Neutral Citation Number: [2020] EWCA Crim 827

Case No: 201902695 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT WOOD GREEN
HH Judge Auerbach
T20180022

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/07/2020

Before:

LORD JUSTICE HOLROYDE
MR JUSTICE LAVENDER
and
HH JUDGE CHAMBERS QC
Sitting as a Judge of the Court of Appeal Criminal Division

- -

Between:

BIFFA WASTE SERVICES LIMITED	**Appellant**
- and -	
THE QUEEN	**Respondent**

- -
- -

Ms Dinah Rose QC and Mr R Banwell (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Appellant**
Mr S Mehta (instructed by **Environment Agency**) for the **Respondent**

Hearing dates: 23rd, 24th June 2020

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Approved Judgment

Covid-19 Protocol: This judgment will be handed down by the judge's clerk remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:00am Friday 03/07/2020.

Lord Justice Holroyde:

1. On or about 14 May and 18 May 2015 the appellant company despatched a total of about 175 tonnes of waste material, said to be paper waste, from its recycling facility at Edmonton in north London. The waste material was destined for two processing plants in China, but travelled only as far as Felixstowe, where inspections of sample bales revealed the presence of various contaminants in both consignments. The appellant was charged with two offences of transporting waste for recovery in a country to which the OECD Decision does not apply, contrary to regulation 23 of the Transfrontier Shipment of Waste Regulations 2007. On 20 June 2019, after a trial in the Crown Court at Wood Green before HH Judge Auerbach and a jury, the appellant was convicted of both offences. It was subsequently sentenced to fines totalling £350,000, made subject to a confiscation order in the sum of £9,912 and ordered to pay the statutory surcharge of £120 and prosecution costs of £240,000. It now appeals against its convictions by leave of the single judge.

The legal framework:

2. It is convenient to begin by outlining the relevant legal framework. The UK is a party to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989. The preamble to that Convention makes clear that it reflected international concerns about the risks of damage to human health and to the environment caused by the transboundary movements of hazardous wastes and certain other wastes (including "wastes collected from households": see Article 1.2 and Annex II). It also records that the parties to the Convention were –

> "convinced that States should take necessary measures to ensure that the management of hazardous wastes and other wastes including their transboundary movement and disposal is consistent with human health and the environment whatever the place of disposal"
>
> and
> "convinced also that the transboundary movement of hazardous waste and other wastes should be permitted only when the transport and the ultimate disposal of such wastes is environmentally sound".

3. In 2001 the Organisation for Economic Cooperation and Development adopted a decision ("the OECD Decision") which developed the framework set by the Basel Convention. China is not a country to which that Decision applies.

4. The European Community became a party to the Basel Convention in 1994 and gave effect to it by establishing rules now embodied in EU Regulation 1013/2006 ("the 2006 Regulation"), which is directly applicable in the United Kingdom. The first recital to the 2006 Regulation makes clear that its main and predominant objective is the protection of the environment, its effect on international trade being "only incidental". Article 2 of the Regulation defines "recovery" in terms which include the

recycling of paper. It goes on, at paragraph 8, to define 'environmentally sound management' as meaning –

> "taking all practicable steps to ensure that waste is managed in a manner that will protect human health and the environment against adverse effects which may result from such waste".

5. Article 36 of the 2006 Regulation, so far as is relevant for present purposes, provides –

> "**Exports prohibition**
>
> 1 Exports from the Community of the following wastes destined for recovery in countries to which the OECD Decision does not apply are prohibited:
>
> (a) wastes listed as hazardous in Annex V;
>
> (b) wastes listed in Annex V Part 3;
>
> …
>
> (g) wastes which the competent authority of dispatch has reason to believe will not be managed in an environmentally sound manner, as referred to in Article 49, in the country of destination concerned."

6. Annex V of the 2006 Regulation is divided into three parts, preceded by introductory notes referred to as the "chapeau". The chapeau indicates that a check must first be made to see whether a particular waste is listed in Part 1, which contains two lists: List A identifies hazardous wastes to which the export prohibition applies; List B identifies wastes to which that prohibition does not apply. If the waste concerned is not included in either of those lists, it is then necessary to see whether it is listed amongst the wastes identified in Parts 2 and 3. If it is, the export prohibition applies. The chapeau goes on to say, in paragraph 3:

> "Wastes listed in List B of Part 1 or which are among the non-hazardous waste listed in Part (i.e. wastes not marked with an asterisk) are covered by the export prohibition if they are contaminated by other materials to an extent which
>
> (a) increases the risks associated with the waste sufficiently to render it appropriate for submission to the procedure of prior written notification and consent, when taking into account the hazardous characteristics listed in Annex III to Directive 91/689/EC; or
>
> (b) prevents the recovery of the waste in an environmentally sound manner."

7. The categories of waste listed in Part 1, List B – commonly referred to as "green list" waste - include category B3020: "paper, paperboard and paper product wastes", which is defined as –

> "The following materials, provided they are not mixed with hazardous wastes:
> Waste and scrap of paper or paperboard of:
> - unbleached paper or paperboard or of corrugated paper or paperboard
> - other paper or paperboard, made mainly of bleached chemical pulp not coloured in the mass
> - paper or paperboard made mainly of mechanical pulp (for example, newspapers, journals and similar printed matter)
> - other, including but not limited to
>
> 1 laminated paperboard,
> 2 unsorted scrap".

Part 3 includes category Y46: "Waste collected from households". For convenience, we shall refer to this as "Y46 household waste". Thus the export prohibition applies to Y46 household waste but not to B3020 paper.

8. Domestic effect has been given to the 2006 Regulation by the Transfrontier Shipment of Waste Regulations 2007 ("the 2007 Regulations"). As we have indicated, the appellant was charged under regulation 23 of those Regulations, which cross-refers to the 2006 Regulation and provides:

> "**23. Prohibitions on export of certain waste for recovery to non-OECD Decision countries**
>
> A person commits an offence if, in breach of Article 36(1), he transports waste specified in that Article that is destined for recovery in a country to which the OECD Decision does not apply".

9. The offence created by regulation 23 is one of strict liability: there is no defence such as reasonable practicability or the taking of all reasonable precautions. It is triable either way. On conviction on indictment the maximum sentence is imprisonment for two years and/or a fine.

10. It is settled law, and common ground in this appeal, that in this context the exporting of a consignment begins when it starts its journey: see, eg, *R v KV* [2011] EWCA Crim 2342, [2012] Env.L.R.15. Thus in circumstances such as this case, if waste is being exported in breach of Article 36, the offence is committed when it leaves the recycling facility, even though it is still in the United Kingdom.

11. In *Beside BV & Besselsen v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1999] Env.L.R. 328 the European Court of Justice held that waste which is collected as household waste can become green list waste. At [32-34] of its judgment, the court said:

> "32. Therefore, 'municipal/household waste' does not cease to be 'amber waste' and therefore does not come within the green list unless it has been collected separately or properly sorted.
>
> 33. As is clear from the introduction to the green list of waste, waste may not, regardless of whether or not it is included on

> that list, be moved as green waste if it is contaminated by other materials to an extent which (a) increases the risks associated with the waste sufficiently to render it appropriate for inclusion in the amber or red lists, or (b) prevents the recovery of the waste in an environmentally sound manner.
>
> 34. The answer to the first question must therefore be that the expression 'municipal/household waste' referred to under AD160 in the amber list in Annex III to the Regulation, as amended by Decision 94/721, includes both waste which for the most part consists of waste mentioned in the green list in Annex II to the regulation, mixed with other categories of waste appearing on that list, and waste mentioned on the green list mixed with a small quantity of materials not referred to on that list"

12. In *R v Ideal Waste Paper Co Ltd* [2011] EWCA Crim 3237; [2012] Env. L.R. 19 the facts were not dissimilar to this present case. The trial judge had rejected a submission that the proceedings should be stayed as an abuse of the process because the test to be applied, in deciding whether waste should be classified as prohibited from export, was so imprecise as to breach the requirements of accessibility and certainty in the criminal law. This court dismissed an appeal against that ruling. It accepted that what starts as Y46 household waste can, by proper sorting, become B3020 paper. It emphasised that a particular consignment of waste must be categorised as either Y46 household waste or paper: it cannot be in both categories. At [42-44] Pill LJ, giving the judgment of the court, said:

> "42. We accept that a very high standard is required of operators in this field. We are mindful of the difficulties faced by commercial operators conducting what is an important and valuable business, not only for them but in the public interest. We are mindful of the extreme difficulty, to which reference has been made, in setting a helpful test of general application when considering and deciding what comes within the definition of household waste. We are not unmindful of the difficulties involved in juries deciding this issue. Juries are familiar with having to decide issues of fact, what evidence to accept. They ae accustomed to considering the state of mind of witnesses and defendants, whether they were acting dishonestly, whether there was consent. A decision as to whether household waste has been converted into waste paper is a decision of a somewhat different kind from those they are normally called upon to make.
>
> 43. There are those who take the view that juries are not the most appropriate forum for trials in environmental cases such as this. We express no view about that, but we do not understate the difficult task of a jury in making a decision and the difficult task of the judge in summing up the case to them.

> 44. Having said that, we are quite unpersuaded that to proceed with a trial as to whether this particular consignment is proved to be household waste is an abuse of the process of the court. The judge will have regard to the 2006 regulation and the 2007 Regulations when giving his directions to the jury. We would contemplate his raising the possibility of a breach being so small as to be minimal and not preventing waste from ceasing to be household waste and becoming waste paper under B3020. That will depend on the circumstances, including the nature and the quality of the contamination and the amount of it. We are confident that a judge will be able to give sufficient directions to a jury to enable them to make the decision as to whether a particular consignment is properly described as household waste and to perform their task by applying that test to the facts."

The facts:

13. Turning to the facts, the appellant provides waste management services to the public and commercial sectors, including waste collection and waste recycling and disposal. Amongst other commercial activities, it sells specific types of waste, including paper waste, to be recycled into new products. A substantial proportion of paper waste is sold to customers in other countries, and the appellant emphasises that such sales are important because the United Kingdom does not have the capacity to recycle as much waste paper as it produces.

14. The appellant had been exporting what it contended was paper waste to the two Chinese mills to which this waste was destined since 2010 and 2011, exporting 110,000 tonnes to China in 2015 alone. These shipments had been regularly inspected in England by the agents of the Chinese mills (referred to at trial as the brokers) and in China by the Chinese authorities. The purpose of the inspections was to check that the waste confirmed to the standards specified in the contracts and in Chinese law for imported paper waste. At the relevant time these required, inter alia, that the waste consisted of at least 98.5% by weight of waste paper, a figure which we understand has subsequently been increased to 99.5%.

15. The present case relates to household waste which the appellant collected from a number of different areas. Depending on the system operated by the local authority for a particular area, some of the waste had been collected by householders simply as mixed recyclables, and some had been separately collected as distinct types of recyclable material such as paper, glass and plastic. The latter, inevitably, included some wastes which had been placed into the wrong container; and both forms of collection inevitably included some items which were not recyclable at all. At its Edmonton facility, the appellant carried out an automated and manual sorting process, the purpose of which was to divide the collected household waste into different waste streams (one of which was paper waste) and to remove contaminants – that is, anything which should not form part of the relevant stream. The paper waste extracted by this process was packaged into bales, each weighing about one tonne. The bales were then loaded into shipping containers before leaving Edmonton to begin their journey to their intended destinations. This appeal relates to two consignments of

what was said to be B3020 paper, despatched a few days apart to recycling plants in China.

16. At Felixstowe, officers of the Environment Agency opened and inspected a number of the containers from each of the two loads. It could immediately be seen that contaminants were present in some of the bales. In relation to containers in the second of the consignments which were inspected, it could also be seen that some of the bales – mainly in the row which was immediately visible when the container was opened – bore blue "passed" labels, but others did not. The containers were detained, and seven of them (destined for two separate plants in China) were moved to a yard for further examination. About three bales from each of these containers were broken so that the contents could more clearly be seen. Representatives of the appellant, and of agents acting for the Chinese purchasers, were able to be present at the inspection, and indeed were permitted to select the bales which were to be broken. It is unnecessary to go into details: it suffices to say that contaminants found in these sample bales included soiled nappies and incontinence pads, sanitary towels, sealed bags containing faeces, items of underwear, other items of clothing, plastic bags, a recycling bag issued by a local authority, plastic bottles, food packaging, electric cable, pieces of wood, metal items, hot water bottles and hi-vis jackets.

The criminal proceedings:

17. The appellant company was charged with the two offences we have indicated. The particulars of count 1 alleged that between 13 and 22 May 2015 the appellant transported waste specified in Article 36(1)(b) of the European Waste Shipments Regulation 1013/2006, namely waste collected from households, that was destined for recovery in China, a country to which the OECD decision does not apply. Count 2 was in similar terms, save that the offence was alleged to have been committed between 17 May and 5 June 2015.

18. It has always been common ground that the appellant was exporting wastes destined for recovery in a non-OECD Decision country. It is also common ground that what was collected and brought to the Edmonton facility for sorting was Y46 household waste. The issue at trial was whether the jury were sure that, by the time the loaded containers left Edmonton, the bales which they were carrying still comprised Y46 household waste and so could not lawfully be exported. It is further common ground that there is no "0% contamination" requirement if Y46 household waste is to become B3020 paper: after proper sorting, the waste may correctly be designated as B3020 paper even though it contains a small amount of contaminants. The prosecution case was that the contaminants present in the relevant consignments were in excess of a permissible minimal level: the Y46 household waste received at the Edmonton facility had either not been sorted at all, or had been sorted so ineffectually that it remained in the category of Y46 household waste and could not lawfully be exported. The defence case was that the waste had been appropriately sorted and that the material being exported to China was properly categorised as B3020 paper.

19. At a comparatively early stage of the proceedings the judge conducted a preparatory hearing. It was submitted on behalf of the appellant that the respondent was in law required to prove not only that the material being exported was Y46 household waste but also that it had not been contaminated by other materials to an extent which prevented the recovery of the waste in an environmentally sound manner. The judge gave a binding ruling in which he rejected that submission. He held that the

prosecution could succeed if it proved that the consignment was correctly categorised as Y46 household waste. If the jury concluded that the consignment was or might have been paper waste, it could potentially be argued that the waste was contaminated by other material which prevented the recovery of the waste in an environmentally sound manner. The prosecution had however made clear that no such argument would be advanced: if the jury was not sure that the consignment was Y46 household waste, the defendant was entitled to be acquitted. The reference in the chapeau to recovery in an environmentally sound manner was therefore irrelevant to what the prosecution had to prove in this case.

20. The appellant appealed against the judge's ruling. The appeal was dismissed by this court at a hearing on 18 December 2018. Written reasons were given in a judgment handed down on 24 January 2019: see [2019] EWCA Crim 20, [2019] Env. L.R. 31. The court made clear at [30] that the only real issue in the appeal was whether the prosecution was required not only to prove that the consignment was Y46 household waste but also to prove the matters set out in para 3(b) of the chapeau. It accepted, at [32], that in some cases paragraph 3 of the chapeau might come into play and be the subject of evidence. But, the court held, this was not such a case, because the prosecution put its case solely on the basis of Article 36(1)(b) and did not seek to rely on Article 36(1)(g). Davis LJ, giving the judgment of the court, concluded at [34]:

> "Accordingly, whether there was sufficient household waste contamination for these consignments properly to be styled as Y46 household waste (rather than the B3020 mixed paper designation given in the export documentation) was a matter of fact and degree for the jury. To seek further to introduce the subject-matter of the chapeau into a case of this particular kind, given the nature of the prosecution here undertaken, would in our view be to introduce an irrelevant and complicating distraction. …"

21. The case then proceeded to trial. Evidence was given by witnesses for the respondent about the inspection of the containers and the findings when the sample bales were inspected. Those witnesses included employees of the agents of the Chinese mills. In cross-examination, they confirmed that the agents had regularly inspected bales of paper waste produced by the appellant and destined for the Chinese mills. They were not asked about the results of those inspections. It is relevant to note that both parties proceeded on the basis that the bales at issue in this case were typical of the bales of paper waste produced by the appellant's facility.

22. The respondent's expert witness Dr Rockey said in cross-examination that the processing of paper involved a fairly standard process, and she accepted that the standard of recycling in China was at least as high as in Europe. She expressed the opinion that waste which was exported as paper should contain only a minimal amount of contamination and so should not need any further sorting before being processed to produce recycled paper. When cross-examined, she expressed the opinion that the bales at issue in this case would have had to be sorted before being put though a paper mill, but she accepted that she was not an expert in how paper mills operate.

23. The evidence adduced by the appellant included both factual and expert evidence as to how effective its sorting process was in removing contaminants and as to the reasons why contaminants which had become compacted within the waste might have been

missed during the sorting process. The appellant's witness Mr Williams gave evidence that the agents of the Chinese purchasers inspected the appellant's product weekly and the relevant official Chinese agency also inspected six or nine times a year. Evidence was given about the process by which the paper waste was recycled in the relevant paper mills in China, using very modern, very large machines. Mr Williams told the jury that he had seen the machines in operation: the wires binding the bale which had come from Edmonton were cut, the bale broken open and the waste went "straight into the pulper", where it was heated by steam injection and any contaminants removed. He added that chemicals were used to "kill bugs" before the recycled paper was produced.

24. The appellant's Chief Operating Officer, Mr Davis, gave evidence in chief to the effect that the management of waste is essential to the protection of the environment and of human health. He referred to awards which the appellant had won in relation to health and safety and innovation, and to the company's charitable works. He was then asked whether he regarded the appellant as a business that takes its environmental responsibilities seriously. He replied:

> "A: Yes, it is core to what we do, we only exist because of environmental legislation so it would be nonsensical for us not to take our responsibilities seriously and our staff take it seriously because whilst it is a basic service, we understand the importance of it because we do it every day and we understand how difficult it is.
>
> Q: To ask you that from a slightly different point of view, is it good commercial sense for you to take your responsibilities seriously?
>
> A: Yes, but we do it for both reasons, it is commercially important, but we would always do it from the moral point of view as well."

25. In the course of the trial, the judge gave three rulings which are challenged in this appeal. First, the judge refused to allow the appellant to adduce factual and expert evidence as to whether the waste met the Chinese standard of acceptability for recyclable waste paper (no more than 1.5% by weight of other recyclable wastes such as metal, glass or plastic), and whether the Chinese paper mills to which the waste was being sold could successfully recycle it in an "environmentally sound manner". He held that this court had already ruled that the categories of Y46 household waste and B3020 paper were mutually exclusive and that, if the waste was proved to be Y46 household waste, then the question of whether it could subsequently be recycled in an environmentally sound manner was irrelevant. His reasons for his ruling were that evidence about such matters risked going behind the decision of this court in January 2019, and that in any event it was not relevant for the jury to know –

> "whether it meets Chinese standards of acceptability, whether the Chinese could successfully process what they receive into a form that is useful or acceptable to them".

26. The parties treated this ruling as precluding, inter alia, the admission of evidence as to the results of the inspections carried out by the agents and the Chinese authorities,

since evidence as to the result of the inspections might lead to the jury being told what the Chinese standard was. That is why the appellant adduced evidence as to the fact of those inspections, but not their results.

27. The second ruling was given in the course of Mr Davis' cross-examination. He was asked a series of questions about the measurement of the level of contamination, whether by nappies or otherwise, in the bales of waste paper produced by the appellant. In his answers he referred to the inspections carried out by the agents, saying, for instance, "… we would rely on the brokers' figures in terms of acid test." Then came the following exchange:

> "Q. So tell me what the answer is in relation to the figures that Biffa produced at divider two. How much was not being picked up in relation to these statistics, these analyses?
>
> A:. Right, in terms of that analysis at that time our bale breaks would've shown less than 1.5% contamination.
>
> Q. Can you show me the figures for that?
>
> A. I'm at a loss here."

28. The jury were sent out at this point. It was submitted that Mr Davis was at a loss how to answer the question because he had been told that the results of the agents' inspections were not to be disclosed to the jury, but could not answer the question without doing just that, and that the appellant would be disadvantaged if it was precluded from adducing evidence of the agents' measurements. The judge indicated that he considered that the way in which the parties had interpreted his first ruling was sensible. Reference to the standards which other people employ was "off limits". In principle, it was not "off limits" to refer to measurements by other people, but in practice it would be difficult to separate evidence as to the measurements from evidence as to the standards. Accordingly, no evidence should be adduced as to the percentages found by the agents, because it was liable to lead into the territory of the agents' standards.

29. Thirdly, the judge allowed an application by the respondent to adduce evidence of previous convictions of the appellant in order to correct a false impression. The application was made pursuant to section 101(1)(f) of the Criminal Justice Act 2003. Section 105(1) of that Act provides that for the purposes of section 101(1)(f), a defendant gives a false impression

> "if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant."

Section 105(6) provides that evidence is admissible under section 101(1)(f) –

> "only if it goes no further than is necessary to correct the false impression".

30. We have already referred to the evidence which Mr Davis gave in answer to questions asked during his examination in chief. The appellant company had in fact been convicted of 18 previous offences, including four for health and safety offences, three of which involved fatalities. The judge held that Mr Davis' evidence had been apt to give a false impression about the appellant's environmental track record: the evidence about the awards received by the company would not alone have created a false impression, but the evidence about the company taking its environmental responsibilities seriously was apt to convey to the jury the implied assertion that it would be at odds with those business standards and ethics for the appellant to have committed environmental offences. Evidence was therefore admissible to correct that false impression, and the judge rejected the appellant's submission that he should exercise his discretion under s78 of the Police and Criminal Evidence Act 1984 to exclude all evidence of previous convictions. He ruled however that evidence of the convictions for health and safety offences should be excluded on grounds of fairness. In the light of that ruling counsel sensibly agreed the terms of a short written admission of fact relating to the 14 convictions for environmental regulatory offences. No criticism is made of the terms in which the judge later directed the jury about the limited relevance of this evidence.

The summing up:

31. The judge helpfully provided the jury with written copies of his directions of law. He directed them that they had to decide the form of the waste when it left Edmonton, and were not concerned with what further processing it would or might have undergone in China. He directed them that it was agreed to be impossible for a consignment of paper to consist literally of nothing but paper, and that the law did not dictate any particular level, threshold or percentage of contaminants which made the difference as to whether the waste was or was not household waste. He said:

> "So, you should not convict merely because you find, if you do, that there were *some* contaminants in each consignment. Rather, your task will be to decide what you think the facts are about the contents of the containers and, if you find that contaminants were present, about their nature, quality and quantity, however you decide to assess it. You will then need to form your own judgment, using your common sense, members of the jury, as to whether the prosecution have made you sure, on the given count, that the nature, quality and quantity of non-paper items that were present, means that you can be sure that the given consignment amounted to waste collected from households"

The grounds of appeal:

32. There are two grounds of appeal:

Ground 1: the judge erred in law in excluding, as inadmissible and irrelevant, factual and expert evidence as to (1) whether the disputed waste complied with Chinese standards for recyclable paper, and was recoverable (ie, recyclable) as paper in China; and (2) whether the waste could be recovered in an environmentally sound manner in China.

Ground 2: the judge erred in acceding to the respondent's application that evidence be admitted of the appellant's bad character in order to correct an apparent false impression under s101(1)(f) of CJA 2003.

The submissions:

33. As to ground 1, the appellant submits that it was wrongly denied the opportunity to adduce evidence which would have shown that the material in the containers was accepted as paper waste both by the Chinese purchasers and by the Chinese authorities, each of whom carried out frequent checks of the appellant's sorting of paper waste and were invariably satisfied with the outcome of their tests. Further, the appellant was denied the opportunity to adduce evidence which would have shown that the Chinese authorities applied high environmental standards and that the paper waste could have been recycled in the Chinese mills without risk to human health or to the environment. Such evidence, it is submitted, was relevant to rebut the prosecution case that the waste leaving Edmonton was so contaminated that it could not be regarded as paper. On a proper analysis of the legal framework, it is relevant to consider the significance of the contamination in relation to the intended recycling of the paper and in relation to whether it would be possible to carry out the intended recycling without risk of damage to human health or to the environment. Those are matters which the jury should consider in making the holistic evaluation which is required of them. It is not suggested that the evidence which the appellant was not permitted to adduce would have been determinative of the issue before the jury; but it was relevant to their difficult task of making the necessary evaluation, as a question of fact and degree, as to whether the Y46 household waste had by proper sorting become B3020 paper. The effect of the judge's ruling was that an important part of the evidence relevant to that issue was not before the jury: they heard some evidence about the way in which the waste would be processed in China, but they were deprived of the further evidence which the appellant wished to adduce. The jury was therefore unable properly to determine whether such contaminants as remained were of no significance, were within the *de minimis* principle and did not prevent the waste being categorised as B3020 paper.

34. It is further submitted that the judge's ruling breached the requirement of certainty and made it impossible for the appellant know whether it was acting lawfully. Given that there can never be a complete absence of any contaminant, and given that there is no objective yardstick to which the jury can refer in making their evaluation, it is necessary for the appellant to be able to show that it complied with the high standards of the Chinese authorities, satisfied its customers who (like the appellant) could have no commercial interest in trading in material which was not B3020 paper, and supplied waste which could be recycled without risk to human health or the environment.

35. It is also submitted that the unfairness created by the judge's ruling was compounded when Mr Davis was cross-examined about the extent to which the sorting process had failed to detect contaminants: but for the judge's ruling, he would have been able to answer the questions by reference to the results of the inspections carried out in the United Kingdom and in China; but as it was, he was left exposed.

36. For the respondent, it is submitted that the legislation casts its focus upon the conduct of the exporter, not on what happens to the waste when it reaches its destination. The export of Y46 household waste is prohibited and therefore it matters not what might be

the effect of a particular contaminant or how the waste will be treated in the country of destination. *Beside BV* shows that if Y46 household waste is to become B3020 paper, it must be properly sorted. In the circumstances of this case, therefore, the focus is on Edmonton, not China. The nature, quality and quantity of contaminants have to be considered by the jury in order to decide whether the waste has been properly sorted, not to decide what will happen in another country. Otherwise, the same waste could be differently categorised according to its country of destination, which would be contrary to the purpose of the legislation.

37. It is submitted that the jury had a good deal of evidence about the nature and processing of the waste received into the Edmonton facility. The appellant adduced evidence that it had invested heavily in high-quality equipment. Mr Williams gave evidence that the purchasers' agents repeatedly inspected the waste which the appellant was selling to Chinese mills, and although the appellant was not permitted to adduce direct evidence that those inspections had been passed, that was the plain implication of the evidence. The appellant was able to send representatives to observe the Environment Agency's inspection of the sample bales, and almost all of the waste in the containers was returned to the appellant. It would therefore have been open to the appellant, if it wished, to adduce evidence as to precisely what contaminants remained in the waste. The jury thus had all the evidence they needed to decide whether the waste had been properly sorted. Moreover, notwithstanding the judge's ruling, Dr Rockey had been cross-examined about the processing of waste in China. That was irrelevant evidence, because it could not help the jury to decide whether the waste had been properly sorted in Edmonton.

38. As to ground 2, it is submitted on behalf of the appellant that Mr Davis was doing no more than putting forward the appellant's response to the allegation that the waste had not been sorted at all, and was not making a false parade of virtue. There was no such implied assertion as the judge found. In the alternative, even if the bad character evidence was in principle admissible, the judge should have excluded it because of its prejudicial effect in circumstances where the appellant was charged with offences of strict liability, and the jury had to make an evaluative judgment. It is suggested that the transcript of a discussion at a later stage of the trial about the "passed" labels reveals that the judge had previously misunderstood the evidence in that regard, and it is submitted that the ruling which the judge gave about it was inconsistent with his earlier admission of the bad character evidence.

39. The respondent submits that the evidence of Mr Davis did not relate to the appellant's defence to the charges: its only purpose was to suggest that the appellant was not the sort of company to commit an offence such as was alleged. Mr Davis's reference to "the moral point of view" confirmed that. The judge was therefore plainly entitled to find that the evidence had been apt to create a false impression. He exercised his discretion favourably to the appellant in excluding evidence about the convictions for health and safety offences.

40. We are grateful to all counsel for their submissions, which were of a high standard. We have taken into account all the points which they made, though we do not find it necessary to mention them all.

Discussion and conclusions:

41. The first ground of appeal challenges the judge's ruling excluding certain evidence which the appellant wished to adduce before the jury. In considering that challenge,

we must first address as a matter of principle the nature of the evidence which is admissible in a case such as this.

42. We think it important to emphasise at the outset that Article 36 of the 2006 Regulation, and therefore regulation 23 of the 2007 Regulations, are concerned with the prohibition of exports of certain wastes destined for recovery in non-OECD Decision countries. Consistently with the aims of the Basel Convention, which as we have noted at [2] reflects the need for measures relating to the transboundary movement and disposal of wastes "whatever the place of disposal", no distinction is drawn between individual non-OECD Decision countries. The Regulation thus prohibits the export of the proscribed wastes to any non-OECD Decision country, regardless of the precise destination.

43. It follows, as both parties recognise, that the correct categorisation of the waste material in question must be determined as at the point where its export begins: here, when the loaded containers left the Edmonton facility. If at that stage the material is properly categorised as Y46 household waste, its export to a non-OECD Decision country is unlawful, regardless of what might happen to it when it reaches its destination.

44. Where, as in this case, waste has been collected as mixed recyclable household waste, it (or some of it) can only become paper by being properly sorted. In this context, "properly sorted" means that the sorting is sufficient to remove contaminants to the point where any contamination which remains is "so small as to be minimal and not preventing waste from becoming waste paper under B3020" (see *Ideal Waste* at [44]). If that minimal level of contamination has not been achieved by the time the export to a non-OECD Decision country begins, the material remains Y46 household waste: the prohibition therefore applies, even if further sorting or processing in the country of destination would remove all but a minimal level of contaminants.

45. Neither the destination of the waste, nor any standard applied by the recipient of the waste or by the country to which it was to be exported, is relevant to the jury's task. The Basel Convention and the 2006 Regulation impose a standard for determining whether waste is B3020 paper waste which applies regardless of the destination of a particular consignment of waste. The opinions of mill owners, or foreign legislatures or environmental agencies, as to how to determine what constitutes paper waste are irrelevant to the application of that standard.

46. It is of course open to a defendant to adduce factual and expert evidence as to the nature of its sorting process, and as to the extent to which that process is effective in removing non-paper waste. It is also open to a defendant to adduce evidence of the fact that it carried out (or caused to be carried out) its own testing of the amount of contaminants remaining in the waste (or comparable waste) after the sorting process; and the results of such testing can be given in evidence, though the jury must be directed that the law does not lay down any particular proportion or level of contaminants below which the waste can properly be categorised as paper waste. But it follows from what we have said that the correct categorisation of the waste material cannot depend on its specific destination. Nor can it depend on precisely how the waste will be recovered in the country of destination, or on the standards which that country applies to determine a permissible level of contaminants, be those standards high or low. The waste in a particular consignment must be either Y46 household waste or B3020 paper waste when it begins its journey: it cannot be categorised as

paper if it is going to one destination but as household waste if it is going to another. The prohibition on exports either applies or does not apply at the outset of the journey, regardless of where the journey will end or what will happen to the waste when it gets there. Any other approach would be inconsistent with the aims and intentions of the Basel Convention and of the legislation flowing from it, and would also be likely to render an essentially simple prohibition unworkable and unenforceable in practice.

47. How then is a jury in a case such as this to decide whether the prosecution have proved that at the start of its journey the waste was Y46 household waste? No simple metric can be provided. As is clear from *Ideal Waste*, the jury will need to consider the quantity, nature and quality of the contaminants which remain after the sorting process. We place quantity first in that list, because it is clear from *Beside BV* and subsequent cases that the quantity of contaminants must be small. If more than a small quantity of contaminants remains, it must follow - regardless of the nature or quality of the contaminants - that the Y46 household waste cannot have been properly sorted and cannot have become a green list waste.

48. If the jury find the quantity to be small, then it is necessary for them to consider the nature and quality of the contaminants. In this regard, because the prohibition relates to exports of waste for recovery, we see some force in the appellant's submission that it is relevant for the jury to know whether those contaminants prevent or impede the recovery of the waste, in an environmentally sound manner, as recycled paper. We think there is merit in the point that, absent any such evidence, a jury might assume that the mere presence of a particular contaminant, in however small a quantity, must necessarily mean that the Y46 household waste could not have become B3020 paper. The jury might be tempted to make such an assumption if the contaminant was unpleasant (eg a soiled nappy) or notably incongruous (eg a hot water bottle).

49. We further accept that this submission is not precluded by the earlier decision of this court, when dismissing the appeal against the judge's preliminary ruling: that decision was concerned with what ingredients of the offence the prosecution were required to prove, and was not concerned with the separate issue of what evidence a defendant may adduce if it chooses to advance an affirmative case as to the correct categorisation of the waste.

50. To counter the risk which we have identified, it is in principle open to a defendant to adduce evidence with a view to showing that, regardless of the precise destination, the bales of paper waste produced by its sorting process could without further sorting be recycled in an environmentally-sound manner. It is therefore open to a defendant to adduce evidence, including expert evidence, of the general processes by which B3020 paper is recycled, with a view to showing, for example, that however out of place a particular contaminant might appear in a consignment of paper, its presence could not have any significant effect on the processing of the waste, in an environmentally-sound manner, into recycled paper. Such evidence cannot of course be determinative of the evaluation which the jury has to make: it remains necessary for the jury to make an overall assessment of the quantity, nature and quality of the contaminants, and to make its own judgment as to whether the waste in question was still Y46 household waste when its export began. We emphasise that this does not open the door to evidence about how the waste will be processed at a particular destination: such evidence is inadmissible because, as we have made clear, the jury has to determine the correct categorisation of the waste when its journey begins and regardless of precisely where it is going.

51. We would add an important case management consideration. A defendant who wishes to adduce evidence of this nature must identify the issue in its defence case statement and at the plea and trial preparation hearing. Depending on the circumstances of the case, consequential issues may arise (for example, if there is a dispute as to whether that which the appellant puts forward as general practice will in fact be followed) and Article 36(1)(g) may become relevant as part of the prosecution case.

52. We are not however able to accept the appellant's further submission that a defendant may adduce evidence of the fact, or the results, of testing carried out (whether before or after the waste leaves the United Kingdom) by the purchasers or by the regulatory authorities in a particular country of destination. This is because any such evidence would be evidence of an irrelevant and inadmissible fact, namely that the waste met a standard applied by a particular operator or regulator in a particular non-OECD Decision country. Any such standard could only be relevant to the importing of the waste into the country concerned, not to the correct categorisation of the waste when it is exported.

53. Those being the relevant principles, we turn to consider whether the convictions are unsafe on either or both of the grounds of appeal.

54. As to ground 1, it follows from what we have said that the judge was correct to rule that evidence as to compliance with Chinese standards or as to the ability of the Chinese purchasers to recycle the waste was inadmissible. The jury did in fact hear evidence about tests carried out by the purchasers' agents and by the Chinese authority (with a clear inference to be drawn that those tests had been passed) and about the processes carried out in the Chinese mills: the appellant had the benefit of Mr Davis' evidence that the breaking open of the bales showed that the level of contamination was less than 1.5%, and of Mr Williams' evidence to the effect that the bales of paper waste would go "straight into the pulper" in the Chinese mills. Thus the evidence which the jury heard went beyond that which was admissible in accordance with the principles we have stated. The judge's ruling did not prevent the appellant from adducing further evidence as to how paper waste is generally recycled, in order to counter the evidence given by Dr Rockey. Nor was the appellant prevented from adducing evidence as to why the contaminants found in the seven bales would not have prevented or impeded such recycling being carried out in an environmentally sound manner. In those circumstances, we are satisfied that the judge's ruling did not deny the appellant the opportunity to adduce the evidence which was properly admissible, and did not cause any unfair prejudice to the appellant. The judge therefore did not fall into error as this ground contends.

55. We can address the second ground briefly. It is well established (see, eg, *R v Renda* [2005] EWCA Crim 2826, [2006] 1 Cr App R 24) that the question whether a defendant has given a false impression about himself is fact-specific. In our judgment, the judge was clearly entitled to find that the evidence given by Mr Davis in examination in chief, in answer to questions specifically asked of him, could convey the impression that the appellant was not the sort of company which would commit an offence. It is not possible to justify that evidence on the basis that it was necessary in order to put forward the appellant's defence to the allegation that the waste had not been sorted at all. The judge was therefore correct to rule that the prosecution could adduce evidence to the extent necessary to correct any false impression. The judge was careful to limit the extent of the bad character evidence which was admitted, and to avoid any risk of unfair prejudice arising from the previous convictions for health

and safety offences, particularly those involving fatalities. He therefore did not fall into error as this ground contends.

56. For those reasons, we are satisfied that the convictions are safe. This appeal accordingly fails and is dismissed.