BRIEFING ON COURT OF APPEAL JUDGEMENT

HORSE HILL OIL DEVELOPMENT

Key Points

- On 17 February 2022, the Court of Appeal delivered a split 2:1 ruling that Surrey County Council's decision in September 2019 to grant planning permission for an oil development without considering the end-use greenhouse gas emissions from the combustion of the oil was lawful[1]. The environmental impact assessment (EIA) had assessed only the emissions arising from the actual extraction of the oil from the ground, but not these end-use emissions. The dissenting judgment by Lord Justice Moylan concluded that the Council had acted unlawfully.
- The challenge brought by Ms Sarah Finch, the appellant, was supported by Friends of the Earth, the legal intervener[2]. It was defended by Surrey County Council (the Council), Horse Hill Developments Limited (the Developer) and the Secretary of State for Levelling Up, Housing and Communities (the Secretary of State; Michael Gove's Department).
- Whilst it is disappointing that the Court of Appeal has concluded that the Council's decision was lawful, the judgment is an improvement in climate terms on the High Court judgment delivered in December 2020[3].
- The High Court had ruled that as a matter of law, the Council could not have taken into account these end-use emissions in the EIA. The Court of Appeal judgment makes clear that this is not correct. Instead, local planning authorities have a discretion as to whether these emissions are assessed in the EIA.
- If Ms Finch brings an appeal and this goes to the Supreme Court, Friends of the Earth will continue to support the case.

Introduction

In 2012, the Council granted planning permission for an exploratory oil well at Horse Hill – a site only 3km west of Horley and 3.5km north of Gatwick Airport. In 2017, they granted permission for a sidetrack well and second borehole, and subsequent testing. In 2019, just a few months after the council passed a motion declaring a climate emergency, they granted planning permission for an oil development. This development, if it goes ahead, will include 6 oil wells that would collectively extract over 3 million tonnes of oil over 20 years, the burning of which would produce more than 10 million tonnes of carbon dioxide equivalent.

[1] *R (oao Finch & Others) v Surrey County Council & Others* [2022] EWCA Civ 187. The judgment is available here

[2] Ms Finch was represented by Mark Willers QC, Garden Court Chambers and Estelle Dehon QC of Cornerstone Barristers, and the law firm Leigh Day LLP. Friends of the Earth was represented by Paul Brown QC, Landmark Chambers and Nina Pindham of No.5 Chambers.

[3] *R (oao Finch & Others) v Surrey County Council & Others* [2020] EWHC 3566 (Admin). Available here

The Legal Challenge

The legal challenge was brought by Ms Finch on behalf of the Weald Action Group; an umbrella for local groups that have been campaigning against the extraction of oil and gas in the southeast of England for years. The case went before the High Court in November 2020, with Friends of the Earth as the legal intervener. The Defendant was the Council, with the Developer and the Secretary of State as Interested Parties.

In December 2020, the High Court ruled that the Council had acted lawfully, rejecting the arguments made by Ms Finch and Friends of the Earth, and finding that the Council was right not to consider the end-use emissions as part of the EIA. In fact, the judge even concluded it would have been unlawful for the Council to have considered them [para 126].

Ms Finch appealed this ruling, with Friends of the Earth again acting as the legal intervener. The substantive hearing took place in November 2021 before three senior judges: Lord Justice Lewison, Lord Justice Lindblom and Lord Justice Moylan.

Ms Finch and Friends of the Earth argued that the Council should have considered the end-use emissions, on the basis that they were clearly indirect effects of the development, in light of regulation 18 and paragraph 5 of Schedule 4 of the Town and Country Planning (EIA) Regulations 2017.

The arguments advanced included that:

- the High Court's interpretation of the EIA regime was unduly restrictive, and ran counter to established case law at national and EU level;[4]
- that there was an inconsistency in the Council's approach, in its willingness to consider the benefits flowing from the end-use of the oil (e.g. the economic benefits), but not the climate disbenefits that ran hand-in-hand with that usage;
- that the fact that the environmental effects from the end-use would arise in locations unknown and unrelated to the development site could not determine whether or not these effects qualified as indirect effects for the purpose of EIA;
- it was evidently possible, in practical terms, to estimate what the end-use emissions from this development would be, and without opening the floodgates/making the EIA regime unworkable[5]. Friends of the Earth referred to case law in other countries, in which end-use (scope 3) emissions from fossil fuel developments are routinely assessed, to show that this was feasible in practice.
- that the reasons provided by the Council for its decision to exclude the end-use emissions from EIA were inconsistent and legally flawed.

Prior to the hearing, campaigners at Friends of the Earth called on the Secretary of State to withdraw from the proceedings, given the Government's claims that it is taking the climate emergency seriously. Disappointingly, the Secretary of State persisted in taking part in the hearing, and defended the Council's decision to grant planning permission for the oil development.

[4] Following the country's withdrawal from the EU, the case law of the European Court of Justice that was in place prior to the end of the transition period on 31 December 2020 forms part of our retained EU law. It remains binding on our domestic courts, and can only be departed from by the Court of Appeal and the Supreme Court.

[5] Such that EIA would then necessarily encompass all manner of other end-use emissions, regardless of whether they were inevitable or closely linked the to the development or not.

The Judgment

Whilst not the full result that Ms Finch and Friends of the Earth were hoping for, the Court of Appeal's judgment is an improvement on the High Court's ruling. Positive aspects of the judgment include:

- The finding that local planning authorities are not prohibited from assessing end-use emissions from fossil fuel developments in EIA. Instead, the Court of Appeal held that this is a matter for planning authorities to decide on for themselves. Whilst Friend of the Earth does not agree with this finding, and believes that the EIA legislation *mandates* the assessment of these end-use emissions in the context of fossil fuel developments, it is certainly better (in terms of its implications for the climate) than the judgment made by the High Court. The High Court had ruled that, as a matter of law, the Council could not have taken these emissions into account in the EIA, on the basis that they could not qualify as indirect effects of the development. By contrast, the Court of Appeal has rowed back from this hard-line position, with Lindblom LJ holding that: "*I do not think it is possible to say that such an impact is legally incapable of being an environmental effect requiring assessment under the legislation".* [para. 43].
- The Court of Appeal's finding that it is scientifically possible to calculate end-use s emissions from fossil fuel developments is helpful, as is their finding that it is feasible to produce a reliable estimate of whether or not the development will have a net increase in carbon emissions. This is timely, given the issue of end-use emissions is coming up again and again in different contexts (see p5 below: potential wider significance of the case). At para. 71, the judgment states:

  > *"We can accept that it is scientifically possible to calculate a theoretical level of greenhouse gas emissions from the combustion of a given quantity of hydrocarbons (see, for example, H.J. Banks, at paragraphs 73 to 88). General estimates of the greenhouse gas emissions from the combustion of the refined products of the crude oil extracted by a particular development can be made, using the methodology in the Institute of Environmental Management and Assessment guidance. This was common ground before us. Whether the oil extracted from the development, once refined, distributed, sold and used, will be responsible for a net increase in global greenhouse gas emissions is a different question. Again, a reliable estimate is not impossible – as one sees, for example, in the decision of the Hague District Court in Vereniging Milieudefensie and others v Royal Dutch Shell Plc C/09/571932 (English version: HA ZA 19-379), which accepted the finding of UNEP's 2019 Production Gap Report that "studies using elasticities from the economics literature have shown that for oil, each barrel left undeveloped in one region will lead to 0.2 to 0.6 barrels not consumed globally over the longer term" (paragraph 4.4.50)."*(emphasis added)

- The Court also rejected the argument that lack of control is determinative of whether something is or is not an indirect effect for the purpose of EIA [para 70]. This is positive, given a key point argued by the Developer and the Council was that the circumstances in which the oil would ultimately be used was not something that the Developer could control.

Whilst these aspects of the judgment are encouraging, Friends of the Earth is disappointed that the Court of Appeal still concluded that it was lawful of the Council to exclude from assessment the *inevitable* end-use emissions arising from the combustion of the oil itself. It was not disputed by any party in the case that these end-use emissions were an inevitable consequence of the development. Friends of the Earth does not therefore agree with the analysis of the majority decision in the Court of Appeal, that the so-called intervening steps

(i.e. the process of refining the oil) between the oil being extracted from the ground, and ultimately burnt (its end-use) meant that the Council's decision to exclude the end-use emissions from the EIA was lawful.

As things stand, the majority decision by the Court of Appeal leaves us with what, in our view, is a bizarre outcome in practical terms: that in the context of a climate emergency, local councils can essentially choose whether or not to assess end-use emissions from fossil fuel developments in EIA[6].

The Split Decision

It is unusual for the Court of Appeal to be unable to reach a unanimous decision on a case. The split decision makes it clear that when it comes to interpreting law relating to climate change, there is disagreement, even amongst senior judges.

It is notable that Lord Justice Lewison expressed reservations in ultimately agreeing with Lord Justice Lindblom that the Council had acted lawfully: "*Whether the downstream greenhouse gas emissions were or were not to be regarded as indirect effects of the project was a question of judgment for Surrey CC. Although it would have been preferable for more explicit consideration to have been given to that question, I have concluded (not without hesitation) that the reasons just about pass muster*."(emphasis added; para. 149).

Friends of the Earth welcomes the strong dissenting judgment from Lord Justice Moylan, who concluded that the Council had acted unlawfully, and who would have allowed the appeal. Contrary to the majority decision, Lord Justice Moylan held that the existence of intervening steps which would take place before the oil was actually used was **not** a lawful reason for the Council to exclude the assessment of the end-use emissions from the EIA. Friends of the Earth agrees with this conclusion, because the refinement process will not alter the ultimate quantity of the end-use emissions that will arise once the oil is burnt. Lord Justice Moylan concluded [para 138] that:

> *"In my view…. it would require cogent reasons to exclude from assessment the environmental effects, including "on climate", of the manner in which the oil will be used when that is the commercial purpose of its extraction. The subsequent process of refining and the subsequent combustion do not, as the county council considered and Holgate J determined, provide justification for the non-assessment of greenhouse gas emissions. On the contrary, the oil's refinement and combustion are, in the present case, the commercial purpose of its extraction and provide justification for such an assessment. In other words, I do not consider that the effects of the extraction of the oil for commercial purposes stop at or with its extraction or with its processing at a refinery somewhere in the world. A broad, purposive approach to the interpretation of the provisions applicable in this case points strongly towards their application not being so limited. As Mr Brown submitted, it is not difficult to describe the combustion of material obtained from a development whose sole purpose is to obtain that material for combustion as being an environmental effect of the development."* (emphasis added)

Potential Impacts and Wider Significance

The Court of Appeal's judgment means that the door is open to other planning authorities to insist on the inclusion of scope 3 emissions in the EIA when they are considering applications for fossil fuel developments.

[6] Subject to this being considered unlawful on public law grounds.

This could have real, and significant impacts for other developments and decisions. The issue of the assessment of end-use (also known as scope 3 emissions) is something that is cropping up again and again, in different contexts. For example:

- In the Whitehaven planning inquiry, in which Friends of the Earth is a Rule 6 Party opposing the proposed coal mine[7], the developer has used the High Court Horse Hill judgment to argue that it cannot be required to assess the end-use emissions from the coal. This is very concerning, given the extent of these emissions; Friends of the Earth has calculated that they will be approximately 194 million tonnes of carbon dioxide equivalent over the lifetime of the coal mine. Importantly, the Planning Inspector made clear that further representations on this issue may be necessary following the hand down of the Court of Appeal's Horse Hill judgment.
- Friends of the Earth is challenging the Government's decision to pledge $1.15 billion to fund a fossil fuel project in Mozambique. [8]Here also, the end-use emissions were not calculated as part of the Government's approval process. In the legal proceedings, the Government originally claimed that it was not possible to do this accurately. However, Friends of the Earth has calculated that over the lifetime of the project, the total emissions will amount to approximately 4.5 billion tonnes of carbon dioxide equivalent, which is more than the total annual emissions of all 27 EU countries put together. The decision to provide funding for this project does not involve EIA, but the principle endorsed by the Court of Appeal in Horse Hill, that it is technically possible to calculate these emissions, is relevant.
- The Court's endorsement of the technical feasibility of calculating end-use emissions is extremely timely given the Government's current Climate Compatibility Checkpoint consultation for future oil and gas licensing in the UK Continental shelf, which closes on 28 February 2022. Test 5 is one of the tests under consideration for the checkpoint, and involves a requirement to calculate scope 3 (end-use emissions) as part of the process for obtaining licensing consent. The consultation asks respondents to explain how this can be done in practice. The Court's judgment makes clear that end-use emissions can be calculated, and refers to an established methodology (the Institute of Environmental Management and Assessment guidance). Friends of the Earth will therefore draw on this as part of its consultation response.

Next Steps

- Ms Finch is considering whether to bring an appeal to the Supreme Court.
- Given the significance of the issues, Friends of the Earth will continue to support the appeal if it goes to the Supreme Court.

For media enquiries, please contact the Friends of the Earth press team: media@foe.co.uk

Friends of the Earth Limited

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[7] Friends of the Earth's briefing on the Whitehaven coal mine planning inquiry is available here
[8] The substantive hearing took place before the Divisional Court in December 2021, and the judgement is awaited. See our press release here. Our briefing on the case is here.