FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 53
XA34/20

Lord President
Lord Menzies
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the appeal under regulation 16 of the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999

by

GREENPEACE LIMITED

Appellants

against

(First) THE ADVOCATE GENERAL (representing the Secretary of State for Business, Energy and Industrial Strategy); and (Second) THE OIL AND GAS AUTHORITY;

Respondents

and

(First) BP EXPLORATION OPERATING COMPANY LIMITED; and (Third) ITHACA ENERGY (UK) LIMITED;

Interested Parties

Appellants: Crawford QC, Welsh; Harper Macleod LLP
First Respondent: Dean of Faculty (Dunlop QC), MacGregor QC; The Office of the Advocate General
Second Respondents: McClelland; Drummond Miller LLP
Interested Parties: Cormack QC (sol adv); Pinsent Masons LLP

7 October 2021

Introduction

[1] This is an appeal against decisions which permit the first and third interested parties

to exploit the Vorlich oil field in the North Sea. The Secretary of State's decision was to agree that consent should be granted by the OGA (Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 reg 5(A1)). The OGA subsequently granted consent (Petroleum Act 1998 s 3(1)).

[2] The first issue is whether BP and Ithaca, the Secretary of State and the OGA complied with the requirements for publicity of applications and environmental information as set out in the 1999 Regulations as these should be purposively interpreted in light of the Directive 2011/92/EU of the European Parliament and the Council on the assessment of the effects of certain public and private projects on the environment (as amended by 2014/52/EU). In addition, two challenges are made to the substance of, as distinct from the procedure leading to, the Secretary of State's decision. The first relates to arithmetical errors relating to greenhouse gas emissions in BP's environmental statement. The second is whether the environmental impact, not of the exploitation process but of the consumption thereafter of the extracted and refined oil, is a relevant consideration.

[3] There is an additional issue about the extent to which these matters have already been determined, either in proceedings in the High Court of England and Wales or in an earlier petition for judicial review in Scotland. In relation to the failure to take into account the consumption of the oil, the respondents and the interested parties plead *res judicata*. The final issue is whether any procedural contraventions should result, as a matter for the exercise of the court's discretion, in reduction of the agreement and consent for an oil field which has cost £230 million to develop and has now been operating for some nine months.

European Union Directive

[4] The EU Directive of 13 December 2011, on the assessment of the effects of certain

public and private projects on the environment (2011/92/EU), provides (Art 2.1) that member states shall adopt measures necessary to ensure that "projects" which are likely to have a significant effect on the environment are subject to development consent and "an assessment with regard to their effects on the environment". The environmental impact assessment must (Art 3.1):

> "identify, describe and assess…the direct and indirect significant effects of a project on…
> (c) …climate…".

A "project" is defined (Art 1.2(a)) as meaning, *inter alia*, "the execution of construction works or of other installations" and other interventions involving the extraction of mineral resources.

[5] The Directive continues by providing (Art 6.2) that, in order to ensure their effective participation, the public require to be informed "electronically and by public notices or by other appropriate means" of a number of matters relative to the consent process. These include: that the project is the subject of an EIA; details of the decision maker, from whom information can be obtained and to which representations can be made; the timescales involved; and the arrangements for public consultation. The public must (Art 6.4) be given early and effective opportunities to participate in the decision-making processes. The arrangements for informing the public, by publication in newspapers and arranging for consultation, are (Art 6.5) to be determined by the member states. Specifically:

> "Member States shall … ensure that the relevant information is electronically accessible to the public, through at least a central portal or easily accessible points of access, at the appropriate administrative level."

[6] The Directive provides (Art 9.1) that the public must be informed "promptly", in accordance with national procedures, of decisions which have been taken. Information

about the content of the decisions, and the main reasons for their having been taken, must be supplied. Member states must ensure (Art 11) that there is a procedure for the review of decisions by a court of law.

Legislation

[7] The 1999 Regulations were intended to transpose the Directive into UK law. They provide that the Secretary of State's agreement is required before the OGA can grant consent for the extraction of oil (reg 5(A1)). The OGA's function is maximising the recovery of UK petroleum (1998 Act, s 9A). They are wholly owned by the Secretary of State, from whom they have operational independence. The Secretary of State is responsible for assessing environmental impact.

[8] The Secretary of State cannot grant a consent unless the application is accompanied by an environmental statement (reg 5(1)(b); see reg 3A). In the ES, the applicant must:

> "3A – (2) …identify, describe and assess…
>
> (a) the direct and indirect significant effects of the relevant project on …
>
> (iii) … climate;
>
> (b) the operational effects of the relevant project… ".

[9] The Secretary of State must not (reg 5(4)) decide the matter unless he is satisfied that the requirements of regulations 9 and 10 "have been substantially met". Regulation 9 contains a series of requirements. The Secretary of State has to serve a notice on the applicant specifying the authorities which are most likely to be interested in the application because of their environmental responsibilities (reg 9(1)). The applicant must serve on each authority copies of the notice, the application and the ES together with a notice that representations can be made to the Secretary of State by a particular date (reg 9(2)).

[10] The applicant must (reg 9(2)(f)) publish a notice, which *inter alia*: describes the application and states both that it is accompanied by an ES and that it is subject to an EIA; provides an address at which the application and the ES can be inspected; sets out the arrangements for public consultation; gives a date by which representations can be made and the address to which they should be made; and explains the availability of a review under regulation 16. The publication of the notice has to be "on such occasions as to be likely to come to the attention of those likely to be interested in" the application, in such newspapers as the Secretary of State may direct and on a public website (reg 9(2A)). A "public website" is (reg 3(1)) "a website accessible to the public where the public can view and download information placed upon it". A copy of the application and the ES should be published alongside the notice (reg 9(2A)). The applicant must make a copy of the application and the ES available for public inspection (reg 9(2)(c)).

[11] Regulation 10 applies when the Secretary of State has sought further information about the ES from the applicant. If he considers that the information ought to have been included in the ES, because it "relates to the significant effects the project is likely to have on the environment" or it is "of material relevance to his decision" (reg 10(2)), he must direct the applicant to make the information available to the public in the same manner as with the original application (reg 10(2)(c)) and publish it in newspapers "on such occasions as to be likely to come to the attention of those likely to be interested in" (reg 10(2)(d)) the application. The requirements of regulation 9 are repeated in relation to the details of publication.

[12] Regulation 5A(1)(a) provides that the Secretary of State, when deciding whether to agree to a consent, must "examine the [ES], including any information provided under regulation 10" and "… any representations … made by any other person about the

environmental effects of the project". The Secretary of State must (reg 5A(8)(a)(ii)) publish his decision, including the main reasons and considerations on which it was based, in the London, Edinburgh and Belfast Gazettes (reg 3(1)).

[13] The scope of an appeal is defined by the Regulations (reg 16) whereby a "person aggrieved" by a consent can apply to the court to quash (reduce) the consent if it was, *inter alia*, granted, in contravention of regulation 5(4) or 5A(1)(a) or the person's interests have been "substantially prejudiced" by non-compliance with any other of the Regulations' requirements.

Background

The Application and Publication

[14] In 1981 BP were granted a licence (P363) to search for, bore for and "get" petroleum in the Vorlich field. The licence is now held by BP (80%, as operator) and Ithaca (20%, as non-operating party). A further licence (P1588) for the Vorlich field was issued on 12 February 2009. Since 2016, it has been held by Ithaca. The Vorlich field is within Scottish jurisdiction (reg 15).

[15] On 9 March 2018, BP submitted an Environmental Statement concerning the exploitation of the field to the Offshore Petroleum Regulator for Environment and Decommissioning, who comes under the auspices of the Secretary of State. On 3 April, BP applied to the OGA, on their own behalf and that of Ithaca, for the necessary consent for two new production wells in the field. On 4 April, OPRED directed BP to publish a notice containing the relevant information, including by way of press advertisement (regs 9(2)(f) and 9(2A)). On 11 April, BP published such a notice on its website. Press notices followed

on 12 April in the *Daily Telegraph* and the *Press and Journal*. The notices were also published on an advertising website, namely Scot-Ads, which searches for public notices.

[16] The notices were in the following terms:

> "PUBLICATION NOTICE
>
> Oil / Gas Field Development / Gas Storage Project
>
> Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 (as amended)
>
> Vorlich Field Development
>
> The Secretary of State for Business, Energy and Industrial Strategy has been informed that [BP] has submitted a letter of application to the [OGA] in relation to the Vorlich Field development project … In accordance with the above-mentioned Regulations, this letter of application is supported by an Environmental Statement, copies of which may be inspected between 10 am and 4 pm on business days at [BP's address in Dyce] until close of business on 13/05/2018. Copies of the [ES] may also be obtained from the address above … or may be accessed via the internet at [internet address on BP's website].
>
> Interested parties have until the date specified above to make representations in relation to the submission to the Secretary of State. All representations should quote the Department's reference number [number] and may be made by letter or e-mail to:
>
> [postal and email addresses of the Secretary of State's Environmental Management Team]."

[17] The notice went on to explain the procedure to be followed thereafter. Following receipt of all representations, the Secretary of State would either grant or refuse consent. This would be published in the UK Gazettes and on the GOV.UK website. Any person aggrieved by the decision could apply to the court. The court could quash the consent in the event of a failure to consider the ES, relevant information or representations. It could also do so where the interests of the aggrieved person had been prejudiced by a failure to comply with any other requirement of the Regulations. *Interim* orders could be sought.

[18] Meantime, on 10 April 2018, a number of media outlets, including the *BBC*, the *Mirror*, the *Financial Times* and several oil industry magazines, had already reported BP's announcement of its intention to exploit the Vorlich field.

[19] Since 12 April 2018, the ES has been accessible through the link specified in the press notices. Attached to the ES were: the application for consent; OPRED's response; the notice in terms of regulation 9(1); and a template notice which was intended to fulfil the requirements of regulation 9(2)(f). An error meant that the fully completed press notice was not included. An affidavit from the environmental manager within OPRED's Environmental Management Team addressed this matter as follows:

> "6. … [BP] published the [ES] on its website on 12 April 2018 with an incomplete version of the public notice template rather than the completed newspaper public notices at the back of the uploaded document. The public notice template included in the [ES] on the BP website does explain how representations can be made so interested parties were still able to contact OPRED about the [ES] but the relevant dates for the public notice period given in the newspaper public notices were not included. The [ES] itself included a contact point within BP, which would have enabled any interested parties to raise queries about making a representation, if they had not seen the relevant details in the two newspaper public notices."

Further Information and the consent

[20] On 19 June 2018, the Secretary of State requested further information (reg 10) from BP, including a habitat assessment and an environmental baseline survey report. These were provided on 6 and 30 July. BP were not directed by the Secretary of State to publish these documents. The EMT's manager explained this as follows:

> "11. On reviewing the information provided by BP, [a team member] determined that the additional information did not change the potential environmental impacts, or the assessment of significance described in the [ES]. Therefore, [she] concluded that the additional information was not relevant to the decision and no further public consultation was required."

[21] The Secretary of State published an [ES] Summary on 3 August 2018, but not in the Gazettes. On 7 August, OPRED notified BP that it had considered the ES and had agreed to the issue of the consent. There had been arithmetical inaccuracies in the ES submitted by BP, concerning the atmospheric greenhouse gas emissions from the operation of the field (not the subsequent consumption of extracted oil and gas). These were addressed by the EMT's manager as follows:

> "19. … the clerical errors did not alter the total CO2-e figure. Consequently, this would not have changed the overall assessment that atmospheric emissions were not significant and therefore were not relevant to the decision. The total atmospheric emissions generated by the Vorlich development project were calculated to account for 0.02% of UK greenhouse gas emissions per year, which was concluded to be of acceptable risk and not significant."

The ESS had referred to the additional information. Clarification had been sought on atmospheric emissions, pipeline and umbilical installation methods, and justification of the risk matrix conclusions. Following responses from consultees, the Secretary of State was satisfied that the specified matters had been duly clarified.

[22] On 20 September 2018, the OGA notified BP of the grant of consent for the works. BP issued a related press release on 27 September, but there was no publication in the Gazettes at that time. The consent was discussed in the Scottish Parliament on the same day as the press release. It received substantial media coverage over September and October, including by the *BBC*, most Scottish and UK circulation newspapers, several trade magazines and Friends of the Earth Scotland.

[23] The Secretary of State's (OPRED's) agreement for the consent was eventually published in the Gazettes on 25 and 26 July 2019. The Gazettes recorded that the notices of the Secretary of State's agreement had not previously been published, but were now. Any

person aggrieved could apply to the court. Any questions could be directed to the EMT. There was no mention of the OGA's consent in the Gazettes.

[24] Offshore construction and installation had commenced in January 2019. Drilling operations began in June and were completed in November. This work had cost about £230 million. If production had to stop, there would be fixed costs of about £5 million per month.

The Use of Oil and Gas

[25] OPRED's guidance on the application of the Regulations sets out the various aspects which an applicant should consider in assessing "the direct and indirect significant effects of the relevant project" (reg 3A(2)) in their ES. An affidavit from the Director of the Secretary of State's Energy Development and Resilience Directorate explained that, whereas the ES required to take into account any emissions generated by the project itself:

> "32. …the indirect emissions associated with the end use of the oil or gas to be produced are not considered when making an assessment of significant effects at an individual project level… The assessment of non-direct effects is limited to those effects which relate to the construction and operational activities of the project".

The reasons for this were said to be that the management of greenhouse gas emissions was considered elsewhere under wider Government policy. Neither OPRED nor the applicant could assess, with any degree of certainty, the impact of the end use of the oil and gas produced. Indirect impacts could not be attributed to a particular project. The EIA process was not concerned with end use effects. Greenhouse gas emissions from the future combustion of oil and gas did not, in the Secretary of State's view, fall within the issues to be addressed in the EIA required by the Regulations.

[26] The affidavit continued by explaining that the use of oil and gas formed part of the UK's energy strategy; to ensure energy supplies whilst meeting policy objectives in terms of

climate change. The UK's climate change framework left the Government to determine how best to balance emission reductions across the economy. Net increases from individual projects were managed within the overall strategy for meeting carbon budgets, notably the 2050 net zero greenhouse gas emissions target which had been set under the Climate Change Act 2008. The UK required to reduce emissions by 80% of 1990 levels by that date (s 1(1)). This met the requirements of the Paris Agreement which had been ratified in 2016. The Agreement did not necessitate any specific emission reduction or any particular mitigatory action. Setting a carbon budget was a complex and high level decision. At present, budgets 1 to 5 covered 2008 to 2032. The Secretary of State had published a Clean Growth Strategy in 2017. Maximising the economic development and recovery of UK oil and gas was an important policy objective (1998 Act Part 1A). Exploitation was important for economic growth, employment and revenue. There was insufficient gas and oil in the North Sea to meet domestic needs. Reduction in domestic production would lead to higher imports.

[27] An affidavit from the appellants' executive director set out their constitution, funding and objectives. As part of their climate change campaign, the appellants maintained that the large oil companies should cease investment in searching for, and extracting, fossil fuels and switch to renewable energy systems. The director explained that, whereas he had been aware of BP's discovery of oil in the Vorlich field at Easter 2019, he had thought that they already had a license to exploit the field. He had not appreciated that they required a further consent. That had only come to his attention in June 2019. If he had known about it, the appellants would have become involved in the process and made representations not only in relation to the environmental effects of BP's operation but also the effects of global warming, which had been created because of the increase in greenhouse

gas emissions. These were caused by, *inter alia*, the consumption of oil and gas. Drilling had been completed in November 2019,

Proceedings in England and Scotland

[28] In November 2019, the appellants applied for a judicial review of the consent on multiple grounds in the High Court of Justice (Queen's Bench Division (Planning Court)) in London (CO/4392/2019). On 5 February 2020, permission to proceed was refused by Lang J for the ninth ground that the Secretary of State had failed to take a relevant consideration into account; *viz.* the effect of the consumption of the oil on the UK's carbon budget and its contribution to climate change. Written reasons for that do not appear to have been published. The Secretary of State conceded grounds (iii) to (vi). These were first (iii) that the Regulations had failed to transpose the Directive because there was no route for challenging a consent. An appeal to the court was competent only once the OGA's consent had been published in the Gazettes. However, there was no requirement that the consent be published in the Gazettes, so the right to appeal might never arise. Secondly (iv), there had been a failure to publish in the Gazettes. These were both breaches of Article 11 of the Directive. Thirdly (v), the Regulations failed to transpose the Directive because they did not require publication and making available of the consent as required by Article 9(1). Finally (vi), BP's notice had failed to explain the right to a review by the court since it said that the challenge was to the Secretary of State's agreement and time ran from the publication of that decision, whereas an appeal was against the OGA's consent. This was contrary to regulation 9(2)(f)(viii).

[29] On 3 April 2020 the parties executed a consent order in these terms. The Secretary of State undertook to publicise the OGA's consent in order to start time running for an appeal

under regulation 16. On that basis the appellants accepted that the Secretary of State had provided a sufficient remedy. In an earlier consent order in separate proceedings (*R (Garrick-Maidment)* v *Secretary of State* (CO/1571/2019)) the Secretary had undertaken to amend the Regulations following a detailed review. In these proceedings it had also been conceded that the Regulations had not adequately transposed Articles 9 and 11 in respect of court reviews of consents. The review had resulted in the replacement of the Regulations by the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020.

[30] In the course of the High Court proceedings, it became apparent (reg 15) that the Scottish courts had jurisdiction over any appeal. The appellants lodged this appeal, and a parallel petition for judicial review, challenging both the agreement and the consent. On 1 October 2020, permission to proceed with the petition was refused ([2020] CSOH 88). The appellants had sought a declarator that the Regulations had failed to transpose the Directive and reduction of the Secretary of State's agreement to the consent. The Lord Ordinary determined that, standing the consent order in England, it was not an appropriate use of the supervisory jurisdiction for the court to pre-empt the review of the Regulations by the Secretary of State. The appellants could challenge the Secretary of State's agreement in an appeal under regulation 16 and thus had an alternative remedy.

Submissions

Appellants

[31] The appellants sought reduction of both the Secretary of State's agreement to the consent and the OGA's consent. At the heart of the complaint was said to be a "myriad" of failures in the consultation exercise required by the Regulations. That had deprived the

appellants of the opportunity to take part in the process by submitting timely representations on BP's ES. Because no representations had been made, they had not been taken into account. What the Secretary of State would have made of any representations could not be known. This all meant that the consent had been contrary to the Regulations.

[32] The appellants did not advance a case of a breach of the Directive or that there had been a failure to transpose the Directive; those matters having been dealt with in the English proceedings. Rather, the breaches alleged were of the Regulations themselves, specifically regs 5(4) and 5A(1)(a), as purposively construed in light of the Directive. The Regulations had to be interpreted as if they gave full effect to the Directive (Case C-14/83, *Von Colson* v *Land Nordrhein-Westfalen* [1986] 2 CMLR 430; European Union (Withdrawal) Act 2018, s 5(2)). The opportunities that the public were given to participate had to be effective (Arts 6(4) and 11; Case C-280/18, *Flausch* v *Ypourgos Perivallontos kai Energeias* [2020] 2 CMLR 7, at paras [31], [38] and [58]-[59]).

[33] The notice of the application required, under regulation 9(2A)(b), to be on a public website. This meant a government website. A notice on any website was not enough (*Kendall* v *Rochford District Council* [2015] Env LR 21, at paras [92]-[94]). The notice had not been published on BP's website "alongside" the ES. Publicity in the press did not cure a failure to comply with the Regulations. The further information requested under regulation 10(2) ought also to have been published as it had been of material relevance to the decision. The precautionary principle ought to have been applied.

[34] The ground for review, whereby the Secretary of State had not taken into account the consumption of the oil, had been refused permission to proceed. There had been no substantive argument on whether climate change was a relevant consideration. It was such a consideration (*R (Friends of the Earth)* v *Heathrow Airport* [2021] PTSR 190 at paras 117-121).

The matter was not *res judicata*. Regulation 3A(2) required an EIA to assess the direct and indirect significant effects of the project on the environment, including the climate (see also sch 2, paras 4 and 5). The Climate Change Act 2008 imposed a duty on the Government to lower the UK's "carbon account" (s 1). The Secretary of State was bound to have regard to the use to which the oil and gas would be put (*R (Stephenson)* v *Secretary of State for Housing, Communities and Local Government* [2019] PTSR 2209 at paras 67-68; *HJ Banks & Co* v *Secretary of State for Housing, Communities and Local Government* [2019] PTSR 668 at paras 94-96, 102-106). The opposite conclusion in *R (Finch)* v *Surrey County Council* [2021] PTSR 1160, which had been appealed, should not be followed (see also *R (Friends of the Earth)* v *North Yorkshire County Council* [2017] Env LR 22 at paras 21, 37-39; and *Preston New Road Action Group* v *Secretary of State for Communities and Local Government* [2018] Env LR 18 at para 93). The Secretary of State could only agree to the OGA granting consent if he had been fully informed of the environmental effects. No one was facing up to what had been allowed.

[35] The interested parties ought to cease operations. Any commercial prejudice which BP or Ithaca might suffer as a result of the reduction of the consent arose from the Secretary of State's failures and not anything done by the appellants. The appellants had not been aware of the notices in the press. They did not employ a person to search for such notices.

Secretary of State

[36] The appellants had not explained what more had been required to comply with the Regulations. The Directive expressly left it to member states to establish the detailed arrangements (Art 6(5); *Flausch* v *Ypourgos Perivallontos kai Energeias*, at para [26]). The Regulations were effective and did not make the exercise of rights under the Directive excessively difficult (C-429/15, *Danqua* v *Ireland* EU:C:2016:789, at para [29]). The terms of

regulations 9 and 10 required only (reg 5(4)) to be "substantially met". Publication on a government website was not required. The OPRED pages of the UK Government website, on which all ESs were available, met the requirements. The appellants had been afforded an adequate opportunity to be involved and make representations. BP's failure to publish a statutory notice was a minor technical failure which did not prejudice the appellants.

[37] The Secretary of State considered that the additional information (reg 10) was neither related to significant effects on the environment nor of material relevance to the ES. The fact that additional material had been reviewed did not necessitate its publication. Certain figures submitted by BP had been inaccurate. The inaccuracies had had no impact on the decision as the ultimate figures had been correct.

[38] The indirect emissions challenge was *res judicata*. Permission to proceed had been refused by the High Court. In any event, the challenge was without merit. The Directive was concerned with the effect of the individual project, not the use of material extracted in the course of a project. The focus was on the particular "project". The definitions provided no support for the contention that the end use of raw materials, after further processes such as refinement to create a different product, was a relevant consideration (*R (Finch)* v *Surrey County Council*, at paras [101]-[102] and [109-112]).

[39] Direct emissions from the end use of oil and gas in the UK were considered and taken into account in the UK's Annual Statement of Emissions. These were matters for political judgment (*R (Plan B Earth)* v *Secretary of State for Transport* [2021] PTSR 190[1] at paras [2] and [281]), which were not challengeable in an appeal under regulation 16. The determination of a carbon budget for the UK was a complex, high-level strategic decision.

[1] On appeal to the UKSC the judgement is with *R (Friends of the Earth)* v *Heathrow Airport* [2021] PTSR 190

Indigenous oil and gas development was an important part of the transition to a low carbon economy. This was all part of the existing framework, which sought to manage the UK's progressive decarbonisation up to the year 2050 (cf *R (Packham)* v *Secretary of State for Transport* [2021] Env LR 10 at paras 83 and 87).

[40] The production of oil from the Vorlich field did not increase the use of oil. The appellants' position, that as a matter of principle there should be no new oil, conflated and confused different questions. The scope of an EIA was a matter of judgment, so long as the information in it was accurate (*R (Friends of the Earth Ltd)* v *North Yorkshire County Council* at para [21], citing *R* v *Rochdale Metropolitan Borough Council Ex p Milne (No 1)* [2000] Env LR 1). Assessment of the adequacy of information should be in line with the standard reasonableness test (*R* v *Cornwall County Council, ex p Hardy* [2001] Env LR 25, para [56]) at paragraph 56). The Secretary of State had a wide range of autonomous judgment (*R (Plan B Earth)* v *Secretary of State for Transport*, at para [136]; *R (Packham)* v *Secretary of State for Transport*; *R (Friends of the Earth)* v *North Yorkshire County Council* at paras [37]-[39]; *Preston New Road Action Group* v *Secretary of State for Communities and Local Government*, para [93]).

[41] If the court established a material error of law, it should not exercise its discretion to reduce the decisions (*King* v *East Ayrshire Council* 1998 SC 182 at 194). A procedural flaw did not automatically result in reduction (*Walton* v *Scottish Ministers* 2013 SC (UKSC) 67, at paras [103]-[140], [155] and [156]). Any partial failure to discharge the requirements of the Regulations would need to be balanced against the prejudice to the respondents, BP and Ithaca. The appellants did not set out a material representation which they would have been able to make, had the relevant requirements been complied with.

OGA

[42] The appellants had failed to demonstrate that any action of the second respondents satisfied the limited grounds of appeal set out in regulation 16. Their role was restricted to considering technical, financial and competency matters. The OGA's consent, and the reasons for it, were unconnected to the issues raised by the appellants. For the second respondents' decision to be reduced, there required to be substantial prejudice to the appellants. Reduction was a discretionary remedy (*King* v *East Ayrshire Council*, at 194). There was no requirement for a decision to be quashed, where a procedural requirement of EU law had been breached (*Walton* v *Scottish Ministers*, paras [138]-[140], [155] and [156]).

BP and Ithaca

[43] There had been no contravention of the Regulations. BP had written to the OGA on 3 April 2018 stating their intention to apply for consent. Their letter had described the project and stated that an ES would be submitted. The letter and the ES were put on BP's website. BP had complied with OPRED's requirements. The press notices had referred to BP's website. The specific notice had not been put on the website, but a template had been and this had contained the relevant information.

[44] The appellants were not a "person aggrieved" in terms of regulation 16; having not participated or made representations in the process provided for by the Regulations. They had had sufficient opportunity to do so. They had secured a remedy in the English proceedings, which had been implemented. They were no longer aggrieved by any live issue.

[45] Reduction should not follow, given the extreme prejudice to the interested parties that would result from reducing the consent, and in light of the appellants' failure to

participate in the process and their delay in commencing proceedings (*Walton* v *Scottish Ministers* at para [87]; *Lardner* v *Renfrew District Council* 1997 SC 104, at 108A-B).

[46] The appellants had not suggested that there would be a significant increase in oil production. Drilling had been completed in November 2019, before the appeal had been marked in June 2020. The appellants had delayed in bringing a challenge. They had not attempted to obtain an *interim* order.

Decision

Procedural challenges

[47] The Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 were intended to transpose the EU Directive of 13 December 2011, on the assessment of the effects of certain public and private projects on the environment (2011/92/EU), into domestic law. It was accepted in the proceedings between the parties in the High Court of England and Wales that they had failed to do so in respect of Articles 9 and 11 of the Directive. The provision whereby a person could appeal a decision, only once the OGA's consent had been published in the Gazettes (Reg 16(3)), was rendered potentially ineffective by the absence of a requirement to publish that consent in that manner. That defect has been remedied by the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020.

[48] The issue of transposition, which was disposed of by the consent order in the English proceedings does not arise in this appeal. The need to publish the consent in the Gazettes in order to engage the appeal provisions, was resolved, for the purposes of this appeal, with the subsequent publication following upon the consent order and, for future consents, by the new regulations. In relation to the allegations of breaches of regulations 5(4), and hence of

regulations 9 and 10, and 5A(1)(a), it was not submitted that these regulations had not adequately transposed the relative parts of the Directive. No doubt, a purposive approach is appropriate when construing the Regulations. Certainly, if there were an ambiguity, it would be necessary to have resort to the terms, including the objectives, of the Directive. It is not evident that this is necessary here where the import and the language of the Regulations reflect the purpose and terms of the Directive.

[49] It was difficult to ascertain from the appellants just what their position was on which part of regulation 9 had been breached. The requirement in regulation 5(4) is that the Secretary of State must be satisfied that regulation 9 has been "substantially met". There is no complaint about a failure to notify and consult the relevant "environmental authorities". There is no suggestion of a failure to make the application and the environmental statement available at a UK address. The case then focuses on regulation 9(2)(f) which required BP to publish a notice, which, as set out above, *inter alia*: described the application and stated that it was accompanied by an ES and was subject to an EIA; provided an address at which the application and the ES could be inspected; set out the public consultation arrangements; gave a date for representations; and explained the availability of a review by the court.

[50] The answer to this element of the case is first provided by the press notice in the *Daily Telegraph* and the *Press and Journal*. This described the application as the Vorlich Field development project. It said that it was supported by an ES, which could be inspected at BP's premises in Dyce or at a specified internet address. It specified to whom representations could be made and the cut-off date for those. It stated that the decision of the Secretary of State would be published in the UK Gazettes and on the GOV.UK website. It drew attention to the existence of a review by the court. In short, on this basis the Secretary

of State had adequate material upon which he could be satisfied that the relevant publication requirements of regulation 9 had been substantially met.

[51] The obligation in regulation 9(2A) is to publish specified material on such occasions as makes it likely that it would come to the attention of those likely to be interested in or affected by the project. This involves, first, doing so in such newspapers as the Secretary of State may direct. There is no complaint that that was not done. BP complied with the Secretary of State's direction in that regard. *Kendall* v *Rochford District Council* [2015] Env LR 21 is readily distinguishable. The complaint there was reliance solely upon a local government website, with no parallel publication in the press. The challenge in *Kendall* nevertheless ultimately failed on the basis that there had been no substantial failure to comply with the relevant regulations and Directive (Lindblom J at para [121]).

[52] Secondly, Regulation 9(2A) requires the applicant to publish the notice on a "public website". It was argued that this, and the relative definition in regulation 3(1) must be construed purposively as meaning a government website. The regulation and the definition must be taken, in the absence of ambiguity or absurdity, to mean what they say. It is for the applicant to publish the notice. Hence the expectation is that he will do so on a website over which he has control. If the Regulations had been intended to require the Government to provide facilities for publication by applicants on a Government website, that could have been stipulated. It was not. The language is clear. There is no inconsistency between the regulation and Article 6.5 of the Directive which refers to the information being "electronically accessible to the public, through… a central portal or easily accessible points of access". This does not support the proposition that only a Government website will do. The statement in the press notice, that the notice could be accessed by looking at the specific web address provided, met the test provided for in the Directive and the Regulations.

[53] The appellants' strongest point in relation to a breach of regulation 9 was the admitted failure of BP, in terms of regulation 9(2A), to publish the application and the ES alongside the notice on the website. An incomplete template of the notice appeared. However, it did refer to an application having been made by BP in relation to the Vorlich Field development project. All that was omitted was the precise location of the field and the cut-off date for representations. Anyone accessing the template could very easily have ascertained what the missing information was from, amongst others, the named OPRED EMT. The defect is of such a minimal nature that it would not have prevented the Secretary of State from being satisfied that regulation 9 had been "substantially met". It certainly caused no prejudice to either the appellants or the public.

[54] The regulation 10 challenge rests on the provision which requires the Secretary of State to direct the applicant to publish any new information sought by him, if he considered that the information ought to have been included in the ES, because it related to the likely significant effects on the environment or was otherwise of material relevance to the decision. This challenge fails for the reasons which the EMT manager explained in her affidavit. The information, when reviewed, did not change the potential environmental impact or the assessment of its significance. The information was not material to the decision. There is no ground upon which that statement of fact could successfully be challenged. In any event, for this ground to succeed, the court would have to hold that, whereas the appellants did not challenge the agreement or consent based upon the original ES, they would have done so had this additional information been published. That is a highly unlikely eventuality and not one which the court is prepared to accept.

[55] There was then sufficient publicity of BP's application to exploit the Vorlich field, the decisions to permit that development and the availability of an appeal to the court to

challenge that decision; ie the ultimate consent. Not only were the formal requirements of the Regulations for publicity substantially met, there was ample surrounding publicity of what was happening. Although the appellants' director has stated that he was unaware of the need for BP to obtain consent for the exploitation of the field, the appellants, as a leading environmental watchdog, ought to have been well aware of the legal mechanisms available in order to mount a challenge. They did not use these mechanisms for whatever reason. The grounds of appeal, in so far as based upon procedural defects, are rejected. In the final analysis they are overwhelmingly technical and unconvincing.

Aggrieved Person

[56] Had the appellants succeeded in their submissions on procedural defects, they would undoubtedly have been aggrieved persons within the meaning of regulation 16. The issue then becomes one of whether, having had adequate notice of the application and failed to make representations to the Secretary of State, they can still claim that status. The matter is conclusively resolved by *Walton* v *Scottish Ministers* 2013 SC (UKSC) 67 and *Lardner* v *Renfrew District Council* 1997 SC 104. The *dicta* in these cases are worthy of repetition.

[57] In *Walton*, Lord Reed said (at para [87]):

> "The authorities also demonstrate that there are circumstances in which a person who has not participated in the process may nonetheless be 'aggrieved': where for example an inadequate description of the development in the application and advertisement could have misled him so that he did not object or take part in the inquiry, as in *Cumming* v *Secretary of State for Scotland* [1992 SC 463]… Ordinarily, however, it will be relevant to consider whether the applicant stated his objection at the appropriate stage of the statutory procedure, since that procedure is designed to allow objections to be made and a decision then to be reached within a reasonable time, as intended by Parliament".

[58] In *Lardner*, the Lord President (Rodger), delivering the opinion of the court (at 107), said:

> "The appellant…is a member of the public who has an interest in what happens to the site because it is near him and he uses it, but on the other hand he did not avail himself of the opportunities which Parliament has afforded for participating in the process for adopting the local plan. We do not suggest, of course, that someone who has not objected to the draft plan or taken part in an inquiry can never be 'a person aggrieved'. On the other hand, there is a difference between *feeling* aggrieved and *being* aggrieved: for the latter expression to be appropriate, some external basis for feeling 'upset' is required – some denial of or affront to his expectations or rights. … The particular circumstances of any case require to be considered and the question must always be whether the appellant can properly be said to be aggrieved by what has happened. In deciding that question it will usually be a relevant factor that through no fault of the council, the appellant has failed to state his objection at the appropriate stage of the procedure laid down by Parliament since that procedure is designed to allow objections and problems to be aired and a decision then to be reached by the council. The nature of the grounds on which the appellant claims to be aggrieved may also be relevant… but … they all relate to matters which he could have put, or endeavoured to put, to the council or to the reporter at the inquiry."

[59] As in *Lardner*, the points which the appellants seek to raise in relation to arithmetical errors and the environmental effects of the consumption of oil and gas are all matters which could have been made the subject of representations, by following the procedure laid down by the Regulations, to the Secretary of State. It may have been that they would have been rejected, but that is not the point. Having failed to take them at first instance, the appellants cannot be aggrieved that they were not taken into account by the decision maker and permitted to raise them only on an appeal to the court. For this reason, the appeal must be refused.

The environmental effects of the consumption of oil and gas

Res Judicata

[60] A decision to refuse permission for an application to proceed to a hearing is a procedural one (see on leave to appeal *Politakis* v *Spencely* 2018 SC 184, LP (Carloway), delivering the opinion of court, at para [14]). The decision taken is administrative in nature and may depend upon whether an application is thought to have a defined degree of

prospects of success. It is not a substantive decision on the merits of the application. The effect of such a decision is to prevent there from being a substantive judicial determination of the point for which leave or permission is refused. It cannot found a plea of *res judicata* except in so far as relating to a procedural decision of the same nature. It cannot prohibit substantial argument in an appeal, such as the present, in which there is no permission or leave requirement. The *media concludendi* are not the same. Neither of the refusals to allow certain grounds of judicial review to proceed in England and Wales or Scotland can prohibit a person with an unrestricted right of appeal to this Court from proceeding with that appeal.

[61] The situation is different with the consent orders in the judicial review proceedings in England. The substantive matters, which were agreed by the parties and endorsed by the High Court, a right of review; a matter which was corrected by the belated publication of the OGA's consent in the Gazettes. They do not re-arise now.

Arithmetical Errors

[62] In light of the OPRED EMT's explanation of the arithmetical errors, this point was not pressed. That explanation provides the answers to the challenge. The overall figures were correct.

Merits

[63] The relevant considerations which require to be taken into account in an environmental impact assessment, notably when the applicant is preparing his Environmental Statement, are set out in regulation 3A. So far as is relevant to the current appeal, the applicant is required to assess the direct and indirect significant effects of the project on, amongst other elements, the climate and the operational effects of the relevant

project. In this area, regulation 3A(2) mirrors the terms of the Directive (Art 3.1). Again, there is no issue concerning any lack of adequate transposition.

[64] The question is whether the consumption of oil and gas by the end user, once the oil and gas have been extracted from the wells, transported, refined and sold to consumers, and then used by them are "direct or indirect significant effects of the relevant project". The answer is that it is not. The exercise which the applicant had to carry out, and the Secretary of State had to assess, was a determination of the significant effects of drilling the two wells and removing the oil and gas. That involved considering the effects of depositing and operating an exploration rig or rigs on site. The ultimate use of a finished product is not a direct or indirect significant effect of the project. It is that effect alone which, in terms of the Regulations, must be assessed.

[65] The court agrees with the reasoning in *R (Finch) v Surrey County Council* [2021] PTSR 1160 in which Holgate J reached the same conclusion in relation to what is a direct or indirect effect of a "development"; in that case the drilling of new oil and gas wells on land. As Holgate J stated (at para 101):

> "The extraction of a mineral from a site may have environmental consequences remote from that development but which are nevertheless inevitable. …[T]he true legal test is whether an effect on the environment is an effect of the development for which planning permission is sought. 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… and which do not form part of the same 'project'."

However broad and purposive an interpretation of the Regulations or the Directive might be attempted, the clearly expressed wording of the legislation cannot be disregarded (*ibid* at paras 103-104). It is the effect of the project, and its operation, that is to be considered and not that of the consumption of any retailed product ultimately emerging as a result of a refinement of the raw material.

[66] The issue of what may be an obviously material consideration does not arise because the parameters of what is to be assessed are defined by reference to the effects of the project. This is in contrast to cases in which the decision maker is formulating planning policy and is consulting on what is relevant (*R (Stephenson)* v *Secretary of State for Housing, Communities and Local Government* [2019] PTSR 2209) or where the relevance of ultimate use is not disputed (*HJ Banks & Co* v *Secretary of State for Housing, Communities and Local Government* [2019] PTSR 668). The approach in *Finch* is not dissimilar to that taken in *R (Friends of the Earth)* v *North Yorkshire County Council* [2017] Env LR 22 (Lang J at paras 37-39) and is consistent with that in *Preston New Road Action Group* v *Secretary of State for Communities and Local Government* [2018] Env LR 18 (Lindblom LJ at para 68).

[67] In *Finch*, Holgate J went on (at paras 105 *et seq*) to explain that the overall responsibility for the transition to a low carbon society, including the net zero target in the Climate Change Act 2008, lay with the UK Government. A range of measures was being pursued to achieve a reduction in the consumption of oil. Development control and EIAs had a specific, limited ambit. They did not regulate the environmental effects of the general use of all land in the country. The use of motor vehicles was not regulated by planning control. Increased use of an airport was an indirect effect of an additional or expanded runway, but that was a different situation. Once more, the court finds itself in agreement with Holgate J, who carried out a detailed analysis of several of the European and English cases to which this court was also referred, sometimes *en passant*, and which does not require to be repeated.

[68] 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.

Although the appellants' aspiration is for such extraction to cease, it does not appear to be contended that the UK economy is not still reliant in a number of different ways on the consumption of oil and gas. At present, a shortage of oil and gas supplies is a matter of public concern. The argument is, in any event, an academic one. It is not maintained that the exploitation of the Vorlich field would increase, or even maintain, the current level of consumption. Unless it did so, it is difficult to argue that it would have any material effect on climate change; even if it is possible to arrive at a figure for its contribution by arithmetical calculation relative to the production of oil and gas overall. The Secretary of State's submission that these are matters for decision at a relatively high level of Government, rather than either by the court or in relation to one oilfield project, is correct. The issue is essentially a political and not a legal one.

Remedy

[69] Had there been defects in the notification and consultation procedures, and the appellants had been substantially prejudiced by them, it would have been difficult for the court to resist affording the appellants the remedy which they seek; ie a quashing (reduction) of the consent. Regulation 16 makes it clear that the power to afford the appellants that remedy is a permissive rather than a mandatory one. In that context, no doubt all the circumstances have to be taken into account (*King* v *East Ayrshire Council* 1998 SC 182, LP (Rodger) at 194). Nevertheless, if a consent has been obtained, in a situation in which the appellants had been deprived of their right to make representations and to be consulted, the effect is that the consent has been obtained unlawfully. It can hardly be argued that, as a significant campaigner on fossil fuel issues, the appellants did not have a substantial interest, in a practical sense, in the outcome (*ibid*).

[70] However, in a situation in which the appellants did not take steps to obtain an *interim* order and delayed bringing proceedings, despite their knowledge of the project going ahead, the court may have required to consider whether to suspend the operation of any decision to quash the consent until such time as the Secretary of State had been afforded an opportunity to reconsider his agreement to the consent in the light of any representations made Since the matter does not arise for decision, the court will reserve its view on the precise terms, or competence, of any such order (cf *Walton*, Lord Carnwath at paras [142] to [145]).

Result

[71] The appeal is refused.