

## Assessing pending Supreme Court verdict in a Surrey oil field case

By [Tim Clark](#) | Thu 18 January 2024

Surrounded by hedgerows to the south and a woodland to the north, Horse Hill in Surrey is not really on the property world's radar. However, the field a few miles north of Gatwick Airport is at the centre of a legal tussle that could reshape the UK's planning laws and have ramifications for major planning applications up and down the country.



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The long-running case of *Finch vs Surrey County Council*, which is now awaiting a ruling from the Supreme Court, revolves around the indirect impacts of development and what it is reasonable to take into account when considering the long-term impacts of developments themselves.

Climate campaigner Sarah Finch, on behalf of Weald Action Group, first filed a legal dispute with Surrey County Council in September 2019 over the local authority's decision to grant Horse Hill Developments planning permission to expand an existing oil well. The proposals would add four new oil wells to the site at Horse Hill and extract crude oil over a 20-year period.

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***If the court [upholds] the claim, we're going to end up with an unworkable beast of a system***

*Alison Ogley, Freeths*

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While the environmental impact assessment (EIA) submitted to the council included estimates of the direct emissions (known as scopes one and two) from building the project, indirect emissions (scope three) were not included in the report.

Finch argued at the time that in failing to consider the scope-three emissions, the council had breached the UK's obligation to a 2011 EU directive.

In the submission to the High Court, which heard the case in 2020, Finch stated that a developer also had an obligation under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 to provide an environmental statement that describes the likely significant effects of a development, both direct and indirect. This includes 'downstream' emissions resulting from the use of an end product – in this case the petroleum that would originate from the oil wells.

In essence, Finch argued that the future combustion of the products refined from the oil extracted at Horse Hill should be included in the EIA report. High Court judge Justice Holgate dismissed the claim, as did the Court of Appeal in 2022. The case was heard by the Supreme Court last June, but a ruling has yet to be published.

Finch's contention might sound questionable, but similar climate-focused actions are to a certain extent already becoming a feature of the corporate landscape. Last year, *Property Week* spoke to shopping centre operator [Unibail-Rodamco-Westfield \(URW\)](#), which is beginning to look further than its own direct emissions to reduce the overall carbon footprint generated from indirect sources, including tenants at its sites.

Using environmental scopes one, two and three as its basis for action, URW is taking steps to monitor how much carbon is produced by the day-to-day operations of its shopping centres and looking at how to reduce it. The operator is aware this process will take time and is working productively with tenants to reduce impacts.

## Practical concerns

A key distinction between URW's efforts and the Horse Hill case is that URW is undertaking the measures at its own discretion and has a timeline for action. Finch's argument, meanwhile, is that such action is mandated now, by environmental law.

At the heart of Finch's case is the indirect production of carbon dioxide. This is where sustainability measures come up against a problem of practicality – having to take into account the future uses of any development or resources could well cause the planning system to seize up.

“It won't just affect decisions on energy or even infrastructure projects but potentially all major developments and, as such, has the potential to add significant cost and delays to development projects across a range of sectors,” says Tim Baines, a partner specialising in environment, planning and regulatory law at law firm Mayer Brown, who adds that the case is pivotal for several reasons.

“It raises constitutional questions about the role of the courts in overturning the decisions of elected officials, especially in an area so highly politically charged as climate change; it gives rise to a risk of opening the floodgates to a raft of climate-related claims; and, more broadly, it has implications for decision-makers where there are overlapping regulatory regimes, not just in the context of planning and environmental regimes.”

The Supreme Court's delay in publishing a ruling in Finch vs Surrey County Council may be due to the implications the case throws up for environmental law. The wider interest the case has generated may also be a factor.

“The Office for Environmental Protection [OEP] has intervened in the case, which highlights its concern that previous court decisions left the law on EIAs in an uncertain position,” says Claire Fallows, partner at law firm Charles Russell Speechlys. “The OEP has asked the Supreme Court to clarify the law on the assessment of indirect effects.”

Another reason for the delay could be that the High Court and the Court of Appeal gave different reasons for dismissing the case.

“The split between the High Court and the Court of Appeal effectively is that Justice Holgate [who ruled in the High Court] went as far as saying that it wasn't possible to properly assess the indirect effects of the use of hydrocarbons [from the Horse Hill scheme] and their downstream impact as the claimant was suggesting,” says Alison Ogle, partner at law firm Freeths.

“What the Court of Appeal said in its ruling was: ‘Well, maybe yes, maybe no; but at the end of the day, it's a matter for the local planning authority's judgement and the law is clear on that.’”

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## ***It gives rise to a risk of opening the floodgates to climate-related claims***

*Tim Baines, Mayer Brown*

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Ogley says the initial High Court decision by Justice Holgate is, potentially, the stronger legal argument as it leaves less room to interpret the actions of local authorities.

“I would be surprised if the Supreme Court doesn’t back Justice Holgate’s decision,” she says. “The Holgate decision is the more complicated judgment to go with, and the court may be taking time to think through the process and ensure its decision doesn’t lead to any absurd outcomes.”

### **Complex case**

According to Pamela Chesterman, partner at law firm Irwin Mitchell, the Supreme Court has had to grapple with many complex issues, which have both direct and indirect impacts on UK law. “There were several elements that, despite at first glance sounding fairly understandable and obvious, in context required a little more consideration,” she says.



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Chesterman notes that the court needs to consider not only the concept of 'project' in its judgment but also the legal consequences of how different effects – which include greenhouse gas (GHG) emissions from the oil extracted from the site – are viewed within current laws.

“An earlier decision that dealt with exploration of hydrocarbons [Preston New Road Action Group and Frackman vs Secretary of State for Communities and Local Government] had distinguished the development, ie exploration, from extraction because [it seemed] acceptable that the exploration of hydrocarbons did not inevitably lead to the extraction,” says Chesterman.

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### ***EORs will shift the focus to an 'outcome-based' approach***

*Catherine Knight, Russell-Cooke*

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She adds: “What was interesting in that case was the court’s recognition of the absence of GHG or climate change factors in the EIA directive or regulations – a concept given much more emphasis since their implementation, following the Climate Change Act 2008.

“Furthermore, in the past year, the UK’s energy security needs arguably played a factor in the need to verify this type of information and forecast its impact more comprehensively.”

Others are less convinced that the Supreme Court has made special dispensation for the Horse Hill case, however.

“I would not put any delay down to special features of this case – all cases that reach the Supreme Court are complex and need clarity,” says Angus Walker, partner at law firm BDB Pitmans. “It is more likely a general backlog. Although, if more recent challenges are being decided earlier, that might suggest something is holding this one up.”

According to Freeths’ Ogley, if Finch prevails, it would make a mockery of the entire EIA process. “If the court decides that the Finch claim is going to be upheld, we’re going to end up with an unworkable beast of a system.

“If you have to assess all the downstream effects of what you are producing [from a development] then it reaches the point where you never get to the end of the EIA, because you could never stop assessing.”

Ogley adds that if someone were to propose, say, a chicken farm, then the impact of people in a restaurant eating the chicken grown on the farm would possibly need to be included in an assessment.

“You may need to assess the health effects of people eating intensively farmed poultry within the development. There can always be another layer to assess,” she adds.

## **New assessments**

Ultimately, the government is aware of the shortcomings of the EIA process and has planned to phase out the assessments. The Levelling-up and Regeneration Act 2023 proposes to replace EIAs with environmental outcomes reports (EORs) in due course. Although, as Fallows notes: “It is questionable as to how far this government can or will proceed with the detail of such proposals ahead of a general election.”

While the introduction of EORs will render the Supreme Court’s decision in the Finch vs Surrey County Council case obsolete, Whitehall will likely take note of the ruling as it may provide a steer for how the new assessments may be viewed.

Catherine Knight, senior associate in the planning team at law firm Russell-Cooke, says another question is whether the introduction of EORs will provide greater clarity.

She adds: “What is clear is that EORs will apply at the strategic level to assessments of relevant plans – for example, local plans, planning applications under the Town and Country Planning Act 1990, and to Nationally Significant Infrastructure Project applications under the Planning Act 2008 – and will shift the focus of the reporting to an ‘outcome-based’ approach and consistency in reporting considerations across the planning spectrum.”

The impact of the Horse Hill development on day-to-day climate emissions might be minor compared with that of the vast oil fields spread across the world; but the impact on future planning policy could turn out to be earth-shattering.