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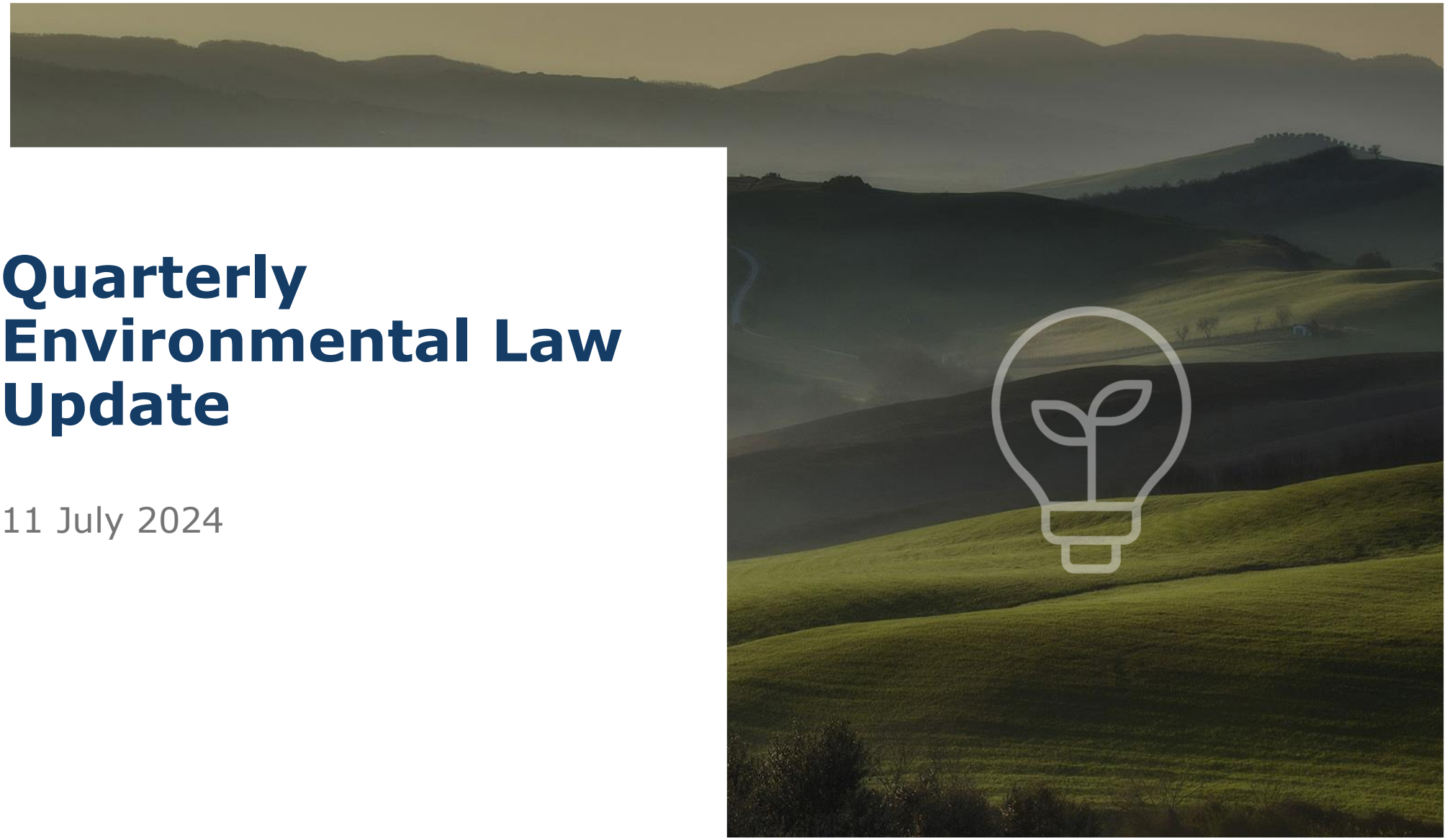

Quarterly Environmental Law Update

11 July 2024

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Meet the Speakers

Gregory Jones KC

Andrew Fraser-Urquhart KC

Charles Forrest

Esther Drabkin-Reiter

Francis Taylor Building

Nuisance and Knotweed

Davies v Bridgend CBC [2024] UKSC 15; [2024] 2 WLR 1237

Manchester Ship Canal Co Ltd v United Utilities Water Ltd [2024] UKSC 22

Gregory Jones KC

With grateful assistance to David Graham

Francis Taylor Building

Davies v Bridgend CBC [2024] UKSC 15; [2024] 2 WLR 1237

Manchester Ship Canal Co Ltd v United Utilities Water Ltd [2024] UKSC 22

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Statutory Nuisance Update

Charles Forrest

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Statutory Nuisance- update

a) *R. (oao Ball) v Hinckley and Bosworth Council* [2024] EWCA Civ 433

b) Update on costs under s.82(12) EPA 1990: *Jones v Chapel-en-le Frith Council* [2023] EWHC 200 (KB), *R (oao Parker) v Magistrates Court at Teeside* [2022] EWHC 358 (Admin), *Taylor v Burton* [2021] EWHC 1454 (Admin), *R (oao Notting Hill Genesis) v Camberwell MC* [2019] EWHC 1423 (Admin)

ai) *Ball*: background

- 29 April 2024; Coulson, Baker, Elisabeth Laing LLJ

- Facts: LA had served an abatement notice on the operator of a motor racing circuit near the Appellant's home following complaints of noise. The notice imposed limits on noise levels and on numbers of noisy days. It also provided for possible variations to the restrictions. The operator later requested variations, which the LA granted. The appellant considered that the variation would increase the impact of noise and so applied to JR that decision

- JR refused in EWHC by Eyre J. EWCA unanimously reversed that on appeal

- Issue: whether council has power to vary an abatement notice which it has issued against a statutory nuisance under s80 EPA 1990

aii) *Ball*: what the Court decided and why

- LA didn't have power to vary a notice served under s.80 EPA 1990. Reasons:
    - Agreed no express power for LA to vary in Part III EPA 1990/1995 Regs
    - No implied power to vary:
        - Implication usually necessitated by the absence of an express provision but, under 1995 Regs, the MC on appeal had an express power to vary ('downwards')
        - An implied LA power, whether by necessary implication or s.111 LGA 1972/s.1 LA 2011, would be potentially inconsistent with MC's express power and would undermine the constitutional division of powers between LA/MC e.g. if the LA could vary it might wrongly be thought to follow that the LA too could consider the BPM df before serving the notice (see below)
        - Above was complete answer, but 'necessary implication' test (*Piff Elms*) was not met anyway: convenience/economy insufficient and unproven

aiii) *Ball*: what the Court decided and why (cont..)

- Reasons:

  - Under ss.79-80, LA had a duty to serve a notice where a statutory nuisance existed or was likely to occur/recur and also service was a one-off event (*Aitken*); stage 1 in a 2-stage process. There was therefore no continuing duty on LA to liaise with the recipient before/after service, and no LA discretion to consider whether recipient had a BPM case *(Ex p. South West Water Ltd, Manley*, *Deacon*), to which an LA power to vary could be said to be in service

  - *Ex p. Everett* [1999], which endorsed an implied power to withdraw (further endorsed *obiter* by EWCA in *Ball*), did not compel a different conclusion either in precedent or its reasoning. That was *obiter* and the power to vary is a different type of power (not merely a lesser power of the same type), not least in the case of an 'upward' variation

bi) Costs under s.82(12) EPA 1990

- s.82 proceedings "are, in character, criminal. However, they are subject to a costs regime which is sui generis" (*Jones* at §12)

- s.82(12): *"Where on the hearing of proceedings for an order under subsection (2) above it is proved that the alleged nuisance existed at the date of the making of the complaint or summary application, then, whether or not at the date of the hearing it still exists or is likely to recur, the court* […] ***shall*** *order the defendant or defender (or defendants* […] *in such proportions as appears fair and reasonable) to pay to the person bringing the proceedings such amount as the court* […] *considers reasonably sufficient to compensate him for any expenses properly incurred by him in the proceedings.".*

- V.good summary of s.82(12) case law in *Parker*

bii) Costs under s.82(12): *Parker* & other case law

- s.82(12) comprised a statutory duty, not a discretion

- Its discharge involves 3 Qs calling for evaluative judgments:

  (i) what "expenses" were "properly incurred" meaning they shouldn't be excluded i.e. whether the step which incurred the cost was a proper/not unnecessary one for the prosecutor to take;

  (ii) what amount is "reasonably sufficient to compensate" the prosecutor for the properly incurred expenses. Are the amounts claimed more than warranted? Are they proportionate to subject matter in dispute? (*Notting Hill Genesis, Burton*)

  (iii) if there is more than one defendant responsible, what was a "fair and reasonable proportion" of the expenses which any given defendant should be ordered to pay?

- MC has degree of discretion and this is a broad-brush process, albeit one which will normally require some inquiry (e.g. by evaluating costs schedule, more rigorously where costs claimed are high (*Notting Hill Genesis*)) and giving adequate reasons (*Burton*)

biii) Costs under s.82(12): *Parker* (cont..)

- Defendant's means not a 'prism' through which to decide the principle of whether a costs order should be made (cf. position in criminal cases (*Ex p. Dove*))- its relevance is at any enforcement stage

- It was agreed that means of prosecutor/defendant are also legally irrelevant to Question 1 above. Without ruling out its relevance to Question 2 ('never say never'), the Court said obiter that it struggled to see how it would be legally relevant to that question

- Reminder: although claim in *Parker* was allowed to proceed by way of JR for fact specific reasons, should generally ABWoCS

biv) Costs under s.82(12): *Jones*

- *Jones* endorsed *Parker*

- Where a s.82 Nuisance Order is made on appeal by the EWHC, the Court will normally, under its wide discretion in s.28A(3) SCA 1981, award costs, of both the appeal itself and below, by applying the s.82(12) approach *(Jones).* This is an exception to the normal discretion in criminal ABWoCS which is exercised according to the more restrictive criminal costs regime

Further statutory nuisance talks through MBL Seminars

- 'Statutory Nuisance & Abatement Notices- From Start to Finish', **on 25 September 2024 and on 11 March 2025** (https://www.mblseminars.com/courses/statutory-nuisance-and-abatement-notices-from-start-to-finish-learn-live#:~:text=Introduction,giving%20practical%20tips%20and%20advice)

- 'Statutory Nuisance Orders- Shining a Light on s.82 EPA 1990 Applications' **on 31 October 2024** (https://www.mblseminars.com/courses/statutory-nuisance-orders-shining-a-light-on-s82-epa-1990-applications-learn-live)

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Fisheries Management in UK waters

Bottom trawling and sand eel fishery

Esther Drabkin-Reiter

What I'll cover…

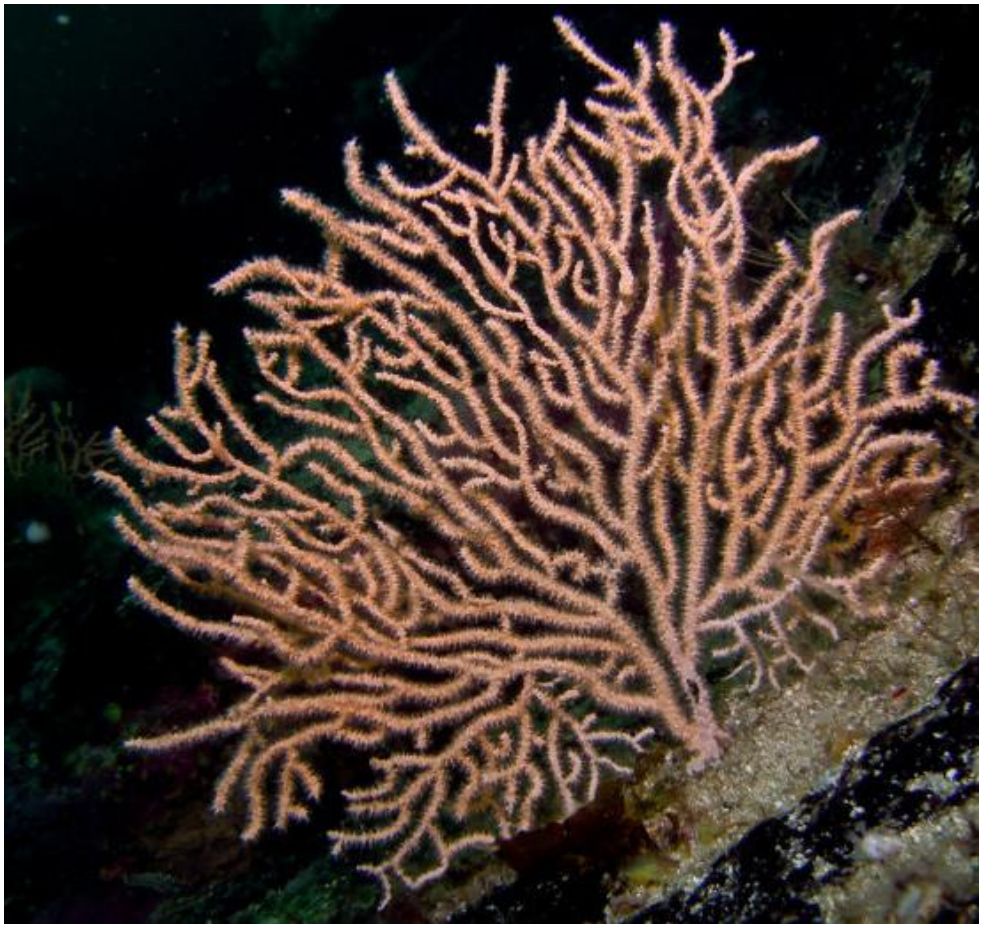
1. The Brexit "dividend"
2. Bottom towed fishing gear
3. Sand eel fishery
4. The response from Europe
5. The future…?

The Brexit "dividend"

- Freedom to provide greater environmental protection outside the CFP?
- DEFRA on the Fisheries Act 2020:
  - *Now that we are an independent coastal state, free from the Common Fisheries Policy, the Fisheries Act 2020 introduced new powers enabling the Marine Management Organisation (MMO) to implement fisheries management measures in MPAs in English offshore waters.*
- EA 2021 target: by 31 Dec 2042, 70% of protected features in all MPAs (MCZ, SAC or SPA in England) in favourable condition and all other protected features in recovering condition
- Interim target in EIP 2023: 48% of protected features to be in favourable condition by 31 January 2028
- OEP Progress Report (2024): Interim target challenging but achievable, insufficient information on state of MPAs to assess long-term target

Bottom towed fishing gear

- Use of weighted towed nets along seabed
- Effective but harmful to seabed, corals, sponges and "pink sea fan"
- High rate of bycatch
- Marine Protected Areas Bottom Towed Fishing Gear Byelaw 2023 – in force as of 22 March 2024
- Bans use of "bottom trawls, seines, dredges, or similar gear, including trawls towed on or very close to the seabed" in 13 Marine Protected Areas in England
- Adds to existing ban in 4 MPAs
- "Targeted" ban – 181 MPAs in English waters in total



Pink sea fan - © Natural England/Ross Bullimore

Sand eel fishery

- Food source for seabirds, marine mammals and fish… and livestock
- Closure of all sand eel fisheries in UK waters from 26 March 2024
- Sandeel (Prohibition of Fishing) (Scotland) Order 2024 SSI 2024 No 36
- Builds on closure of a major sand eel fishing area off north-east coast in 2000
- Since 2021 – UK fishermen banned from taking up UK quota for sand eel fishery in North Sea
- Vast majority of total allowable catch for sand eel allocated to the EU under post-Brexit arrangements – c.97%
- Large proportion of this allocated to Denmark

https://www.gov.uk/government/news/uk-proposes-measures-to-protect-englands-much-loved-seabirds

The response from Europe

- Outrage from Danish fishermen
- EU Commission requested consultations with UK under TCA on 16 April 2024
- 30-day period for consultations expired on 16 May 2024
- Not clear if extended by agreement or whether a mutually agreed solution has been reached
- If no solution – which appears likely – proceed to arbitration
- Final report must be issued within 6 months of establishment of arbitral tribunal
- Minimal information in the public domain: consultation process confidential until arbitral hearing

Potential arguments?

EU

- Base conservation and management decisions on best available scientific advice from ICES
- Agreement as to total allowable catch (TAC) in March 2024
- Reciprocal obligation to grant access to waters where TAC agreed

UK

- Rights and regulatory freedoms of independent coastal States
- Precautionary approach to fisheries management
- Minimising harmful impacts of fishing on marine ecosystem / preserving marine biodiversity
- Existing sand eel closure
- Non-discriminatory measure

The future?

- Await outcome of arbitration
- Retaliatory action by EU?
- Implications for carbon emissions and the Danish economy
- Closure of sand eel fishery as potential compensatory measure for offshore wind
- DEFRA on MPAs: "*The confirmation of the new byelaw represents a significant step forward in the MMO's ambitious programme to protect all 54 English offshore MPAs from impacts of fishing activity by 2024*."
- Labour Manifesto commitment to comply with Environment Act targets

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Finch: Climate Change and Environmental Assessment

Andrew Fraser-Urquhart KC

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

- 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

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.

Stuffed by Finch: Biscathorpe

Oil production PP

Started under High Court, decided under High Court

ES/OR based on High Court

No consideration by Inspector: Basis of High Court challenge

***Simplex* case run in High Court**

Conceded after Finch judgment

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