Appeal no: UKSC 2022/0064

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL
CIVIL DIVISION (ENGLAND AND WALES)
[2022] EWCA Civ 187

BETWEEN:

R (on the application of)
SARAH FINCH on behalf of the WEALD ACTION GROUP

Appellant

and

(1) SURREY COUNTY COUNCIL
(2) HORSE HILL DEVELOPMENTS LTD
(3) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES

Respondents

and

(1) FRIENDS OF THE EARTH LTD
(2) GREENPEACE UK
(3) THE OFFICE FOR ENVIRONMENTAL PROTECTION
(4) WEST CUMBRIA MINING LTD

Interveners

WRITTEN CASE ON BEHALF OF THE OFFICE FOR ENVIRONMENTAL PROTECTION

Stephen Tromans KC **Ruth Keating**

Counsel for the Office for Environmental Protection

39 Essex Chambers, London WC2A 1DD

0207 832 111

The OEP and the basis for intervention

1. This application to intervene is made on behalf of the Office for Environmental Protection ("OEP"). The OEP is an independent non-departmental public body established under section 22 of the Environment Act 2021 and sponsored by the Department for the Environment, Food and Rural Affairs. The OEP's principal objective is to contribute to environmental protection and the improvement of the natural environment.[1]

2. The OEP has functions in England and Northern Ireland to hold government and other public authorities to account against their environmental commitments and compliance with environmental law. The OEP also has the power to apply to intervene in any judicial review relating to an alleged failure to comply with environmental law where it considers that the failure (if it occurred) would be serious.[2] The OEP can make such an application whether or not it considers that the relevant public authority has failed to comply with the environmental law in question.[3] This is the first occasion on which the OEP has used this power, reflecting the general public importance of the case.

3. The OEP applied to intervene in this appeal on 8 February 2023 and was granted permission to intervene on 11 April 2023.

4. The OEP has intervened in this appeal because it is concerned that the decisions of the lower courts could have an adverse effect on sound environmental decision making and hence on environmental protection and the improvement of the natural environment.

5. In respect of this appeal the OEP considers that two aspects of its submissions are of particular importance: (a) its wish to see a principled approach taken to the meaning and

[1] Section 23 Environment Act 2021.

[2] Section 39 Environment Act 2021. Seriousness is defined in the OEP's Strategy and Enforcement Policy (22 June 2022) and includes at 4.2(a) that a factor in assessing seriousness is: *"whether the conduct raises any points of law of general public importance. This may be, for example, by setting a precedent with wider potential implications (beyond those of the case) or addressing an important area of law where clarification would be valuable or important"*. The OEP's Strategy and Enforcement Policy is available at: www.theoep.org.uk/strategy-and-enforcement-policy.

[3] Sections 39(6) and (7) of the Environment Act 2021.

effect of the term "indirect effect" in the EIA Regulations as a matter of law;[4] and (b) its proposed principles to provide guidance on such an approach as per para. 41 below. The OEP states at the outset that its interest in this appeal is both in respect of greenhouse gas ("GHG") emissions and indirect effects more broadly, of which Scope 3 GHG emissions are one important example.

6. These submissions are structured as follows:

a. The OEP's essential concerns (at paras. 7 to 11);
b. General points on the EIA regime (at paras. 12 to 15);
c. Key provisions of the EIA regime in issue (at para. 16);
d. Comments on the approach at First Instance (at paras. 17 to 19);
e. Problems with majority Court of Appeal approach (at paras. 20 to 32);
f. Suggested approach to indirect effects (at paras. 33 to 44);
g. The issue of the allegedly unmanageable scope of assessment (at paras. 45 to 52);
h. Comparative law (at paras. 53 to 58);
i. Conclusion (at paras. 59 to 62).

The OEP's essential concerns

7. The OEP emphasises that it is not taking sides between the parties – it is simply concerned to ensure that the law is clear and effective in ensuring public participation and protecting the environment. The judgments of the courts below have undermined that clarity and effectiveness. The OEP's objective is to assist the UKSC, to the extent it can, to provide clear and effective principles on the important questions of environmental impact assessment of Scope 3 emissions (see para. 41 below) and more generally the correct approach to indirect effects of proposed development.

8. It should be mentioned at the outset that the Government has consulted on its intention to bring forward a new domestic framework for EIA regimes in England through proposed powers under the Levelling-up and Regeneration Bill. It is not clear – at this stage – what form any new regime will take. However, it seems likely that the same issue on Scope 3 emissions is likely to arise under any replacement regime.

[4] References are to The Town and Country Planning (Environmental Impact Assessment) Regulations 2017.

9. As it stands, the outcome of *Finch* in the Court of Appeal raises serious concerns about the ability of the EIA regime to capture climate impacts as indirect, secondary or cumulative effects, and/or transboundary effects, notwithstanding the amendments to the EU Amending EIA Directive 2014 (2014/52/EU) referenced below (at para. 60) making clear that climate change is an important impact to be assessed.

10. The OEP does not intend to repeat any of the arguments of the parties in the courts below and does not believe it is doing so. Having reviewed the written case of the Appellants, the OEP is satisfied there is little if any duplication in these submissions. To the contrary, the OEP's case is that there are important legal submissions which were not made below and have not been considered by the first instance judge or Court of Appeal.

11. Finally, given the number of jurisdictions that already require the assessment of downstream GHG emissions under the relevant environmental assessment legislation, it is important that the UK has its own guiding legal principles for assessment, taking into account relevant comparative law.

General points on the EIA regime

12. Broadly stated, the purpose of EIA is to assess the likely significant effects of certain projects upon the environment. As noted at para. 7.1 of the Explanatory Memorandum to SI 2017/571, the *"… objective of the Directive is to provide a high level of protection of the environment and to help integrate environmental considerations into the preparation of proposals… to reduce their impact on the environment"*.

13. In practice, the proportion of projects requiring EIA is low relative to total applications for planning permission. As noted in para. 7.5 to the Explanatory Memorandum to SI 2017/571, there are around 500 - 600 environmental statements submitted each year in England through the planning system, representing about 0.1% of all planning applications. EIA therefore only applies to a very small proportion of projects. Whilst this case concerns projects constituting development under land use planning, it is important to be aware that EIA also covers many other types of projects and regimes, for example forestry, water management, port and harbour works and marine licensing, to name a few.

14. Crucially, the environmental information gained by assessment – comprising both the developer's environmental statements ("ESs") and the outputs of consultation with specialist statutory bodies and the public – informs but does not dictate the ultimate decision. The identification of adverse effects under EIA does not mean that permission or consent should necessarily be withheld. The process is intended to inform project design and decision-making, including informing measures which may be necessary to avoid, mitigate or compensate for certain effects.[5]

15. In the context of this appeal, it is worth reiterating that the fact that GHG emissions are assessed does not mean the proposal is unacceptable: the environmental effects of GHG emissions simply have to be weighed against other material considerations. It has been succinctly stated that, *"EIA is not a procedure for preventing actions with significant environmental impacts from being implemented, although in certain circumstances this could be the appropriate outcome of the process. Rather the intention is that actions are authorised in the full knowledge of their environmental consequences."*[6] Assessment is also important so that members of the public and stakeholders – such as statutory consultees – are properly informed and able to participate meaningfully in the process.[7] EIA is quintessentially concerned with *how* a decision is made, not *what* the decision should be.

Key provisions of the EIA regime

16. The key questions for the Court require an understanding of the meaning and effect of the following provisions of the EIA Regulations and their interplay:

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[5] As Lord Hoffmann said in *R v North Yorkshire CC Ex p. Brown* [2000] 1 A.C. 397, at p.404, the purpose is *"to ensure that planning decisions which may affect the environment are made on the basis of full information".*

[6] See Thornton J in *R (on the application of Friends of the Earth Ltd) v Secretary of State for International Trade/Export Credits Guarantee Department (UK Export Finance)* [2022] EWHC 568 (Admin) at [274].

[7] See for example the decisions cited by the House of Lords in *Berkeley v Secretary of State for the Environment, Transport and the Regions* [2001] 2 A.C. 603 – including Advocate General Elmer in *Commission of the European Communities v Federal Republic of Germany* (Case C-431/92) [1995] ECR I-2189, 2208-2209, para. 35 and Advocate General Elmer in *Aannemersbedrijf P K Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* (Case C-72/95) [1996] ECR I-5403, 5427, para. 70: *"Where a member state's implementation of the Directive is such that projects which are likely to have significant effects on the environment are not made the subject of an environmental impact assessment, the citizen is prevented from exercising his right to be heard"* Other authorities also emphasise this point of the need to enable worthwhile public participation, for example, in *Abraham v Wallonia* (Case C-2/07) [2008] Env. L.R. 32 (as cited in *R (on the application of Squire) v Shropshire Council* [2019] EWCA Civ 888 at [77]) and *R (Burkett) v Hammersmith and Fulham LBC (No.2)* [2004] Env. L.R. 3, per Newman J, para. 8.

16.1 Unless an EIA compliant with the Regulations has been carried out for the development planning permission may not be granted (reg. 3).

16.2 The EIA process must identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of the proposed development on (inter alia) climate (reg. 4(2)).

16.3 The EIA process must include the preparation of an ES which is part of the environmental information that must be examined and taken into account (reg. 2(1), 4(1) and 26(1)).

16.4 The ES must include at least a description of the likely significant effects of the proposed development on the environment (reg. 18(3)(b)).

16.5 It must also include at least any additional information specified in Schedule 4 relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected (reg. 18(3)(f)).

16.6 Schedule 4 specifies a description of the likely significant effects of the development on the environment resulting from, inter alia: the impact of the project on climate (for example the nature and magnitude of GHG emissions) (Schedule 4, para. 5(f)).

16.7 The description should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the development. It should *"take into account the environmental protection objectives … which are relevant to the project, including in particular those established under [the Directive]"* (Schedule 4, para. 5).

16.8 It must also include the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment (reg. 18(4)(b)).

Comments on the approach at First Instance

17. The OEP's intervention is not concerned with the irrationality/reasons aspects of this case, which are fact specific and on which it makes no submissions. The OEP is concerned rather with the underlying legal principles, which are the focus of its submissions.

18. The judgment at first instance focused on the references to *"the development"* and *"the project"* as the basis for assessment, to reach a conclusion that EIA *"must address the environmental effects, both direct and indirect, of the development for which planning permission is sought … but there is no requirement to assess matters which are not the environmental effects of the development or project"* (see in particular paras. 45, 101, 110 and 126).

19. Holgate J found that in the circumstances of the case, assessment of GHG emissions from use of refined oil products was incapable as a matter of law of falling within the scope of EIA. He advanced a *"legal test"* of *"whether an effect on the environment is an effect of the development for which planning permission is sought"* (para. 101). Holgate J also went on at paras. 127 to 132 to deal with a fallback position based on assessment of such emissions being a matter of judgment for the planning authority. In the OEP's submission, Holgate J fell into error by placing far too much emphasis on the words *"project"* and "*development*" and his view of their meaning (see for example paras. 24, 101, 122 and 132) – he consequently failed to have proper regard to the context and purpose of the EIA regime as a whole and the effect of the network of the provisions cited at paragraph 16 above.

Problems with majority Court of Appeal approach

20. The Court of Appeal were correct to reject the approach of Holgate J that, as a matter of law, Scope 3 emissions can never be indirect effects. The majority in the Court of Appeal therefore disagreed with his primary reasoning (see paras. 43 and 141), but supported his reasoning on the fallback case.

21. They were correct in rejecting the primary reasoning. They rejected his "legal test" at para. 101 as being simply a restatement of the question in different terms and not a legal test at all (paras. 41 and 141(ii)). Those criticisms, it is respectfully submitted, are correct.

22. The judgment of the Court of Appeal has left the issue of assessment of indirect effects and Scope 3 emissions unclear, in that Sir Keith Lindblom SPT held, at para. 40, that the question of whether a particular impact on the environment is truly a *"likely significant [effect]"* of the proposed development – be it a *"direct"* or *"indirect"* effect – is ultimately a matter of fact and evaluative judgment for the authority. The test proposed by Sir Keith Lindblom SPT, as per para. 41, was as follows: *"What needs to be considered is the necessary degree of connection that is required between the development and its putative effects."*

23. In the OEP's submission, this approach is likely in practice to give rise to the risk of inconsistent decisions between local planning authorities and other relevant decision makers under the EIA regime on matters which are likely to be of significant importance and controversy, and where a common and consistent approach would be desirable.

24. The Court of Appeal decision seems likely to result in repeated litigation on the same point. The OEP submits that the meaning of the words used in the legislation, including the words *"indirect effects"*, should be a matter of law, and not simply of planning judgment. In circumstances where these indirect effects need to be considered there is still scope for judgment in deciding whether on the facts an effect is a likely indirect one in respect of the proposed development, and if so whether it is significant.

25. The majority stated a test of *"the necessary degree of connection"* between the development and its putative effects, which was not simply a matter of law for the court, but a question for the planning authority, subject to scrutiny by the court on normal public law grounds (paras. 41 and 42). The Court did not however seek to explain what was or was not a *"necessary degree of connection"*.

26. The problem with this approach is that it means that local planning authorities could reach entirely different conclusions on an important issue of principle on essentially the same facts, provided their reasons for arriving at those conclusions are adequate. The powers of the court to intervene would be dependent to a large extent on the strengths and weaknesses of the written reasons of the planning authority, and the difficulties which may arise in different judicial views on this point. The law would be left in an unpredictable state with

potentially capricious results, which would not be good law, nor provide the consistently high level of environmental protection which is the objective of EIA (para. 12 above). One can already see the problem emerging in respect of the challenge to the West Cumbria Mining Limited project, the subject of another intervention to the UKSC in this case.

27. There is an additional point to be made, not addressed by the first instance judge or Court of Appeal and not, it would seem, drawn to their attention.[8] This is the relationship between material considerations and EIA. It is well established that what is a material consideration in planning terms is a question of law, not judgment or policy, a principle enunciated as long ago as 1995 by Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] WLR 759, at paragraph 56,[9] and more recently reiterated by Lord Sales JSC in *R (Wright) v Resilient Energy Severndale Ltd* [2019] 1 WLR 6562; [2019] UKSC 53, para. 42. If as a matter of law, emissions from fuels obtained by extraction of hydrocarbons form a material consideration in planning terms then it is submitted there would be difficulty if a local planning authority could as a matter of simple judgment decide that such emissions should not be assessed in terms of their impact because they were deemed not to be *"indirect effects"*.

28. In *R (Thornby Farms Ltd) v Daventry DC; R. (Murray) v Derbyshire CC* [2003] QB 503; [2002] EWCA Civ 31, having reviewed the authorities, Pill L.J., with whom the other members of the Court agreed, concluded in para. 53 of his judgment: *"…A material consideration is a factor to be taken into account when making a decision…"* This is reflective of the wide definition given by Government, namely: *"A material planning consideration is one which is relevant to making the planning decision in question (eg whether to grant or refuse an application for planning permission).* ***The scope of what can constitute a material consideration is very wide*** *and so the courts often do not indicate what cannot be a material consideration …"*[10] It is the OEP's submission that Scope 3 emissions fall within this *"very wide"* definition of what constitutes a *"material*

[8] The nearest one gets is the brief discussion by Sir Keith Lindblom SPT at para. 91.

[9] *"The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority."*

[10] Government Planning Practice Guidance paragraph: 008 Reference ID: 21b-008-20140306, revision date: 06 03 2014. See www.gov.uk/guidance/determining-a-planning-application#how-decisions-on-applications.

consideration". For example, the OEP refers to the recent decision made in respect of the application by West Cumbria Mining Ltd[11] in which references are made to *Finch*.[12] That decision notes the perceived difficulty in calculating GHG emissions but this is plainly not the same point as Scope 3 emissions not being a *"material consideration"*.[13]

29. The OEP also makes the following observations on the case law cited and relied upon by the Court of Appeal:

29.1 At para 65, Sir Keith Lindblom SPT sought to distinguish *R (Squire) v Shropshire Council* [2019] EWCA Civ 888. In *Squire*, the development of intensive poultry infrastructure would result in significant quantities of manure, which would ultimately be used as fertiliser on third party land: this 'end-use' was not part of the development applied for but was accepted to be an indirect effect of the development. Sir Keith Lindblom SPT relied on the existence of intermediate processes of oil refinement in *Finch* as being the determinative factor in deciding that combustion emissions did not constitute an 'indirect effect' of an oil extraction project. He did not accept that the Scope 3 or *"downstream"* GHG emissions in *Finch* were connected to the development in *"the same way"* as the impacts of the storage and spreading of the manure was in *Squire* because the manure was *"a product of the development itself…a waste product with a commercial value"*. Sir Keith Lindblom SPT said that in *Squire*: *"The connection between the development and the impacts in question was clear as a matter of fact, and not dependent on a series of intermediate processes"*. It is submitted that: (a) in the case of hydrocarbons the impact is clear and quantifiable as a matter of fact; and (b) the distinction based on intermediate processes in the context of hydrocarbons is flawed. Indeed, in the context of spreading manure there may well be intermediate steps such as drying, anaerobic digestion/pyrolysis and storage prior to that manure being capable of use as a fertiliser in an agricultural context. The distinction is simply artificial. There is a clear path which can be traced from the extraction of the hydrocarbons to the GHG released from the products made from them,

[11] Decision available: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1122625/22-12-07_Whitehaven_-_Decision_Letter_and_IR.pdf.

[12] At paras. 33 and 35. The Inspector's Report also makes several references to *Finch* at 1.16, 1.22-1.26 and 7.88-7.101.

[13] Para. 35.

just as there was a clear path from the farming of poultry to the pollution potentially caused by use in agriculture of the commercial by-products derived from their manure.

29.2 Further, the approach of the majority in the Court of Appeal (and the fallback reasoning of the first instance judge) lean heavily on first instance and Court of Appeal authority on the approach to considering challenges to the adequacy of ESs – *Blewett*[14] and *Bowen-West*[15]. Both of these seminal cases contain passages which have received approval from the Supreme Court in *Friends of the Earth*[16] (see para. 58 in CA) and appear to have been central to the CA majority's approach.

29.2.1 It is important, in the OEP's respectful submission, to consider these cases in context, and to address the question of where the court's role in interpreting the words of the legislation stops and the role of the planning authority in applying the words to specific facts starts.

29.2.2 In *Blewett*, the relevant ground of challenge was to the alleged inadequacy of treatment of effects on groundwater in the ES. It is important to note that there *was* assessment of these effects, the allegation was that this assessment was inadequate and therefore the purported ES was not a lawful ES at all. There was no issue as to the construction of the relevant provisions of the then EIA Regulations. Plainly it is undesirable and contrary to basic principles of judicial review that the court should engage in detailed factual and scientific criticism of an ES, which is simply not the court's role – see the comments of Sullivan J, in particular at paras. 41 and 68, regarding the *"unduly legalistic"* approach. However, providing legal authority on the meaning of a statutory expression plainly does not offend that principle.

29.2.3 In *Bowen-West* the issue was somewhat different. Planning permission had been granted by the Secretary of State on appeal for disposal at a landfill site of low-level radioactive waste, in addition to hazardous waste which was already permitted. At the time of that decision there were further proposals for a future major extension of the site. The central question for the Court of Appeal was whether the decision-maker was bound to treat these

[14] *R (Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin).

[15] *Bowen-West v Secretary of State for Communities and Local Government* [2012] EWCA Civ 321.

[16] *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52.

proposals for future development as *"indirect, secondary or cumulative effects"* of the development, with that development being *"demonstrably but Phase 1 of a much larger scheme"* (paras. 7 and 10). The Secretary of State and planning inspectorate took the view that the development should be treated as a stand-alone scheme and not as part of a larger, more comprehensive development (paras. 14-15). Laws LJ, giving the judgment of the Court, held that it was *"inescapable"* that the *"project"* to be assessed was only the proposal contained in the planning application: he did not decide if this was a question of law or judgment and said that would have been his conclusion either way (para. 26). Then at para. 27, he concluded that the question of whether the largest scheme in contemplation involved indirect, secondary or cumulative effects of the proposal under determination was an issue of fact, or a matter of fact or of judgment. However, despite the apparent breadth of this language, it may be noted that the decision was angled more to the application of the term *"cumulative effects"* than to its meaning.

29.2.4 Laws LJ in *Bowen-West* made reference at para. 31 to the decision of the Court of Appeal in *Goodman*,[17] a case on the term *"urban development projects"* as Schedule 2 EIA development. He regarded it as obvious but unhelpful to state that the meaning of a text is for the court to ascertain. However, it is respectfully submitted that the approach in *Goodman* bears greater reflection. In that case, Buxton LJ at para. 8 stated that the approach to expressions used in the legislation is not simply a finding of fact, however fact sensitive the determination, nor of discretionary judgment. Rather it involves a correct understanding in law of the meaning of the relevant words (para. 8). This principle, as Buxton LJ went on to say, is nuanced where the expression is sufficiently imprecise that a range of different conclusions may be available, in which case the test is one of rationality. It is also noteworthy that in applying this principle in *Alford v Secretary of State for the Environment, Food and Rural Affairs* [2005] EWHC 808 (Admin) the Divisional Court accepted that "… *in interpreting regulations based on EC law it is incumbent on a national court, if confronted with a dispute about the meaning of a phrase used in a directive, to identify the purposes of the directive and adopt a meaning (provided that the words are capable of bearing that meaning) which best promotes the wide scope and broad purpose of the directive"* (para. 17 per Brooke LJ). Further, this is also apparent from the House of

[17] *R (on the application of Goodman) v Lewisham LBC* [2003] EWCA Civ 140; [2003] Env. L.R. 28.

Lords decision in *Empress Car Company (Abertillery) Ltd v National Rivers Authority* [1999] 2 AC 22 (discussed further below at para. 40) where it was made clear that identifying the scope of a rule – either a statutory provision or common law rule – *"... is not a matter of common sense fact; it is a question of law"* (see per Lord Hoffmann at p. 31).

30. This suggests that it is not correct in principle simply to regard the approach to what is an indirect effect as being a matter of fact or discretion. It is first a question of law as to what the term means. [18] There may only be an area of discretion if more than one meaning is possible. Having established the meaning or permissible range of meanings, the application to the individual case is then one of fact. Then determining whether an indirect effect is a *"likely"* or *"significant"* effect is a question of judgment.

31. It is also relevant to note the approach of the courts to the application of planning policy. The interpretation of such policy is a matter for the court, as is clear from Supreme Court authority: *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983 (para 35); *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 WLR 1865 (paras. 22 and 26). Its application to the facts is for the decision maker. The approach of the Court of Appeal in *Finch* seems at odds with this approach and, respectfully, it would be perverse if greater latitude was given to a decision maker interpreting and applying statutory language than to one applying planning policy. This is particularly so since the courts have repeatedly emphasised that planning policy should not be construed like a statute, i.e. planning policy should be construed less rigorously, for example in *Hopkins Homes* paras. 22, 23, 25 and 74.

32. Neither *Goodman* and similar cases, nor the *Tesco Stores* line of authority on planning policy, were apparently considered by the first instance judge or Court of Appeal in *Finch*.

[18] The OEP notes that the Appellant cites the case of *R (Crematoria Management Limited) v Welwyn Hatfield Borough Council* [2018] EWHC 382 (Admin) to like effect at footnote 35, though the case was not apparently cited to the Court of Appeal or first instance judge.

Suggested approach to indirect effects

33. The majority of the Court of Appeal regarded the essential test as being that *"... [t]o come within the reach of the legislation, it must be identifiably an effect of the project in hand"*.[19] However, this statement does not answer the question of whether Scope 3 emissions are *"an effect"* of the project in hand. Indeed, the question is the meaning of *"an effect"*, given all effects are presumably either direct or indirect.

34. The OEP would invite the Court to stand back and consider the question more broadly than the judge at first instance and the majority judgments in the Court of Appeal approached it. The reasoning, both at first instance and in the Court of Appeal, is focused squarely on planning and development control. This appeal is, of course, a case involving a planning permission. However, as stated above at para. 13 the EIA regime itself is about projects much more broadly.

35. It is therefore respectfully submitted that the approach should be first to establish what the term *"direct and indirect significant effects of the proposed development"* means (reg. 4(2)). In so doing, regard should be had to the underlying principles and objectives of the legislation, deriving as it does from an EU Directive and reflecting other international obligations. The Appellant's case makes the point on underlying EU law and the OEP does not repeat these points. It is also relevant to make the Court aware that its decision also has potential relevance for transboundary assessment of UK projects. The EIA Regulations at reg. 58 reflect the need to comply with EIA procedures in respect of development proposed to be carried out in England which is the subject of an EIA application and is likely to have significant effects on the environment in another EEA State. GHG emissions are a paradigm example of those which have transboundary effects.

36. Aside from this EU background, it seems clear from the wording in Schedule 4, para. 5 of the EIA Regulations (see para. 16 above) that the nature of the effects intended to be covered is very comprehensive. This is consistent with the underlying objective of improving decision making by a comprehensive assessment of those effects which are likely and significant, thereby allowing both the specialist agencies responsible for

[19] At [38].

environmental protection and the general public to understand them and participate effectively in the process, leading to better informed, higher quality decisions.

a. **Direct effects:** Direct effects may be understood in normal language as those which arise directly from the development, without any subsequent intervention or circumstances. As well as the physical effects of the petroleum extraction process, it is surely a direct effect that hydrocarbons which had been in the ground are now commercially available.

b. **Indirect effects:** In respect of indirect effects, the OEP submits that it is wrong to suggest that what is an *"indirect effect"* is simply a matter for planning judgment. The correct approach should be that the meaning of the words is a matter of law – with application to individual cases then being either a matter of fact or planning judgment where appropriate (for example if a putative effect is "likely" and "significant"). It would therefore be helpful if the UKSC could lay down some clear principles on the meaning of *"indirect effects"* in the context of this case and more generally.

37. If it is correct, as the OEP submits, that the meaning of the term *"indirect effects"* of a project is primarily a matter of law, how should the Court approach the task of interpreting these words? It is of course possible to consult dictionaries, as the meanings of *"indirect"* and *"effects"*, but these, it is submitted, are of limited help.

38. Two general propositions are relevant and are, it is submitted, of assistance.

38.1 The first is that the goal of the exercise is to ascertain the intention of Parliament, as stated by Lord Hodge JSC in *R (Project for the Registration of Children as British Citizens) v SSHD* [2022] UKSC 3; [2022] 2 WLR 323, para. 31. One important point to note in this case is that the purpose of the EIA Regulations was to transpose EU legislation with a broad scope and purpose.

38.2 The second is that the context of the statute as a whole is a very important consideration: see *Project for the Registration of Children as British Citizens*, para. 29.

39. Whilst, self-evidently, the purpose of the EIA Regulations is to ensure the assessment of the effects of relevant projects – and thus it is a project which is the subject matter of the assessment – what is in fact being assessed are the *effects* of the project and the broad purpose of the regime suggests that what are the effects to be assessed should be given a broad interpretation rather than a constrained one.

40. Whilst a word used in legislation may appear to be capable of a variety of meanings, the context may assist the courts in interpreting it. A relevant example is the approach of the House of Lords in the seminal case of *Empress Car Company (Abertillery) Ltd v National Rivers Authority* cited above at para. 29.2.4, where the House of Lords considered the correct approach to the word *"caused"* in the context of water pollution offences. Like this case, this raised issues of attributability and causation. As per Lord Hoffmann at para. 29.2.4 above, one cannot give a common-sense answer to a question of causation without knowing the purpose and scope of the rule.[20] Having identified that purpose and scope, the House of Lords was able to conclude by providing clear guidance in the form of principles for justices dealing with prosecutions for *"causing"* pollution. Equally in this case, a sensible answer to what is an indirect effect must depend on the purpose and scope of the rules of which it is part.

41. It is submitted with respect and due deference, that similar principles could be provided in this case, along the following lines:

    41.1 The purported effect should be identified.

    41.2 It should be considered whether the effect can sensibly be assessed by EIA as an indirect effect of the project, in the sense that the project contributes in some identifiable and sufficiently certain way to that effect. This is because the purpose of the regime is to achieve a comprehensive scheme of assessing effects which can reasonably be assessed and which are relevant to the consideration of the application in order to understand the project's implications in terms of environmental effects: see reg. 18(4)(b), para. 16 above. (This is discussed in more detail below at paras. 43 and 44.) The approach of an identifiable contribution fits with the scheme of the EIA

[20] Page 31.

regime (para. 16 above) and its acceptance that not only direct effects but also *"indirect, secondary and cumulative"* effects need to be considered (Schedule 4, para. 5). It also reflects the requirement for information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment (reg. 18(4)(b)) and taking into account the environmental protection objectives which are relevant to the project, including in particular climate change as one such factor established under the Directive (Schedule 4, para. 5 and 5(f).[21]

41.3 Applying this approach, based on the wording of the Directive and Regulations, it is submitted there are a number of matters which, as a matter of law, should not be taken by themselves to mean that a purported effect is not an indirect effect and which it would be helpful for the Court to enunciate. These are discussed in the following sub-paragraphs.

41.4 The fact that the purported effect will occur at a different time and in a different location to the project is not of itself a reason why it is not an *"indirect effect"*. The nature of environmental effects is that they can be spatially dissociated from their source and indeed may be transboundary or even global in nature.

41.5 The fact that the applicant for the project will not have control over any later activities which contribute to the emission also is not of itself a reason why it is not an *"indirect effect"*. This would be contrary to the broad scope of the legislation in addressing *"indirect"*, *"cumulative"* and *"secondary"* effects and would leave a large gap in the legislation.

41.6 The fact that there may be further stages such as processing of the outputs of the project, whether wastes or products, also is not of itself a reason why it is not an *"indirect effect"* for the same reason.

41.7 The fact that there may be later stages where EIA takes place, or later opportunities for control of the putative effects, is also not of itself a reason why it is not an *"indirect*

[21] It is submitted that this approach, based on the statutory wording and its objectives is to be preferred to seeking to read in or adopt tests such as foreseeability, remoteness or causation derived from other contexts. Similarly, the test of whether the effects must be shown to be "inevitable", while apparently satisfied in this case, may be too exacting a test, especially given that the regime is supposed to catch "likely" effects.

effect". This would be contrary to the objective that EIA should take place at the earliest possible stage. This does not mean that any later controls which can be established to be in place are irrelevant to the substantive decision: they are however irrelevant to the scope of EIA.

41.8 The fact that the emissions might occur in any event from other sources than the project were the project not to go ahead (for example some other person producing hydrocarbons) also is not of itself a reason why they are not an *"indirect effect"*. This would be also be contrary to the scope and purpose of the EIA Regulations and would undermine its effectiveness. Again, however, having assessed the effects, such arguments might be capable of being relevant at the stage of making the substantive decision in terms of the weight to be accorded to the emissions. It may be noted, to avoid doubt, that this is a different point to the argument that as a matter of fact the indirect effect may not actually occur.

42. The term *"indirect effects"* does not strike the OEP as one which is capable of a wide variety of meanings. An indirect effect in the OEP's submission is simply one which involves some further intervention or circumstance as well as the project itself. A cumulative effect is one which operates together with effects from other projects or activities. A secondary effect seems likely to refer to one which occurs where an emission undergoes some transformation, for example chemical. Emissions arising from the use of extracted hydrocarbons after the necessary processing appear to the OEP to be an indirect effect of their extraction for commercial purposes, on the meaning of the language used read in its statutory context. There is a clear connection between these products being made available and the emissions from their end use, such that the emissions are sensibly capable of being assessed and taken into account in the EIA process for extraction. An approach which categorised them as not being *"indirect effects"* on the basis that (a) there was intermediate processing involved; or (b) some further stage of regulation might be involved; or (c) the emissions from end use were spatially or temporally remote from the site of the development; or (d) emissions would occur in any event from other hydrocarbons, would be wrong as a matter of law. The issue is not one of judgment and rationality.

43. If, contrary to these submissions, there are exceptional cases where for some reason such emissions should not be regarded as indirect effects then the approach of Moylan LJ (para. 129) that, given the terms of the relevant provisions, cogent reasons would be required has much to commend it. Moylan LJ stated at the same paragraph that he would not go as far as to conclude "… *as a matter of law that such emissions are necessarily required to be assessed in an EIA*". This statement requires careful unpacking to avoid potential confusion. As above, it is submitted that the question of whether an effect is an indirect effect of the development is one of law. Irrationality in the classic *Wednesbury* sense envisaged by the majority is not relevant. However, it does come in at the next stage where it is for the planning authority to exercise judgment as to whether such emissions are *"likely"* and *"significant"* so as to require assessment, and if so, the level of information required in any given case so as to provide *"the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment"* (reg. 18(4)(b)).

44. The above submissions relate to the facts of the present case, on hydrocarbons extracted for commercial sale and use. In cases other than such emissions from fuels, it may be less clear that there is an indirect effect. The production of steel or cement as a general commodity would not have the same inescapable linkage to emissions from the items or structures which might or might not be manufactured or built using these commodities – for example, steel might be used to make a diesel vehicle or an electric vehicle, for wind turbines or for construction of an oil rig. Such putative, conjectural and uncertain emissions would not be sensibly capable of being assessed and taken into account in the EIA process. This is relevant to the first and second principles stated at paragraph 41.1 and 41.2 above, whereby the starting point is to identify the purported indirect effect and whether there is sufficient certainty to admit of sensible assessment. In the examples of steel and concrete above, it would not be possible to identify such an effect. This addresses the concerns on that score expressed by Holgate J at paras. 4-7, discussed further in the following section. It should be pointed out that downstream emissions of the type at issue in this case are only one example of Scope 3 emissions and that there are numerous examples of other types of Scope 3 emissions which are routinely and uncontroversially subject to EIA: these include for example emissions from vehicle movements generated by employees, users or occupiers of the development.

The issue of the allegedly unmanageable scope of assessment

45. Underlying some of the argument in the first instance and Court of Appeal decisions is the point that assessing Scope 3 emissions could become an impossible task.[22]

46. Holgate J, at the outset of his judgment, sought to highlight the ramifications of the judgment beyond the facts of the present case.[23] In respect of the wider ramification of the judgment the same point on indirect effects could arise in other contexts. The example given by Holgate J at first instance was a motor vehicle. The OEP submits that the Court should be live to the distinction between: (a) those things that can be assessed: (b) those that, while potentially difficult to assess, can be assessed in practice; and (c) finally those which may be incapable of meaningful assessment. The quantity of GHG emitted may depend on several uncertain variables. However, in those instances this will involve some reasonable forecasting and this may sometimes mean educated assumptions are made. Planners frequently use average models to determine environmental impacts, by way of example, determining car movements on local roads from a housing scheme.

47. Clearly, there is a spectrum in play here, ranging from a project to extract minerals which will be burnt directly (e.g. coal), minerals which will be processed to produce fuel, through to the manufacture of products (e.g. cars) or components of such products.

48. For fuels, there should in principle be little difficulty in assessing the quantity of GHG emitted from a given quantity of fuel. In the case of hydrocarbons which are extracted for use as fuel, it is obvious that the combustion of the hydrocarbons will emit GHG which will have effects on climate. There should be nothing problematic in estimating the global warming effects of the combustion of the quantities of hydrocarbons likely to be produced.

49. Plainly as the indirect effects become more remote, there may be greater difficulty in assessment. As stated in *Squire* at para. 15:

> *"Domestic case law acknowledges that an environmental statement will not always contain the "full information" about a project, and that the EIA regulations "recognise that an environmental statement may well be deficient, and make provision*

[22] CA judgment at [55] and [71]; and HC at [50].

[23] At [4]-[8].

through the publicity and consultation processes for any deficiencies to be identified so that the resulting 'environmental information' provides the local planning authority with as full a picture as possible" (see the judgment of Sullivan J as he then was, in R. (Blewett) v Derbyshire CC [2003] EWHC 2775 (Admin) at [41).[24]*"*

50. The EIA regime does not demand the impossible – it may be that some assessments are more difficult than others or, indeed may be impossible on the current state of knowledge. However, the point is not whether the effects are or are not *"indirect"* but rather whether it is reasonable to require their assessment in view of the uncertainties, this being a matter for the decision-making authority (see para 16.8 above and reg. 18(4)(b)).

51. The OEP also notes that in the recent decision of *R (Friends of the Earth Ltd) v Secretary of State for International Trade/Export Credits Guarantee Department (UK Export Finance)* [2022] EWHC 568 (Admin) it is explained at para. 33 that in June 2019, the House of Commons Environmental Audit Committee ("EAC") published a report that was highly critical of UK Export Finance's support for fossil fuel energy projects. The Court noted that the EAC referred to the GHG Protocol as providing a methodology for calculating emissions which is part of an established framework that *"is widely recognised and applied"*.[25]

52. While there is evidently a question of degree as to how possible it is to assess indirect effects, it is plainly wrong to suggest that simply because it may be more difficult to assess these emissions than more obvious direct ones, no attempt should be made at all. Further, the fact that there may be environmental assessment downstream at a later stage does not obviate the necessity of carrying out EIA (which may be less detailed and less precise) at an earlier stage.

[24] Para. 41 provides in relevant part: *"…In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the "full information" about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting "environmental information" provides the local planning authority with as full a picture as possible…"*

[25] Paras. 37, 255 and 304.

Comparative law

53. The OEP notes the Appellant's reliance on international case law at paras. 91-99 of her written case. The OEP will not duplicate these references, but would endorse the relevance and importance of referring to these cases. This is in line with established UKSC practice, as *"an important tool in the judge's toolbox"*[26] and, it is submitted, is particularly important in an area such as the assessment of GHG emissions, where there is a great commonality of the issue and its legal significance across common law and civil law jurisdictions, and where the law is moving rapidly. The discussion by Preston J in *Gloucester Resources v Minister for Planning* [2019] NSWLEC 7 at paras. 486 to 513, referenced by the Appellant at para. 94 of her written case, is commended to the Court as a useful summary.

54. The OEP notes the judgment of the Supreme Court of Ireland ("SCI") handed down on 16 February 2022 (one day before the Court of Appeal decision in *Finch*) in *An Táisce – The National Trust for Ireland v An Bord Pleanála* [2022] IESC 8. Briefly, it related to a proposed major cheese factory and whether indirect effects from the dairy farms which would supply the necessary milk for cheese production should be assessed. The OEP makes no submission on the correctness or otherwise of the factual findings by the SCI, partly because the reasoning on the facts is not entirely straightforward to deduce. However, the important point is that the inspector in *An Táisce* considered that the upstream GHG emissions from milk production were an indirect effect, but concluded on the facts that they were not significant (paras. 63 to 69). As cited at para. 68 of the judgment, para. 11.138 of the Inspector's report provided: *"Impacts on climate are likely to arise in the production of 450 million litres of milk which produces [0.513 megatonnes] of CO2 [or their equivalents]. While the impact of the proposed development alone is considered insignificant, there is an indirect impact."* This is similarly the case in respect of the Board's decision as cited at para. 70 of the judgment: *"Indirect impacts on climate are likely to arise in the production of 450 million litres of milk but the emissions arising [have] already [been] accounted for and regulated through the National Climate Action*

[26] See for example, the speech of Lord Reed at the Centre for Private Law, University of Edinburgh *Comparative Law in the Supreme Court of the United Kingdom* 13 October 2017, page 14, available at www.supremecourt.uk/docs/speech-171013.pdf. See also Christina Lienen, *Judicial Constitutional Comparativism at the UK Supreme Court*. Legal Studies, Volume 39 , Issue 1 , March 2019 , pp. 166 – 182 DOI: https://doi.org/10.1017/lst.2018.30.

Plan as part of the dairy sector overall emissions." Therefore, an assessment of the indirect effects took place but ultimately it was considered that those effects were not significant. The SCI did not consider this to be an irrational conclusion.

55. It was accepted that the GHG emissions in this case were properly indirect effects, and that consideration of whether they are *"likely"* and *"significant"* such that they should be assessed is a question for the decision-maker on the facts. This is not the same as finding that the GHG emissions were not indirect effects in law. Indeed, at para. 26 of the judgment Hogan J recorded the acceptance by the appellant that the milk supply was an indirect effect of the project and said this was clearly correct.

56. Further, the OEP notes that at para. 110 Hogan J stated that: *"In these circumstances the present case must be judged to be at the opposite end of the "indirect environmental effects" spectrum when compared with cases such as An Táisce Edenderry and Ó Grianna."* In terms of that spectrum:

56.1 *An Táisce v An Bord Pleanála* [2015] IEHC 633 ("*An Táisce Edenderry*") concerned a decision of the Board to grant planning permission for the continued use and operation of a previously permitted peat and biomass co-fired power plant. In his judgment White J determined that he was satisfied that the environmental effects of extracting the peat fuel source from the third-party bogs did fall within the ambit of *"indirect effects"* for the purposes of Article 3(1) of the EIA Directive, and were therefore liable to be assessed (para. 73); and

56.2 In *Ó Grianna v An Bord Pleanála* [2014] IEHC 632 ("*Ó Grianna"*) the issue was whether the project consisted of the construction of wind turbines alone or whether the fact that they had to be connected to the national grid had also to be taken into account. Peart J opted for the latter interpretation, saying*: "I am satisfied that the second phase of the development in the present case, namely, the connection to the national grid, is an integral part of the overall development of which the construction of the turbines is the first part… The wind turbine development on its own serves no function if it cannot be connected to the national grid"* (para. 27).

57. In speaking of a *"spectrum"* it seems clear from the cases referred to by the SCI – *An Táisce Edenderry* and *Ó Grianna* – that whether the position on the spectrum amounts to an indirect effect of the project is a question for the court, not the decision maker. Further, this is important context for the SCI's acknowledgment that: *"…there are also cases where there is a clear and unbreakable inter-relationship between the project itself and certain off-site activities such that a causal relationship between the construction or operation of the project and certain direct or indirect environmental consequences has been clearly established"* (para. 82). The OEP submits that those circumstances apply in the case of hydrocarbons.

58. The OEP has also reviewed the position in the US as a comparator. It is notable that the US Environmental Protection Agency cites the GHG Protocol standards[27] on its website and provides guidance on calculating Scope 3 emissions.[28] In academic commentary on the topic, it has been said that *"greenhouse gas emissions can be meaningfully evaluated even when there is considerable uncertainty about the exact timing and location of the activities giving rise to the emissions"*.[29] In the US, this has led to the rejection of the argument that emissions are too speculative to calculate.[30] Of course, the precise wording

[27] More information on the GHG Protocol is available at: https://ghgprotocol.org/. The GHG Protocol itself is available at: https://ghgprotocol.org/sites/default/files/standards/ghg-protocol-revised.pdf. The GHG Protocol defines Scope 3 emissions on page 27 of the Protocol.
It is noted that the initiative was launched in 1998 and the Scope 3 Standard was released in 2011. Specific guidance on how to address Scope 3 emissions is available at https://ghgprotocol.org/scope-3-calculation-guidance-2.

[28] See: www.epa.gov/climateleadership/scope-3-inventory-guidance.

[29] Michael Burger & Jessica A. Wentz, *'Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review'*, 41 Harv. Envtl. L. Rev. 109 (2017).

[30] See for example, *Sierra Club v Federal Energy Regulatory Commission* 867 F 3d 1357 (DC Cir, 2017), 18. In response to the Federal Energy Regulatory Commission's contention that it is impossible to know exactly what quantity of GHG would be emitted as a result of the project, the court confirmed, on page 24, that: *"FERC next raises a practical objection, arguing that it is impossible to know exactly what quantity of greenhouse gases will be emitted as a result of this project being approved. True, that number depends on several uncertain variables, including the operating decisions of individual plants and the demand for electricity in the region. But we have previously held that NEPA analysis necessarily involves some "reasonable forecasting," and that agencies may sometimes need to make educated assumptions about an uncertain future. See Del. Riverkeeper, 753 F.3d at 1310. Indeed, FERC has already estimated how much gas the pipelines will transport: about one million dekatherms (roughly 1.1 billion cubic feet) per day.*
The EIS gave no reason why this number could not be used to estimate greenhouse-gas emissions from the power plants, and even cited a Department of Energy report that gives emissions estimates per unit of energy generated for various types of plant." (emphasis added)

of the National Environmental Policy Act 1969 ("NEPA") is not identical to the EIA regime which is the subject of this appeal. However, the relevance of the US example is that the UKSC is not being asked by the OEP to establish principles and methodologies that do not exist – they are well established principles and means of assessment which have been examined in detail and vindicated by the US Courts.

Conclusion

59. The failure to assess indirect effects and GHG emissions where it can feasibly be done deprives decision makers and the public of valuable information and impairs the quality of the ultimate decision. Carrying out that assessment and having that information does not of course mean that such effects will outweigh other considerations, such as economic and energy security. The question is whether the EIA has properly assessed and weighed (including being tested against national and local policy) indirect effects, such as GHG emissions, to the extent it is possible to do so.

60. As correctly pointed out by Moylan LJ, at para 103, the 2011 EIA Directive was amended in 2014 and amendments were in part driven by the need for climate change to become one of the *"important elements in assessment and decision-making processes".* Recital 7 of the 2014 EIA Directive emphasises that *"climate change…constitute[s] [an] important element in assessment and decision-making processes."* Recital 13 to the 2014 EIA Directive expressly says: *"it is appropriate to assess the impact of projects on climate (for example greenhouse gas emissions)"*.

61. The OEP considers that the first instance and Court of Appeal majority decisions are inconsistent with these recitals and the UKSC is respectfully invited to provide clear

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On page 25 of the judgment the court added that: *"We do not hold that quantification of greenhouse-gas emissions is required every time those emissions are an indirect effect of an agency action. We understand that in some cases quantification may not be feasible. See, e.g., Sierra Club v. U.S. Dep't of Energy, --- F.3d ---, No. 15-1489, slip op. at 22 (D.C. Cir. Aug. 15, 2017). But FERC has not provided a satisfactory explanation for why this is such a case".*

In another example of *Food & Water Watch and Berkshire Environmental Action Team v FERC* 28 F.4th 277 (D.C. Cir. 2022), page 11 of the judgment outlines the following on forecasting*: "In requiring evaluation of indirect effects, "the statute does not demand forecasting that is not meaningfully possible, [but] an agency must fulfill its duties to the fullest extent possible." Del. Riverkeeper Network v. FERC, 753 F.3d 1304, 1310 (D.C. Cir. 2014)"*. The court therefore concluded on page 18 that: *"For those reasons, we remand to the agency to perform a supplemental environmental assessment in which it must either quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot do so".*

principles in line with the submissions above – in particular the principles at para. 41 above.

62. The numbered reasons upon which the OEP's argument is founded are as follows:

62.1 The decision of the first instance judge was wrong in law both in his primary argument and the fall back reasoning (see paras. 17 to 19 above).

62.2 The approach of the majority of the Court of Appeal was also wrong in law in categorising the question as one of fact and judgment only, and was in this respect contrary to authority not cited to the courts below. The Court of Appeal's decision, as well as being wrong, leaves the law in a highly problematic state and is not conducive to good environmental decision making (see paras. 20 to 32 above).

62.3 The minority judgment of Moylan LJ has more to commend it, but could have been more firmly rooted in principle and authority (see paras. 43 and 60 above).

62.4 Taking into account the purpose and context of the legislation it is possible for the Court to provide clear guidance as a matter of law on indirect effects, and respectfully, the Court should take the opportunity to do so (see para. 41 above).

62.5 The suggestion that a decision contrary to that of the majority in the Court of Appeal would result in unmanageable requirements is both misconceived and exaggerated (see paras. 45 to 52 above).

62.6 The approach advocated by the OEP would be consistent with how the law is developing in other jurisdictions.

STEPHEN TROMANS KC **RUTH KEATING**

39 ESSEX CHAMBERS

LONDON

WC2A 1DD