Freshfields Bruckhaus Deringer

Supreme Court judgment in *Finch* – Overview of the decision and its implications

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A. Introduction

On 20 June 2024, the UK Supreme Court handed down its long-awaited judgment in *R (on the application of Finch on behalf of Weald Action Group) (Appellant) v Surrey County Council and others (Respondents)* [2024] UKSC 20 (***Finch***). In a ruling that may have significant ramifications for the consenting of many new projects, the Court found that a planning authority should have considered the indirect downstream greenhouse gas emissions of an oil and gas project as part of its Environmental Impact Assessment.

In this briefing, we summarise the main findings of the judgment and provide a high-level analysis of the likely implications.

B. Statutory framework

Finch related to the requirements for Environmental Impact Assessments (***EIA***) pursuant to the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (the ***Regulations***).

These Regulations, which originally implemented EU Directive 92/11/EU (as amended) (the ***Directive***), require proponents of certain categories of project to prepare EIAs and submit them in Environmental Statements (***ES***) alongside planning applications. The EIA process is designed to ensure that authorities factor environmental issues into discretionary assessments of the acceptability of relevant projects – EIAs do not impose substantive restrictions on which projects can or cannot be approved.

The substantive parts of the Regulations are replicated identically in EIA instruments binding other (non-planning) project authorities, such as the North Sea Transition Authority for offshore oil and gas and the Marine Management Organisation for marine works, so the principles in *Finch* have broad ramifications beyond planning.

All of the relevant Regulations require EIAs to '*identify, describe and assess*' the '*direct and indirect significant effects*' of a project on, among other things, the air, climate and landscape (Regulation 4(2)).

C. Background

Finch concerned a judicial review of Surrey County Council's (the ***Council***) 2019 decision (the ***Decision***) to grant planning permission to expand oil production and add new wells to an existing onshore oil well site in Surrey (the ***Project***). It was estimated that in the final phase of the Project, over 3.3m tonnes of oil would be extracted.

As part of the planning application process, the developer, Horse Hill Developments Ltd (the ***Developer***), carried out an EIA.

Prior to carrying out its EIA, the Developer had requested a scoping opinion from the Council under Regulation 15. This scoping opinion provided that the EIA should include an assessment of '*the global warming potential of the oil and gas that would be produced by the proposed well site*.' In the end, the Developer's ES did not include this: it covered direct emissions from sources within the Developer's control (Scope 1 emissions under the Greenhouse Gas (***GHG***) Protocol), but did not extend to emissions produced as a consequence of the Project's activities, including the combustion of any oil to be extracted (Scope 3 emissions). The Developer explained that this was (among other reasons) because the processes that would lead to such combustion would be subject to their own pollution control regimes, which were likely to require the mitigation of material environmental risks.

The Council accepted the ES covering this more limited scope, and ultimately decided to grant planning permission for the Project.

The Claimant, who lives near the site and represents the Weald Action Group, challenged the Decision on the

grounds that by issuing permission based on an EIA scope that was limited in this way, the Council had erred in law. The challenge was rejected by the High Court and subsequently by the Court of Appeal, before being appealed to the Supreme Court.

D. Supreme Court decision

The Supreme Court reversed the decisions of the lower courts and allowed the appeal by a 3-2 majority – finding effectively that the Council's Decision was unlawful in that it relied on an insufficient EIA.

'Effects' of the project

In the leading judgment, Lord Leggatt noted that the '*whole purpose*' of extracting fossil fuels was to make hydrocarbons available for combustion. He placed emphasis on the fact that the parties had agreed that combustion of the Project's extracted oil was 'inevitable' and would ultimately result in GHG emissions that would contribute to global warming. He therefore rejected the argument that the refining process breaks the causal chain between extraction and combustion, given that this process does not alter the basic nature or intended purpose of oil.

> **'[I]*f the project goes ahead, this chain of events and the resulting effects on climate* [the combustion of oil and release of GHG gases into the atmosphere] *are not merely likely but inevitable*' [para 79]**

Based on this, he ruled that downstream GHG emissions were '*effects of the project*' within the meaning of the Regulations, and therefore the Council's failure to require assessment of them as part of the EIA process rendered its Decision unlawful.

Importantly, Lord Leggatt drew a distinction between oil and other commodities, such as iron and steel, which may have several different uses and be incorporated into many different end products. Where there is indeterminacy regarding future use, he suggested that it would be impossible to identify which effects are likely and to make any meaningful assessment of the effects at the EIA stage:

> '***Oil is a very different commodity from, say, iron or steel, which have many possible uses and can be incorporated into many different types of end product* […]. *In the case of a facility to manufacture steel, it could reasonably be said that environmental effects of the use of products which the steel will be used to make are not effects of manufacturing the steel* […] *because the manufacture of the steel is far from being sufficient to bring about those effects*' [para 121]**

Assessing the effects

As to how combustion emissions could be calculated in an ES, Lord Leggatt said that this was '*not a difficult task*' and that methodologies such as that described in the guidance issued by the Institute of Environmental Management and Assessment (***IEMA***), should be used. Following this guidance, he found that, '[a]*ll that is required is to identify from published sources a suitable 'conversion factor' – which is the estimated amount of carbon dioxide emitted upon combustion of each tonne of oil produced*.' The conversion factor used in *Finch* (which appears to have derived from the UK Government's Greenhouse Gas Conversion factors) was 3.22 tonnes of CO_2 per tonne of oil produced, which resulted in an estimated total of 10.6m tonnes of CO_2 emissions over the lifetime of the project.

Lord Leggatt did however note that material should only be included in an ES '*if it is information on which a reasoned conclusion could properly be based*' and that '*whether a possible effect of a project is likely and capable of assessment may, depending on the circumstances, be a matter on which different decision-makers, each acting rationally, may take different views*.' [para 78]

E. Implications of the decision

As developers, decision-makers and courts grapple with the implications of the *Finch* judgment, we address below some of the more immediate questions flowing from the decision.

1. Which projects will *Finch* apply to?

There is no doubt that downstream Scope 3 emissions should now be included where an EIA is required for projects involving the new or expanded extraction of oil and other hydrocarbons that will go on to be combusted.

The application of the judgment to the consenting of other projects subject to EIAs is less clear, however, and will likely turn on the end uses of anything that is extracted or produced by the project, and the extent of the inevitability of such uses. Based on the comments made by Lord Leggatt in respect of other commodities, such as iron or steel, it may be possible to argue that where the future use of a commodity or product is not certain, the environmental effects (including GHG emissions) of the end use are insufficiently certain to constitute '*effects of the project*', and there may therefore be grounds to exclude them from any EIA.

This does not mean that *only* projects involving hydrocarbon extraction will be affected. Where the product of a particular project will realistically only have one end use, the reasoning in *Finch* would make it difficult to exclude assessment of the environmental impact of that end use from the EIA for that project.

2. What should developers consider doing differently?

To increase the legal resilience of project consents, Developers should think more broadly about the inevitable '*effects*' of an EIA project (and for greater prudence, also the likely – or even potential – effects), and assess these effects in an expanded EIA scope. In particular, there are now clear legal risks in limiting the scope of environmental impacts to those within the project operator's direct control or within the geographical boundary of the project. For many projects, this will mean carrying out an assessment of the Scope 3 emissions associated with downstream products.

This may represent a significant departure from current practice. While operators commonly include measurements of the Scope 1 and 2 emissions of projects in both EIA and broader sustainability reporting, using methodologies such as those published by IEMA, Scope 3 assessments are less common in both EIA and broader reporting. While Scope 3 reporting is increasing – e.g. due to pressure from consumers and investors – there is still no requirement to do so under English law (pending the outcome of a consultation by the former Conservative government). *Finch* may therefore be seen as accelerating the application of Scope 3 reporting to developers of certain projects – particularly those involving fossil fuel abstraction and production.

Quantifying the effects of a project

The decision in *Finch* makes a point of presenting the exercise of calculating downstream emissions as simple. Given Lord Leggatt's endorsement, it may be prudent to adopt the relevant UK Government conversion factors that *Finch* suggests would have made the Council's decision lawful. This aligns with the IEMA Guidance which provides that '[t]*he Government conversion factors for greenhouse gas reporting are suitable for use by UK based organisations of all sizes, and for international organisations reporting on UK operations.*' This methodology was also supported by the Office for Environmental Protection in its submissions to the Supreme Court in *Finch*, which may be indicative of the future direction of travel of Government guidance and/or legislative measures.

However, the IEMA Guidance is not binding, and it is not clear whether this approach *must* (or even can) be followed in all cases, and/or whether developers will have some leeway in terms of how they estimate the downstream emissions of a project's output. As explained in Government Guidance, using a conversion factor is just one way of measuring GHG emissions, as an alternative to recording emissions at the source or by continuous emissions monitoring. Lord Leggatt also recognised that, where conversion factors are used, there are multiple sources for the underlying figures (see, for example, those published by the US government and Base Carbone by the French Environment and Energy Management Agency). While adopting the approach endorsed by *Finch* may seem to be a safe route, all projects are different, and the appropriate methodology for a particular project requires thoughtful consideration (particularly where there are international developers or other stakeholders involved). This may be relevant for proponents who assess and voluntarily report on their actual and projected Scope 3 emissions, and who need to be careful not to carry out EIAs using methodologies or other parameters that create scope for future conflict.

Finally, even if developers do not consider *Finch* to bring any of the broader effects of a project within the EIA scope (including any Scope 3 emissions), project authorities will be increasingly sensitive to these issues in validating ESs going forward, and any insufficiencies in scope will provide a new avenue for challenge by opponents. Developers seeking to optimise the efficiency and legal resilience of project-consenting processes should accordingly consider demonstrating proactively how and why they have reached conclusions regarding downstream effects and Scope 3 emissions in ESs, by reference to the future end uses of the project's outputs where relevant.

3. How might this affect project decision-making processes?

It is clear that *Finch* will ensure that certain project authorities are furnished with more information regarding certain projects' Scope 3 emissions as part of the EIA process. However, the impact of that information on how authorities exercise their ultimate discretion will vary, depending on the type of consent being sought and the project itself. It is not clear whether this will lead to fewer projects being approved, or approved with more stringent restrictions and conditions.

The Office for Environmental Protection's submission provided a helpful reminder of the procedural nature of EIAs, with which the Court agreed: '*the environmental information gained by assessment – comprising both the developer's environmental statements ('ESs') and the outputs of consultation with specialist statutory bodies and the public – informs but does not dictate the ultimate decision. The identification of adverse effects under EIA does not mean that permission or consent should necessarily be withheld. The process is intended to inform project design and decision-making, including informing measures which may be necessary to avoid, mitigate or compensate for certain effects.*'

The *Finch* decision does not *of itself* change the factors that an authority is required to consider in deciding whether to approve a new project, nor the weight that

should be attached to each of them. Decisions must still be based on the factors dictated by the relevant empowering legislation (such as planning, marine, or oil and gas legislation). These factors vary, but generally include a mix of technical parameters, prevailing national and local policies, and the outcomes of stakeholder consultations – alongside the information mandated to be included in the EIA. Where any of these factors relate to climate change, the requirement for the EIA to include greater information on Scope 3 emissions will likely have more opportunity to influence the final outcome.

In fact, in *Finch* itself, Lord Leggatt recognised that the Council had considered UK climate policy to be relevant to the assessment of the Project. However, he stressed that the Court was not being asked to review the Council's application of that policy, even though it was '*clearly relevant to the substantive decision whether to grant development consent*', concluding only that the EIA process should ensure that decisions of that type took place '*on an informed basis*'.

It follows that Government policy on the relevance of climate impacts will likely be the most determinative factor to the outcome of project applications. However, the impacts of an increased requirement to place Scope 3 data in front of authorities applying such policies will presumably affect the outcomes of at least some of these decisions. Depending on the project and national policy, an authority may well consider that the Scope 3 data affects the discretionary balance, such that the adverse effects outweigh any beneficial effects. And, where it doesn't affect the ultimate decision, the authority will need to be prepared to defend this decision (see below).

4. Will this lead to more planning challenges?

There is little doubt that challengers will look to use this case as inspiration and/or ammunition for further challenges (and indeed, the *Finch* judgment is already being cited in ongoing planning court cases).

On the other hand, once the current backlog of open applications with ESs prepared pre-*Finch* has been determined, it may be that the increased certainty as to the legal test decreases the scope for challenge. In his judgment, Lord Leggatt made clear that he does not think that the decision will open the floodgates to more planning application challenges, given that only certain projects would be affected.

Projects where Scope 3 emissions *are* considered as part of the EIA process, and where consent is granted, may prove to be a new ground for carry-on challenges, building on the foundations of *Finch*; in particular, judicial review claims brought by environmental campaigners. Depending on the legal grounds advanced in such cases, authorities may well be able to defend their decisions – for example, by showing that their decisions were rational (referring to prevailing policy where appropriate) and/or that they provided clear reasons for their decisions – but such litigation will nonetheless be costly for all involved and may cause project delays.

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