A Finch in the coalmine? Friends of the Earth v SoS Levelling Up, Housing and Communities & others [2024] EWHC 2349 (Admin)

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On 13 September 2024, the High Court quashed the decision to grant planning permission for a new underground coal mine in Whitehaven, Cumbria in the case of *Friends of the Earth v SoS Levelling Up, Housing and Communities & others* [2024] EWHC 2349 (Admin) ('*Whitehaven*').

The hearing took place shortly after the handing down of the judgment of the Supreme Court in *R (Finch on behalf of the Weald Action Group) v Surrey County Council* [2024] UKSC 20 ('*Finch*'). Whitehaven has previously been discussed on this blog (see Cumbria Coalmine – Deep Dive Part 1 and Part 2). *Whitehaven* marks one of the first cases in which that landmark judgement has been applied. Those seeking an authoritative summary of the litigation and conclusions in Finch need look no further than paragraphs [16]-[18] and [25] of *Whitehaven*.

The decision in Whitehaven will be of interest to practitioners in both planning law and climate change law, not only for its discussion (and helpful summary) of *Finch* but also for its confirmation that the impact granting consent for a project may have on the ability of the UK to perform its leadership role in promoting international action on climate change may be a legally relevant consideration in the context of a planning decision.

Legal Context: ***Finch***

Before turning to the decision in *Whitehaven*, it is helpful to understand the legal context in which it was decided, namely the decision of the Supreme Court in *Finch*.

Finch was a legal challenge to the grant of planning permission for the extraction of oil over a 25 year period. It was agreed that it was inevitable that the extracted crude oil would be refined and ultimately combusted somewhere in the world. The environmental statement ('ES') had excluded consideration of the greenhouse gas emissions from the consumption of fuel products in motor vehicles, even though these were capable of being estimated. The claimant argued that these should have been included as part of the environmental impact assessment ('EIA'), on the basis that combustion emissions were

indirect effects of the oil extraction project.

The decision of the Supreme Court, handed down on 20 June 2024, was that whether GHG emissions from the combustion of fuel projects were in a fact of the oil extraction project was ultimately a question of law depending upon whether the extraction would be a cause of that combustion. As it was common ground that the combustion of the refined products would be an inevitable consequence of the extraction, the Supreme Court held that the reasons given by Surrey County Council for not treating the GHG emissions from fuel combustion as likely significant effects of the oil extraction were legally flawed.

Factual background

Whitehaven related to a planning application for the mining and processing of metallurgical coal, which would be used for the production of steel. At the planning inquiry in late 2021, the approach of the applicants, West Cumbria Mining Limited ('WCM'), had been that end use GHG emissions from the burning of coal fell outside the scope of the EIA because they were not effects, whether direct or indirect, of the proposed mining project. In the alternative, even if they were effects, WCM had argued that there was no legal requirement to assess them because they would not comprise any material additional emissions compared to the existing baseline, since (a) the demand for coke (the coal blend used in steel production) is led by the demand for steel, and (b) the coal produced by the proposed development would replace, rather than be additional to, other coking coals already used in the coke blend (see [37] of *Whitehaven*). Importantly, on this latter point, WCM had argued that there would be perfect or virtually perfect substitution of those other coals.

Two organisations - Friends of the Earth ('FoE') and South Lakeland Action on Climate Change – Towards Transition ('SLACC') – played an active role in the public inquiry, in which the Inspector (with whom the Secretary of State agreed) determined that the GHG emissions from the burning of Whitehaven coal were not likely significant indirect effects of the proposed development and within the scope of EIA. Following the grant of planning permission, both FoE and SLACC brought claims in January 2023 under s.288 of the Town and Country Planning Act 1990, seeking the quashing of that permission.

The High Court initially stayed proceedings pending the decision of the Supreme Court in *Finch*, before lifting the stay in April 2024, when, after close to a year of deliberation, the Supreme Court had not yet handed down its judgment. Less than a month before the hearing in *Whitehaven* was due to take place, the Supreme Court handed down its judgment in *Finch* (20 June 2024) and on 10 July 2024, the Secretary of State sent the Court a draft consent order, accepting, contrary to its earlier position, that the decision should be quashed, citing Lord Legatt's judgment in *Finch* about the purpose of the EIA regulations.

As the Secretary of State agreed to submit to judgment on the EIA ground it took no part in the proceedings thereafter. It follows that in the proceedings which ultimately took place, only the Claimants and the WCM played an active role.

The decision

The decision in *Whitehaven* is a decision on two separate claims, one brought by FoE and one by SLAAC. In the light of the overlap between their respective grounds of challenge, Holgate J grouped these into five "issues", with Issues (i)-(iii) being common to both claimants.

Issue (i): Breach of EIA regulations

Under Issue (i) the claimants contended that the Secretary of State acted in breach of the 2011 Regulations by deciding that GHG emissions from the burning of Whitehaven coal were not a significant, likely effect of the proposed development.

Like *Finch*, it was common ground that the burning of the coal was an inevitable consequence of its extraction. The Court therefore held that the GHG emissions from the combustion of the coal were significant likely indirect effects of the project that needed to be assessed as part of the EIA process. Moreover, it held that the assessment was an obvious material consideration that the Secretary of State was obliged to take into account in the determination of the planning application (at [101]-[102])

To this, WCM made three arguments in the alternative:

(i) Because the extraction of Whitehaven coal would result in an equivalent amount of US coal remaining in the ground, the burning of the Whitehaven coal could not be a "significant effect" for the purposes of the 2011 Regulations (at [103]);

(ii) The errors made by the Secretary of State were not material errors because taking into account the conclusions in the decision letter on substitution, there would be no net increase in GHG emissions, even if the burning of Whitehaven coal were to be included in the assessment (at [104]);

(iii) Issue (i) does not justify the quashing of the decision because absence the legal errors, the decision would have been the same (at [104]). As such, the outcome of Issue (i) should be considered together with Issue (ii).

The Court rejected all three of these arguments.

In relation to the first, it held that this argument would be absurd as if correct, it would mean that no assessment would need to be made at all in the ES, EIA or decision of the GHG emissions from the combustion of the Whitehaven coal, nor of the substitution of that coal for US coal ([at [103]).

In relation to the second, the Court emphasised that any offsetting should not be confused with the question of whether extraction of Whitehaven coal is in law a relevant cause of the burning of the coal: whether the extraction of Whitehaven coal would be a legally relevant cause of US coal remaining in the ground is not the same question as whether that extraction is in law a cause of the GHG emissions produced when the Whitehaven coal is burned. Because the burning of the extracted coal was *inevitable*, legal causation was established in respect of the extraction. By contrast, there had been no finding of fact by the Inspector or Secretary of State that it was inevitable that the US coal will stay in the ground because, and to the extent that, Whitehaven coal is extracted. As such the Secretary of State had not made the findings necessary to support WCM's argument in the Court (at [108]).

The Court held that this was a freestanding reason for the decision to be quashed, but nevertheless considered whether those legal errors could be overcome in light of the outcome on the substitution issue (i.e. the third argument of WCM under Issue (i)).

Issue (ii): Substitution

Under this issue, the claimants' argued that the Secretary of State's conclusion that the proposal would have a neutral or beneficial effect on global GHG emissions was inconsistent the findings in the decision letter on substitution of Whitehaven coal for US coal and illogical in the absence of any finding as to the degree of substitution.

The Court found in favour of the claimants, finding that the Secretary of State's handling of the substitution issue was legally flawed, both individually and cumulatively. This issue was addressed in considerable detail in the judgment, with the legal errors listed at [187]. These included the finding that WCM's contentions that (a) end use emissions did not have to be assessed and/or (b) would not lead to

a net increase in GHG emissions depended upon perfect, or virtually perfect, substitution (i.e. that all or nearly all of the coal burned at Whitehaven would replace US coal, which would then stay in the ground). However, the decision letter demonstrated that the Secretary of State either found that there would be only partial substitution, or failed to reach any consistent conclusion on this issue. As a result, the Court held that the Secretary of State was not entitled to conclude that the proposed development would not lead to a net increase in GHG emissions.

Notwithstanding the Court's conclusions on Issues (i) and (ii) the Court proceeded to consider the other three main issues at the appeal. Of these remaining issues, I consider Issue (iii) to have the widest potential implications, and I will therefore address this briefly below.

Issue (iii): Impact of planning permission on the UK's climate change leadership role

The Claimants had argued that the concern that grant of planning permission for the Whitehaven coalmine would harm the ability of the UK to persuade other countries to reduce GHG emissions from the use of coal was a material disbenefit of the proposal. First, the mine would result in a substantial net increase in GHG emissions and would therefore set a bad precedent internationally for the development of coal mines elsewhere in the world. Second, even if the Secretary of State were to accept that the project would operate as a net zero mine, that would still be a harmful precedent, because any further mining projects of the same nature would depend on the off-setting of GHG emissions, and offsets are a finite global resource.

WCM argued that the Inspector had accepted WCM's case that the net zero nature of project was a positive signal and therefore beneficial in the planning balance. Thus, despite being in dispute at the inquiry, it was accepted by the parties to the legal proceedings that the signal sent by the grant of the planning permission for the mine (and its effect on the UK's standing to promote international action to tackle climate change) was a relevant planning consideration – a position with which Holgate J agreed (see [203]).

In light of its findings that the assumption that the proposed mine would be net zero was flawed, the Court held that Issue (iii) must also succeed. Moreover, the Court held that even if the Claimants had not succeeded on Issues (i) and (ii), the Claimants would nevertheless succeed under Issue (iii). This was because the Secretary of State failed to deal in any way with the claimants' alternative case in relation to the precedent effect of a net zero mine: i.e. that it would lead to other similar project dependent on offsetting arrangements, which would be undesirable due to offsets being finite.

Concluding remarks

The decision in the Whitehaven coalmine case is therefore not only of interest because it is one of the first cases in which *Finch* has been applied, but also in its own right. The Court's careful and detailed discussion on substitution issue provides a good example of the planning court's willingness and ability to grapple with detailed technical evidence in relation to climate change to determine the extent to which the decision-maker has made rational and consistent findings in respect of such evidence.
In addition, for decision-makers considering applications for controversial fossil fuel projects – or for renewables or carbon-capture projects that may demonstrate climate leadership – the decision is likely to be of importance for its confirmation that likely impacts on the UK's international standing on climate change can be a material planning consideration.

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Richard Honey KC was instructed for the Secretary of State in this case, and appeared at the High Court hearing in order to assist the Court. **Alexander Greaves** appeared as junior counsel for West Cumbria Mining Limited. Neither have had any involvement in the drafting of this blog post.