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Recent UK Court Rulings on Scope 3 Emissions: Have the Floodgates to Climate Change Litigation Fully Opened?

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On 20 June 2024 the UK Supreme Court issued its long awaited decision in *R (on the application of Finch on behalf of the Weald Action Group) (Appellant) v Surrey County Council and others (Respondents)* [2024] UKSC 20 ("**Finch**").

This was followed on 13 September 2024 by the UK High Court decision in *Friends of the Earth and others v South Lakeland Action on Climate Change – Towards Transition and others* [2024] EWHC 2349 ("**Whitehaven**").

The two decisions have important implications for those conducting environmental impact assessments for fossil fuel projects. Namely, the need to take the scope 3 emissions resulting from those projects into account.

The Finch Decision

The case concerned the grant of planning permission to Horse Hill Developments Ltd for the retention and extension of the Horse Hill Well Site, Surrey, and to drill four new wells, to produce hydrocarbons over a 25-year period (the "**Development**").

The question for the Supreme Court was relatively simple. It had to decide whether it was unlawful for Surrey County Council not to require the environmental impact assessment ("**EIA**") for the Development to include an assessment of the impacts of greenhouse gas emissions resulting from the eventual use of that oil as fuel (known as scope 3 emissions). The only matter at issue was whether the scope 3 emissions were the effects of the Development at all. The Supreme Court decided that they were, overturning the decision of the lower courts.

The key points arising from the decision are:

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1. Where an EIA is required for a proposed project for the extraction of petroleum and natural gas for commercial purposes, the wording transposed into UK Law by the EU EIA Directive (Directive 2011/92/EU as amended) requires the EIA to consider scope 3 emissions.

- The legislation specifying the requirements of an EIA is procedural in nature. It is not concerned with the substance of the decision of whether to grant development consent but with how the decision is taken.
- The Supreme Court's decision does not, therefore, mean that consent for future hydrocarbon projects cannot be granted. It means only that the scope 3 emissions arising from such a project must be taken into account in the decision-making process.

Background

In September 2019, Surrey County Council granted planning permission for the Development. In doing so, the Council did not assess the environmental impacts of the scope 3 emissions that would result from the oil's ultimate use because they were treated as beyond the EIA's scope.

Ms Finch, a local resident in Surrey and a climate activist, applied for judicial review of Surrey County Council's decision to grant planning permission, citing serious concerns about the effects which the extraction and use of hydrocarbons would have on climate change.

The legislation at the heart of this dispute was Directive 2011/92 EU (as amended) of the European Parliament and the Council ("**EIA Directive**") and the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("**2017 Regulations**").

Decision at First Instance

In 2020, the Planning Court dismissed Ms Finch's application for judicial review and concluded that the scope 3 emissions from the future combustion of the refined oil products from the Development were "*as a matter of law, incapable of falling within the scope of the EIA required by the 2017 Regulations for the planning application*."

Court of Appeal Decision

Ms Finch appealed the first instance decision on the basis that the Planning Court erred in its interpretation of the 2017 Regulations. The Court of Appeal dismissed Ms Finch's appeal and found that Surrey County Council was entitled to decide as a question of "*fact and judgment*" whether the

Development's scope 3 emissions fell within the assessment required by the 2017 Regulations.

Supreme Court Decision

The Supreme Court decided (by a majority of three to two) that Surrey County Council's decision to grant planning permission was unlawful because the EIA for the project failed to assess the effect of scope 3 emissions resulting from the eventual combustion of oil produced by the new wells.

Delivering the majority judgment, Lord Leggatt emphasised that scope 3 emissions are an inevitable consequence of crude oil production. The case had proceeded on the basis of an agreed fact that all crude oil produced from the Development would be combusted, which he concluded resulted in the scope 3 emissions being a relevant effect of the Development which was required to be considered in the EIA.

The Supreme Court's decision makes clear that, even where scope 3 emissions are required to be considered in the EIA, this need not preclude the grant of permission. Instead, the obligation to consider scope 3 effects in EIAs, where relevant, ensures that the decision-making process is informed by a comprehensive understanding of a project's impact on the environment.

In arriving at this decision, the Supreme Court did not follow decisions on near identical questions by both the Scottish Court of Session relating to offshore oil production (in *Greenpeace Ltd v Advocate General* [2021] SLT 1303) and the Irish Supreme Court relating to a cheese factory (in *An Taisce – The National Trust for Ireland v An Bord Pleanála (Kilkenny Cheese Ltd, notice party)* [2022] 2 IR 173). In both cases, the EIA Directive, as implemented by relevant regulations, was not interpreted to require the consideration of scope 3 effects in the EIA. The leading judgment cited with approval the decision of the Oslo District Court in *Greenpeace Nordic v The State of Norway (represented by the Ministry of Petroleum and Energy)*, Case No 23-099330TVI-TOSL/05, which also decided that the EIA in question should have considered scope 3 emissions.

The Whitehaven Decision

The Whitehaven decision considered the UK Government's approval of a new coal mine in Whitehaven, Cumbria. The EIA Directive was, again, at the heart of this dispute, along with the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("**2011 Regulations**").

Although it was the 2017 Regulations and not the 2011 Regulations that applied in Finch, all parties accepted that the principles laid down in the Finch decision applied equally to the Whitehaven case. The High Court, therefore,

applied the Supreme Court's majority decision in Finch and found that the decision to grant approval for the coal mine was unlawful.

It is of note that, in reaching its decision, the High Court rejected the arguments advanced by the developer of the coal mine that the project would have a zero net increase effect on global greenhouse gas emissions because the coal produced would substitute coal that would otherwise be produced in the US. The judgment illustrates how any evidence that a project will have a net zero effect will be subjected to significant scrutiny, particularly if, as in this case, that position is based on substitution.

The Whitehaven decision quashes the decision made by the previous Secretary of State in December 2022 to grant planning permission for the coal mine. It is now up to the developer of the mine to decide whether to appeal the judgement and/or maintain its application. If it elects to maintain its application, the government will need to consider again the question of whether to grant approval and, in doing so, would need to take into account the scope 3 emissions that would be generated by the project.

Implications for Offshore Oil and Gas

Wording that is the same as, or similar to, that contained in the 2017 Regulations and the 2011 Regulations exists in many other pieces of UK legislation, including regulations concerning the offshore extraction of oil and gas. The Finch and the Whitehaven decisions are, therefore, likely to have an impact on the process by which approval for offshore oil and gas projects is sought.

However, even in situations where scope 3 emissions are required to be included in EIAs as part of that approval process, neither the Supreme Court's nor the High Court's decision acts as a bar to approval ultimately being granted.

Comment

Finch and Whitehaven serve as further examples of environmental activists using the UK courts to challenge the approval and development of fossil fuel projects in the UK.

The decisions are already being heralded by a number of these groups as a gamechanger. But it should not be forgotten that the role of the courts is to interpret and apply the law, not to make policy. The decisions do not prevent approval for further oil and gas projects in the UK being granted. However, they will likely embolden those who wish to oppose such projects, leading to more climate change related actions being commenced in the courts.