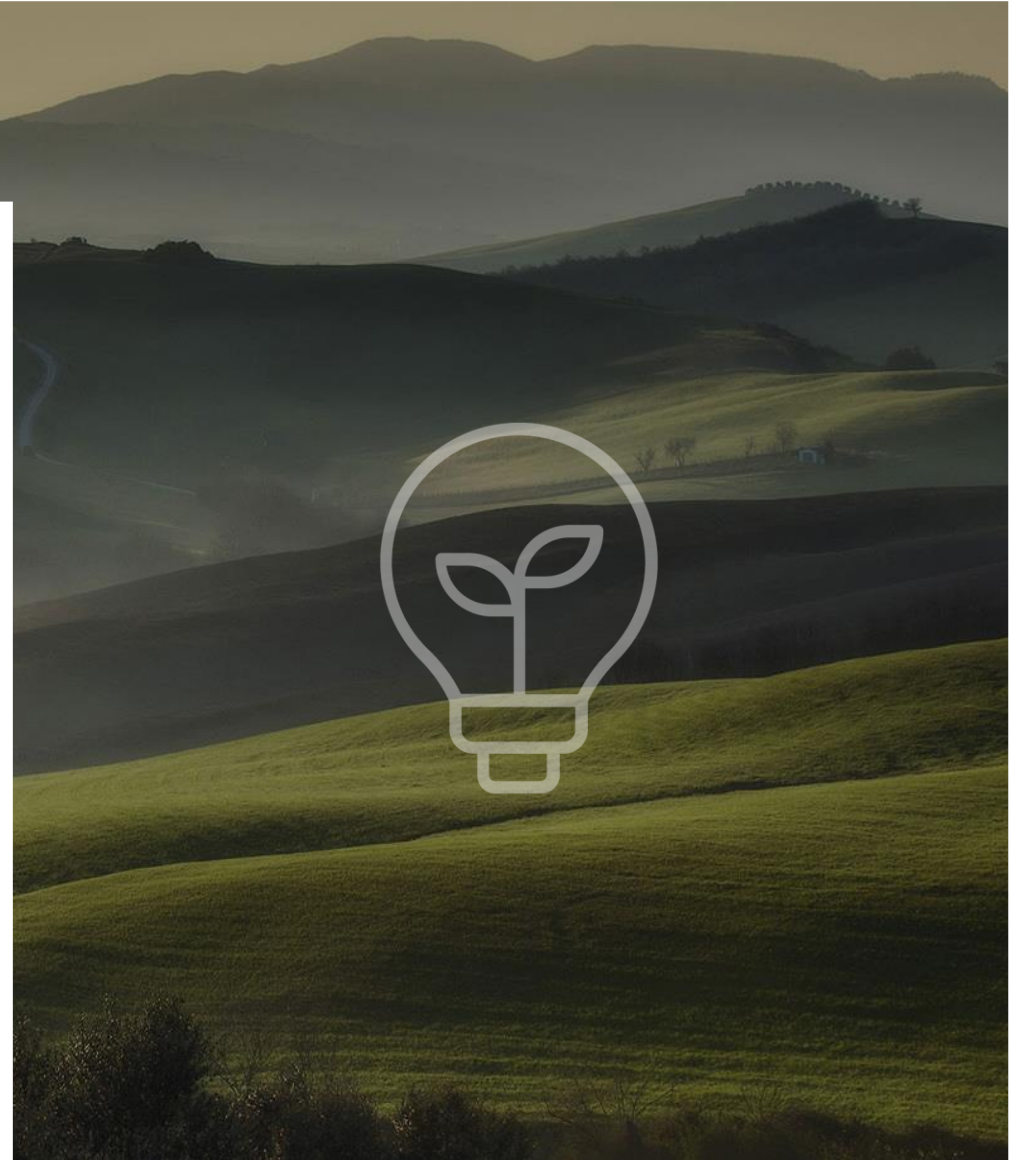




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Breakfast Briefing: The Supreme Court Decision in *Finch*

25 June 2024





What we'll cover

1. Factual and procedural background
2. The majority judgment
3. The minority judgment
4. Wider implications
5. Open discussion...



Facts/procedural background

1. Requirement for an Environmental Statement
2. The proposed development
3. The Council's initial view as set out in the Scoping Opinion and the submitted Environmental Statement
4. Decision of the Council to grant planning permission
5. High Court challenge and decision
6. The judgment of the Court of Appeal
7. Agreed facts before the Supreme Court



Judgment of the Majority: Lord Leggatt (with whom Lord Kitchin and Lady Rose agree)

Preliminary points

- Stark division between Court
- Everyone agreed CoA wrong
- Discursive judgment



Judgment of the Majority: Lord Leggatt (with whom Lord Kitchin and Lady Rose agree)

Causation: “What are or are not “effects of a project” is...a question of causation” [65]

- Question of fact in first place
- Different tests of causation in law may yield different outcomes [68] – [71]
 - i) “but for” (weak)
 - ii) “necessary and sufficient” (strongest possible)
 - iii) matters of ordinary occurrence / proximate (strong)
- EIA test is whether effect is “likely” [72]
 - I i) No discussion of threshold (or relevant caselaw!), due to agreed inevitability



Judgment of the Majority: Lord Leggatt (with whom Lord Kitchin and Lady Rose agree)

Causation: the need for sufficient evidence

74. Whatever the precise meaning of the term, to determine that a potential effect is “likely” requires evidence on which to base such a determination. **If evidence is lacking so that a possible future occurrence is a matter of speculation or conjecture, then a rational person would not feel able to judge that it is “likely”.** Such agnosticism is not the same as judging the event to be unlikely. It reflects a belief that there is too little knowledge on which to base a judgment.

77. Implicit in these provisions, and in the aims of the EIA Directive, is the criterion that material should be included in the environmental statement and taken into account in the procedure only if it is information on which a reasoned conclusion could properly be based. **Conjecture and speculation have no place in the EIA process.** Thus, if there is insufficient evidence available to found a reasoned conclusion that a possible environmental effect is “likely”, there is no requirement to identify, describe and try to assess this putative effect. This criterion must also govern, where a possible effect is regarded as “likely”, the nature and extent of the assessment of the effect. (emphasis added)

- Likelihood and ability to assess effects are matters of evaluative judgement [78]
- Answer straightforward in *Finch*:
 - Combustion and release of GHG inevitable
 - Estimating GHG not a difficult task



Judgment of the Majority: Lord Leggatt (with whom Lord Kitchin and Lady Rose agree)

Type of effects

- “*wide causal reach*” of Directive wording emphasised [83]
- Distinction between “direct” and “indirect” does not really matter [84]
- 2013 Commission Guidance endorsed as a starting point...
- Combustion emissions from extraction projects are indirect effects
- Transboundary effects: “*effects on the environment that are specific to that other Member State rather than purely global effects*” [98]



Judgment of the Majority: Lord Leggatt (with whom Lord Kitchin and Lady Rose agree)

Irrelevant factors (1)

- Location of effects, including uncertainty over time and place [102]
- Absence of control – i.e. where no ability to avoid or mitigate [103] – [105]
- Other regulatory regimes [106] – [109]
- Intermediate process – refining the oil
 - *“Given that the process of refining the oil is one which it is always expected and intended that the oil will undergo - and which it is agreed that the oil produced here will inevitably undergo - it is unreasonable to regard it as breaking the causal connection between the extraction of the oil and its use.”* [118]
 - Floodgates concern misplaced
 - Other processes with many end products / possibilities distinguished [121] – [122]



Judgment of the Majority: Lord Leggatt (with whom Lord Kitchin and Lady Rose agree)

Irrelevant factors (2)

- The project or development *itself*

"...Outside the realms of Kantian metaphysics, there is no such thing as "the development itself" which enjoys some sort of separate noumenal existence. There are only the human activities which constitute the physical development (or "project", to use the terminology of the EIA Directive)." [128]

- Short dismissal

a. Location not relevant

b. Effects of other projects: *"It does not follow that because the combustion emissions are effects of some other activity, such as the refinement of the oil or its subsequent use as fuel by consumers, then they cannot also be effects of the project of extracting the oil"*

- CoA's "sufficient causal connection"

- Approach, and reliance upon intervening stages, "intolerably vague" [133]
- Intervening stages do not provide rational basis for denying causal link
- Not impossible to assess combustion emissions



Judgment of the Majority: Lord Leggatt (with whom Lord Kitchin and Lady Rose agree)

Irrelevant factors (3)

- National policy / centralised approach to GHG emissions
 - Wrong to interpret EIA Directive by reference to UK policy and legislation [151]
 - Relevance to decision
 - “...It remains essential to ensure that a project which is likely to have significant adverse effects on the environment is authorised with full knowledge of these consequences.”* [152]
 - Political context of decision-making arena enhances importance of comprehensive information on LSE of project [153]



Judgment of the Majority: Lord Leggatt (with whom Lord Kitchin and Lady Rose agree)

Summary of approach

- Effects of a project on the environment not obviously vague: question which, in principle, admits only one answer [59]
- Approach not matter of judgement: decision-maker must adopt correct interpretation
 1. Is the effect a “likely” significant effect of the project on the environment? [72]
 2. Is that effect capable of meaningful assessment, so as to provide sufficient evidence to support a reasoned conclusion? [74] – [78], [121], [167]



The minority judgment – Lord Sales and Lord Richards

Structure of the judgment

- Background to the appeal [175]-[210]
- EIA legislative regime [211]-[238]
- Aarhus Convention [239]
- National policies on climate change and planning [240]-[250]
- Analysis [251]-[330]
 - Split into 7 further sections, including (1) Purpose and scheme of EIA directive [251]-[272] and (2) Text of the EIA directive [273]-[295]
- Conclusion [331]-[333]



The minority judgment – Lord Sales and Lord Richards

Main findings

- Whether downstream/scope 3 GHG emissions within scope of EIA Directive is a question of law and interpretation of the Directive
- On the proper interpretation of the Directive, downstream/scope 3 GHG emissions are not “*effects of the project*” for the purposes of EIA
- LPA correct not to require inclusion of such effects in EIA: if it had, it would have erred in law



The minority judgment – Lord Sales and Lord Richards

Reasoning – purpose and scheme of EIA Directive

- Aims to ensure common approach is adopted across all Member States [251]
- Contemplates that decision will often be taken by local or regional authorities – procedures in Directive are appropriate for that level of decision-making [252]
- Scope 3/downstream emissions addressed at the level of national policy, and through international discussion/agreement between States [253]-[254]
 - LPAs ill-equipped to address issues around scope 3 emissions and constitutionally inappropriate for them to do so [255]-[256]
 - Not role of EIA to generate information not directly relevant to decision [257]-[258]
- Proportionality principle requires restrictive interpretation of EIA Directive [259]-[261]
- Including scope 3 emissions would lead to incoherence/inconsistency [262]-[263]
- Amendments to EIA Directive incorporating assessment of GHGs/climate change do not indicate scope 3 emissions should be included [270]-[272]



The minority judgment – Lord Sales and Lord Richards

Reasoning – text of EIA Directive

- Text clearly shows that “*indirect effects of the project*” do not include scope 3 emissions [273]
 - Definition of “*project*” in Article 1(2)(a) focuses on a specific set of physical works [274]
 - Effects must be “*of the project*” – on a natural reading, downstream or scope 3 GHG emissions in this case are not “*of the project*” [275]-[276]
 - Obligations in EIA Directive (eg on requirement to conduct EIA, provision of information, screening) focus on assessment of impacts of the project *itself* and not wider downstream impacts [277]-[294]
- EU Commission – overseer of EIA regime – has not commenced infraction proceedings against MS for failure to include downstream emissions in EIA [295]



The minority judgment – Lord Sales and Lord Richards

Reasoning – case law

- In agreement with majority that *Abraham* and *Ecologistas* do not mandate inclusion of scope 3 emissions in EIA [299]-[302]
- *Squire* did not assist as the indirect environmental effects from the disposal of manure were “*closely connected with the operation of the project in issue*” [304]
- Agreed with Irish Supreme Court in *Kilkenny Cheese* that indirect significant effects for EIA are those “*the development itself has on the environment*” and must be “*intrinsic to the construction and operation of the project*” [307]-[312]
- Disagreed with majority that *Greenpeace Nordic* persuasive authority, due to paucity/poor quality of reasoning [315]



The minority judgment – Lord Sales and Lord Richards

Final warning [332]

In relation to the attempt to enlist the EIA Directive in the worthy cause of combating climate change, by seeking to press it into service in relation to requiring EIA in respect of downstream or scope 3 greenhouse gas emissions, see the cautionary words of Lord Bingham of Cornhill in *Brown v Stott* [2003] 1 AC 681, 703, quoting from Hamlet in relation to the ECHR:

“The Convention is concerned with rights and freedoms which are of real importance in a modern democracy governed by the rule of law. It does not, as is sometimes mistakenly thought, offer relief from ‘The heart-ache and the thousand natural shocks That flesh is heir to.’” ...

In the present context, the EIA Directive, interpreted according to its terms, has a valuable role to play in relation to mitigating greenhouse gas emissions associated with projects for which planning permission is sought, but it should not be given an artificially wide interpretation to bring all downstream and scope 3 emissions within its ambit as well.



The minority judgment – Lord Sales and Lord Richards

Points to consider/discuss...

- Very detailed analysis of text and purpose of EIA Directive (cf majority)
- Focus of judgment is on *all* scope 3/downstream emissions
- No reference to findings of majority e.g. on causation, exclusion of wider downstream effects, transboundary assessment, caveat in *Kilkenny Cheese*
- Final warning strongly reminiscent of Judge Eicke's dissent in *Verein Klimaseniorinnen* (see Environmental Law Blog: <https://www.ftbchambers.co.uk/elblog/view/positive-obligations-standing-and-victim-status-in-klimaseniorinnen-v-switzerland-2024-echr-304>)



Implications

Summary of approach

- The effects of a project on the environment are not obviously vague: it is a question which, in principle, admits only one answer [59]
- The correct approach is not matter of judgement: the decision-maker must adopt the correct interpretation. The approach is twofold, though these questions feed into each other:
 1. Is the effect a “likely” significant effect of the project on the environment? [72]
 2. Is that effect capable of meaningful assessment, so as to provide sufficient evidence to support a reasoned conclusion? [74] – [78], [121], [167]



Implications

How is a decision maker/assessor to approach causation/likelihood?

- Question of fact in first place, but not of pure evaluative judgment (unlike CoA). Likelihood of effect and ability to assess require judgment. But where that judgment is the effect is inevitable then only one answer.
- On the facts of *Finch*, effect was agreed to be an inevitability, so there is no discussion of what the threshold might be or relevant case law on this in other cases.
- The best we get, as per [74] is that if evidence is lacking so that a possible future occurrence is a matter of speculation or conjecture, then a rational person would not feel able to judge that it is “likely”. This is why the two limbs of the test set out by the UKSC lead to each other. If insufficient evidence making effect incapable of assessment, then it will not be “likely”.



Implications

Summary of approach

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 1. Is the effect a “likely” significant effect of the project on the environment? [72]
 2. Is that effect capable of meaningful assessment, so as to provide sufficient evidence to support a reasoned conclusion? [74] – [78], [121], [167]



Implications

The way of negation

- Distinction between “direct” and “indirect” does not really matter [84]
- Transboundary effects mean effects specific to the other Member State, not just generic global effects [98]
- Location of effects, including uncertainty over time and place [102]
- Absence of control – i.e. where no ability to avoid or mitigate [103] – [105]
- Other regulatory regimes [106] – [109]
- Intermediate process – refining the oil
- The project or development *itself*
- National policy / centralised approach to GHG emissions



Implications

Wider points

- What other stages in fossil fuel production and use require GHG emissions to be assessed? Terminals, storage facilities, PFSs etc.?
- What lesser forms of causation below inevitability? Not clear.
- Materiality? Example of iron and steel in cars? Components?
- Cautious pragmatism.



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