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Client Alert

International Disputes

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Following *Finch*: Planning Permission for Coal Mine Quashed

EXECUTIVE SUMMARY

In the recent case of *Friends of the Earth v Secretary of State for Levelling Up, Housing & Communities & others; South Lakeland Action on Climate Change v Secretary of State for Levelling Up, Housing & Communities & others* [2024] EWHC 2349 (Admin), the High Court quashed planning permission for what would have been the UK's first new deep coal mine for over thirty years.

This ruling follows the decision of the Supreme Court in *R (Finch) v Surrey County Council and others* [2024] UKSC 20 earlier this year (K&S Alert) and is the first judgment applying the landmark finding that environmental impact assessments (EIAs) for fossil-fuel projects must include an assessment of the "downstream" or "scope 3" emissions produced by burning the extracted fossil fuels. This does not mean that planning for new fossil fuel projects in the UK will necessarily be rejected. However, it does mean that failure to account for scope 3 emissions in an EIA or failure to provide adequate information about net zero claims, including the deliverability of offsetting arrangements, such as to allow public scrutiny of the plan may result in a planning decision being quashed by the courts. The judgment also sets a high threshold for any claim that emissions from "clean" fuels extracted from a development in the UK can substitute the emissions from "dirtier" fuels extracted elsewhere. While potentially confined to coal, this decision may have a bearing on future decisions with respect to extraction of fossil fuels more generally, including outside of the UK.

CASE BACKGROUND

In December 2022, the then Secretary of State, Michael Gove, gave planning approval for a new mine owned and operated by West Cumbria Mining ("**WCM**") to be built at Whitehaven, Cumbria. The coal which was to be mined in Whitehaven would be used to produce coke, for use in the steel industry.

Challenges to this planning approval were brought by two NGOs, Friends of the Earth ("**FoE**'') and South Lakeland Action on Climate Change ("**SLACC**"), under the Town and Country Planning (Environmental Impact Assessment) Regulations of 2011 (the "**2011 Regulations**"). FoE and SLACC challenged the Secretary of State's decision to allow planning permission on five grounds, namely that:

1. the Secretary of State acted in breach of the 2011 Regulations by deciding that greenhouse gas ("GHG") emissions from the burning of Whitehaven coal were not a significant, likely effect of the proposed development;
2. the Secretary of State's conclusion that the proposal would have a neutral or beneficial effect on global GHG emissions was flawed (including on the basis that it was inconsistent with findings on the substitution of Whitehaven coal for US coal);
3. the Secretary of State failed to consider the impact that granting planning permission would have on the ability of the UK to perform its leadership role in promoting international climate action;
4. the Secretary of State failed to consider issues relating to WCM's proposed GHG emissions offsetting scheme; and
5. the Secretary of State's treatment of SLACC and the FoE was internally inconsistent.

Regulation 3(4) of the 2011 Regulations requires the Secretary of State to take into account ''environmental information'' in the form of an ''environmental statement'' prior to granting planning permission for projects where there are likely to be significant environmental effects.

The environmental statement provided by WCM was required to include a description of the ''likely significant effects of the development on the environment'' as well as measures planned to prevent, reduce, or offset significant adverse effects on the environment. The decision in Finch clarified that downstream emissions are within the scope of the environmental statement, and therefore the EIA.

FINCH, WHITEHAVEN AND THE FUTURE OF THE EXTRACTIVE SECTOR IN THE UK

Finch concerned the granting of planning permission to expand an onshore oil project, enabling the extraction of crude oil in Surrey. The Supreme Court found that the EIA did not examine the environmental impact of the downstream emissions which would arise when the crude oil extracted from the site was refined. Such emissions were "plainly" an effect of the project and therefore should have been assessed by the local planning authority given that they were a foreseeable and inevitable consequence of the oil extraction.

Applying the principle in Finch, Mr Justice Holgate found that "the burning of the Whitehaven coal is an inevitable consequence of its extraction from the mine". Following the decision of the Supreme Court in Finch, he went on to conclude that "the GHG emissions from that combustion are significant likely indirect effects of the project the subject of the planning application". Therefore, the Secretary of State had erred in failing to consider the impact on global warming of the downstream (scope 3) emissions when granting planning permission for the Whitehaven mine.

It is of note that, some two weeks prior to the High Court hearing in the Whitehaven case, Angela Raynor, Secretary of State for Housing, Communities and Local Government, announced that the government would not defend the legal

challenge. She cited the Supreme Court's findings in Finch, as well as the UK's leadership in climate policy and commitments under the Paris Agreement, as reasons for withdrawing its defence. This decision should be seen in the light of Labour's manifesto pledges in relation to climate change, including to stop issuing new oil and gas exploration licenses.

WHITEHAVEN AND THE DEFENCE OF SUBSTITUTION

In its defence, WCM argued that the development of the Whitehaven mine, and the subsequent burning of Whitehaven coal, would not result in a material increase in GHG emissions (either direct or downstream) because coal extracted in Whitehaven would supply the UK and European steel production in the place of that extracted in US mines. US coal would remain in the ground because, according to WCM, Whitehaven coal would be cheaper to the UK and European markets. Therefore, as a result of the US substitution effect, WCM argued that the burning of Whitehaven coal could not amount to a ''significant environmental effect'' for the purposes of the 2011 Regulations.

Mr Justice Holgate, in dealing with this argument, agreed with the claimants that, rather than substituting the extraction of US coal, the opening of the mine would simply add another source of coal to the world market, leaving US suppliers to sell their product elsewhere (including to an ample Chinese market). Overall, more coal would be supplied, more steel would be produced, and more GHG emissions would be released.

The judgment in Whitehaven built upon the finding in Finch that the evidential burden is on the developer to assess the GHG emissions in its environmental statement. In relation to the substitution argument in Whitehaven, Mr Justice Holgate found that it was for WCM to produce information in its environmental statement that demonstrated there would be no net increase in GHG emissions, "including any legal causation in relation to substitution".

In order to successfully rely on the substitution argument, Mr Justice Holgate found that WCM would be required to show a degree of substitution that was close to perfect. This is a high bar which will prove difficult to surmount in other cases.

CARBON OFFSETTING AND NET-ZERO CLAIMS

WCM's defence that Whitehaven would be a ''net-zero coal mine'' followed from its argument of substitution, as well as its plans to offset any emissions produced by the mine. WCM's carbon offsetting arrangements involved the purchase of credits in the international voluntary carbon market. WCM claimed that this would reduce the net change in GHG emissions from the operation of the mine to zero. The Secretary of State accepted these offsetting arrangements.

The claimants contended that the total direct emissions produced at Whitehaven over its 25 years of operation would represent roughly 6 months of UK total emissions at 2022 levels and would involve the purchase of a significant number of carbon credits. Mr Justice Holgate thus found that the "deliverability of the offsetting arrangements proposed" was a "relevant planning consideration" which the Secretary of State should have taken into account. Failing to do so established a ground for the Court to quash the Secretary of State's decision.

THE UK'S INTERNATIONAL ROLE IN COMBATING CLIMATE CHANGE

Finally, the judgment also recognised the impact of granting planning permission for Whitehaven on the UK's leadership role in promoting international action on climate change. The claimants argued that "…the UK can only credibly claim to be a world leader on climate issues if it practices what it preaches" and that granting planning

permission for the Whitehaven mine would "harm the ability of the UK to persuade other countries to reduce GHG emissions from the use of coal".

Citing both the Paris Agreement and the Climate Change Act of 2008, which gives statutory effect to the UK's commitment to achieve net zero by 2050, Mr Justice Holgate found that the impact of the Whitehaven mine on the UK's net-zero goals and global climate leadership was a material planning consideration that the Secretary of State had to take into account when considering if a proposal was environmentally acceptable. This finding may well create significant obstacles for developers seeking permission to extract fossil fuels, particularly coal, in future projects.