Landmark Chambers

EIA and SEA case-law: review of the year

Heather Sargent

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EIA

R (o.a.o. Finch) v Surrey CC

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[2020] EWHC 3566 (Admin) [2021] PTSR 1160 – 21 December 2020

Holgate J

- JR of grant of planning permission by Surrey CC to retain and expand the Horse Hill Well Site and to drill four new wells, for the production of hydrocarbons over a 25 year period

- ES assesses the GHG that would be produced from the operation of the development itself but does **not** assess the GHG that would be emitted when the crude oil produced from the site is used by consumers

R (o.a.o. Finch) v Surrey CC

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- Town and Country Planning (Environmental Impact Assessment) Regulations 2017

- Main issue: does the requirement in the 2017 EIA Regulations to provide an ES that describes both the direct **and indirect** likely significant effects of a development, require an assessment of the GHG emissions that result from the use of an end product that is said to have originated from that development?

- Short answer: no

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- GHG emissions from the use of fuel (the end product) are addressed by Government policy on climate change and energy
  - **Not** necessary by virtue of the 2017 EIA Regulations for the LPA to go further than **applying** those policies in its decision on whether to grant planning permission – **not** necessary for it to require those GHG emissions to be estimated and assessed as part of the EIA of the development

- [101] "the fact that the environmental effects of consuming an end product will flow "inevitably" from the use of a raw material in making that product does not provide a legal test for deciding whether they can properly be treated as effects "of the development"

R (o.a.o. Finch) v Surrey CC

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- "The extraction of a mineral from a site may have environmental consequences remote from that development but which are nevertheless inevitable […] An inevitable consequence may occur after a raw material extracted on the relevant site has passed through one or more developments **elsewhere** which are not the subject of the application for planning permission and which do not form part of the same "project""

- The true legal test: is an effect on the environment, an effect **of the development for which planning permission is sought?**

- "Indirect effects" cover consequences that are "less immediate" but **"they must, nevertheless, be effects which <u>the development itself</u> has on the environment"**

R (o.a.o. Finch) v Surrey CC

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- The clearly expressed wording of the legislation cannot be disregarded: effect must be given to that language even if the result is that some environmental effects are not assessed

- [105]: rejection of proposition that there are no other measures in place within the UK for assessing and reducing GHG emissions from the combustion of oil products in motor vehicles (including net zero target in Climate Change Act 2008)

R (o.a.o. Finch) v Surrey CC

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- [107]: “It has to be recognised that development control and the EIA process have a specific and, to some extent, limited ambit, namely to assess and control proposals for new development and in some circumstances, the retention of existing development. But, because the incidence of planning control depends upon whether planning permission is required, or enforcement action is possible, these regimes do not regulate the environmental effects of the general use of all land in the country”

- [112]: “Essentially, development control and the EIA process are concerned with the use of land for development and the effects of that use. They are not directed at the environmental effects which result from the consumption, or use, of an end product”

R (o.a.o. Finch) v Surrey CC

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- Other points to note:
  - [91]-[94]: the mere fact that an applicant produces an ES that does not comply with the terms of an LPA's **scoping opinion** does not **of itself** amount to a breach of the 2017 EIA Regulations
  - (*Obiter*) [143]: neither para. 183 of the NPPF nor para. 112 of the Minerals PPG allows a LPA (or ES) to disregard a relevant environmental effect "but [they] do allow an authority to exercise judgement as to the extent to which such an effect should be assessed in the development control process, taking into account the existence of other dedicated regulatory regimes"

Pearce v SSBEIS

[2021] EWHC 326 (Admin) [2021] JPL 1229 – 18 February 2021

Holgate J

- JR of the SoS's decision to make the North Vanguard Offshore Wind Farm DCO
- ES prepared by NVL for Vanguard assessed cumulative impacts arising from both Vanguard and Boreas wind farm projects, including landscape and visual impacts from the onshore infrastructure proposed at Necton
- Both the ExA and the SoS decide that consideration of cumulative landscape and visual impacts from Vanguard and Boreas should be deferred to any subsequent examination of the Boreas proposal

Pearce v SSBEIS

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- Can consideration of an environmental effect be deferred to a subsequent consenting process?
  - [109]: yes, **if** the decision-maker has judged that the effect is **not significant** – see e.g. ***ex p Milne*** [2001] Env LR 406
  - Where the decision-maker treats the effect as being **significant** (or does not disagree with the "environmental information" before him/her that it **is** significant): "[a] range, or spectrum, of situations may arise" – helpfully analysed at [110] ff.

Pearce v SSBEIS

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- In some cases the principles set out in ***R (Larkfleet Limited) v South Kesteven DC*** [2016] Env LR 76 (at [29]-[30], [35]-[38] and [56]) **may** allow a decision-maker properly to defer the assessment of cumulative impacts arising from the subsequent development of a **separate** site, not forming part of the same project
  - E.g. ***R (Littlewood) v Bassetlaw DC*** [2009] Env LR 407

- Circumstances of present case "are clearly distinguishable from ***Littlewood***" ([118])

- SoS's failure to evaluate the information before him on the cumulative impacts of the Vanguard and Boreas substation development = breach of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009

Pearce v SSBEIS

- [122] “The Defendant unlawfully deferred his evaluation of those effects simply because he considered the information on the development for connecting Boreas to the National Grid was “limited”. The Defendant did not go so far as to conclude that an evaluation of cumulative impacts could not be made on the information available, or that it was “inadequate” for that purpose. […] I would add that because he did not address those matters, the Defendant also failed to consider requiring NVL to provide any details he considered to be lacking, or whether NVL could not reasonably be required to provide them under the 2009 Regulations as part of the ES for Vanguard”.

Pearce v SSBEIS

- Deferral is also irrational; and ([143]) “even if it be assumed that it was legally permissible to defer the evaluation of the cumulative impacts at Necton to the examination of the Boreas DCO application, any such decision had to be adequately reasoned”
  - “The bare statement in this case that the information on Boreas was “limited” did not come anywhere near discharging that requirement”

- Holgate J rejects argument that relief should be withheld under s. 31(2A) of the Senior Courts Act 1981

- DL granting DCO is quashed

Abbotskerswell PC v SSHCLG

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[2021] EWHC 555 (Admin) [2021] Env LR 28 – 11 March 2021

Lang J

- Unsuccessful claim for statutory review (s. 288 TCPA 1990) of SoS's decision to grant outline planning permission on appeal for a major mixed use development on the southern fringe of Newton Abbot (including 1,210 dwellings, a primary school, up to 12,650 sq m of employment floorspace & two care homes)

- Ground 1: SoS erred in failing to assess any material environmental information relating to the assessment of GHG emissions and climate change, in breach of the 2011 EIA Directive and the 2011 EIA Regulations

Abbotskerswell PC v SSHCLG

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- Lang J notes ([82]) that the role of the Court in reviewing the adequacy of the assessment in an environmental statement has been recently reviewed by the Supreme Court in ***R (Friends of the Earth Ltd) v Heathrow Airport Ltd*** [2020] UKSC 52 (the Airports NPS litigation - at [142]-[146])

- Rejects argument that the judgment of the Court of Appeal in the Airports NPS litigation (***R (Plan B Earth) v SST*** [2020] EWCA Civ 214 [2020] PTSR 1446 at [137]) establishes that a **more intensive** standard of review should be applied where there is a "patent defect" in the assessment

Abbotskerswell PC v SSHCLG

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- [85]: "…Neither ***Squire*** nor ***Plan B*** established a separate category of unlawfulness based on "patent defect". The deficiencies in the assessment in ***Squire*** demonstrated conventional public law errors (i.e. irrationality and failure to take into account relevant considerations), which resulted in a breach of the requirements of the EIA Directive and regulations"

- [86]: "The adequacy of the ES in this claim falls to be assessed according to conventional ***Wednesbury*** principles, as set out by the Supreme Court in ***Friends of the Earth***"

Abbotskerswell PC v SSHCLG

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- On the GHG argument: under reg. 2 of the 2011 EIA Regulations, the SoS was only required to consider the adequacy of such information on climate change in the ES as "may reasonably be required"

  - In deciding what was "reasonably required" the SoS had a "wide range of autonomous judgment on the adequacy of the information provided" and had to be "free to form a reasonable view of [his/her] own on the nature and amount of information required", subject only to review on ***Wednesbury*** grounds (***Friends of the Earth*** at [144])

Abbotskerswell PC v SSHCLG

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- On the facts: SoS reached a judgement that the information provided on climate change was sufficient; C's criticisms were considered by the SoS but rejected
- SoS's conclusions were rational and lawful
  - N.b. site was allocated for development in the local plan and had "already been through a LP examination and subject to a raft of environmental testing, at that stage, for the Allocation to be adopted"
  - GHG emissions had been considered in the context of the Local Plan, the sustainability appraisal and the SEA
  - Thus "[i]t is apparent that the Secretary of State had climate change issues well in mind, in particular, the sustainability of the Site, transport, flood risks, air quality and a low emissions strategy"

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SEA

R (o.a.o. Rights: Community: Action) v SSHCLG

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[2020] EWHC 3073 (Admin) [2021] PTSR 553 – 17 November 2020

Divisional Court: Lewis LJ, Holgate J

- JR seeking to quash the SIs that introduced Use Class E and certain PD rights

R (o.a.o. Rights: Community: Action) v SSHCLG

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- [79]: “From the statutory framework it can be seen that a plan or programme is only required to be the subject of an environmental assessment if all four of the following requirements are satisfied:
  - (1) the plan or programme must be subject to preparation or adoption by an authority at national, regional, or local level, or be prepared by an authority for adoption, through a legislative procedure by Parliament or Government;
  - (2) the plan or programme must be required by legislative, regulatory or administrative provisions;
  - **(3) the plan or programme must set the framework for future development consents of projects**; and
  - (4) the plan or programme must be likely to have significant environmental effects.

R (o.a.o. Rights: Community: Action) v SSHCLG

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- Claim dismissed: on the SEA ground of challenge, the DC concludes that none of the 3 SIs constitutes a “plan or programme” that “sets the framework for future development consents” within the meaning of art. 3(4) of the SEA Directive

R (o.a.o. Friends of the Earth Ltd) v Heathrow Airport Ltd

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[2020] UKSC 52 [2021] 2 All E.R. 967– 16 December 2020

Supreme Court

- FoE and Plan B complain that the environmental report that the SST was required under the SEA Directive to prepare and publish was defective, in that it did not make reference to the Paris Agreement
  - Supreme Court: Divisional Court was right to reject that complaint

R (o.a.o. Friends of the Earth Ltd) v Heathrow Airport Ltd

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- Broader points on SEA:
  - [66]: SC agrees with Singh J in ***Cogent Land LLP v Rochford DC*** [2013] 1 P&CR 2 that a defect in the adequacy of an environmental report prepared for the purposes of the SEA Directive may be cured by the production of supplementary material by the plan-making authority, subject to there being consultation on that material
  - [67]: "It follows that [SEA] may properly involve an iterative process; and that it is permissible for a plan-making authority to introduce alterations to its draft plan subject to complying with the information requirements in art. 5 and the consultation requirements in arts. 6 and 7"

R (o.a.o. Friends of the Earth Ltd) v Heathrow Airport Ltd

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- [142]: art. 5(2) and (3) of the SEA Directive confer a discretion on the SoS regarding the information to include in an environmental report **and** the approach to be followed in deciding whether the SoS has exercised his discretion unlawfully is the ***Blewett*** approach, as established in relation to the adequacy of an ES in the EIA context

- I.e. ([144]) the standard of review is "conventional" ***Wednesbury***

R (o.a.o. Friends of the Earth Ltd) v Heathrow Airport Ltd

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- [146]: the public authority responsible for promulgating an environmental report should have **a significant editorial discretion** in compiling the report, to ensure that it is **properly focused on the key environmental and other factors which might have a bearing on the proposed plan or project**
  - Absent such a discretion: risk of excessively defensive approach to drafting environmental reports; risk of report being **excessively burdened with irrelevant or unfocused information**, which would undermine their utility **in informing the general public in such a way that the public is able to understand the key issues and comment on them**
  - In short: risk of the public being "drowned in unhelpful detail" and "losing sight of the wood for the trees"

Thank you for listening

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