the Appellants as confirmation of his lack of expertise and experience can be more appropriately characterised as objections to his methodology and conclusions and such objections should properly be put to him in cross-examination and/or in submissions at the hearing.

108. *Deloitte* confirms that "Relevant evidence should be admitted unless there are compelling reasons not to. The prejudice to each party of respectively admitting/not admitting the evidence should be weighed. (*Mobile Export365 and Atlantic Electronic).*" When the prejudice to the respective parties is weighed, the balance is weighted in favour of allowing Dr Godley's evidence. Without that evidence HMRC will not be able to support its case nor properly challenge the scientific and technical evidence that the Appellants rely upon in support of their appeal and the Tribunal will be denied the assistance of expert evidence in an area of specialist knowledge and experience which the Tribunal does not possess.

Objection 5 Dr Godley's report is not independent or impartial.

109. The Appellants criticise Dr Godley's report as not being a balanced and impartial presentation and assessment of the evidence and issues. HMRC's position is that Dr Godley, as an expert witness, is entitled to give his view, supported by reasons, on the ultimate issues of fact and even if the Appellant's criticisms were valid, they would go to the weight to be attached to the evidence rather than its admissibility. In *Kennedy* at [51] was stated that, contrary to HMRC's submission, if an expert report does not comply with the recognised duties of an expert witness to be independent and impartial the court may exclude the evidence as inadmissible but that the "requirement of independence and impartiality is in our view one of admissibility rather than merely the weight of the evidence."

110. The application of Part 35 CPR to cases before the Tribunal was considered by Judge Mosedale in *Chandanmal* at [7–14]:

> [9] CPR practice direction 35 at 2 requires an expert witness to give an independent view. At 3.2 it requires the expert witness to state his expertise, disclose his sources, make clear if anyone helped him with the report, summarise the range of opinions on the matter and give reasons for his own opinion, and state that he has complied with his duty to the court. At 2.5 he is required to communicate any material change of view to the parties without delay.
>
> [10] HMRC point out that the Tribunal does not have rules similar to CPR part 35. The Tribunal can admit what evidence it chooses (Rule 15(2)(a) of Tribunal Procedure

(First Tier Tribunal)(Tax Chamber) Rules 2009) and theoretically could admit expert evidence from an expert who was not independent. But I see no good reason why I would do that in this case. A Tribunal as much as a court is concerned with the reliability of expert evidence. It is right and in the interests of justice that the only opinions of witnesses relied on by the Tribunal are witnesses who are both expert in the specialist area on which they give their opinion and who are impartial between the parties.

…

[12] This only goes to reinforce my view that expert witnesses, even in the Tribunal, should comply with the requirements of CPR practice direction 35 and state that they have done so. Indeed, it is normal practice within the Tribunal to direct that expert witnesses should do so.

…

[14] My conclusion is that there is every advantage to expert witnesses in the Tribunal following CPR Practice Direction 35 and no disadvantage.

111. HMRC's Letter of Instruction (at paragraphs 21-25) to Dr Godley set out in detail the requirements of Part 35 CPR, his duty as an expert and the appropriate wording required for him to make the declaration in his report that the requirements of Part 35 CPR had been met. At paragraph 215 of his report Dr Godley confirms that he has read and understood Part 35 CPR and states that "The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer". His signature is appended after the declaration that he has read and understood Part 35 CPR. This confirms that not only has Dr Godley been made aware of the requirements of Part 35 CPR but his report states that he has complied with those requirements.

112. The crux of the Appellants various objections to Dr Godley's partiality and independence were that Dr Godley had omitted to refer to the use of slaked lime by Cristal and the contrast between his unequivocal conclusion that the use of APCr waste would not satisfy the description of "calcium based reaction waste from titanium dioxide production" and that of HMRC's technical LFT expert, Mr Durkan in 2013. Having considered Dr Godley's report in detail I do not consider that the objections made by the Appellants demonstrate a lack of independence or impartiality by Dr Godley such that his report would be inadmissible. Turning briefly to the two main examples relied upon by the Appellants.

113. Dr Godley's report does refer to the use of slaked lime as slurry by Cristal. At paragraph 139 of his report Dr Godley repeats Mr Martin's description of the Cristal treatment process which states "Solid $Ca(OH)_2$, (often referred to as hydrated or slaked lime) is a relatively dry white powder and at paragraph 140 he states "Paragraph 30 of Mr. Martin's statement indicates that in the Cristal $FeCl_3$ waste treatment process the hydrated lime is first mixed with water into a slurry containing about 10 to 20% of calcium (Ca)[31]. The $Ca(OH)_2$ slurry is then mixed with the acidic $FeCl_3$ waste where the $Ca(OH)_2$ neutralises the acid in the $FeCl_3$ waste stream forming calcium chloride ($CaCl_2$) from the HCl.". At paragraphs 143-183 Dr Godley explains the assumptions and calculations that he has used to reach his conclusion in paragraph 183.

114. Dr Godley, as an expert, has expressed his definitive view at paragraph 199 based upon his analysis in the preceding paragraphs. In *Kennedy* at [48] and [49] the Supreme Court stated that "an expert's bald statement of his opinion is not of any real assistance" and "what carries weight is the reasoning not the conclusion." Dr Godley has considered the evidence provided to him and, on the basis of his analysis and reasoning, reached a different conclusion to that of Mr Durkan. Whilst that conclusion is seemingly at odds with Mr Durkan's, that does not demonstrate a lack of independence, impartiality or a balanced approach. The Appellants'

disagreement with his unequivocal conclusion and methodology is a matter to be addressed in cross-examination with Dr Godley and in submissions.

115. The instances in Dr Godley's report where submissions or assertion are made does not in my view render the entire report inadmissible, relevant evidence should be admitted unless there are compelling reasons not to and the Tribunal possesses the expertise to distinguish between inadmissible submissions and admissible expert evidence, (*Deloitte* at [22]).

Objection 6 The majority of Dr Godley's evidence is irrelevant or unnecessary for the resolution of the issues in the appeal.

116. The Appellants submit that Dr Godley's report correctly identifies that the appeal concerns whether or not the FCC waste is a "calcium based reaction wastes from titanium dioxide production" however, much of his report is irrelevant to that issue (particularly Section B dealing with waste classification and legislation), duplicates Mr Martin's evidence and the composition of the FCC waste and Cristal waste should be capable of agreement. HMRC's position is that the Appellants implicitly accept that Dr Godley's report does in part have relevance to the issues in the appeal contrary to their previously stated view, the Appellants principal criticism and the composition of the FCC and Cristal wastes cannot readily be agreed as there remain issues between the parties as to the waste composition and processing.

117. At paragraph 96 above I confirmed that Section B of Dr Godley's report that provided a summary of the waste classification and legislation should be excluded from the report along with his answers to questions (iii) to (vi). At paragraph 67 above I recorded that it was now accepted by the Appellants that questions (i) and (ii) were relevant to the issue under appeal as it was not accepted by HMRC that the FCC waste was "calcium based reaction wastes". I accept that if Dr Godley's report needlessly duplicates Mr Martin's evidence then those sections should be excluded. Examination of paragraphs 139-142 and 165-168 confirms that Mr Martin's evidence is not simply duplicated but is summarised and comments provided by Dr Godley on his evidence and/or areas of dispute are set out. I note that the inclusion of Mr Martin's evidence at paragraphs 139-142 that is objected to and criticised by the Appellants as unnecessary duplication is the same evidence that in paragraph 113 above the Appellants criticised Dr Godley as not impartial or independent by omitting this evidence.

118. When the remaining admissible sections of Dr Godley's report are considered it is clear that they are relevant and necessary and address the issues in dispute between the parties. I accept that some of the remaining disputed issues may be capable of agreement and the directions below make provision for such possible agreement.

Conclusions and directions

119. Taking account of the above I confirm the following rulings on the admissibility of Dr Godley's report and provide directions for the progression of the appeal.

120. HMRC's application for permission to rely upon the expert witness report of Dr Godley is granted subject to the following paragraphs that are inadmissible.

121. The inadmissible paragraphs are:

(1) Paragraphs 27-109 Section B summarising the EWC Directives, Regulations and Decisions the classification of waste;

(2) Paragraphs 151-153 commenting on the Cristal waste EWC code and its qualification for the lower rate of LFT

(3) Paragraphs 207-213 which address and answer questions (iii)-(vi)

122. Dr Godley's report will need to be amended to reflect the inadmissible paragraphs. The relevant parts are: Table of contents, Summary, paragraph 18 of the Instructions and Annex C. Relevant EWC Directives, Regulations and Decisions that the parties wish to refer to in submissions will need to be included in the authorities bundle.

123. As indicated by the Appellants in correspondence and submissions, this appeal would greatly benefit from the parties agreeing a statement of agreed facts and issues in dispute. The parties are directed to submit draft directions for the Tribunal's consideration within 28 days of the date of release of this decision, such directions to be agreed if possible, dealing with and setting deadlines for:

(1) A statement of agreed facts;

(2) A statement of agreed issues;

(3) Service by either party of amended or additional witness statements of fact; and

(4) Service by Appellants of any expert evidence and by HMRC of amended or additional expert evidence addressing the statements of agreed facts and/or issues.

124. I apologise to the parties for the delay in providing this decision, the delay has been caused by a lengthy period of illness.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

125. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

GERAINT WILLIAMS
TRIBUNAL JUDGE

Release date: 29 NOVEMEBR 2021