Indirect effects—the scope of the environmental impact assessment (Finch v Surrey County Council)

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Planning analysis: The Planning Court dismissed an application for judicial review which sought to challenge and to quash the defendant local planning authority's decision to grant planning permission for the commercial extraction of crude oil. The claimant's main argument was that the greenhouse gas emissions from combustion of products for which the oil is a raw material, notably vehicle and aeroplane fuel, must be subject to assessment within the environmental impact assessment (EIA) required before granting permission. Mr Justice Holgate has decisively held otherwise, focusing on the development project itself and holding that these 'downstream' emissions are not capable of being indirect effects of the development. The defendant's EIA obligations did not require it to assess the impact of greenhouse gas emissions arising from the consumption of oil produced at the site, which might take place anywhere in the world. Other grounds, including a claim that the defendant had misinterpreted paragraph 183 of the National Planning Policy Framework (NPPF), or that it is not a lawful policy, were dependent upon success in the main ground, and failed. Written by Harriet Townsend and Dr Alex Williams, both of Cornerstone barristers, who acted for Surrey County Council (the defendant in these proceedings).

R (on the application of Finch) v Surrey County Council (Friends of the Earth Ltd intervening) [2020] EWHC 3559 (QB)

What are the practical implications of this case?

As Holgate J recognised (at paras [4]–[5] and [99]), the claimant's arguments, if correct, would have implications well beyond the immediate context of crude oil extraction. The same arguments would apply to proposed developments involving the extraction of any minerals for subsequent use in generating energy, as well as the production of components that may end up in products (aircraft, for instance) that generate greenhouse gas emissions.

The judgment brings welcome clarity to the law in this area, holding that downstream emissions are *incapable* of falling within the scope of the EIA regime, unless they amount to effects of the particular development in question (para [126]). An EIA should focus on the effects of the development itself, rather than on the potential for the extracted mineral to cause environmental impacts in future.

It is, nevertheless, important to remember that downstream greenhouse gas emissions associated with hydrocarbon development are still to be taken into account by the lawful application of relevant planning policy in the overall planning balance. Finch establishes a significant but much narrower point, that effects that are not 'of the development' fall outside the scope of the EIA regime.

For the avoidance of doubt, the claim turned on the interpretation of domestic regulations, and its significance is unaffected by Brexit.

What was the background?

In September 2019, the defendant granted planning permission for the retention and expansion of the Horse Hill Well Site, the production of crude oil over a period of 20 years, and the subsequent restoration of the site. The Town and Country Planning (Environmental Impact Assessment) Regulations, SI 2017/571 required the developer to submit an environmental statement (ES) that described the likely significant effects of the development,

both direct and indirect, on various aspects of the environment including the climate. Accordingly, the ES detailed the greenhouse gas emissions that would arise from the operation of the development itself. But it did not include the 'downstream' greenhouse gas emissions that would result from the crude oil being used by consumers, having been extracted from the site and refined elsewhere. The defendant accepted the developer's reasons for omitting downstream greenhouse gas emissions from the ES, having earlier adopted a scoping opinion that recommended including them.

In a claim supported by a local environmental action group, and Friends of the Earth, the claimant sought judicial review of the decision to grant planning permission, which she contended was unlawful. Her central argument was that the defendant had failed to comply with the Town and Country Planning (Environmental Impact Assessment) Regulations, SI 2017/571, as well as Directive 2011/92/EU as amended in 2014, by failing to assess downstream greenhouse gas impacts arising from the combustion of the oil extracted from the site. Since the combustion of end products would inevitably result in greenhouse gas emissions, she argued, they were attributable to the project and represented indirect effects of the project that the ES needed to assess. It was common ground that, once refined, the oil could be combusted anywhere in the world.

What did the court decide?

Holgate J rejected the claimant's arguments. Under the Town and Country Planning (Environmental Impact Assessment) Regulations, SI 2017/571, the relevant test is not whether a given environmental effect is inevitable but whether it is an effect of the development for which permission is sought. Even inevitable consequences may first require a raw material extracted pursuant to one development to pass through one or more further developments which are not the subject of the application (para [101]). Unless in reality the development is part of a larger project which has been artificially 'salami-sliced' into smaller projects, SI 2017/571 does not require the consideration of environmental effects of another development on a different site (para [112]). The defendant's obligations did not extend to considering the environmental effects of consumers using an end product made from the crude oil (ie refined) in a separate facility. In the circumstances, downstream greenhouse gas emissions were not even capable of being considered under the EIA regime (para [126], which summarises in a single paragraph the judge's conclusions); and, even if they were, the defendant's decision not to consider them was rational and otherwise lawful in the circumstances (paras [123]–[127]).

The judge drew support from the wording of various aspects of the Town and Country Planning (Environmental Impact Assessment) Regulations, SI 2017/571 including the Town and Country Planning (Environmental Impact Assessment) Regulations, SI 2017/571, regs 2(1), 4(2), 18(3) and (4) and Sch 4 (discussed at paras [33]–[45]), and Directive 2011/92/EU that the Town and Country Planning (Environmental Impact Assessment) Regulations, SI 2017/571 transposed (see paras [21]–[32]). His review of domestic case-law (at paras [119]–[126]) is also instructive—notably *R (on the application of Squire) v Shropshire Council* [2019] EWCA Civ 888, in which a challenge succeeded because of a 'failure to assess an obvious environmental effect of the proposed development, namely the disposal of the waste it would generate'; and *Preston New Road Action Group (through Holliday) v Secretary of State for Communities and Local Government and another* [2018] EWCA Civ 9, in which Lord Justice Lindblom stated (at para [68]) that the concept of indirect effects 'cannot be stretched to include effects that are not effects of the project at all'. The Court of Justice's consideration of end products in the context of Directive 2011/92/EU in *Abraham v Region Wallonne*, Case C-2/07 (2008), [2008] All ER (D) 431 (Feb) and *Ecologistas en Accion-CODA v Ayuntamiento de Madrid (2008)*, Case C-142/07 offered the claimant no support. Properly understood, both cases concerned environmental effects that were effects of the development in question (paras [114]–[117]).

The judge also rejected the argument that the claimant's reading of the Town and Country Planning (Environmental Impact Assessment) Regulations, SI 2017/571 was necessary

because there were no other measures in place for assessing and reducing greenhouse gas emissions from the combustion of oil products in motor vehicles (paras [105]–[106]).

The claimant accepted that her remaining grounds of review depended on her main argument (above) succeeding. Accordingly, and for other reasons, Holgate J rejected her claims that the defendant had failed to comply with the Town and Country Planning (Environmental Impact Assessment) Regulations, SI 2017/571 and Directive 2011/92/EU by failing to consider the UK's environmental protection objectives of addressing the climate crisis and reducing greenhouse gas emissions (paras [134]–[140]); that it had acted unlawfully in its interpretation of para 183 of the NPPF and paras 12 and 112 of the Minerals Planning Practice Guidance by allowing downstream greenhouse gas emissions to be excluded from the ES; and that, alternatively, those policies were incompatible with Directive 2011/92/EU and therefore unlawful (paras [141]–[144]).

Case details

- Court: Planning Court (Queen's Bench Division), High Court of Justice
- Judge: Holgate J
- Date of Judgment: 21 December 2020

Harriet Townsend and Dr Alex Williams are barristers at Cornerstone Barristers, and acted for Surrey County Council in this case. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysis@lexisnexis.co.uk.