VASSPETRO

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R (Finch on Behalf of Weald Action Group) v Surrey County Council - Bad Law and Worse Policy

On 20 June 2024, the UK Supreme Court handed down its long-awaited decision in the case of ***R (Finch on behalf of Weald Action Group) v Surrey County Council*** [2024] UKSC 20 (hereinafter "***Finch***")[1]. There has been very extensive commentary about the decision in the press and in social media. Conservative and pro-oil industry commentators have been downbeat[2] and environmentalists have been triumphant.

However, the Supreme Court did not rule that the onshore Horse Hill oil development cannot take place, much less did it cancel an oil and gas licence. Simply put, what the *Finch* court did was to interpret onshore planning law to require an oil company seeking development approval to state in its environmental impact assessment (**EIA**) the amount of likely greenhouse gas (**GHG**) emissions which will arise from downstream burning (to produce energy) (**Scope 3 emissions**). The fact that such Scope 3 emissions might occur anywhere in the world and would likely only arise through a secondary process such as refining, was not a relevant factor. Hitherto, oil companies only had to state the likely GHG emissions which would arise directly from the project operations.

The goal of this article is to analyse the concrete holding of the *Finch* court (a 3-2 majority judgment), to examine certain policy issues associated with the judgment, and assess its implications for the UK oil industry.

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[1] References to the paragraphs and pages of Finch judgment are made from this link: www.supremecourt.uk/cases/docs/uksc-2022-0064-judgment.pdf

[2] To give just some prominent examples of the latter kinds of commentary, Ross Clark writing in the Spectator website on 20 June 2024 produced an article entitled "*The Surrey oil judgment undermines our democracy*". On the same website and on the same date, Andrew Tettenhorn produced an article entitled "*The Supreme Court has put the future of fossil fuel projects in jeopardy.*" And again, on the same website but on 21 June, Iain McWhirter produced an article entitled "*The Supreme Court's oil ruling spells trouble for the SNP"*. And on 22 June, Jeremy Warner produced an article published in the Daily Telegraph website entitled "*Britain's wilful destruction of its oil and gas industry is beyond belief.*"

My conclusion is that *Finch* is unsound in law and possibly unworkable. I suggest that the incoming Secretary of State for Energy Security and Net Zero (Secretary of State) clarify the matter as it affects the United Kingdom Continental Shelf (UKCS) by issuing guidance in the terms described below or else legislate to amend the law. The position onshore is likely to be more anarchic for reasons which I state below.

A. THE CASE & THE RULING

Put simply, in 2018, Horse Hill Developments Limited (**HHDL**) the holder of onshore petroleum licence PEDL 137, sought permission from Surrey County Council (**County Council**) to carry out a development programme which would have involved the retention of two existing oil wells and the drilling of four more to produce oil over a twenty-five-year period. As part of the process, HHDL was required by law to provide the County Council with an EIA.

The rules governing the onshore EIA submission were contained in the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571) (**Onshore EIA Regulations**). These, in turn, were drawn up to implement Directive 2011/92/EU of the European Parliament and of the Council as amended by Directive 2014/52/EU. As part of its EIA, HHDL provided information to the County Council of the likely GHG emissions which it would expect *to arise directly from site operations* over the period of development and production. This (until 20 June 2024) was normal procedure for qualifying oil and gas field developments both onshore and offshore.[3] It might be worthwhile stating at this point that provisions governing offshore field developments are substantially identical to the Onshore EIA Regulations in pertinent part but are contained in the Offshore Oil and Gas Exploration, Production Unloading and Storage (Environmental Impact Assessment) Regulations 2020 SI2020/1497 (**Offshore EIA Regulations**). In the case of the UKCS, qualifying field developments must be approved both by the Secretary of State and by the North Sea Transition Agency (**NSTA**).

The holding of *Finch,* which applies directly to onshore developments, is likely by extension to apply to the substantially identical language of the offshore regime.

[3] A qualifying oil and gas project (whether onshore or offshore) is one where daily production exceeds 500 tonnes of oil or 500,000 cubic metres of gas. Where daily production is projected to fall under this level an oil company may request the County Council or Secretary of State (if offshore) to screen the project to confirm that an EIA is not required. See e.g. Offshore EIA Regulation 6.

Based on an EIA which merely considered GHG emissions from site activities (but not those from the downstream burning of the produced hydrocarbons) the County Council approved the development programme submitted by HHDL. Finch requested a judicial review, alleging among other things, that the approval of the development programme by the County Council was defective as being based on an EIA which did not consider the effect of the Scope 3 emissions of the project's oil and gas production. Finch's request for judicial review was granted but her case was dismissed by Holgate J of the Queen's Bench Planning Court.[4] He found that the EIA requirements of the Onshore EIA Regulations only required disclosure of GHG emissions to be incurred by local project operations. His reasoning in essence was that an approval under town and country planning legislation could only consider local effects of a "project". References in the legislation to "direct and indirect significant effects" still referred only to local effects.[5] He stated that: "… the true legal test is whether an effect on the environment is an effect of the development for which planning permission is sought."[6] He also found that even if he was wrong in dismissing the judicial review in terms of pure law, the decision of the County Council approving the project and not considering downstream emissions was not at the required "irrational" standard. Accordingly, the decision of the County Council was upheld on two separate grounds.

Finch appealed to the Court of Appeal, which by majority (made up by Sir Keith Lindblom, Senior President of Tribunals and Lewison L.J, with Moylan L.J dissenting) affirmed Holgate J's decision but only on the second ground, i.e. that the County Council's decision was not "irrational."[7]

Finally, the case went to the UK Supreme Court which by majority (made up of Lords Leggatt and Kitchin and Lady Rose) upheld Finch's appeal. Two justices (Lord Sales and Lord Richards) dissented. Lord Leggatt delivered the majority opinion. He noted that the County Council could not have lawfully approved the development application of HHDL if an EIA had not been carried out which "... complied with the obligation to 'identify, describe and assess in an appropriate manner … the direct and indirect significant effects' of the project on (among other factors) 'climate': see Regulation 4(2) ….."[8] There followed an exhaustive review of the Onshore EIA Regulation, underlying EU law, the Aarhus Convention and relevant authorities. Using a causation-based approach Lord Leggatt reasoned that since the oil would only be produced to be burnt, then

[4] See [2020] EWHC 3566.
[5] See Onshore EIA Regulations Regulation 4(2).
[6] [2020] EWHC, Para. 101
[7] [2022] EWCA Civ. 187, Para. 92
[8] *Finch*, Para. 53, page 16

worldwide GHG emissions, and their capacity for associated warming must be an "indirect significant effect."[9] He thus rejected the main holding of Holgate J in the lower court. He also rejected the holding of the Court of Appeal: "… there is no basis on which the council could reasonably decide that it was unnecessary to assess the combustion emissions."[10]

However, Lord Leggatt emphasised: "The [Onshore EIA Regulation] does not prevent the competent authority from giving development consent for projects which will cause significant harm to the environment."[11] Instead, based on the proper factual analysis set forth in the EIA, the decision-maker is merely required to give a reasoned decision which can only be challenged on judicial review on grounds of "irrationality."

After an equally exhaustive legal analysis the dissenting opinion, delivered by Lord Sales, reached the opposite conclusion, agreeing with the principal holding of Holgate J, to the effect that the EIA for an oil development must be local and project based. Lord Sales also put heavy emphasis on the fact that the UK's response to the climate change issue is principally made through the Climate Change Act 2008 as amended. Local decision-making on energy matters should be part of this overall national framework.

B. ANALYSIS AND CONSEQUENCES

1. Lord Leggatt's decision was firmly driven by a causation chain analysis which can be broken down into four main tiers as follows: (a) hydrocarbons are only produced to generate energy (**Tier 1**); (b) the generation of energy from hydrocarbons will inevitably lead to there being Scope 3 emissions (**Tier 2**); (c) it is easy to quantify the level of Scope 3 emissions which will arise from the production of each field (**Tier 3**); and (d) the resulting Scope 3 emissions will have a "significant impact on climate" (**Tier 4**).[12] As Lord Leggatt stated in the opening words of the judgment:

> The whole purpose of extracting fossil fuels is to make hydrocarbons available for combustion. It can therefore be said with virtual certainty that, once oil has been extracted from the ground, the carbon contained within it will sooner or later be

[9] Id., Paras. 66-100, pages 20-29
[10] Id., Para. 139, page 39
[11] Id., Para. 3, page 2
[12] Id., Para. 7, page 3

> released into the atmosphere as carbon dioxide and so will contribute to global warming.[13]

2. In order for the *Finch* holding to be sound, the four-tier causation analysis must be true, ***without exception***, for the produced commercial hydrocarbon molecules of each qualifying UK upstream oil and gas project. But this is simply not so. Let us look at the soundness, or otherwise, of each Tier.

2.1. **Tier 1**. **All commercially produced hydrocarbons are used for energy**. The undeniable fact is that a substantial proportion of the world's hydrocarbon production, perhaps around a very rough annual twenty percent (20%), goes into making petrochemicals from which are made some six thousand discrete products. This is particularly true of the lighter hydrocarbons, such as methane, and the natural gas liquids. Other hydrocarbons are used to make pharmaceuticals, specialist engineered materials, such as Kevlar, lubricants, asphalt and other products. It will in most cases be impossible to know at development approval stage how exactly the projected petroleum production will be used over the life of a project. It is also likely that different joint venture partners will sell their production shares for different ultimate uses.

In connection with the "other downstream" uses argument, Lord Leggatt made the following remarkable statement which speaks for itself:

> "[rejecting certain reasoning of the Court of Appeal] The first [argument] was that "decisions yet to be made 'downstream" would determine how much of the oil would end up combusted". ***If true,*** that might make it impossible to assess what the likely quantity of combustion emissions would be. ***But it is not true. It was an error to say that how much of the oil would end up being combusted would depend on decisions yet to made "downstream"*** (our emphasis and italics"). It is common ground that *all* of the oil would be combusted. (Court's italics)[14]

2.2. **Tier 2. The generation of energy from hydrocarbons will inevitably lead to there being Scope 3 emissions**. This is correct.

[13] Id., Para. 2, page 2
[14] Id., Para. 135, page 38

2.3. **Tier 3**. **It is easy to quantify the level of Scope 3 emissions which will arise from the production of each field**. This is only true if one knows what proportion of one's field production will be used for energy.

2.4. **Tier 4**. **The resulting Scope 3 emissions will have a "significant impact on climate"**. Putting aside the general issue of what the "significant impacts" might be (see analysis below in Point 3), it is not true that all Scope 3 emissions will necessarily have a significant climate impact, or even any impact at all. Future Scope 3 emissions may be sequestered by carbon capture and storage (**CCS**) processes and hence may have no climate impact at all. It should be noted that both major UK parties envisage the initiation and massive expansion of CCS projects in the life of the next Parliament. Furthermore, under relevant law, the "significant impact on climate" *must relate* to the Scope 3 emissions of the particular project under consideration, in this case Horse Hill.[15] Are we to suppose that the small envisaged onshore production from Horse Hill, which would have been a small part of overall UK production, which is in itself a tiny part of world production, could have had a "significant impact on [global] climate". Consider that the world has just reached the mark of one hundred million barrels of oil production per day, which does not include the vast additional quantities of produced natural gas and coal.

In all fairness to Lord Leggatt, he conceded that an argument could have been made that the Scope 3 emissions of Horse Hill would not have had a "significant" impact on climate and therefore need not have featured in the EIA.[16] *He noted that the issue had never been raised in the proceedings.* This is a very important point because it indicates that it is not a legal holding of *Finch* that Scope 3 emissions from a qualifying hydrocarbon development project inevitably meet the "significant impact" requirement.

2.5. I respectfully suggest that Lord Leggatt's four-tiered causation theory is erroneous.

[15] See e.g. Offshore EIA Regulation 8 and Schedule 6. The whole focus of the legislation is on "the project" (in this case Horse Hill) and not the effects of "the project cumulated with all similar projects everywhere in the world."
[16] *Finch*, Para. 138, pages 38-39

3. Closely related to the four-tiered causation approach is Lord Leggatt's repeated use of the concept of "significant impact" on climate. While we might agree that *worldwide (*as opposed to project specific*)* Scope 3 emissions, when released into the atmosphere, can have a "significant impact" on climate, it is impossible to gauge the future impact without using a crystal ball. We only know of the types of problems which may or may not occur based on multiple unknowable contingencies. The Inter-Governmental Panel of Climate Change itself runs several different future climate scenarios. In this context it is simply not possible to, in Lord Leggatt's words, "identify, describe and assess in an appropriate manner … the direct and indirect significant effects" of the project on climate.[17]

4. Let us assume that we can surmount the difficulties mentioned above. Take the onshore situation first. In each case of a qualifying petroleum development, a County Council must weigh the local benefits of a proposed petroleum development, which could include elements of energy supply, national and regional income, jobs, etc. against the unquantifiable future risks of global warming. As Lord Sales aptly observed in the minority judgment: "It is no part of the object of the EIA Directive to generate information which does not have a direct and practical bearing on the matters to be decided by the decision-making authority. ***It is difficult to see what in practical terms, a local planning authority is supposed to do with general information about downstream or scope 3 emissions other than to say that in its opinion they are so great that the project ought not to proceed at all*** …." (our emphasis and italics added)[18] With due respect to Lord Sales, he may be too pessimistic in this regard. Faced with evidence of Scope 3 emissions data in an EIA, a rational County Council could surely elicit the benefits of contemporary petroleum development and note that the policy of the UK government is to encourage new oil and gas production **and** at the same time pursue net zero (**Net Zero**) GHG emissions by 2050.

5. But Lord Sales' wider point is that giving this duty and responsibility to individual County Councils directly undermines the whole structure of onshore UK energy law decision-making. The UK's oil and gas law regime

[17] *Finch*, Para. 53, page 16

[18] Id., Para. 258, page 79. In the case of *Greenpeace Limited* v *The Advocate General et al* [2021] CSIH 53(adjudicating the identical issue on judicial review in the offshore context) the Court of Session, following the holding of Holgate J. in the *Finch* case at first instance, noted: "It would not be practicable, in an assessment of the environmental effects of a project for the extraction of fossil fuels, for the decision maker to conduct a wide ranging examination into the effects, local or global, of the use of that fuel by the final consumer". *Greenpeace,* at Para. 68. The *Greenpeace* decision must now be regarded as overruled by *Finch* but that will not make the required global environmental assessment any easier.

is contained principally in the Petroleum Act 1998 as amended and our approach to climate change and to the implementation of the Paris Accord is set forth in the Climate Change Act of 2008 as amended which now embodies Net Zero. Some Country Councils, may, as Lord Sales suggests, simply decide to stop all petroleum developments and others, of a different political or business hue, may take the opposite view and allow them all. We could then have a patchwork of anarchic and contradictory County Council energy policies, or even differing energy policies within a County Council.[19]

6. Additionally, the cardinal rule of the Climate Change Act, which has been much attacked from many quarters, is that the UK focuses on lowering its *own* GHG emissions. In stark contrast, County Councils are now catapulted into an analysis of global emissions since it is very often impossible for an oil company to know where its molecules will eventually be consumed. And if County Councils are to play a global role by considering worldwide Scope 3 emissions, should they not also consider the important present-day problems that arise through global energy poverty, the cost-of-living crisis, and failing energy security?

7. Petroleum developers offshore (as onshore) are always oil companies who have the rights to develop petroleum discoveries by virtue of holding a production licence (called a PEDL onshore). Offshore licences frequently impose mandatory work commitment obligations at the exploration and appraisal stages. Offshore oil companies are usually not required by their licences to develop their discoveries, but that is their whole economic reason for existence. However, by virtue of Petroleum Act 1998 amended Section 9A, the NSTA is required to lay before Parliament a "Strategy" to achieve the "principal objective" of "maximising the recovery of UK petroleum". The current (second) version of the OGA Strategy (2021) requires oil companies to develop appropriate offshore discoveries to maximise economic recovery (**MER**). See OGA Strategy Paragraph 8. This Strategy was first passed in 2016 well after the Climate Change Act of 2008 and was restated in amended form in 2021 after Net Zero was adopted in 2019. While offshore oil companies are rightly required to reduce or

[19] In rejecting the finding of the Court of Appeal, (which was that it was in the discretion of the County Council to determine what an "indirect effect" of a project could be), Lord Leggatt stated the following highly sound formulation: "As an initial comment, this would be a very unsatisfactory state of affairs. It would mean in cases of the present kind there would be no consistency, or means of ensuring consistency, between decisions made by different planning authorities when faced with similar issues, or even between decisions made by the same authority on different occasions in relation to similar projects" *Fitch*, Para. 60, page 18. **The very same policy objection can be levelled against his own holding**.

eliminate their project GHG emissions (see NSTA Stewardship Expectation 11 – Net Zero) no cognizance has ever been taken of the climate change effect of Scope 3 emissions. To do so would be entirely inconsistent with the whole offshore petroleum legislative scheme.[20] Can UKCS licensees be legally obliged to explore for, appraise and develop hydrocarbon discoveries which may in fact never receive development permission because of climate change impacts? That scenario is envisaged by *Finch*.

8. Of the two offshore regulators, the NSTA is by law required to abide by the OGA Strategy in "exercising any power under a petroleum licence" (Petroleum Act 1998 Section 9B(d)) which includes the right and duty to approve proposed development programmes. See Model Form Clause 16 in recent Licences. The Secretary of State, on the other hand, is (bizarrely) only required to comply with OGA Strategy in so far as it relates to certain decommissioning matters (see Petroleum Act 1998 Section 9BA). What is clear is that the Secretary of State could only reject an otherwise acceptable offshore development project on the basis of climate change impacts arising from Scope 3 emissions if it was willing to launch a wholesale change (not to say revolution) in UK petroleum law and policy. Labour, in particular, has in this election campaign merely said it is committed to not holding any new UKCS licencing rounds. The clear implication is that existing discoveries and new discoveries made on existing licences can and should be developed.

9. However, in order to provide assurance to the UKCS oil companies, and the wider oil industry community throughout the UK, but especially in the Northeast of Scotland, I propose that the incoming Secretary of State promptly issue guidance on the following lines:

> The Secretary of State notes that the UK Supreme Court has recently decided in the case of [*Finch*] that oil companies seeking approval for onshore development approval (and by extension for offshore development) are required to state in their environmental impact assessments (**EIA**) the likely amount of all GHG emissions which will be caused by field production no matter where in the world such emissions may ultimately accrue. The UK Government has long been aware of the global warming impact of GHG emissions and has addressed the issue by, *inter alia*, enacting the Climate Change Act of 2008, signing the Paris

[20] The majority opinion of *Finch* briefly touched on the role of the maximising economic recovery regime offshore but failed to grasp its implications. See Finch, Para. 145, page 40.

Agreement and adopting the requirement for Net Zero emissions by 2050, among other measures.

We must emphasise that even our world leading legal Net Zero requirement was never intended to be a zero hydrocarbon use requirement. We will need oil and gas for many decades, and it is much better to produce it here than to pay for dirtier imports generated by friend and foe alike. Hydrocarbons which we fail to produce will in any event be produced by others, damaging our balance of payments, and compromising our energy security. We now announce that even though oil companies seeking offshore development decisions must *per Finch* list their likely Scope 3 emissions in their EIAs, it is our considered national policy at this time not to reject an otherwise acceptable offshore development merely because of its level of Scope 3 emissions. This is not a decision which can be sensibly made on a case-by-case basis because the question would always be the same in all cases, and our answer, which is a national political decision in favour of petroleum development, must also be consistent. Naturally, our position on this may change in the future, and if so, we will inform the industry and the public promptly.

10. Alternatively, a better solution would be to amend the Onshore EIA Regulations and the Offshore EIA Regulation to restore the *status quo ante Finch*. Perhaps this issue might be addressed in the new streamlined system which may replace EIAs with environmental outcomes reports?

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Uisdean Vass has over 35 years' experience practicing oil and gas law in the UK and throughout the World. He is qualified to practice in Scotland and in Louisiana and has worked in many different aspects of the oil business. Mr. Vass is involved in giving advice on the new MER regime in the UK and he also advises governments on regulatory matters. The heart of his practice lies in advising oil companies on licencing and doing deals, whether through farmouts, assets sales or company sales.