Neutral Citation Number: [2024] EWHC 2349 (Admin)

Case No: AC-2023-LON-000377
and AC-2023-LON-000387

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/09/2024

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

AC-2023-LON-000377

(1) FRIENDS OF THE EARTH LIMITED	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES **(2) WEST CUMBRIA MINING LIMITED** **(3) CUMBRIA COUNTY COUNCIL**	**Defendants**

AND

AC-2023-LON-000387

SOUTH LAKELAND ACTION ON CLIMATE CHANGE – TOWARDS TRANSITION	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES **(2) WEST CUMBRIA MINING LIMITED** **(3) CUMBRIA COUNTY COUNCIL**	**Defendants**

- -
- -

Mr. Paul Brown KC, **Mr. Toby Fisher** and **Mr. Alex Shattock** (instructed by **Leigh Day**) for the Claimant in the first claim.
Ms. Estelle Dehon KC and **Mr. Rowan Clapp** (instructed by **Richard Buxton Solicitors**) for the Claimant in the second claim.
Mr. Richard Honey KC (instructed by the Government Legal Department) for the first defendant in each claim.
Mr. James Strachan KC and **Mr. Alexander Greaves** (instructed by **Ward Hadaway LLP)** for the second defendant in each claim.

The third defendant in each claim did not appear and was not represented**.**

Hearing dates: 16th – 18th July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13th September 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Holgate:

Introduction

The background to these proceedings

1. On 7 December 2022 the first defendant, the Secretary of State for Levelling Up, Housing and Communities issued a decision letter ("DL") granting the second defendant, West Cumbria Mining Limited ("WCM"), planning permission for a new underground coal mine at Whitehaven, Cumbria. The application had been made as far back as 31 May 2017. On 11 March 2021 the Secretary of State called in the application for determination by himself in place of the local planning authority ("LPA") responsible for mineral development, the third defendant, Cumbria County Council ("CCC").

2. The application was for the mining and processing of over 60 Mt of metallurgical coal between 2025 and 2049. The mine would produce High Volatile coal, known as High Vol A Hard Coking Coal (or HVA). This would be blended with coals sourced from elsewhere to produce coke. Coke is an essential ingredient for the production of steel in a blast furnace, in particular a Blast Furnace-Basic Oxygen Furnace ("BF-BOF"). The Whitehaven coal differs from industrial or thermal coal, which is normally of a lower quality and used as fuel.

3. The application site had three components: a main mine site, a rail loading facility and an underground conveyor route to transport coal from the mine to the rail facility. The main mine site has a surface area of 23ha. The onshore area of underground mining would occupy about 300ha.

4. An offshore mining area covering about 2,400ha would fall outside the territorial scope of planning control. Instead that operation and associated works below the high water mark require a marine management licence from the Marine Management Organisation under the Marine and Coastal Access Act 2009.

5. A public inquiry into the planning application took place over 16 days between 7 September and 1 October 2021. CCC decided to adopt a neutral position and did not participate substantially in the inquiry. But Friends of the Earth Limited ("FoE") and South Lakeland Action on Climate Change – Towards Transition ("SLACC") did take an active part, opposing the proposal. They instructed counsel and witnesses on a range of subjects and made substantial submissions, to which WCM responded.

6. The Inspector submitted a report ("IR") to the Secretary of State dated 7 April 2022 in which he recommended that planning permission be granted subject to conditions.

7. FoE and SLACC each bring a claim under s.288 of the Town and Country Planning Act 1990 ("TCPA 1990") seeking to have the decision of the Secretary of State quashed.

8. FoE is a campaigning organisation dedicated to protecting the natural world and the well-being of its inhabitants. It is made up of over 350 community groups and of over 200,000 individual activists and supporters across England, Wales and Northern Ireland. It is the largest grassroots environmental campaigning body in the country.

9. SLACC is a registered charity based in Kendal, Cumbria. Its objects are to promote for the public's benefit the conservation, protection and improvement of the physical and natural environment and to advance public education in these matters. One of SLACC's aims is for climate change to be addressed by decreasing dependence on fossil fuels and lowering carbon emissions.

10. These proceedings focus on the alleged unlawfulness of the way in which the Secretary of State addressed greenhouse gas ("GHG") emissions resulting from the proposed extraction of coal and their effects on climate change. This has been a subject of great controversy. So it is important for the public to appreciate that the court is not hearing appeals from the Secretary of State's decision. It is not dealing with the merits of that decision, whether in favour of the project or against. Instead, these are applications for judicial review.

11. In *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 553 the Divisional Court stated at [6]:

> "It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The Court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully. …. it is not the role of the court to assess the underlying merits of the proposals."

EIA and assessment of GHG emissions from burning coke as an end product

12. The issues in this case arise in the context of the legislation governing environmental impact assessment ("EIA"). The relevant regulations are the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011 No 1824) ("the 2011 Regulations"). Although the 2011 Regulations were replaced by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 No. 571 ("the 2017 Regulations"), the effect of the transitional provisions in reg. 76 of the latter is that the 2011 Regulations continued to apply to the application for planning permission in the present case (IR 1.10).

13. There is no dispute that this project constituted "EIA development." Accordingly, reg.3(4) prohibited the grant of planning permission without the Secretary of State having taken "the environmental information" into account and stating in the decision that he or she had done so. That information comprised the "environmental statement" ("ES") which WCM was required to provide, together with any further information provided by bodies entitled to make representations and "any representations duly made by any other person about the environmental effects of the development."

14. The ES had to include such of the information in Part 1 of sched. 4 as was reasonably required to assess "the environmental effects of the development" and which the applicant could reasonably be expected to compile, having regard to current knowledge and methods of assessment (reg. 2(1)). Paragraph 3 of sched. 4 referred to a description of the aspects of the environment "likely to be significantly affected by the development" including climatic factors. Paragraph 4 of sched. 4 referred to a description of "the likely significant effects of the development on the environment," including direct and indirect effects. Paragraph 5 of sched. 4 referred to a description of the measures envisaged to prevent, reduce and offset any significant adverse effects on the environment.

15. If a planning authority or an Inspector considered that the ES should contain additional information in order to qualify as an ES, they would serve a notice on the applicant to that effect, which the applicant would then be obliged to provide (reg.22). That "further information" would then be the subject of public consultation and there would be an opportunity for representations to be made.

16. At the heart of these proceedings lies the recent decision of the Supreme Court in *R (Finch on behalf of the Weald Action Group) v Surrey County Council* [2024] UKSC 20; [2024] PTSR 988. That case concerned a legal challenge to the grant of planning permission by the County Council to extract oil over a 25 year period. In that case it was agreed that it was inevitable that the crude oil extracted would be refined and ultimately combusted somewhere in the world. The ES in that case excluded consideration of the GHG emissions from end use consumption of fuel products in motor vehicles. Although those emissions were capable of being estimated, the County Council accepted that they fell outside the requirements for EIA.

17. The High Court rejected the challenge ([2021] PTSR 1160) holding that either:

    (i) The end use emissions from the combustion of fuel products were legally incapable of constituting indirect effects of the oil extraction project and so fell outside the requirements for EIA; or

    (ii) If that was wrong, it had been a matter of judgment for the LPA that the end use emissions were not an effect of the development proposed, and that judgment was not vitiated by any public law error.

18. The majority of the Court of Appeal upheld the dismissal of the claim for judicial review ([2022] PTSR 958). They disagreed with holding (i) in the High Court, but agreed with holding (ii). They stated that whether the combustion emissions were indirect effects of the oil extraction project depended on whether there was a "sufficient causal connection" between the two, a matter of fact and evaluative judgment for the decision-maker. The majority held that there had been no error of law in the judgment reached by the County Council.

19. The public inquiry was held before the hearing in the Court of Appeal took place. WCM's evidence and submissions at the inquiry were put forward on the basis of the decision in the High Court. The judgment of the Court of Appeal was handed down on 17 February 2022. The Inspector invited written submissions from WCM, SLACC and FoE on the effect of that court's decision, which he summarised and took into account in his report to the Secretary of State.

20. Following the reasoning of the Court of Appeal, WCM submitted that there was not a sufficient causal connection between the proposed development and the GHG emissions from the eventual burning of the coal. The Inspector and the Secretary of State agreed that those emissions could not reasonably be regarded as "indirect significant effects" of the proposed development (IR 21.123 and DL 35).

History of the present claims

21. Both claims were brought in January 2023. By then the Supreme Court had given permission to appeal against the decision of the Court of Appeal.

22. On 18 May 2023 the High Court ordered that the applications for permission to apply for judicial review be dealt with at a rolled-up hearing which was due to take place in October 2023.

23. The hearing of the appeal in the Supreme Court took place on 21 and 22 June 2023. On 28 July 2023 the High Court granted a stay of the claims pending the judgment of the Supreme Court.

24. On 15 April 2024 the High Court granted WCM's application for the stay to be lifted and ordered that the rolled-up hearing should take place before 31 July 2024.

25. The decision of the Supreme Court was handed down on 20 June 2024. The majority of the Supreme Court (to whom I will refer as "the Supreme Court") decided that both the High Court and the majority of the Court of Appeal had been wrong. Whether the GHG emissions from the combustion of fuel products were an effect of the oil extraction project was ultimately a question of law depending upon whether the extraction would be a cause of that combustion. Given the common ground that the combustion of the refined products would be an inevitable consequence of the extraction, the Supreme Court said that there was no need for the court to decide which legal test for causation should be adopted. Each of the three causation tests considered by the court was satisfied by the circumstances in *Finch*. The reasons given by Surrey County Council for not treating the GHG emissions from the combustion of the oil as likely significant indirect effects of the oil extraction were legally flawed and the planning permission was therefore quashed.

26. Before explaining the parties' cases in the light of the Supreme Court's decision in *Finch*, it is necessary to summarise key parts of the factual context for the present dispute.

27. The remainder of this judgment is set out under the following headings.

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The factual context for the present dispute

28. GHGs comprise a number of chemicals with different global warming properties. Conventionally, they are normally quantified by reference to a single unit, expressed as tonnes of carbon dioxide equivalent ("CO_2e"). That equivalence is based upon a comparison between the global warming potential of a particular GHG and one tonne of CO_2.

29. Ecolyse, consultants acting on behalf of WCM, produced a GHG Assessment dated 1 September 2021. It estimated that 60 Mt of coal would be extracted during the life cycle of the project (Table 2-2).

30. Ecolyse estimated that over that same period, operations at the mine would generate around 8.2 Mt CO_2e (table 4-2). That figure was considered to be "significant" for the purposes of the EIA regime (para. 4.8). They said that mitigation measures would reduce that figure to 1.85 Mt CO_2e (table 4-2). However, those figures expressly excluded any GHG emissions from the burning of the coal extracted from the mine because, applying *Finch* in the High Court, they were not considered to be direct or indirect effects of the project (paras. 2.11 to 2.12).

31. WCM's Revised Chapter 19 of the ES (dated 3 September 2021) stated that the residual GHG emissions figure of 1.85 Mt CO_2e generated from the mine was still considered to be "significant." Consequently WCM would enter into a planning obligation under s.106 of the TCPA 1990 to compensate for those emissions by requiring the purchase of "Gold Standard offsets" or an equivalent. On that basis WCM claimed that the mine would be net zero compliant or "a net zero mine" (paras. 18 to 19 of Chapter 19 of the ES).

32. WCM executed a s.106 obligation on 28 October 2021 to give effect to that commitment. This is the subject of FoE's ground 1.

33. Professor Michael Grubb gave evidence on behalf of SLACC. He estimated that the quantity of coal expected to be extracted from the mine would generate about 220 Mt CO_2e when burned as part of the end product, coke (i.e. in steel production). WCM did not produce an alternative figure.

34. The Planning Inspectorate ("PINS") issued an "Adequacy Check" of the ES. In the version dated March 2022, PINS, after taking into account WCM's comments that there were technical difficulties and uncertainty with assumptions relating to the calculation of such end use emissions, said that "this information taken together provides a reasonable evidential basis to support the necessary consideration of impacts and effects resulting from downstream emissions." This assessment was adopted by the Inspector in his conclusions in chapter 21 of his report (IR 21.114).

35. The Inspector continued:

> "21.115 The information demonstrates that substantial carbon emissions will arise from the end use of the extracted coal. Having regard to this information and relevant IEMA guidance (IEMA Assessing Greenhouse Gas Emissions and Evaluating their Significance. 2nd Edition) it is my opinion that the release of these emissions at this scale and intensity are likely to be significant."

In his decision the Secretary of State accepted IR 21.114 - 21.115 (see DL 5 and DL 32).

36. As I have indicated, the approach of WCM and its consultants Ecolyse was that these end use GHG emissions from the burning of the coal fell outside the scope of the EIA because they were not effects, whether direct or indirect, of the proposed coal mining project (see e.g. GHG Assessment paras. 2.11 to 2.13 and p.25 and Chapter 19 of the ES para. 13).

37. Critically, WCM said in the alternative that if, as a matter of law, those emissions could be considered to be effects of the project, there was no legal requirement to assess them "because they would not comprise any material additional emissions compared to the existing baseline" (the no-development scenario), on the grounds that (a) the demand for coke is led by the demand for steel and (b) the coal produced by the proposed development "would replace, rather than be additional to, other coking coals that are already used in the coke blend" (Para.14 in chapter 19 of the ES para. and Appendices). This is the "substitution" argument which is the subject of FoE ground 3 and SLACC ground 1. It is a major issue in these challenges.

38. WCM submits that both the Inspector and the Secretary of State accepted its case that the Whitehaven coal would replace more expensive coal otherwise being supplied from US coal mines to the UK and European steel-making market (see e.g. its skeleton at paras. 12 to 28 and 78). In essence WCM said that if coal is extracted at Whitehaven then, although there would be no legal or other impediment to the continued exploitation of competing US mines, a broadly equivalent amount of coal will remain in the ground in those mines, purely for an economic reason, namely the difference in the cost of coal for use in the production of steel in the UK and Europe. WCM's case was that for that reason there would be perfect (100%) or virtually perfect substitution.

39. Part of FoE and SLACC's case at the inquiry was that the extraction of coal at Whitehaven would increase the supply of that type of coal in the market so that its price would decrease, and likewise the price of steel, leading to an increase in demand.

40. WCM responded that the coke and steel-making markets do not operate in conformity with general economic principles on supply and demand. The demand for coke is led by the demand for steel. Where the demand for steel increases or decreases, the demand for, and hence production of, coke adjusts accordingly. So, for example, many mines in the US which are towards the top of the costs curve are referred to as "swing suppliers", because they switch production on and off in response to changes in demand for steel and thus coke. Furthermore, an increase in the supply of coking coal does not affect the benchmark prices against which such coals are priced and, in any event, the supply of Whitehaven coal would be too insignificant to affect pricing in the global market (IR 7.63 to IR 7.71).

41. The Inspector accepted WCM's economic argument that the Whitehaven coal would be at a competitive advantage over US coal for the UK and European market. But he concluded that it would substitute for US coal "to some extent" (IR 21.48 to IR 21.52 and IR21.120). This approach to substitution then formed part of the Inspector's treatment of end use emissions from the burning of the Whitehaven coal (see e.g. IR 21.120 to 21.122). The Secretary of State broadly agreed with the Inspector (DL 21 and DL 36).

42. But it is important to note that WCM's case, accepted by the Inspector and the Secretary of State, only went as far as saying that the demand for coke is led by the demand for steel and that the increase in the supply of coking coal would not affect the prices of coke or steel, nor would it affect the demand for steel *for that reason*. But that begs obvious questions, such as what does drive the overall demand for steel in the first place or, more narrowly, if Whitehaven were to supply the UK and European steel production market in place of US mines would there still be a demand for that substituted US coal. Either of these issues could affect the extent to which WCM's substitution argument that extraction of Whitehaven coal would not result in a net increase of GHG emissions for steel production, is right or wrong. Would the US coal substituted for the UK/European market stay in the ground or would there be demand from elsewhere? It will be necessary to see how these matters were dealt with by the parties at the inquiry, and then by the Inspector and the Secretary of State.

43. It should also be noted that if, contrary to WCM's substitution argument, the burning of the coal extracted at Whitehaven were to result in a net increase in GHG emissions, the s.106 obligation dated 28 October 2021 would not provide any offsetting measures, unless future Government guidance or policy, or legislation or national standards should expressly provide to the contrary (pp. 22-24). It was not suggested that that position changed in the subsequent unilateral undertaking entered into by WCM under s.106 of the TCPA 1990 on 6 February 2023. In other words, the Secretary of State's approval of the Whitehaven mine does not require any mitigation or offsetting of any net increase in GHG emissions attributable to the combustion of the coal extracted.

44. An important part of the evidence before the inquiry was a sensitivity analysis carried out by Professor Grubb (an expert called by SLACC). There is no dispute that GHGs produced from the combustion of each tonne of metallurgical coal extracted are much greater than GHGs per tonne from the extraction process. Based on his estimate of GHG emissions from the burning of extracted coal over the whole lifetime of the mine (220 Mt CO_2e), the Professor stated that even if as much as 99% of that coal substituted for US coal, the 1% net additional GHG emissions from the burning of Whitehaven coal (2.2 Mt CO_2e) would double WCM's estimate for the mitigated GHG emissions from the mine itself (1.85 Mt CO_2e). Even if as much as 90% substitution were to take place, the 10% net additional GHG emissions from the end use of the Whitehaven coal (22 Mt CO_2e) would be more than 11 times that estimate of the mitigated GHG emissions from the mine (IR 12.41). Professor Grubb carried out a similar exercise in section 7 of his proof to show that if only 1.1% of the Whitehaven Coal over the lifetime of the mine did not substitute for the US coal, the end use GHG emissions from that Whitehaven coal would equal the estimated savings in GHG emissions through the reduction in transport distances to the UK and Europe steel markets.

45. WCM criticised Professor Grubb's sensitivity analysis because it did not take into account the fact that the substituted coal would be in mines without comparable mitigation of GHG emissions and certainly not "net zero mines." In his witness statement dated 22 June 2023, Mr. Kamran Hyder, the Solicitor acting for WCM, produced a number of exhibits many of which related to material before the inquiry. But he also produced a "technical note" from Ecolyse dated 21 June 2023 without any accompanying explanation. This note purports to show the numerical effect of WCM's criticism. The note draws upon figure 3.6 of a report by Wood Mackenzie (consultants acting for WCM) dated 10 August 2021, attached to a proof of the same date by Mr. Jim Truman (of Wood Mackenzie), which compared GHG emissions intensity of US coal and Whitehaven coal. It is said that from that data it can be deduced that there

would not be a net increase in overall GHG emissions attributable to the proposed project unless US coal *not* substituted represented at least 8% of the Whitehaven coal (with mitigation of the Whitehaven project) or at least 8.5% of the Whitehaven coal (with mitigation plus the s.106 offsetting arrangements). These figures also took into account the savings in GHG emissions from reduced transportation distances and are said to be directly comparable to Professor Grubb's 1.1% figure (save that he had only considered savings from transportation).

46. It does not appear that this analysis leading to the alternative figures of 8% or 8.5% was put before the inquiry or the Secretary of State. But even if it is correct, it still shows how WCM's claim that there would not be a net increase in GHG emissions is very sensitive to whether end use emissions are included and, if so, the extent to which US coal is substituted by Whitehaven coal. For example, the new figure of 8% still assumes that Whitehaven achieves 92% substitution of US coal, or that about 55 Mt of US coal (92% of 60 Mt) would remain in the ground throughout the lifetime of the Whitehaven project to 2049 simply because Whitehaven coal would be cheaper for the UK and European steel market. It is assumed that there could be no other demand for that US coal over the next quarter century or so. But the obvious issues referred to in [42] above remain.

47. Furthermore, I note that the Inspector concluded in IR 21.127 that because the Whitehaven coal would be likely to substitute for "some coal into the UK and mainland Europe," there would be some unquantifiable reduction in GHG emissions in relation to transportation. But that would be offset in the event of Whitehaven coal being sold into wider markets beyond the UK and Europe. In IR 21.133 the Inspector went further, where he said that there may be some unquantifiable reduction in GHG emissions from transportation savings "and the potential substitution of some coal to be sourced from a net-zero mine." But such benefits would be small scale and potentially offset by the export of coal to wider markets. The Secretary of State did not disagree with those conclusions and, therefore, is to be taken as having agreed with them (DL 5).

The parties' cases in these claims following the Supreme Court's decision in *Finch*

48. The parties have amended their pleadings in the light of the Supreme Court's decision and/or addressed its implications for the claims in their skeletons.

49. FoE (ground 4) and SLACC (ground 3) submit that the Inspector and the Secretary of State erred in law by deciding that GHG emissions from the burning of Whitehaven coal were not likely significant indirect effects of the proposed development and within the scope of the EIA required by the 2011 Regulations for reasons which the Supreme Court has held to be legally irrelevant. Indeed, they were obliged to treat those emissions as relevant effects requiring assessment in the EIA. The claimants submit that the breach of the Regulations has affected not only public participation in the EIA and inquiry process but also substantive decision-making. The attempt by WCM to resist the quashing of the decision on these grounds by the exercise of the court's discretion has revealed public law errors in the EIA process and in the decision-making on the planning application.

50. In a skeleton dated 1 July 2024 the Secretary of State agreed that the alleged breaches of the 2011 Regulations did occur. Given that it is inevitable that any coal extracted at Whitehaven would be used in making steel, the GHG emissions from the burning of that coal were likely significant indirect effects of the mining project. At IR 21.115 the

Inspector judged that the combustion emissions, as projected by Professor Grubb, and similarly by Professor Barrett (on behalf of FoE – see IR 10.77) would be "significant" (skeleton para.100). That was accepted by the Secretary of State (DL 5).

51. However, at that stage the Secretary of State submitted that in the exercise of its discretion the court should refuse to quash the decision. It had been judged that the outcome for climate change would be neutral or slightly beneficial because the coal burned would "replace, and not be additional to, other coking coal which would have been used anyway in the baseline scenario." The Secretary of State accepted that there would be perfect, or virtually perfect, substitution based on the economic case put forward by WCM and so there had been no need for the Secretary of State to estimate any shortfall in substitution of US coal or to assess the impact of that shortfall (see e.g. para. 87 of skeleton). For that reason it was accepted that there would not be a net increase in GHG emissions after taking end use emissions into account. Although end use emissions had not been assessed in the ES, they had been considered in the decision-making process. On that basis, even if end use emissions had been considered in the EIA, it was inevitable that the decision would have been the same.

52. But on 10 July 2024 the Government Legal Department on behalf of the Secretary of State sent to the court a draft consent order submitting to a quashing of the decision. The draft statement of reasons repeated the analysis in the skeleton regarding the breaches of the 2011 Regulations. But the Secretary of State now accepted that the court should not exercise its discretion against making a quashing order. The Secretary of State no longer suggested that because of the way in which the substitution and related economic issues had been handled, it was inevitable that the decision would still have been to grant the planning permission absent the error of law in relation to the 2011 Regulations. Instead, the Secretary of State said in para.12 that:

> "The First Defendant accepts that on the facts of this case there was a serious defect and the public were deprived of their rights under the EIA Regs 2011 such that it cannot be said that the Decision would not have been different without the procedural error. In light of what was said by Lord Leggatt in Finch about the purpose of EIA (at inter alia paras 3, 18, 60-61, 63, 105, 152, and 154) it is accepted that the public, including the Claimants, did not enjoy in substance the rights conferred by the EIA Regs 2011 and suffered substantial prejudice. The public were to a significant extent deprived of access to information and participation which could have informed the decision. The assessment of GHG emissions should have been undertaken by the developer, which would have led to a more systematic and comprehensive assessment, with more information being provided to inform the public and the decision-maker. The assessment of GHG emissions should also have been undertaken early on in the process to allow the public to comment on it at an early stage. It would also have allowed the sufficiency of information provided for the EIA to have been challenged."

53. The Secretary of State agreed to submit to judgment solely on FoE ground 4 and SLACC ground 3. Thereafter, the Secretary of State took no active part in these proceedings, although Mr Richard Honey KC did attend on her behalf throughout the hearing in order to assist the court.

54. WCM continues to defend all grounds of challenge and submits that the decision should not be quashed.

55. On the proposed consent order, WCM submits that despite the common ground that it is inevitable that the Whitehaven coal would end up being burned, the GHG emissions produced would not be a "significant likely effect" for the purposes of the 2011 Regulations because the Secretary of State had found that there would not be any net additional GHG emissions. WCM says that the decision to grant planning permission was not tainted by any material error of law. Alternatively, WCM submits that because of that same finding, it follows that the decision to grant planning permission would inevitably have been the same, even if the end use GHG emissions had been assessed, and so the court should exercise its discretion by refusing to quash the decision.

56. Plainly, these two alternative ways in which WCM seeks to refute the *Finch* line of argument are dependent upon the findings made by the Inspector and the Secretary of State on the substitution of US coal by Whitehaven coal and the economic justification for that effect, in response to the cases advanced by the main parties at the inquiry.

A summary of the grounds of challenge

57. Given the above analysis, I will address the claimants' grounds of challenge in the following order:

(i) FoE ground 4 and SLACC ground 3

The Secretary of State acted in breach of the 2011 Regulations by deciding that GHG emissions from the burning of Whitehaven coal were not a significant, likely effect of the proposed development;

(ii) FoE ground 3 and SLACC ground 1

The Secretary of State's conclusion that the proposal would have a neutral or beneficial effect on global GHG emissions was inconsistent with the findings in the decision letter on substitution of Whitehaven coal for US coal, or alternatively were illogical in the absence of any finding on the degree of substitution, alternatively failed to have regard to the economic evidence on demand before him, alternatively, involved a failure to give legally adequate reasons;

(iii) FoE ground 2 and SLACC ground 2

The Secretary of State failed to have regard to evidence and submissions on the impact of a decision to grant planning permission for the coal mine on the ability of the United Kingdom to perform its leadership role in promoting international action to address climate change and/or the reasons given on the subject were irrelevant or illogical and/or there was a failure to give legally adequate reasons;

(iv) FoE ground 1

The Secretary of State erred in law in the treatment of the issues relating to WCM's proposed scheme for offsetting GHG residual, mitigated emissions from the coal mine itself; and

(v) SLACC ground 4

The Secretary of State's treatment of the cases of WCM on the one hand and FoE and SLACC on the other, was internally inconsistent and inconsistent with para. 217 of the National Planning Policy Framework ("NPPF") and the decision in *Satnam Millennium Limited v Secretary for Housing, Communities and Local Government* [019] EWHC 2631 (Admin).

I will refer to these as Issues (i) to (v).

58. The two claims were heard together. Where the claimants pursued essentially the same grounds of challenge (Issues (i), (ii) and (iii)) they each adopted the submissions of the other.

59. The submissions of the parties on all of these Issues were wide-ranging and unnecessarily so. In this judgment I will focus only on those matters which the court needs to determine in order to resolve the dispute between the parties. It would be an inappropriate use of the court's resources and contrary to the overriding objective in CPR 1.1 to go further, notwithstanding the importance to the parties of the project and its effects.

The decision of the Supreme Court in *Finch*

60. The object of an EIA is to ensure that the environmental impact of a project likely to have significant effects on the environment is exposed to public debate and then considered in the decision-making process on whether development consent should be granted. It aims to ensure that if such consent is given, it is given with "full knowledge of the environmental cost" [3].

61. I would add that the meaning of the expression "full knowledge" is well-established. For example, in *R v Rochdale Metropolitan Borough Council ex parte Milne* [2012] Env. LR 22 Sullivan J (as he then was) explained at [94] that "full knowledge" does not connote some abstract threshold of knowledge which must be attained. The legislation seeks to ensure that as much knowledge as can reasonably be obtained, given the nature of the project, about its likely significant effects on the environment is available to the decision-maker.

62. In general terms EIA requires the preparation of an ES by the developer, the carrying out of consultations with statutory consultees and the public, the examination of that information and the environmental effects of the project by the decision-maker [15]. The EIA covers the likely significant effects, both direct and indirect, of the project on the environment including climate [16]-[17].

63. The County Council's decision in *Finch* was subject to the 2017 Regulations. Mr. James Strachan KC for WCM rightly accepted that the principles laid down by the Supreme Court apply equally in the present case, where the Secretary of State's decision was subject to the 2011 Regulations rather than the 2017 Regulations.

64. I would add that even going back to Council Directive 85/337/EEC, the recitals included:

> "Whereas development consent for public and private projects which are likely to have significant effects on the environment

> should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; whereas this assessment must be conducted on the basis of *the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question;*" (emphasis added)

65. The 1985 Directive set out the "main obligations" of developers. Article 3 provided:

> "The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and *indirect* effects of a project on the following factors:
>
> - human beings, fauna and flora,
> - soil, water, air, *climate* and the landscape,
> - the inter-action between the factors mentioned in the first and second indents,
> - material assets and the cultural heritage." (emphasis added)

Article 5 and Annex III set out the information a developer had to provide, which included significant effects on "climatic factors." The environmental information gathered had to be taken into consideration in "the development consent procedure" (art. 8).

66. The Aarhus Convention provided for public participation in decision-making, based upon 85/377/EEC. This was reflected in Directive 2003/35/EC. One of the objectives of the Directives is "to increase the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken" (see e.g. recitals (3), (4) and (6) of 2003/35/EC and the Supreme Court at [18] to [21]).

67. The Greenhouse Gas Protocol Corporate Accounting and Reporting Standard Protocol classifies GHG emissions into three categories: scope 1, scope 2 and scope 3 ([39] to [43]). GHG emissions from burning the extracted coal form part of the Whitehaven project's scope 3 emissions, but the present challenge is not concerned with any other scope 3 emissions.

68. The reasoning in [53] of the Supreme Court's decision is applicable in this case. Although the 2011 Regulations were arranged in a different manner to the 2017 Regulations, the legal requirements are substantially the same. Thus, reg. 3(4) of the 2011 Regulations prohibited the Secretary of State from granting planning permission without having first taken into account "the environmental information" (and see art. 8 of 85/337/EEC). That information had to include the "environmental statement" prepared by the applicant for permission, about which consultees and the public concerned would be able to make representations. That statement had to include at least the information in part 2 of sched. 4 and such of the information in part 1 as was reasonably required to assess the environmental effects of the development. That was to include "likely significant" indirect effects of the project on climate factors. In *Finch*

the County Council had accepted that consideration of end use emissions be excluded altogether from the EIA and so, if that had been unlawful, then so was the grant of planning permission in that case ([53]).

69. The question of whether something which is an "effect" of a development is "significant" involves a value-judgment, which carries the potential for different decision-makers to reach different conclusions legitimately ([58]).

70. The EIA Regulations involve predicting what are "likely" effects ([72]). There are potentially different interpretations of what is meant by "likely" ([73]). But it was unnecessary for the Supreme Court to decide which test should be adopted, because it was common ground that the combustion of the oil extracted and the resultant GHG emissions were inevitable ([79]). In other cases, a determination of whether a potential effect is "likely" requires evidence on which to base that decision. So that where a lack of evidence means that a possible effect is simply a matter of conjecture or speculation, then it would not be possible rationally to conclude that it is "likely." Material should only form part of an EIA if it is information on which a reasoned conclusion could properly be based. Conjecture and speculation have no place in the EIA process. So, if there is insufficient evidence available to found a reasoned conclusion that a possible effect is "likely", there is no requirement for that effect to be identified and assessed. Where an effect is "likely", the sufficiency of evidence to found a reasonable conclusion will also affect the nature and extent of the assessment to be carried out. All these are matters of evaluative judgment ([73] to [79] and [138]).

71. What is an "effect" of a project is a question of causation ([65]). Whether X is a cause of Y is first a question of fact ([66]). But simply answering that factual question is insufficient to determine whether, *as a matter of law*, X is to be regarded as a cause of Y, and Y as an effect of X. That legal issue is influenced by the purpose of the legislation ([67]). The Supreme Court postulated three different legal tests of causation with varying degrees of strength ([68] to [71]). But the Court did not find it necessary to decide which test should be adopted for the purposes of the EIA legislation, because in *Finch* the inevitability of the combustion of the extracted oil made that unnecessary ([79] to [80]).

72. The GHG emissions from the combustion of the oil qualified as "indirect" effects ([86] to [92]).

73. The Supreme Court accepted that climate change is a global problem precisely because there is no correlation between where GHGs are released and where the consequential effects on climate change are experienced. Wherever GHG emissions occur, they may contribute to global warming. Accordingly, the relevance of GHG emissions caused by a project does not depend, for example, on where combustion of the oil produced takes place ([97]).

74. The Supreme Court then held that a number of factors taken into account by the decision-maker in *Finch* to determine that the end use emissions were not an "effect" of the oil extraction were irrelevant, including:

(i) The fact that an impact, or the immediate source of an impact, occurs well away from the project site, or in unknown locations unrelated to the development, was irrelevant. It is in the nature of indirect effects that they may occur as a result of

a complex pathway involving intermediate activities away from the location of the project ([102] and [114]);

(ii) The fact that the time and place of the combustion of the oil products were outwith the control of the developer of the extraction project was irrelevant ([103]). On the other hand, one of the aims of EIA is to identify ways in which a project may be modified so as to avoid, reduce or offset a likely significant adverse effect on the environment. In that regard, it is relevant to consider whether such measures are within the control of the project developer. If not, that does not alter the need to include an assessment of the effect in the EIA ([104] to [105]);

(iii) The fact that the crude oil extracted from the development site could not be used as a fuel product without refinement and other intervening processes was irrelevant. Those matters did not break the chain of causation. It was inevitable that the extracted oil would be refined so that it could be combusted by end users ([117] to [118] and [125] to [126]). The fact that there is a series of intervening stages between the extraction of oil and the ultimate generation of GHG emissions from burning the fuel product did not provide any rational basis for denying that the two events are causally linked. If there is an inexorable causal path from X to Y, Y is an effect of X, which is not altered by the number or nature of those steps ([134]);

(iv) The test for whether something is an "indirect effect" of a project is not whether there is a "sufficient causal connection" between the two ([132]).

75. The Supreme Court concluded that the burning of the refined oil products resulting from the extraction of the oil at the site in Surrey was a significant likely indirect effect of that oil extraction project for the purposes of the EIA legislation. But it emphasised that that decision did not give rise to any concern about the opening of floodgates. Cases concerning oil and coal extraction are readily distinguishable from the use of other minerals and manufacturing processes ([120] to [124]).

76. I note that at [150] the Supreme Court said that, just as it was relevant for a planning authority to take into account the beneficial indirect effects of a project on climate (e.g. the "green" energy generated by a wind farm or solar farm), so adverse effects on climate are a relevant planning consideration.

77. Mr. Strachan relied upon the discussion in *Finch* at [163] *et seq* of the decision of the Irish Supreme Court in *An Taisce – the National Trust for Ireland v An Bord Pleanala (Kilkenny Cheese, Notice Party)* [2022] IESC 8; [2022] 2 IR 173 ("*the Kilkenny Cheese case*") to support a general proposition that a decision-maker is entitled to consider whether there would be no net increase in GHG emissions as a result of a proposed development and, if so, to conclude that there would be no "likely significant effect" requiring assessment under the 2011 Regulations.

78. The issue in *Kilkenny Cheese* was whether a large new cheese factory requiring 450m litres of milk each year (4.5% of Ireland's national milk supply) would cause, as an upstream effect, the GHG emissions from the dairy herds involved in producing that quantity of milk. But it is important to note that the decision-maker found that the milk would come from existing sources and was going to be produced in any event. The new factory would not require new supplies of milk (see [108] of the Irish Supreme Court's

decision). Neither the *Kilkenny Cheese* decision nor the Supreme Court in *Finch* provide any support for Mr Strachan's proposition.

79. The other issue in *Kilkenny Cheese* discussed in *Finch* was whether the supply of milk to the factory might stimulate an increase in the overall demand for, and production of, milk and thus GHG emissions. The Irish Supreme Court held that that would not be an indirect effect of the project, agreeing with *Finch* in the High Court. The UK Supreme Court disagreed with that part of the Court's reasoning, but agreed with the decision that there had been no need to assess that additional effect because proof of causality remained entirely speculative ([167]).

80. When I address Issue (ii) it will be necessary to return to the subject of what we mean in this case by there being no net change, or no net increase, in GHG emissions.

Legal principles for section 288 challenges

81. The general principles upon which a claim for statutory review under s.288 of the TCPA 1990 is carried out have been summarised in *St. Modwen Developments Limited v Secretary of State for Communities and Local Government* [2018] PTSR 746 at [6] to [7]. An Inspector's report and a decision letter are both addressed to the parties who are familiar with the issues in the case and evidence and submissions deployed.

82. Matters of weight are for the Inspector and the Secretary of State, subject to Wednesbury irrationality. That concept includes not only reaching a decision beyond the range of reasonable decisions open to the decision-maker, but also a demonstrable flaw in the reasoning leading to the decision. That could involve significant reliance upon an irrelevant consideration, or absence of evidence to support an important step in the reasoning, or reasoning which involves "a serious logical or methodological error" *(R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 at [98] approved in *Finch* at [56]).

83. Regulation 59 of the 2011 Regulations provides that for the purposes of a claim for statutory review, the reference in s.288(1)(b)(i) of the TCPA 1990 to an action on the part of the Secretary of State which is not within the powers of the Act includes a grant of planning permission in breach of reg. 3 of those regulations.

84. In *R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 the Supreme Court approved the well-established principles upon which the court may review the decision-maker's judgment on the adequacy of an ES or EIA. The Wednesbury standard of review is applicable ([142] to [146] and see also *R (Blewett) v Derbyshire County Council* [2004] Env. LR 29; *R (Spurrier) v Secretary of State for Transport* [2020] PTSR 240 at [434]).

85. Where a claimant establishes a public law error in a s.288 claim the court retains a discretion as to whether that should result in the decision being quashed. In that event, the burden is on a defendant (i.e. WCM) to show that the decision would inevitably have been the same absent that legal error, by reference to parts of the decision which are untainted by it (*Simplex GE (Holdings) Limited v Secretary of State for the Environment* [2017] PTSR 1041). In making such an assessment the court must not stray from its proper function of reviewing the lawfulness of the decision into the forbidden territory of evaluating the substantive merits of the proposal or the decision (*R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] 1 WLR 3315 at [10]).

86. In *R (Champion) v North Norfolk District Council* [2015] 1 WLR 3710 Lord Carnwath JSC said that, following the decision of the Supreme Court in *Walton v Scottish Ministers* [2013] PTSR 51, where a breach of the EIA Regulations is established, the court has a discretion to refuse relief if the applicant has been able in practice to enjoy the rights conferred by the legislation and there has been no substantial prejudice ([54]).

87. At [55] to [57] Lord Carnwath reviewed the position in the light of the subsequent judgment of the CJEU in *Gemeinde Altrip v Land Rheinland-Pfalz* Case C-72/12; [2014] PTSR 311. At [58] he said that the decision of the CJEU was not inconsistent with *Walton* and:

> "It leaves it open to the court to take the view, by relying "on the evidence provided by the developer or the competent authorities and, more generally, on the case file documents submitted to that court" that the contested decision "would not have been different without the procedural defect invoked by that applicant". In making that assessment it should take account of "the seriousness of the defect invoked" and the extent to which it has deprived the public concerned of the guarantees designed to allow access to information and participation in decision-making in accordance with the objectives of the EIA Directive."

88. None of the parties in these proceedings suggested that the court should proceed on the basis that *Finch* has overruled that statement. They also agreed that the essential question that the court should determine is the *Simplex* question, namely whether it is inevitable that the decision-maker would still have granted planning permission absent any legal error identified.

Issue (i) – breach of the 2011 Regulations

89. WCM submitted to the Inspector and the Secretary of State that, following the decision of the Court of Appeal in *Finch*, the issue was whether, as a matter of evaluative judgment, there was a "sufficient causal connection" between the proposed development and GHG emissions from the combustion of the Whitehaven coal in blast furnaces to constitute a significant, indirect effect of the mining project (IR 9.13). For the reasons summarised in IR 9.14, WCM submitted that there was no such connection and so those end use GHG emissions were not a likely significant indirect effect of the proposed development (IR 9.15).

90. On 1 September 2021 WCM had submitted a GHG Assessment by Ecolyse (see [29] above) in response to a request from the Inspector under reg.22 of the 2011 Regulations (dated 30 June 2021) for an updated assessment. WCM said that in order to avoid a "paper chase" through various documents (*Berkeley v Secretary of State for the Environment* [2021] 1 AC 603, 617) it had decided to present the Ecolyse report as a composite document to replace the earlier work carried out by AECOM in a 2020 report in its entirety. WCM relied solely upon the Ecolyse Assessment for the purposes of demonstrating the likely climate change effects of the proposed development (paras. 1.7 to 1.8).

91. The Inspector rightly said that the Ecolyse document did not assess the GHG emissions of the end use of the Whitehaven coal (IR 21.102).

92. Following the handing down of the judgments in the Court of Appeal, SLACC and FoE contended that the ES was inadequate because of a failure to address those emissions.

93. The Inspector noted the estimate of the end use GHG emissions from Professors Grubb and Barnett and the applicant's response, which did not offer an alternative numerical assessment. The Inspector considered that he had a reasonable evidential basis to consider the impacts and effects of the downstream emissions (IR 21.110 to 21.114). He did not find that this subject was a matter of conjecture or was speculative or impossible to assess rationally. The Inspector concluded that the substantial GHG emissions which would arise from the end use of the Whitehaven coal would be likely to be significant (IR 21.115). The Secretary of State agreed (DL 5 and DL 32).

94. The Inspector applied the "significant causal connection" test laid down by the Court of Appeal (IR 21.109) which the Supreme Court has since held to be incorrect.

95. The Inspector then had regard to a number of factors which the Supreme Court has determined are irrelevant on the issue of causation: the fact that the coal would be subject to intervening processes (IR 21.116), the developer would have no knowledge or control over these processes or mitigation measures; and the use of the coal is subject to decisions yet to be made downstream (IR 21.117).

96. The Inspector had previously set out conclusions on the substitution issue at IR 21.48 to IR 21.52. At IR 21.120 to 21.123 he referred back to those conclusions and mingled, or blended, them with factors drawn from *Finch* in the Court of Appeal, including matters which the Supreme Court held to be irrelevant, to conclude that the end use GHG emissions were not indirect significant effects of the proposed development:

> "21.120 Taking into account my findings above regarding the potential for the coal from the proposed development to substitute to some extent for other coal, rather than acting as an additional source, I am of the view that the GHG emissions arising from the use of the coal in the steel making process would likely be the same whether it is partly supplied by WCM coal or from elsewhere. The downstream emissions at issue in this case relate to the BF-BOF steel manufacturing plants using coking coal and not to the proposed mine itself.
>
> 21.121 I have identified that emissions associated with the end use of the coking coal are likely to be significant. However, having regard to the nature of the product and relevant demand, set out earlier in this report, I consider that in absence of the proposed development, equivalent emissions would also likely occur from extraction and use of substitute coking coal sources from other origins. Uncertainty will remain as to the likely origin of any replacement products, however there could well be benefits from providing a coking coal source closer to the most likely European market consumers. Taking this into account, I consider that whilst the effects of the downstream emissions are significant, they may well be considered neutral or at worst slightly beneficial when compared with other extractive sources.

> 21.122 Therefore, the emissions from the use of coking coal are significant and to some extent are inevitable whether coal from the proposed development or other sources is used. However, I have taken into account the essential character of the proposed development in this application, the fact that an indeterminate amount of the coal would be blended with other coals, the lack of any precision regarding the use of the coal, including the location of the coke ovens, the blast furnaces in which it may be used, the point of use and the extent to which decisions are yet to be made "downstream" and my view that equivalent emissions would also likely occur from extraction and use of substitute coking coal sources from other origins.
>
> 21.123 The above factors lead me to conclude that the impacts of GHG emissions the subsequent use of the coal, as part of a blended coke product, at indeterminate proportion and in an indeterminate quantity, with no knowledge at this stage of the nature and efficiency of the particular blast furnace and any GHG emission mitigation measures that may be installed, cannot reasonably be regarded as indirect significant effects of the proposed development. Accordingly, I have attached little weight to this matter."

97. I do not wish to appear to be critical of the Inspector. I readily acknowledge that he was doing his best to apply legal principles which were far from straightforward and as the law was evolving in the courts. But having said that, WCM relied upon substitution as *an alternative or fallback* argument in case it should be decided that the GHG emissions were in fact a significant, indirect effect of the proposed development. Notwithstanding Mr. Strachan's own attempt to blend or amalgamate the two, I will explain later under Issue (i) why they are legally distinct.

98. To summarise at this point, the Inspector's conclusions on the causation issue were affected by the following legal errors:

    (1) He applied "the sufficient causal connection" test which the Supreme Court has since held to be incorrect;

    (2) He took into account the irrelevant factors I have identified; and

    (3) He took into account his conclusions on substitution.

99. The Inspector went on to set out his overall conclusions on climate change (IR 21.125 to IR 21.134), but they do not alter my views on the Inspector's report in relation to Issue (i).

100. In the conclusions at DL 34 to DL 36 the Secretary of State appears to have separated the substitution issue (DL 36) from the issue of whether GHG emissions would be a likely significant effect of the proposed development (DL 34 and DL 35). Therefore the Secretary of State did not commit error (3). But he did commit errors (1) and (2):

> "34. Like the Inspector, the Secretary of State has considered whether there is sufficient causal connection between the proposal and the impact on the environment associated with

> downstream GHG emissions as a consequence of the use of the coal in a blast furnace, and whether this constitutes a significant indirect effect of the proposed development (IR21.109). He has taken into account that the Court of Appeal held that the EIA Directive and Regulations do not compel the assessment of the environmental effects resulting from the consumption or use of an end product where those environmental effects are not actually effects of the proposed development; and has also taken into account that there are a number of distinct and intervening processes from the extraction of the coal as part of the proposed development and its use in a blast furnace to make steel (IR21.113), as set out in IR21.116. He agrees with the Inspector at IR21.117 that the applicant would have no knowledge or control over the above processes and the avoidance or mitigation measures employed by any particular blast furnace when using coke made from WCM coal, or indeed a coke maker, and further agrees at IR21.118 that the 'essential character' of the proposed development does not extend to the subsequent use of metallurgical coal by the facilities and processes beyond the planning application boundary and outwith the control of the applicant (IR21.118).
>
> 35. Overall, the Secretary of State agrees with the Inspector that the impacts of GHG emissions from the subsequent use of the coal, as part of a blended coke product, at indeterminate proportion and in an indeterminate quantity, with no knowledge at this stage of the nature and efficiency of the particular blast furnace and any GHG mitigation measures that may be installed, cannot reasonably be regarded as indirect significant effects of the proposed development (IR21.123). Therefore he agrees with the Inspector on this matter and in the application of the Finch judgement (IR21.123).
>
> 36. The Secretary of State has gone on to consider the impacts of using coal from WCM. He agrees with the Inspector that to some extent the emissions from the use of coking coal are inevitable whether coal from the proposed development or other sources is used (IR21.122), and further agrees for the reasons given at IR21.121 that the effects of downstream emissions may well be considered neutral or slightly beneficial when compared with other extractive sources. He has concluded at paragraph 21 above that it is highly likely that there is the potential for a significant degree of substitution to occur. He agrees for the reasons given at IR21.120 and IR21.129 that the proposed development would have a broadly neutral effect on the global release of GHG from coal used in steel making, whether or not end use emissions are taken into account, and would enable some of the coal used to be sourced from a mine that seeks to be net zero (IR21.129)."

101. Taking into account the common ground that the burning of the Whitehaven coal is an inevitable consequence of its extraction from the mine, in my judgment it is plain,

following the decision of the Supreme Court in *Finch*, that the GHG emissions from that combustion are significant likely indirect effects of the project the subject of the planning application. Accordingly, the 2011 Regulations required WCM's ES *and* the EIA process to assess those emissions and their implications. The Secretary of State was obliged to take into account that environmental information (including the GHG emissions from combustion of the Whitehaven coal) before deciding whether or not to grant planning permission on the application.

102. Furthermore, in view of the scale and significance of those emissions, (according to the evidence accepted by the Inspector at IR 21.110 to IR 21.115 and by the Secretary of State at DL 5 and DL 32), in my judgment that assessment was an obviously material consideration which the Secretary of State was obliged to take into account in the determination of the planning application (see *Friends of the Earth* [2021] PTSR at [116] to [121]).

103. WCM suggested that because the extraction of Whitehaven coal would result in an equivalent amount of US coal remaining in the ground, and so there would be no net increase in GHG emissions from the new mine, the burning of the Whitehaven coal could not be a "significant effect" for the purposes of the 2011 Regulations. But this argument proves too much. It would mean that, as a matter of law, no assessment would need to be made at all in the ES, EIA or decision of the GHG emissions from combustion of the Whitehaven coal, nor of the substitution of that coal for US coal. That would be absurd. Instead, the correct analysis is that both are significant matters and, if substitution of US coal would be a likely effect of the proposed project, both effects had to be assessed in accordance with the 2011 Regulations.

104. WCM also took up a less extreme position in which they advanced two very similar answers on the errors made by the Secretary of State under Issue (i). First, they submitted that they were not *material* errors of law, because taking into account the conclusions in the decision letter on substitution, there would be no net increase in GHG emissions even if the burning of Whitehaven coal were to be included in the assessment. Second, and essentially for the same reasons, Issue (i) does not justify the quashing of the decision because, absent those legal errors, it is inevitable that the decision would have been the same (*Simplex*). Accordingly, WCM says that the outcome of Issue (i) should be considered together with Issue (ii).

105. It is necessary to consider how causation applies to both the combustion of the Whitehaven coal and the substitution effect.

106. To the extent that substitution for US coal would result in a reduction in GHG emissions, that could potentially be offset against the GHG emissions attributable to the burning of the Whitehaven coal. Assuming that there will be no other demand for it, the US coal would not be burnt. But that offsetting does not mean that substitution of US coal is a relevant factor in determining whether the burning of Whitehaven coal is a likely significant effect of the proposed development. Any such offsetting which could be justified should not be confused with the question whether the extraction of Whitehaven coal is in law a relevant cause of the burning of that coal. Likewise, the fact that the 2011 Regulations require the "significance" of an effect to be assessed, which can have a quantitative aspect, does not justify eliding these two different issues of cause and effect.

107. Here, WCM claimed that an equivalent (or near equivalent) amount of US coal would remain in the ground simply because the Whitehaven coal would be cheaper than the US coal to the operators of UK and European blast furnaces. Self-evidently, that is not the same chain of causation as that which is involved in the transportation of Whitehaven coal, blending, and onward distribution to a blast furnace for combustion. The fact that both chains begin with the extraction of coal at Whitehaven does not mean that they constitute, or form part of, the same chain of causation. The two should not be muddled up. The alleged substitution of US coal by the coal extracted from the Cumbrian site is a different cause and effect, or causal relationship, from that which results in the burning of the Whitehaven coal.

108. Whether the extraction of Whitehaven coal would be a legally relevant cause of US coal remaining in the ground is not the same question as whether that extraction is in law a cause of the GHG emissions produced when the Whitehaven coal is burned. In the latter case, because that burning is inevitable, legal causation is established. In the former case there has been no finding by the Inspector or the Secretary of State that it is *inevitable* that the US coal will stay in the ground because, and to the extent that, Whitehaven coal is extracted. Not surprisingly, given that the Inspector's report and the Secretary of State's decision pre-date the judgment of the Supreme Court, the decision-maker has not considered which causation test should be applied for the purposes of the 2011 Regulations (see *Finch* at [67] to [71]), nor has that test been applied to the substitution of US coal in this case. The Secretary of State was not asked to make, and has not made, the findings necessary to support WCM's legal argument in this court. On this analysis, the legal error under Issue (i) is a freestanding reason for the decision to be quashed, irrespective of the conclusion I reach under Issue (ii).

109. Mr. Strachan's attempt to draw an analogy, firstly with wind farms and solar farms (*Finch* at [150]) and secondly with *Kilkenny Cheese* (*Finch* at [163])) does not assist WCM. In the first case, it is an intrinsic characteristic of such a project to produce green energy and so its causal relationship to the development cannot be in any doubt. In the second case, it was found that the milk for the factory was going to be supplied from existing sources and was going to be produced in any event. The link was accepted as being inevitable. Whether there was some wider effect on market demand capable of being assessed was a different issue (*Finch* at [167]).

110. Nevertheless, I will go on to consider whether the outcome of Issue (ii) overcomes the legal errors under Issue (i).

Issue (ii) – The substitution issue

Responsibility for producing information on GHG emissions

111. It is appropriate to begin by considering who was responsible for producing relevant information on GHG emissions as an effect of the project.

112. It is well-established that the concept of a *legal* burden of proof has no place in the multi-factoral context of public inquiries. But planning policies may have the practical effect of requiring a developer, or as the case may be a LPA, to produce evidence to satisfy a criterion, or to show that a particular beneficial or harmful effect will or will not occur, sometimes to a particular policy standard. If that party fails to do so, the policy may well indicate the consequence for decision-making, subject, of course, to any other material considerations. Accordingly, that party faces a policy requirement to produce adequate evidence to satisfy the decision-maker on the point. Policies may be

concerned with the risk of a harm occurring. As a general proposition, the more serious the risk (generally a combination of likelihood and consequences), so the decision-maker may expect more cogency in, or apply a precautionary approach to, the material addressing that risk (*Satnam* at [108]).

113. Paragraph 217 of the NPPF, sometimes referred to as the "coal test" is an example of a *policy* burden to produce adequate information:

> "217. Planning permission should not be granted for the extraction of coal unless:
>
> a) The proposal is environmentally acceptable, or can be made so by planning conditions or obligations; or
>
> b) If it is not environmentally acceptable, then it provides national, local or community benefits which clearly outweigh its likely impacts (taking all relevant matters into account, including any residual environmental impacts)."

114. In the present case the Secretary of State decided that the proposal failed to meet the requirements of para. 217(a) and therefore went on to consider whether it met the requirements of para. 217(b) (DL 67). The Secretary of State concluded that the benefits of the proposal outweighed its harm, including economic benefits. Plainly, WCM took on a policy or evidential burden of showing that para. 217 of the NPPF was satisfied. That included the harm of the GHG emissions produced when the Whitehaven coal is burned. Likewise, WCM took on the burden of establishing its claim that there would be no net increase in GHG emissions as a result of the US substitution effect upon which that claim depended.

115. A similar analysis applies to the application of the 2011 Regulations in the light of the decision of the Supreme Court in *Finch*. It was for WCM to assess in its ES the very large amount of GHGs which would be emitted from the burning of the Whitehaven coal. In so far as WCM wished to claim that the US substitution effect would be just as large, so that there would be no net increase in GHG emissions, or alternatively that there would be some lesser offsetting effect, it was for WCM to produce information in its ES to demonstrate that point, including legal causation in relation to substitution. Regulation 22 of the 2011 Regulations confirms that it is the applicant who is responsible for producing information which is legally essential for a compliant ES.

116. Following the Supreme Court in *Finch* at [152] to [154], WCM needed to produce full information (in the sense previously explained) on those two effects which it claimed balanced each other out (or resulted in some offset). The public was entitled to participate in a EIA process in which they could respond to such material. It was not for the public to have to produce key components of that information. I now turn to see what happened.

WCM's Environmental Statement

117. I consider first how WCM addressed end use emissions and substitution of US coal in the ES. I will then consider how these matters were addressed in the inquiry process.

118. We know that the GHG Assessment by Ecolyse produced in order to replace an earlier Assessment ([90] above), did not consider end use emissions (IR 21.102). Likewise, it did not consider substitution.

119. On 3 September 2021 WCM produced its revised Chapter 19 of the ES (like the GHG Assessment a response to the Inspector's reg.22 request for information dated 30 June 2021). Paragraph 1 stated that "the main body of the assessment for this chapter is provided in the revised GHG assessment" (reproduced as Appendix 1). I have previously summarised what was said in Chapter 19 about end use emissions and substitution. But the ES did not say where that substitution would take place and why ([37] above). Instead, the ES relied upon a report by Dr. Bristow produced in 2020 (appendix 2) and an additional report dated 10 August 2021 prepared by Wood Mackenzie for the inquiry (appendix 3).

120. However, Dr. Bristow was not mentioned by the Inspector once in his report, not even in his lengthy summary of WCM's case. It is not difficult to see why. Ms. Caroline Leatherdale, WCM's environmental consultant, said in cross- examination in September 2021 that Dr. Bristow's report was out of date and that WCM relied instead on the material from Mr. Truman and Wood Mackenzie. Indeed, the Inspector referred frequently to the evidence of Mr. Truman (of Wood Mackenzie), whom the Secretary of State described as the only expert with a detailed understanding of the metallurgical coal market to give evidence at the inquiry (DL 21). Although WCM ceased to rely upon Dr. Bristow's report, I will deal with it below as part of the material before the inquiry to which other witnesses responded. Its treatment of the substitution issue was terse, to say the least.

121. The report from Wood Mackenzie dated 10 August 2021 did not address end use emissions from combustion of Whitehaven coal. It did address substitution of US coal. The report explained that the Whitehaven coal was of a suitable quality for replacing US coal sold into UK and European markets and would be significantly cheaper. However, the report did not claim that there would be 100% or perfect substitution. It did not claim that the extraction of Whitehaven coal would cause an equivalent or similar amount of US coal to remain in the ground. The court was not shown any attempt by Wood Mackenzie to estimate the likely extent of substitution, so as to demonstrate that the estimated GHG emissions from the burning of Whitehaven coal would be counter-balanced by substitution resulting from the extraction of that coal, alternatively the approximate extent of any such substitution.

122. It follows from the Supreme Court's decision in *Finch* that the ES failed to comply with the 2011 Regulations by assessing the GHG emissions from the combustion of Whitehaven coal. Because WCM relied upon the substitution effect in order to arrive at a nil net increase in GHG emissions, WCM was also obliged to produce an assessment justifying that effect and its extent.

123. Here it is essential to keep in mind the sensitivity exercise which Professor Grubb had carried out. On his figures, if US coal was not substituted by more than 1% of the Whitehaven coal, the burning of the Whitehaven coal would increase global GHG emissions. Even on the additional material advanced by WCM in June 2023 (see [45] to [46] above), the burning of the Whitehaven coal would still produce a net increase in GHG emissions if less than 91.5% of that coal substituted US coal otherwise supplied for UK and European steel production.

124. On any view, WCM's case had to show 2 things: (i) a very high degree of substitution not far short of perfect substitution, and, if that was shown, (ii) that there would be no other demand for US coal substituted by that Whitehaven coal. The ES material upon which WCM relied during and after the inquiry did not address points (i) or (ii). The claim in the ES that there would be no net increase in GHG emissions was essentially a matter of assertion which was not assessed. It was not suggested in the ES or the inquiry that these matters were incapable of assessment. These omissions on a subject which was fundamentally important to the EIA of WCM's proposed development, meet the test for unlawfulness in *Blewett*, *Spurrier* and *Friends of the Earth*. Following the decision of the Supreme Court in *Finch*, WCM did not provide the kind of analysis which was required for the public and consultees to respond to.

Evidence at the inquiry

125. The next question is whether these important gaps were addressed during the inquiry and, if so, how.

126. I begin with the report of Dr. Bristow in 2020, because, although he did not give evidence and ceased to be relied upon by WCM (see [120] above), some witnesses at the inquiry did respond to his material.

127. Dr. Bristow explained the "derived market" for coke. Steel is made to order. When steel production increases, the production of coking coal increases, but not the other way round (paras. 6.21 to 6.22). Then at paras. 7.8 to 7.9 Dr. Bristow said this:

> "7.8. Coking coal is mined on demand. If better or equivalent grade coal can be mined from a closer location at a similar price, that coal will replace the coal that is currently being exported from further afield. In the present case, the WCM coal will substitute the equivalent volume of USA coal that is currently being exported to Europe by being shipped across the Atlantic.
>
> 7.9. In my judgement, the USA would not continue to mine the same grade of coal for sale to other countries because a) there is no proven market for them to do that, and b) because shipping to alternative major steelmaking countries in Asia and India involves such high transport costs that it would question the economic viability. Instead, the most likely outcome is that there would be a corresponding reduction in the extraction of this coal."

128. FoE did not dispute Dr. Bristow's opinion in para. 7.8 that the Whitehaven coal would be cheaper than US coal for the UK and European steel market and so they accepted that there would be *some* substitution. But there was a dispute about his view in the first sentence of para. 7.9, that there would be no demand from other markets for US substituted coal. The court was not shown any evidence produced by Dr. Bristow to the Secretary of State to support that assertion.

129. At para. 7.22 Dr. Bristow said that the primary reason why production at Whitehaven "will very likely result in an equivalent decrease in production in the USA" was that Whitehaven coal has lower operational costs and significantly less transport costs to the UK and European market. In addition, many US mines are low in height and expensive to operate efficiently (paras. 7.22 to 7.24). At least 50% of US coal mines are marginal

producers. Because of their production costs, they are only profitable when coal prices are high (para. 7.25).

130. In any event, this material from Dr. Bristow begged the question what factors drive demand for steel in the first place. He said, uncontroversially it would seem, that demand for steel is driven by a country's economic outlook and GDP growth, which leads in turn to demand for coking coal (paras. 6.20 and 7.12).

131. Mr. Simon Nicholas, an energy finance analyst with experience of seaborne coal markets, gave evidence for FoE responding to Dr. Bristow. In particular, he challenged the assertion in para. 7.9 of Dr. Bristow's report that there would be no alternative market for US coal substituted by the extraction of Whitehaven coal (paras. 2.4 to 2.5). He provided supporting evidence. For example, he said that in 2019 and 2020 about 30% of US coking coal was exported to markets in Asia. He said that there is a proven market in Asia (paras. 3.4 to 3.5). He also explained that there is a growing market for US coking coal in China and elsewhere in Asia (paras. 3.5 to 3.12). Mr. Nicholas agreed that "swing suppliers" in the US may scale back production in response to a drop in demand, but the converse is also true (paras. 3.17 to 3.18). Accordingly, the mere fact that Whitehaven coal would be cheaper than US coal to the UK and European markets, would not guarantee that US coal would stay in the ground to the extent that coal is extracted at Whitehaven (para. 3.20).

132. In section 4 of his proof (published on the same day as Mr. Nicholas's), Mr Truman dealt with the outlook for BF-BOF steel-making in Europe. He said that global finished steel demand is expected to continue to rise to 2049, albeit at a slower rate than in the past as Chinese consumption peaks. China accounts for over half global steel consumption. In India a growing economy will result in steel demand there increasing by more than fourfold by 2049. Europe is a mature steel consuming region where the consumption of finished steel is forecast to increase at a compound rate of 0.5% over the period 2021 to 2049. Global steel production will grow steadily in the long term, in line with finished steel demand. BF-BOF production in Europe will decline marginally over the next 20-30 years.

133. Mr Truman said that the Whitehaven coal was expected to be in the first quartile of global seaborne metallurgical coal, at a cost of about US$70/tonne, and among low cost producers in Russia and Australia (para.6.2). US coal production costs range between US$75/tonne to US$165/tonne. Accordingly, the Whitehaven coal would be highly cost-competitive in the European market and so was expected to take market share from high cost US producers (paras. 6.3 to 6.4). In section 7 of his proof Mr. Truman accepted that the increase in the supply of coal by extraction at Whitehaven could reduce the price of HVA coal, but that would not reduce the cost of steel to such an extent as would delay the transition from blast furnaces to alternatives emitting less GHGs.

134. Mr Truman did not deal in his first proof with the issue of whether a reduction in the price of coal might result in an increase in the demand for steel. More importantly, he did not deal with the issue of whether there could be demand from other markets (e.g. in Asia) for substituted US coal.

135. Mr. Truman produced a rebuttal proof on 31 August 2021 in which he responded to a number of witnesses. Regarding the evidence of Mr Nicholas, he said that although US coal was being exported to China, the data did not include details on the type of coal

being delivered. In his view the US was primarily being called upon to replace low or medium volatile coal which would have been shipped from Australia to China in the absence of a ban imposed by the Chinese Government (paras. 2.4 to 2.5). However, he was aware of one US company shipping coal to China since Dr Bristow's report of which high volatile A coal represented about 1m tonne a year. Mr Truman suggested that the Chinese ban on Australian coal would come to an end (paras. 2.6 to 2.8).

136. In response to Mr Nicholas's view that there is no guarantee that US coal would remain in the ground if Whitehaven coal were to extracted, Mr Truman said that the US serves as a swing supplier to the seaborne market, provides tonnage when supply decreases from elsewhere and contracts when alternative supplies return (para. 2.10). For example, when flooding occurred in Queensland between 2010 and 2011 "US increased exports" to fill a shortfall in the market. As Australian exports returned, US exports reduced. He said that extraction of Whitehaven coal would "cause a reduction in US production of the same quality coal" (para. 2.1). In my judgment, it is plain that, read fairly as a whole, Mr Truman did not attempt to demonstrate perfect, or virtually perfect, substitution.

137. Mr Truman also replied to the evidence of Professor Paul Ekins OBE (a witness called by SLACC). The latter had said that if there ceased to be demand in Europe, Whitehaven coal might be exported to Africa or Asia. Mr Truman responded that "there would still be significant savings in GHG emissions, compared to the emissions *if that demand were to be filled with US high-volatile A coals*." He estimated the savings for both Japan and India (paras. 3.3 to 3.5). Of course, this exercise was only relevant on the assumption that there is demand for US high volatile coal in those markets. Then in paras. 3.6 to 3.21 Mr Truman explained why in his view the cost of coal production has a minimal impact on the dynamics of coal trade, value and steel output.

138. In an Addendum dated 6 September 2021 to its report dated 10 August 2021 (see [119] above), Wood Mackenzie stated that China had been importing larger volumes of US *high-volatile A* coals, sourced from *two* mines in the USA. Wood Mackenzie said that they believed that opportunities would expand for exporting this type of coal into "the broader Asia region" (paras. 1.18 to 1.20). The consultants referred to the advantages of using high fluidity coal in steel-making, a characteristic shared by US and Cumbrian high-volatile coal (para. 2.10 of Wood Mackenzie's August 2021 report and see also IR 21.30). Elsewhere they had said that that the Asian market for US high volatile coal would expand.

139. In his closing submissions to the Inspector (paras. 97-98), Mr Paul Brown KC on behalf of FoE referred to the evidence I have summarised above, in particular the Addendum from Wood Mackenzie. He submitted that there was evidence from WCM's experts to show that the extraction of Whitehaven coal to meet UK and European demand would not result in US high volatile coal remaining in the ground because of the increasing demand in Asia for that coal. He continued:

> "Critically, even if some degree of substitution is possible, that is not enough to make this coal mine carbon-neutral. **In order to conclude that granting permission for the WCM mine would not result in an increase in downstream emissions, the Secretary of State would need to be satisfied that virtually <u>all</u> of the American or Australian coal which is displaced would**

> **remain in the ground i.e. that there will be perfect substitution.**" (original emphasis) (para.98).

140. Ms. Estelle Dehon KC made similar submissions on behalf of SLACC. She said that para.2.12 and fig.1 of Mr Truman's rebuttal only sought to show 50% substitution of US coal achieved by cheaper Australian coal (see the ban referred to in [135] above). Opening a UK coal mine "would simply add another source of UK coal to [the] world, leaving the current US suppliers to sell their product elsewhere." In my judgment it is plain that these were principal important controversial issues with which, as a matter of law, the Inspector and the Secretary of State had to grapple.

The Inspector's report and the decision letter

141. The Inspector's report should be read in the context of the evidence and submissions put forward by the parties to him.

142. WCM submitted in its ES that even if GHG emissions from the combustion of Whitehaven coal were an effect of the extraction of that coal, that was not "significant" given that an equivalent, or virtually equivalent, amount of US coal would remain in the ground, solely because the Cumbrian coal would be cheaper for UK and European steel producers using coke. That argument assumed that there would be no other demand for the US coal from other markets.

143. WCM did not produce any estimate of its own to quantify GHG emissions from the combustion of Whitehaven coal. There was an issue as to whether WCM had produced evidence to show perfect or near-perfect substitution of US coal for consumption in the UK and Europe. At all events WCM did not produce any alternative estimate of a lesser degree of substitution.

144. Although in 2020 Dr. Bristow had claimed in his report for WCM that there would be no alternative market for substituted US coal, by September 2021 WCM was not relying upon his evidence. Instead, they were relying upon Wood Mackenzie, who stated unequivocally that there was a market for US high volatile A coal in China and elsewhere in Asia, which was expanding. Although that undermined WCM's substitution argument for treating the combustion of Whitehaven coal as having a nil net effect on GHG emissions, WCM did not produce any estimate of the increasing Asian demand for US coal and how that would impact upon the quantity of GHG emissions caused by the project.

145. The Inspector summarised WCM's case on the need for the Whitehaven coal at IR 7.22 to IR 7.47, refuting at IR 7.24 to 7.34 a case put forward by SLACC, but not FoE, that the coal would not be suitable as HVA coking coal for the UK and European market. WCM's case on alternative technologies was summarised at IR 7.48 to 7.62.

146. WCM's case on substitution was summarised at IR 7.63 to IR 7.71. This included evidence on why the increase in supply at Whitehaven would not have any material effect on the price of coking coal or the production costs of steel (IR 7.67 to IR 7.69). The role of "swing suppliers" in the US who will ramp up or reduce production to respond to increases or decreases in demand was set out at IR 7.63 to IR 7.64 and IR 7.71. It was said that "there is no basis for saying that substitution will not occur." High cost "swing suppliers" in the USA would scale back their production (IR 7.71).

147. The Inspector summarised WCM's case on GHG emissions at IR 7.88 to IR 7.132. WCM submitted that there was no need for GHGs from combustion of the coal to be assessed (IR 7.89 to 7.97). At IR 7.98 WCM submitted that even if those emissions were treated as being relevant, they would be impossible to quantify effectively. At IR 7.101 WCM made the point that Professor Grubb's sensitivity analysis needed to be adjusted for the fact that substituted US coal would otherwise be extracted from mines which are not net zero. I have referred to that point at [45] to [46] and [123] above.

148. The Inspector summarised FoE's case on the demand for coking coal at IR 10.6 to IR 10.18, alternative technologies at IR 10.20 to IR 10.40 and IR 10.48 to IR 10.50 and downstream emissions at IR 10.77 to IR 10.88.

149. FoE submitted that the operational GHG emissions of the proposed mine would be dwarfed by those resulting from the combustion of Whitehaven coal amounting to 194 Mt CO_2e (IR 10.77). The Inspector recorded at IR 10.82 to IR 10.84 an important part of FoE's case, namely that WCM's contention in 2020 that there was no established market for US coal which would be displaced by Whitehaven coal, had been contradicted by subsequent material, not least the Wood Mackenzie Addendum in September 2021. The Asian market for the comparable US coal is expected to expand. Furthermore, there was an internal contradiction in WCM's case that if the intended UK and European market for Whitehaven coal should dry up that coal would be exported instead to Asia, but displaced US coal would remain in the ground rather than be sold in the Asian market (IR 10.85). IR 10.86 summarised para. 98 of FoE's closing submissions (see [139] above).

150. The Inspector summarised SLACC's case on end use GHG emissions at IR 12.31 to 12.39 and on substitution at IR 12.40 to IR 12.49. He referred to Professor Grubb's sensitivity analysis and contention that there would have to be "perfect substitution" of US coal (IR 12.41). The concept of "swing suppliers" would not mean that US coal could not be sold elsewhere if displaced from UK and European markets. The evidence produced by Mr. Truman on the relationship between Australian and US exports showed only 50% substitution (IR 12.47). Opening another coal mine in the UK would simply add another source of coal to the world market, leaving US suppliers to sell their product elsewhere, including an ample Chinese market. Overall, more coal would be supplied and there would be more GHG emissions (IR 12.49).

151. The Inspector's conclusions were set out in chapter 21 of his report. He dealt with the need for the Whitehaven coal at IR 21.25 to IR 21.63, which include a section on substitution at IR 21.48 to IR 21.52. He dealt with climate change at IR 21.64 to IR 21.134, including a section on downstream emissions at IR.21.102 to IR 21.124. After addressing a wide range of other issues, the Inspector dealt with the planning balance and gave his overall conclusions at IR 22.1 to IR 22.21.

152. The Inspector addressed the importance of coking coal as a raw material for steel production at IR 21.25 to IR 21.27. The Inspector concluded that the Whitehaven coal can be classed as HVA coal suitable to substitute for the US HVA coal that is imported into the UK and Europe (IR 21.30 to IR 21.33).

153. As for forecasts and scenarios on the future need for and supply of coking coal, the Inspector concluded that there would be a need for such coal in the UK and Europe until 2040 or 2043 and a global need, particularly in South East Asia continuing beyond 2050. But it was not possible to determine with any certainty how the demand for

coking coal will vary over the lifetime of the project. There is clearly a current market demand for the product in the UK and Europe and the Whitehaven coal would be competitively priced so as to be considerably attractive to this market (IR 21.35 to IR 21.37). The length of time for which that may continue is dependent on the commercial introduction of alternative technologies. But because there was no certainty about the pace of those changes, this longer term demand for coking coal (in the UK/European market) could not be predicted with any degree of certainty (IR 21.38).

154. The Inspector gave his first set of conclusions on substitution at IR 21.48 to IR.21.52:

> "21.48 The demand for coking coal is led by the demand for steel. It was suggested that WCM coal may reduce the cost of coking coal, which in turn would reduce the cost of steel and therefore increase the demand for steel and coking coal consumption. However, I do not share that view.
>
> 21.49 The global price for HVA coking coal is set by a benchmark price for premium low volatile Australian coking coal and the price of other coals is set by reference to this benchmark. If the price of benchmark coal goes up or down the prices of other coals that are benchmarked against it will follow suit. Increased supply of HVA coal will unlikely make any difference to the price of HVA coal or the benchmark, particularly as the supply of WCM coal is insignificant to affect the global price.
>
> 21.50 Many mines in the USA operate towards the top of the cost curve and are regarded as 'swing suppliers' due to their role in switching production on or off to respond to demand.503 Target customers in the UK and Europe currently source the majority of HVA coal from the USA as there are no other more cost-effective sources.
>
> 21.51 It is reasonable to assume that WCM only needs to be marginally cheaper to encourage some degree of substitution. The proposed development would contribute a very small fraction of global supply and is unlikely to materially impact on the price of coking coal. I do not consider that the opening of the mine would materially impact on the demand for steel. In my view, the WCM coal intended for the European and UK market would have the benefit of reduced transportation costs, reduced transit time from the mine to user, reduced product degradation and lower risk to supply.
>
> 21.52 Overall, I consider that the WCM coal would be at a competitive advantage over US coal and therefore it is highly likely that there is the potential for a significant degree of substitution to occur."

155. The Inspector set out his overall conclusions on need at IR 21.59 to IR 21.63, without returning to the subject of substitution.

156. The Inspector noted that WCM had not produced an assessment of GHG emissions from the combustion of the Whitehaven coal, specifically in the GHG Assessment by Ecolyse (IR 21.102). At IR 21.108 the Inspector said he had considered whether there was sufficient information available on those emissions for the purposes of the 2011 Regulations. He concluded that, despite WCM's criticisms of the estimates by Professor Grubb and Professor Bartlett, there was "a reasonable evidential basis to support the necessary consideration of impacts and effects from downstream carbon emissions," which in terms of scale and intensity were likely to be "significant" (IR 21.110 to IR 21.111 and IR 21.114 to IR 21.115).

157. Much of the Inspector's discussion of downstream emissions was concerned with whether they amounted to an "effect" of the project for the purposes of the 2011 Regulations. He concluded that they did not. As part of his reasoning, he relied upon his earlier views on substitution (see IR 21.120 to IR 21.122 at [96] above).

158. The Inspector set out his overall conclusions on climate change at IR 21.125 to IR 21.134 of which IR 21.127 to 21.129 and IR 21.133 are relevant to the legal challenge:

> "21.127 The extent to which the proposed development would result in a material reduction in GHG emissions from international shipping is not possible to quantify. Nonetheless, my findings above suggest that the coal from the mine would likely substitute for some coal imported into the UK and mainland Europe. Consequently, there would likely be some, but unquantifiable, likely reductions in GHG emissions from transportation. However, this would be offset in the event that the coal is transported to wider markets beyond the UK and Europe and is therefore a matter to which I have attached little weight.
>
> 21.128 The proposed development would make a comparatively insignificant contribution, in tonnage terms, to the global supply of coking coal and would constitute a small part of a blended product. For these reasons and those set out above, I consider that the amount of steel produced in the UK or mainland Europe by BF-BOF would unlikely increase as a consequence of a more local supply of High Vol A coking coal. Furthermore, I do not consider that in the period up to 2049 the development of the mine would encourage the continued use of blast furnace production methods that would otherwise have been closed or converted to lower carbon technologies.
>
> 21.129 I have considered the contribution to GHG emissions from the use of this coal in steel manufacture in respect of its planning merits. In my view, the likely amount of coal used in steel making would be broadly the same with or without the development of the proposed mine. Consequently, I consider that the proposed development would have a broadly neutral effect on the global release of GHG from coal used in steel making whether or not end use emissions are taken into account. However, the proposed development would enable some of the coal used to be sourced from a mine that seeks to be net zero.

> …
>
> 21.133 In conclusion, I have considered whether the modelled GHG emissions of the proposed development are acceptable in the context of national and local guidance. There may be some unquantifiable reduction in GHG emissions as a result of transportation savings and the potential substitution of some coal to be sourced from a net-zero mine. However, such benefits are likely to be of relatively small scale and potentially offset by the exportation of the coal to wider markets. The GHG Assessment concludes that the residual likely effects of the proposed development on GHG emissions to be relatively neutral. Having considered all of the evidence, I am content that Ecolyse 2 provides an appropriate GHG Assessment that supports my conclusions and I therefore attach significant weight to its findings"

159. The Inspector considered that, taken overall, the proposed development would have a neutral effect on climate change, which should be given neutral weight in the planning balance (IR 21.134). He returned to this at IR 22.9 in the section of his report dealing with the balancing exercise:

> "22.9 I have found that the proposed development itself would have an overall neutral effect on climate change and, as such, there would be no material conflict with Government policies for meeting the challenge of climate change. I recognise that most of the concerns raised in the Inquiry regarding the effect on climate change relate to the subsequent downstream use of the coal in steelworks. In my view, the likely amount of coal used in steel making would be broadly the same with or without the development of the proposed mine. Consequently, I consider that the proposed development would have a broadly neutral effect on the global release of GHG from coal used in steel making whether or not end use emissions are taken into account. As such, I do not consider that the proposal is contrary to the provisions of Chapter 14 of the Framework"

160. In the decision letter the Secretary of State dealt with the need for the coal at DL 18 to DL 24. In DL 18 to DL 21 he broadly agreed with the Inspector's assessment of that need, including that although there is no consensus on future demand in the UK/European market, it is highly likely that a global demand will remain (DL 18). In this context, the Secretary of State addressed certain economic issues and substitution in DL 21:

> "21. For the reasons given at IR21.48-21.52, the Secretary of State agrees with the Inspector at IR21.48 that the demand for coking coal is led by the demand for steel. He further agrees at IR21.51 that the proposed development would contribute a very small fraction of global supply and is unlikely to materially impact on the price of coking coal or the demand for steel. In reaching this conclusion, the Secretary of State has accepted the evidence put forward by the applicant at IR7.63-7.69 and IR7.71.

> He notes that Mr Truman is the only expert with a detailed understanding of the metallurgical coal market to give evidence at the inquiry, and finds the applicant's detailed and informed evidence more persuasive than that of SLACC at IR10.79. He further agrees for the reasons given at IR21.50-21.51 that the WCM coal would be at a competitive advantage over US coal and therefore it is highly likely that there is the potential for a significant degree of substitution to occur (IR21.52). Given the Secretary of State's conclusion above that the proposed development is unlikely to materially impact the demand for steel, it follows that the total amount of coking coal burnt in the steel-making process is unlikely to materially change, regardless of where that coal comes from. In reaching this conclusion the Secretary of State has taken into account and accepts the Inspector's characterisation that many mines in the USA operate towards the top of the cost curve and are regarded as 'swing suppliers' due to their role in switching production on or off to respond to demand (IR21.50). This means that if the coal were not needed it would not be extracted. The Secretary of State therefore does not agree with SLACC's assertion that 'it is impossible to see how the granting of permission to extract WCM coal could have any effect other than to add to greenhouse gas emissions' (IR10.80). For these reasons he does not consider that this proposal would have a material effect on total emissions from burning coal during the steel-making process, regardless of whether there is perfect substitution or not."

161. The Secretary of State dealt with climate change at DL 25 to DL 38. After having explained at DL 34 to DL 35 (see [100] above) why he considered that the combustion emissions would not be an effect of the proposed development, the Secretary of State addressed the impacts of using Whitehaven coal, including the substitution issue, at DL 36:

> "36. The Secretary of State has gone on to consider the impacts of using coal from WCM. He agrees with the Inspector that to some extent the emissions from the use of coking coal are inevitable whether coal from the proposed development or other sources is used (IR21.122), and further agrees for the reasons given at IR21.121 that the effects of downstream emissions may well be considered neutral or slightly beneficial when compared with other extractive sources. He has concluded at paragraph 21 above that it is highly likely that there is the potential for a significant degree of substitution to occur. He agrees for the reasons given at IR21.120 and IR21.129 that the proposed development would have a broadly neutral effect on the global release of GHG from coal used in steel making, whether or not end use emissions are taken into account, and would enable some of the coal used to be sourced from a mine that seeks to be net zero (IR21.129)."

162. The Secretary of State broadly reached the same conclusions as the Inspector which were then reflected in the overall planning balance at DL 69 to DL 73.

Discussion

163. The starting point is that neither the Inspector nor the Secretary of State considered that there was insufficient evidence to enable an assessment to be made of the likely effects of the Whitehaven coal being combusted; on the contrary, (see [34] to [35], [50] and [93] above and IR 21.110 to 21.115).

164. WCM appeared to place some reliance upon IR 21.116 to 21.117 and 21.123 where the Inspector referred to uncertainties about GHG emissions from the use of Whitehaven coal, because a number of matters could not be known, such as the nature of the blended coke product of which that coal would form a part, the nature and efficiency of the blast furnaces involved and any GHG mitigation measures installed. These points were picked up by the Secretary of State in DL 34 and DL 35. In my judgment, it is plain that these passages do not undermine IR 21.114 to 21.115. That is because IR 21.116 to IR 21.117 and IR 21.123 simply formed part of the reasoning as to why there was not thought to be a "sufficient causal connection" between the proposed project and the end use emissions of the former, applying the principles laid down by the Court of Appeal in *Finch*. This reasoning formed part of an assessment of distinct, intervening processes and WCM's lack of knowledge or control over such matters. This is particularly clear in DL 34 and DL 35.

165. So it is plain that the information on GHG emissions from the burning of Whitehaven coal was legally adequate to enable an assessment to be carried out under the 2011 Regulations. I would add that if I had read IR 21.116 to IR 21.117 and IR 21.123 as expressing a negative view on that issue, that would have revealed an internal contradiction with IR 21.114 and 21.115 on an important point, which neither the Inspector's report nor the decision letter resolved. That would be a separate ground for quashing the decision.

166. In any event, WCM chose to advance a case that even if GHG emissions from end use were taken into account there would be a nil increase in GHG emissions overall. This was said to be because the Cumbrian coal would substitute for or displace the supply of US coal to UK and European steel producers and there would be a reduction in GHG emissions because the coal would be transported over a shorter distance and would come from a "net zero mine" rather than a US mining operation producing GHG emissions. This "net zero mine" point has been summarised in [45] to [47] and [137] above.

167. The Inspector disposed of WCM's reliance on the transport savings and "cleaner mine" points. First, at IR 21.127 he said that it was likely that there would be some unquantifiable reductions in GHG emissions from transportation. However, they would be offset in the event of Whitehaven coal being transported to wider markets beyond the UK and Europe. Accordingly he gave little weight to that potential saving. Second, at IR 21.129 the Inspector also had regard to the fact that the proposal would enable some of the coal used in steel production to be sourced from a mine aiming to be net zero. However, at IR 21.133 he said that the unquantifiable savings in GHGs from transportation and the "potential substitution" of some coal by a net zero mine were likely to be "relatively small scale benefits and potentially offset by the exportation of the coal to wider markets."

168. The Secretary of State did not disagree with the Inspector on these points (DL 5, DL 32 and DL 36 to DL 37). Unfortunately, however, other parts of the reasoning of the

Inspector and the Secretary of State are inconsistent with that finding. In DL 36 the Secretary of State agreed with the Inspector at IR 21.121 that "the effects of the downstream emissions may well be considered neutral or *slightly beneficial* when compared with other extractive sources." Neither of them explained how there could be any such "beneficial effect" when they had accepted that the transportation savings were unquantifiable and that the potential for Whitehaven coal to be exported beyond the UK and Europe further afield (e.g. to Asia) offset those savings and the advantage of extraction from a "net zero mine" compared to a "dirtier" mine. Their findings were internally inconsistent.

169. I agree with Mr. Brown that it follows from IR 21.127, IR 21.129 and IR 21.133 that WCM's case that there was no need for the combustion of Whitehaven coal to be assessed depended upon the decision-maker accepting its contention that the extraction of that coal would result in perfect, or virtually perfect, substitution for US coal supplied to the UK and European market. That point was reinforced by Professor Grubb's sensitivity exercise. Mr. Strachan therefore sought to demonstrate to the court that both the Inspector and the Secretary of State had accepted that perfect substitution argument.

170. One fundamental difficulty faced by WCM is that in a number of places the Inspector and the Secretary of State plainly found that there would be only partial substitution:

- "there is the potential for a significant degree of substitution to occur" (IR 21.52)

- "the potential for the coal from the proposed development to substitute to some extent for other coal, rather than acting as an additional source" (IR 21.120)

- "the emissions from the use of coking coal are significant and to some extent are inevitable whether coal from the proposed development or other sources is used" (IR 21.122).

- "it is highly likely that there is the potential for a significant degree of substitution to occur" (DL 21 based upon IR 21.52)

- "He agrees with the Inspector that to some extent the emissions from the use of coking coal are inevitable whether the coal is from the proposed development or other sources is used " (DL 36 based on IR 21.122).

171. Mr. Strachan sought to explain away those passages as only being concerned with whether that coal was of a comparable quality to US coal exported to UK and European steel mills, an issue which arose under the case on the need for the Whitehaven coal. SLACC had argued that the Whitehaven coal was not of a similar quality and therefore could not be a substitute *at all*. Mr Strachan submitted that the Inspector and the Secretary of State were simply referring to the substitution of a significant proportion of HVA coal available in the USA. I reject that submission. WCM never suggested that the Whitehaven reserve was equivalent in scale to the US reserves of HVA coal and so would substitute for all of that coal. There was never an issue for the Secretary of State to resolve as to whether the Whitehaven coal would substitute for all or only part of that US coal. Instead, what WCM had contended was that the price advantage of the Whitehaven coal would result in that coal substituting for roughly the same amount of US HVA coal. The issue was whether all or part of *the Whitehaven coal* would substitute for US HVA coal.

172. Furthermore, the findings dealing with partial substitution appear not only in the sections of the Inspector's report and the decision letter dealing with need, but also in other sections dealing with GHG emissions from the combustion of the Whitehaven coal and climate change. Similarly, I note that in IR 21.120 (relied upon by the Secretary of State in DL 36), the Inspector drew upon his earlier findings on substitution in his section on need when dealing with substitution in relation to the climate change issues. He did not see a distinction between the two. Indeed, it does not appear that anyone at the inquiry suggested that there was.

173. What about the passages upon which WCM relies as showing an acceptance in the Inspector's report and in the decision letter of perfect, or virtually perfect, substitution?

- "GHG emissions arising from the use of the coal in the steel-making process would likely be the same whether it is partly supplied by WCM coal or from elsewhere" (IR 21.120).

- "Having regard to the nature of the product [coking coal] and relevant demand, set out earlier in this report, I consider that in the absence of the proposed development, equivalent emissions would also likely occur from extraction and use of substitute coking coal sources from other origins" (IR 21.121 and see also the end of IR 21.122).

- "The Whitehaven coal would make a comparatively small contribution to the global supply of coking coal. For these reasons and those set out above, I consider that the amount of steel produced in the UK or mainland Europe by BF-BOF would unlikely increase as a consequence of a more local supply of High Vol A coking coal" (IR 21.128).

- "The likely amount of coal used in steelmaking would broadly be the same with or without the proposed development of the mine. Consequently, I consider that the proposed development would have a broadly neutral effect on the global release of GHG from coal used in steelmaking whether or not end use emissions are taken into account" (IR 21.129 and similarly IR 22.9).

174. Essentially the same thinking is to be found in the sixth sentence of DL 21 and in the last sentence of DL 36.

175. With great respect, I find it impossible to reconcile the inconsistencies and muddle in this reasoning.

176. Take for example IR 21.121 and IR 21.122. In the former, the Inspector says that in the absence of the proposed development *equivalent emissions* would also occur from extraction and use of substitute coking coal sources. In the latter, we are told that emissions from the use of coking coal "*to some extent* are inevitable whether coal from the proposed development or other sources are used." The two statements are inconsistent with each other. They cannot stand together. DL 36 relies upon both IR 21.121 and IR 21.122 without recognising this patent contradiction. That part of the decision letter even explicitly "agrees with the Inspector that *to some extent* the emissions from the use of coking coal are inevitable whether coal from the proposed development or other sources is used."

177. I agree with Mr. Brown and Ms. Dehon that the Secretary of State did not reach a consistent view that the extraction of Whitehaven coal would result in perfect, or

virtually perfect, substitution for the US coal otherwise supplying the UK and European steel market. First, given that this was an important issue at the inquiry, the Secretary of State (and the Inspector) would have said so in terms if they had agreed with WCM that that would be the case. Second, there are several express findings which indicate that the Secretary of State went no further than to accept partial substitution (see above). Third, there is this finding at the end of DL 21:

> "For these reasons he does not consider that this proposal would have a material effect on total emissions from burning coal during the steelmaking process, *regardless of whether there is perfect substitution or not*" (emphasis added).

178. By implication it appears that the Secretary of State thought it was unnecessary for him to resolve the substitution issue between the parties. Plainly that represented a departure from the cases of the principal parties at the inquiry. They had taken the view that it was an issue needing to be determined. In these circumstances the Secretary of State had to give a legally adequate explanation for taking a different view, assuming that it would be lawful to do so.

179. Mr Strachan submitted that he did so in this passage in the middle of DL 21:

> "Given the Secretary of State's conclusion above that the proposed development is unlikely to materially impact the demand for steel, it follows that the total amount of coking-coal burnt in the steel-making process is unlikely to materially change, regardless of where this coal comes from."

That conclusion was based on the Inspector's findings in IR 21.48 to IR 21.52 and the evidence for WCM summarised at IR 7.63 to IR 7.69 and IR 7.71, which the Secretary of State accepted.

180. Those references dealt with the following points. The demand for coking coal is led by the demand for steel. The supply of Whitehaven coal would not reduce the cost of coking coal, so as to reduce the cost of steel and *therefore* lead to an increase in the demand for steel and coking coal. Increasing the supply of HVA coal through extraction at Whitehaven is unlikely to make any difference to the global price of HVA coal. The supply at Whitehaven would be too insignificant to affect that price. But Whitehaven coal would have a competitive advantage over US coal so that substitution would occur. This was essentially the case that WCM had made at the inquiry (IR 7.63 to IR 7.69 and IR 7.71) to support its contention in the ES that there would be perfect, or virtually perfect, substitution (see [38], [40], [146] and [160] above).

181. But for a number of reasons, this trawl through the Inspector's report and the decision letter does not help WCM to defend the Secretary of State's decision on the basis referred to in [178] to [179] above.

182. First, DL 21 also contains the Secretary of State's finding that the Whitehaven coal would provide significant, not perfect, substitution of US coal, based upon IR 21.52. The internal inconsistency persists.

183. Second, the reasoning summarised in [180] above went no further than to say that demand for coking coal would not increase because Whitehaven coal will be cheaper than US coal to steel producers in the UK and Europe. Indeed, in certain passages the

Inspector and the Secretary of State focused on whether steel production *in the UK and Europe* would increase because of extraction of Whitehaven coal, concluding that it would be unlikely to (IR 7.68, IR 7.69, IR 21.50 to IR 21.52 and IR 21.128). But neither the Inspector nor the Secretary of State addressed the further important issue raised by the evidence from Wood Mackenzie and the submissions of FoE and SLACC, that US HVA coal would not remain in the ground because of demand from outside the UK and Europe, notably Asia. The important issue with which they failed to grapple is that the grant of planning permission at Whitehaven would increase the supply of high volatile coking coal. Even if that coal is supplied to the UK and Europe in place of US HVA coal, there is an increasing demand in Asia for that type of US coal.

184. Third, the fact that many US mines are "swing suppliers" does not demonstrate that the increasing demand in Asia will not be met by US mines. The Inspector and the Secretary of State relied upon the "swing suppliers" factor in support of a finding that there would be only partial substitution (IR 21.50, IR 21.52 and DL 21). Some US suppliers are lower down the cost curve and are not swing suppliers. For those which are swing suppliers the evidence was that they either reduce or "ramp up" production in response to changes in demand. The court was not shown any evidence before the Secretary of State that US suppliers would not meet that increased demand for HVA coal from Asia while Whitehaven coal is mined.

185. Indeed, in DL21 the Secretary of State went on to say:

> "This means that if the coal were not needed it would not be extracted."

But, of course, the corollary is that if there is a demand or need from elsewhere, then the US coal substituted by Whitehaven coal in relation to the UK/European market would be extracted. This only serves to underscore the complaint that the Secretary of State did not address the important point raised by FoE that, according to Wood Mackenzie, there is increased Asian demand for US HVA coal, thereby undermining WCM's substitution argument as offsetting GHG emissions from the burning of the Whitehaven coal.

186. Fourth, the passage in DL 21 upon which Mr Strachan relied ([179] above) is inconsistent with WCM's case as to why the combustion of Whitehaven coal did not require to be assessed. WCM's claim that that would not result in "any material additional emissions compared to the existing baseline" was simply based on the proposition that the extraction of Whitehaven coal would cause a roughly equivalent amount of US HVA coal to remain in the ground during the lifetime of the project. WCM did not advance an alternative and more ambitious case that end user emissions did not need to be assessed under the 2011 Regulations if the decision-maker should reject that contention. They did not say that if some, or all, of that US coal was mined and burned in addition to the 60 Mt of Whitehaven coal, for example to meet increased demand from Asia, global GHG emissions would nevertheless be the same compared to a scenario where the Whitehaven project did not go ahead. If that case had been advanced, it would have required a sufficiently detailed assessment to be provided by WCM.

187. Accordingly, for the reasons set out above the Secretary of State's handling of the substitution issue was legally flawed in a number of respects both individually and cumulatively :

(i) The ES was so deficient that it failed to comply with the 2011 Regulations ([122] to [124] above). Applying the principles in *Champion* ([86] to [87] above), I agree with the Secretary of State's reasoning set out at [52] above. I cannot be satisfied that the decision would not have been different if that procedural defect had not occurred;

(ii) The Secretary of State was not entitled to conclude that the effects of downstream or end use emissions might be "slightly beneficial" because that was inconsistent with other findings he made ([166] to [168]);

(iii) On the Secretary of State's findings, WCM's contentions that (a) end use emissions did not have to be assessed and/or (b) would not lead to a net increase in GHG emissions depended upon perfect, or virtually perfect, substitution ([169]). The Secretary of State either found that there would be only partial substitution [170] or failed to reach any consistent conclusion on the issue ([175] to [177]). On that basis the Secretary of State was not entitled to find that the proposed development would not lead to a net increase in GHG emissions;

(iv) The Secretary of State failed to take into account and deal with an obviously material consideration raised by FoE, namely that there would be demand from Asia for US HVA coal substituted by Whitehaven coal supplied to the UK/European market ([184] to [185]);

(v) The apparent conclusion by the Secretary of State that he did not need to decide whether there would be perfect substitution was legally flawed ([178] to [186]);

(vi) The Secretary of State failed to give legally adequate reasons in relation to these matters, thereby causing substantial prejudice.

188. Consequently, I reject WCM's contention that the effect of the Secretary of State's findings on substitution is that the failure to assess GHG emissions from the combustion of the Whitehaven coal was not a material error of law, alternatively that if it was, applying *Simplex,* the decision should not be quashed because it inevitably would have been the same absent the legal errors identified.

189. I uphold the legal challenges under Issues (i) and (ii).

Issue (iii) - Impact of granting planning permission on UK's leadership role in promoting international action on climate change.

190. The Paris Agreement recognises the important role to be played by developed countries in tackling climate change. The last recital states:

> "*Also recognizing* that sustainable lifestyles and sustainable patterns of consumption and production, with developed country Parties taking the lead, play an important role in addressing climate change,"

Article 4(4) states:

> "Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their

> mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances."

191. The Climate Change Act 2008 is the main statutory scheme for giving effect to the UK's commitment to achieve net zero by 2050. The framework was analysed in *R (Friends of the Earth Limited) v Secretary of State for Business, Energy and Industrial Strategy* [2023] 1 WLR 225 at [28] to [55]. The Secretary of State mainly responsible for giving effect to the 2008 Act is now the Secretary of State for Energy Security and Net Zero. Part 2 of the 2008 Act deals with the Climate Change Committee ("the CCC"), the independent body charged with advising the Secretary of State on the setting of carbon budgets and advising Parliament on the progress being made to achieving those budgets and the net zero target.

192. The closing submissions of FoE to the inquiry (para. 106) highlighted a number of reports by the CCC explaining the importance of the UK's leadership role for achieving contributions from other countries to reducing GHGs and climate change. The CCC described the diplomatic efforts which the UK had made to reduce GHG emissions from the use of coal. The choices made by the UK in, for example, setting its "nationally determined contribution" under the Paris Agreement for reducing emissions and the 6th Carbon Budget affected its credibility as a climate leader and set an important context for the making of commitments by other countries. One of WCM's witnesses accepted during cross-examination at the inquiry that this form of "leading by example" includes decisions made by the Government on major projects such as the Whitehaven proposal (para. 107). Lord Deben made much the same point as the then Chair of the CCC (see letter of 29 January 2021 to the first defendant).

193. In their opening submissions at the inquiry (para. 27) FoE put their point succinctly:

> "…the UK can only credibly claim to be a world leader on climate issues if it practices what it preaches."

The concern that the grant of planning permission for the Whitehaven coal mine would harm the ability of the UK to persuade other countries to reduce GHG emissions from the use of coal was advanced as a material disbenefit of the proposal.

194. This case was put in at least two main ways. First, the mine would result in a substantial net increase in GHG emissions and would therefore set a bad precedent internationally for the development of coal mines elsewhere in the world. Second, even if the Secretary of State were to accept that the Whitehaven project would operate as a net zero mine (taking into account the burning of the coal produced), that would still be a harmful precedent, because any further mining projects of the same nature would depend upon the off-setting of GHG emissions. Offsets are a finite global resource. The UK should not be increasing its production of coal (e.g. paras.110 to 118 of FoE's closing submissions and paras. 71 and 76 of SLACC's closing submissions).

195. In my judgment it is plain from, for example the opening and closing submissions for SLACC and FoE, that these were "principal important controversial issues" attracting a legal duty on the part of the Secretary of State to give reasons explaining in a lawful manner how those issues were resolved. That appears from the nature of the matters raised, the evidence relied upon and WCM's response. I reject WCM's faint attempt to suggest that these were not issues which engaged the legal duty to give reasons.

196. SLACC called Sir Robert Watson to give evidence. He was formerly the chair of the UN's Intergovernmental Panel on Climate Change ("IPCC"). He has also been the Chief Scientific Adviser to the Department for Environment, Food and Rural Affairs and to the World Bank. In two proofs of evidence he explained why permitting the project would harm the UK's leadership role and diplomacy to encourage action by other countries to tackle climate change. He also relied upon observations by Mr. John Kerry, the US Presidential Envoy for Climate.

197. The inquiry also received evidence from John Ashton CBE, a former Special Representative for Climate Change at the Foreign and Commonwealth Office. He was said to have been involved in the diplomacy of climate change for nearly 25 years, mainly at a high level. He gave specific evidence on how the UK has previously relied upon its own efforts to reduce the use of coal and GHG emissions, in order to persuade other countries to do likewise. "But diplomatic leverage depends upon reputation for integrity and coherence" which can easily be lost. If the Whitehaven project were to go ahead there would be serious damage to the UK's diplomatic ability to encourage other countries to take measures against climate change, not just on coal but on the climate more generally. He said that this would be against the national interest (para. 44).

198. In their closing submissions both claimants pointed to the absence of any evidence for WCM from a witness with comparable experience and standing to Sir Robert Watson and Mr. Ashton. It is informative to see how the Inspector summarised WCM's case, largely by reference to its closing submissions (see the first sentence of section 7 of the IR).

199. WCM's case was summarised at IR 7.133 to IR 7.142 and IR 7.232 to IR 7.233. This part of its case was entitled "virtue signalling." WCM adopted Sir Robert Watson's explanation of that term: someone who wants to look good but not for the real reason and not by looking at the evidence, but simply taking the moral high ground without looking at the scientific evidence (IR 7.134).

200. WCM suggested that to treat the grant of planning permission for the mine as sending out a negative and harmful signal to the international community involved the objectors ignoring evidence in support of that decision, in particular that this would be a net zero mine (see e.g. IR 7.138 to IR 7.140, IR 7.142 and IR 7.232 to IR 7.233). Instead, that should be seen as a positive signal. Furthermore, the international community would recognise a distinction between thermal and metallurgical coal (IR 7.140).

201. WCM even went so far as to suggest that the objections raised by SLACC, FoE and others were not a material planning consideration (IR 7.136 to IR 7.139).

202. Fortunately, the Inspector was not distracted by these points. When he came to deal with the objection, he did not suggest that it should be rejected as an irrelevant consideration, nor did he rely upon the notion of "virtue signalling." He did not suggest that the objection had no merit because of any distinction between thermal and metallurgical coals.

203. Wisely, Mr. Strachan (who did not appear at the inquiry) did not attempt to argue that the objectors' argument was legally irrelevant. Instead, he submitted that the Inspector had accepted WCM's case that the net zero nature of the project would be a positive signal and therefore beneficial in the planning balance. It would set a good precedent. In other words, WCM's case in this court does involve accepting that the signal sent by

the grant of a planning permission for the mine (and its effect on the UK's standing to promote international action to tackle climate change), whether good or bad, is a relevant planning consideration.

204. The Inspector summarised FoE's case on this issue at IR 10.59 and IR 10.94 to IR 10.103 and SLACC's case at IR 12.50 to IR 12.57. Mr. Ashton's evidence was summarised at IR 16.46 and IR 16.50 to 16.52.

205. The Inspector dealt with the issue at IR 22.16 to IR 22.18:

> "22.16 There was considerable discussion during the Inquiry regarding the "virtue signalling" of granting planning permission for a new coal mine against the background of climate change and the UK's position as a world leader in that regard. However, planning policy does not provide any restrictive approach to coal extraction. It provides a rigorous test for the consideration of coal mining proposals as prescribed by paragraph 217 of the Framework.
>
> 22.17 There is no justifiable basis for finding that the benefit of maintaining a sufficient supply of minerals, which does not exclude coal, as set out in paragraph 209 of the Framework should necessarily be reduced as a consequence of climate change policy provided that proposed development addresses such policy. In this regard, the granting of planning permission for the proposed development would only signal that the planning balance here, given current policy, fell in favour of the proposal. As such I do not consider that the granting of planning permission would set an undesirable planning precedent.
>
> 22.18 Notwithstanding the views expressed during the Inquiry, the clear intent of the applicant is to seek to ensure that the proposed development is net zero and is consistent with Chapter 14 of the Framework and the BEIS Industrial Decarbonisation Strategy. No other evidence was forthcoming regarding any other mine in the world that is, or intending to seek, net zero attainment. Against this background, there is the likelihood that the proposed development would set a benchmark to which other mineral extraction developments should aspire. Whilst I do not attach anything more than negligible weight to this benefit, it nonetheless provides an example of how mineral development can be designed to meet the requirements of Chapter 14 of the Framework and facilitate the sustainable use of minerals in accordance with Chapter 17."

206. The Secretary of State adopted those conclusions (DL 5) save in one respect which is not in dispute in these proceedings. In IR 22.16 the Inspector suggested that planning policy, including para. 217 of the NPPF "does not provide any restrictive approach to coal extraction." That is not strictly correct. In summary, that paragraph provides that planning permission should not be granted, unless the proposal is environmentally acceptable (which must include impact on climate change), or it provides national, local or community benefits which clearly outweigh its likely impacts (see [113] above). In

DL 23 the Secretary of State corrected IR 22.16 by stating that while planning policy does not set out a purely prohibitive policy for coal, as in the case of peat, nevertheless para. 217 of the NPPF "sets a high hurdle." The decision letter then went on to paraphrase that paragraph in the way I have set out above.

207. I agree with Mr. Strachan that it does not really matter that the Inspector did not address the issue raised by objectors in chapter 21 of his report and that he only dealt with it in chapter 22 when he struck the planning balance. At that stage, when applying para. 217 of the NPPF, he brought in all relevant considerations. At DL 65 the Secretary of State agreed with the Inspector that para. 217, and an equivalent development plan policy, were the key considerations in this case. There is no challenge to that conclusion. The absence of any findings on the effect on the UK's leadership role in Chapter 21 of the Inspector's report does not matter. What does matter is whether his conclusions in IR 22.16 to IR 22.18 reveal any error of law.

208. As I have said, the Inspector, and therefore the Secretary of State as well, accepted WCM's case that the Whitehaven mine would be likely to set a net zero benchmark to which other mineral extraction developments should aspire. In reaching that conclusion they relied upon the previous findings in chapter 21 of the Inspector's report (and the corresponding parts of the decision letter) that the proposal would not result in a net increase in GHG emissions, taking into account emissions from the burning of the Whitehaven coal and substitution. I therefore agree with Ms. Dehon that because the claimants' challenges must succeed under Issues (i) and (ii), they must also succeed under Issue (iii). The assumption that the proposed mine would not produce a net increase in GHG emissions, or would be a net zero mine, is legally flawed for the reasons previously given.

209. The view that the Whitehaven mine would be net zero is the only reason of any substance now advanced by WCM as to why the Secretary of State did not need to grapple with the objection the subject of Issue (iii). That argument is unsustainable.

210. In any event, even if the Secretary of State's view that the Whitehaven project would be a net zero mine was not open to legal challenge, the claimants would still succeed under Issue (iii). The Secretary of State failed to deal in any way with the claimants' alternative case that a positive precedent effect of a net zero mine leading to other similar projects would depend upon further offsetting arrangements; that would be undesirable because offsets are a finite resource. Neither the Inspector nor the Secretary of State tackled this substantial point under Issue (iii), because of their reliance upon the net zero mine approach.

211. For these reasons I uphold the legal challenge under Issue (iii).

Issue (iv) - Arrangements for offsetting GHG emissions from the operation of the mine

212. Issue (iv) relates to FoE's ground 1. WCM estimated that the operation of the Whitehaven mine would produce 1.85 Mt CO_2e over the life cycle of the project. The Secretary of State accepted the offsetting arrangements in the s.106 obligation entered into by WCM as reducing the net change in GHG emissions from the operation of the mine to zero (see [30] to [32] above). The arrangements would involve the purchase of credits in the voluntary carbon market. The obligation before the Inspector and the Secretary of State allowed the purchase of offsets arising outside the UK.

213. FoE submitted that in his report the Inspector endorsed the GHG assessment produced for WCM in relation to the offsetting of operational emissions (see e.g. IR 21.97 to IR 21.101, IR 21.125, IR 21.130 and IR 21.133). WCM claimed that the emissions, once offset, would represent 0% of the UK's national carbon budgets. FoE submitted that properly construed the domestic legislation relating to carbon accounting for the purposes of compliance with those budgets does not allow offsets from outside the UK to be taken into account. Accordingly, the Inspector and the Secretary of State erred in law.

214. WCM objected that this legal argument was not raised by FoE during the inquiry or during the application process leading up to the decision letter and that it was too late for the matter to be raised in proceedings under s.288 of the TCPA 1990.

215. Wide-ranging arguments were deployed by both FoE and WCM on a number of issues under FoE's ground 1. This decision will have to be quashed in any event on the basis proposed by the Secretary of State, reinforced by the conclusions I have reached under Issues (i) and (ii). It will also have to be quashed under Issue (iii). It would be inappropriate for these additional matters to be discussed at length in this judgment. Fortunately, there is no need to do so. Issue (iv) can be dealt with relatively shortly.

216. In para. 79 of its closing submissions FoE crisply set out its case on offsetting. It had three components. The Inspector identified the first two (paras. 79(a) and (b)) at IR 10.70 and IR 10.71.

217. Paragraph 79(c) of the FoE's submissions said:

> "The CCC has specifically advised that "*all UK emissions must be tackled, <u>without reliance on offsets from elsewhere</u>*" (emphasis added). It appears to be common ground that "elsewhere" means UK emissions must by tackled by UK offsets. However, when asked about this, Miss Leatherdale was not able to identify any projects in the portfolio of Gold Standard that are UK-based." (original emphasis)

FoE accepts that this passage did not raise any argument about the legal regime for carbon accounting under the Climate Change Act 2008. It did on the other hand clearly raise the UK's *policy* that UK GHG emissions should be tackled without relying upon offsets from outside the UK.

218. Mr. Toby Fisher, on behalf of FoE, showed the court a number of policy documents which supported the straightforward point advanced in para. 79(c) of FoE's closing submissions. They included the CCC's statutory advice on the setting of the sixth carbon budget, the Government's Industrial Decarbonisation Strategy and the Government's Net Zero Strategy. No issue is taken about the import of these policy documents.

219. Although the Inspector's report referred to para. 79(a) and (b) of FoE's closing submissions, it did not mention the objection set out in para. 79(c). Neither the report nor the decision letter addressed that point. The court was not shown anything in the Inspector's report, or elsewhere, to indicate that WCM responded to the policy objection raised. For example, it was not said by WCM that the s.106 obligation before the Secretary of State would prevent reliance upon non-UK offsets. At the hearing before me it was common ground that it would not.

220. WCM's case that the Whitehaven mine would be net zero was accepted by the Inspector and the Secretary of State. It formed an important part of that case and of their reasoning. By the same token, the application of the UK's policy to the offsetting proposed by WCM to support its net zero claim was "a principal important controversial issue" which attracted a legal obligation on the part of the Secretary of State to give reasons. It was also an "obviously material consideration" to the Secretary of State's assessment of WCM's "net zero mine" case.

221. For these reasons I accept that FoE has established a legal ground under Issue (iv) for quashing the decision. Nevertheless, WCM submits that the court should exercise its discretion not to quash the decision. This involves the application of the test in *Simplex* (see [85] above).

222. For this purpose, WCM relies upon the unilateral undertaking under s.106 of the TCPA 1990 which it entered into on 6 February 2023 (see [43] above). It is said that the effect of the undertaking would be to restrict reliance on offsets to UK-based credits.

223. This has given rise to a substantial dispute in witness statements filed on behalf of FoE and WCM as to whether this revised commitment to offset the residual GHG emissions from the operation of the mine is deliverable. It is said, for example, that there are insufficient UK-based credits available to offset the annual emissions from the mine. Even if the UK market were to be scaled up significantly, the mine would still take up a substantial proportion of those credits, to the detriment of other businesses in the UK seeking to rely upon them. WCM contested that evidence. WCM also said that if it could not obtain sufficient credits to satisfy the unilateral undertaking, the mine could not be operated, or operations would have to cease until compliance is achieved. The claimants pointed to a risk of the project becoming a stranded asset.

224. I agree with Mr. Fisher that the deliverability of the offsetting arrangements proposed by WCM was a relevant planning consideration which the Secretary of State had to take into account. The decision to grant planning permission proceeded on the basis that the proposal would cause environmental harm (e.g. harm to the Pow Beck Valley and to a heritage asset) so that it did not satisfy para. 217(a) of the NPPF. WCM therefore had to demonstrate benefits outweighing that harm. The economic and other benefits upon which the Secretary of State relied in the decision letter will not occur unless the project and offsetting are both deliverable.

225. The court is not in a position to resolve such competing contentions. The evidence has not been tested. Indeed, that would be inappropriate. Instead, the 2023 unilateral obligation and the rival evidence upon the merits of the offsetting now proposed were matters to be put before the Secretary of State. The first defendant was the decision-maker who should have been asked to consider and determine those issues. It is not for the court to take on the decision-maker's fact-finding role in order to decide whether, absent the relevant error of law, the decision would inevitably have been the same, albeit on the basis of fresh material that the Secretary of State was never asked to consider. There is no escaping the simple point that the particular argument of FoE which I have addressed under Issue (iv) was fairly and squarely before the Secretary of State. Thus any attempt by WCM to answer that contention should also have been before the decision-maker.

226. I uphold the legal challenge under Issue (iv) on the basis set out above, but no further.

Issue (v) – Unlawful disparity in the treatment of the parties' cases

227. Issue (v) relates to SLACC's ground 4. The argument begins with para. 217 of the NPPF (see [113] above). The Secretary of State decided that the proposal would cause environmental harm and so did not satisfy sub-para. (a). Consequently, WCM had to show benefits outweighing that harm under sub-para. (b). Accordingly, WCM bore an evidential or policy burden (not a legal burden of proof) of the kind recognised in *Satnam Millennium* at [104].

228. SLACC raises two points. First, it is said that the Inspector and the Secretary of State wrongly required SLACC to provide "certainty" in its evidence on a number of points, for example the absence of future demand for coking coal, or the potential for introducing or scaling up alternative technologies. It was submitted that this also involved improperly putting a "burden" on SLACC contrary to para. 217 of the NPPF. I do not accept this submission. Read fairly and in context, the Inspector and the Secretary of State were simply referring to the uncertainty surrounding a number of assessments or projections about future circumstances. They did not improperly place a burden upon SLACC in relation to such matters.

229. Second, SLACC complains that in a number of passages both the Inspector and the Secretary of State accepted probabilistic assessments put forward by WCM, for example, with regard to the claimed substitution effect and emissions from the end use of burning the coal. They submit that this was inconsistent with the approach they took to points advanced by SLACC, where they expected certainty to be shown. In my judgment there was no such inconsistency or error of law. As *Satnam* at [108] shows, the word "certainty" need not be used in an absolute sense. There may be degrees of certainty or, indeed, uncertainty. The language used in the Inspector's report and in the decision letter is consistent with that approach. That language reflected a judgment reached in relation to each subject. It did not involve any inconsistency of approach.

230. For these reasons I reject the ground of challenge under Issue (v), SLACC's ground 4. It is unarguable.

Conclusions

231. For the reasons set out above:

(i) I accept the grounds of challenge under Issues (i), (ii), (iii) and (iv) to the extent set out above and I grant permission to bring the claims under s.288 of the TCPA 1990 to that same extent;

(ii) I refuse to grant permission for all other grounds of challenge as being unarguable;

(iii) The court orders the decision to be quashed.