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The Downstream Effects of Finch

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This is the second blog post in a series which summarises the major developments in climate litigation in 2024, both in the United Kingdom and worldwide.

The Downstream Effects of Finch

In September 2019, planning permission was granted to expand oil production from a well in Surrey. Sarah Finch, on behalf of local residents, brought judicial review proceedings, arguing that the environmental impact assessment (“**EIA**”) for the project was unlawful because it did not assess the greenhouse gas (“**GHG**”) emissions produced by burning the oil within the scope of the “likely significant indirect effects” of the project.

This argument was rejected on the papers, and upon oral renewal, as ‘unarguable’. Once permission for the judicial review was granted on appeal, the claim was refused by the High Court and by the Court of Appeal.

On 20 June 2024, the Supreme Court handed down its judgment in R (Finch on behalf the Weald Action Group) v Surrey County Council [2024] UKSC 20, and the majority (Leggatt, Kitchin, and Rose JSC) allowed the claimant’s appeal. Lord Leggatt, for the majority, noted at [7]: *“The only issue is whether combustion emissions are effects of the project at all. It seems to me plain that they are.”*

This decision provoked a substantial reaction, for two reasons. First, over the course of five years, the proceedings attracted substantial media interest. Second, there were immediate concerns (which the majority acknowledged) that the ‘floodgates’ would open and complicate any future development which entailed carbon-intensive downstream effects. Six months on, and with the advantage of further first-instance decisions applying *Finch*, this blog assesses the judgment’s ‘downstream effects’ and suggests they have to date been relatively limited.

The EIA Directive and Its Limits

Directive 2011/92/EU, known as the “**EIA Directive**”, is implemented in UK legislation through the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (“**the Regulations**”). The Regulations requires an EIA to be carried out before planning permission can be granted for categories of projects which are likely to have significant environmental effects. The EIA must identify, describe and assess the likely “direct and indirect significant effects” of a project on, among others, the climate.

An EIA does not determine whether planning consent will be granted. It is a procedural regime whose central function is to ensure that the environmental effects are known and subject to public debate, as Lord Leggatt noted at [3]. Significantly, EIAs are only mandatory for specified large-scale developments (such as power stations and airports). They *may* be required where the project’s size, activity, or location would have significant environmental consequences.

Finch’s Treatment of Causation

The majority judgment treated the phrase “indirect effect” as matter of causation, because “*an effect is the obverse of a cause*” [65].

Lord Leggatt considered three possible tests which might establish a causal relationship between the project and the alleged effect: (i) ‘but for’ causation; (ii) whether an effect was a “necessary and sufficient cause” of a project; or (iii) whether an intervening act was ordinary or extraordinary, following *Environment Agency v Empress Car Co* [1992] 2 AC 22. However, because in this case it was an agreed fact that combustion of the oil produced was “inevitable”, which satisfied all three tests, the majority did not rule on which was correct.

This gives rise to a degree of legal uncertainty as to what the applicable test is, in cases where the downstream effects of the climate are not inevitable. The majority mitigated the potential uncertainty, by glossing the Directive’s accompanying words of “likely” and “significant” and thereby limiting the scope of indirect effects which must be considered.

First, Lord Leggatt noted at [77] that causation must be established by evidence and not by conjecture. If there is insufficient evidence to support a reasoned conclusion that a possible effect is “likely”, no requirement arises to assess it.

Second, there is no obligation to assess effects which are *de minimis*. Lord Leggatt considered the example of a plant manufacturing parts for the construction of motor vehicles or aircraft at [122]: on these facts, the local authority could reasonably take the view that the contribution of such components is not sufficiently material to justify attributing the impact on the environment of the end-product of the activity (i.e. an airplane) to the manufacture of the component parts.

Third, where a product of a project (such as metals from a steelworks) have many possible uses, this indeterminacy would make it impossible to identify any such uses as “likely”.

In September 2024, Finch was applied for the first time by Holgate J in the *Friends of the Earth v Secretary of State for Levelling Up, Housing, and Communities* [2024] EWHC 2349 (Admin), in the context of the controversial Whitehaven coal mine. Difficult questions on causation were once again avoided because the combustion of the coal was inevitable. Future cases will have to tease out a practical approach to Lord Leggatt’s judgment.

Practicality and policy

The legal error in **Finch** was a failure to consider the downstream effects at all. The obligation imposed by **Finch** can be discharged by erring on the side of caution and making a reasonable assessment of all likely effects.

Further, even if an EIA identifies significant adverse environmental effects arising from downstream carbon emissions, the decision to grant consent will be made against the relevant policy framework and as a matter of planning judgment.

Finch may have put mandatory legal consideration of carbon emissions in the news, but planning policy – and, therefore, executive decision-making – remains the critical factor in determining whether carbon-intensive projects will be granted consent.

1 The EIA Directive is implemented in UK legislation via the Town and Country Planning (Environmental Impact Assessment) Regulations 2017.

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