



CLIMATE CHANGE MUST BE COUNTED

R (Finch) v Surrey County Council [2024] UKSC 20

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Introduction

The Supreme Court has held that the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (the “2017 Regulations”) require an Environmental Impact Assessment (“EIA”) to take into account not just the emissions when oil was extracted but also the emissions when the oil was ultimately used as fuel.

This is important because it means the scope of EIAs must be very broad; although the Supreme Court did not think the floodgates would be opened.

Facts

A developer applied to Surrey County Council for planning permission to extract oil from six wells over a period of 20 years. An EIA was therefore compulsory because it concerned the extraction of petroleum for commercial purposes where the amount extracted exceeds 500 tonnes per day.

The developer contended, and the council accepted, that the the scope of the EIA was limited to the direct releases of greenhouse gases from the well site during the lifetime of the project. In other words, that they need not consider the greenhouse gas emissions that would occur when the oil was ultimately burnt as fuel.

The claimant argued that the EIA was unlawful because it had not considered the greenhouse gas emissions that would ultimately occur upon combustion of the oil produced.

The High Court and Court of Appeal disagreed, upholding the Council’s decision. However, the Supreme Court upheld the claim by a majority, and quashed the Council’s decision.

Decision

The following points were key to the Supreme Court's majority decision:

- **Legislative breadth:** The legislation is very broadly drafted. The 2017 Regulations were designed to implement the EIA Directive 2011/92/EU. Article 3(1) of the EIA Directive requires the EIA to assess both the *“direct and indirect”* effects of a project on the specified environmental factors, one of which is climate. Annex IV, para 5 stipulates that the description of the likely significant effects on the factors specified in article 3(1) should cover both the direct effects and *“any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project.”* As the Supreme Court noted, it would be hard to devise broader wording than this.
- **Question of causation:** The *“effects of the project”* was a question of causation. Causation was certain in this case. The High Court found that *“it is inevitable that oil produced from the site will be refined and, as an end product, will eventually undergo combustion, and that that combustion will produce [greenhouse gas] emissions.”* The emissions in this case could be reasonably estimated using an established method.
- **Secondary processes:** Although there was a separate activity of transforming crude oil at a refinery (projects which would in the UK and EU require separate planning permission and a separate EIA), this did not break the causal connection because the basic nature and intended use of the oil remained the same. It could not be assumed the crude oil would be sent to a refinery where an EIA would be required before the oil could be refined. Further, there was no rule that, if effects were counted for one project, that dispensed of the need to count them elsewhere. An objective of the EIA Directive was to take environmental impacts into account at the earliest possible stage.
- **No geographical limit:** The EIA Directive does not impose any geographical limit on the environmental effects to be assessed. Nor does the climate impact depend on where the release occurs.
- **Floodgates:** The High Court was worried that EIAs would be unduly onerous and unworkable if all the greenhouse gas emissions generated from subsequent activities had to be assessed. The Supreme Court did not think the floodgates would open. Oil was different to, e.g. iron or steel, which have many possible uses and so a much less determined causal connection with the ultimate release of greenhouse gases. Similarly, it might reasonably be considered that the manufacture of a component is insufficiently material to justify attributing to it the environmental impact of the end product. The EIA process does not require effects to be assessed where they are incapable of assessment.

Accordingly, the EIA was obliged to assess the effect of the climate on the combustion of the oil to be produced.

Comment

The effects of this decision are likely to be far reaching, both (a) in terms of the strong general message that climate change is an important planning consideration, but also (b) the difficulty in drawing a line as to which environmental impacts are sufficiently causally connected to require inclusion in an EIA.

The Supreme Court decision suggests oil wells are at one, certain, end of the spectrum and the production of materials such as iron and steel may be at the other, uncertain, end of the spectrum. However, there will be a sizable grey area. For example, what bearing will *Finch* have on developments generally, outside of the extraction of fossil fuels? How should one approach transport proposals providing for the movement of vehicles that may produce emissions? How too should one approach large housing estates where there are foreseeable transport implications? The area is now likely to be ripe for legal uncertainty and challenges.

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