OUTER HOUSE, COURT OF SESSION

[2025] CSOH 10

P560/22, P967/23, P1158/23

OPINION OF LORD ERICHT

In the Petitions

by

(FIRST) GREENPEACE LIMITED

Petitioner

for

Judicial review of the lawfulness of the grant of consent given by the Secretary of State for Business Energy and Industrial Strategy under Regulation 14 of the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 and the grant of consent under Regulation 15 of the 2020 Regulations by the Oil and Gas Authority to BG International Limited for the development of and production from the Jackdaw Field

Petitioner: Crawford KC, Welsh; Harper Macleod LLP
First Respondent (Advocate General for Scotland): Pirie KC, Tariq KC; Office of the Advocate General
Second Respondent (The Oil and Gas Authority also known as North Sea Transition Authority): Moynihan KC, E Campbell; Drummond Miller LLP
First Interested Party (BG International Ltd): Christine O'Neill KC, Solicitor Advocate, D Scullion; Brodies LLP

(SECOND) GREENPEACE LIMITED

Petitioner

for

judicial review of the lawfulness of the agreement to the grant of consent under regulation 14 of the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 by the Secretary of State for Business, Energy and Industrial Strategy and of the grant of consent under regulation 15 of the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 by the Oil and Gas Authority to Equinor UK Limited for the development of and production from the Rosebank Field.

Petitioner: Crawford KC, Welsh; Harper Macleod LLP
First Respondent (Advocate General for Scotland): Pirie KC, Tariq KC; Office of the Advocate General
Second Respondent (The Oil and Gas Authority also known as North Sea Transition Authority): Moynihan KC, E Campbell; Drummond Miller LLP
First Interested Party (Equinor UK Ltd): MacGregor KC, Breen; CMS Cameron McKenna Nabarro & Olswang LLP
Third Interested Party (Ithaca SP E&P Ltd): McBrearty KC, R Anderson; Pinsent Masons LLP

(THIRD) UPLIFT

Petitioner

for

judicial review of (first) the agreement to the grant of consent in terms of Regulation 14 of the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 by the Secretary of State for Energy Security & Net Zero; and (second) the grant of consent in terms of Regulation 15 of the said Regulations by the Oil and Gas Authority, for the development of and production from the Rosebank Oil Field

Petitioner: Duncan KC, Colquhoun; Davidson Chalmers Stewart LLP
First Respondent (Advocate General for Scotland): Pirie KC, Tariq KC; Office of the Advocate General
Second Respondent (The Oil and Gas Authority also known as North Sea Transition Authority): Moynihan KC, E Campbell; Drummond Miller LLP
First Interested Party (Equinor UK Ltd): MacGregor KC, Breen; CMS Cameron McKenna Nabarro & Olswang LLP
Third Interested Party (Ithaca SP E&P Ltd): McBrearty KC, R Anderson; Pinsent Masons LLP

29 January 2025

Introduction

[1] A developer must not commence a project in respect of offshore oil and gas without:

(a) the Secretary of State's agreement to the grant of consent by the Oil and Gas Authority (now known as the North Sea Transition Authority) ("OGA"); and

(b) the consent of the OGA

(Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 (the "2020 Regulations"), Regulation 4).

[2] These three petitions relate to oil or gas projects in the North Sea and North Atlantic. Two non-governmental organisations, Greenpeace and Uplift, seek to challenge (a) the decision of the Secretary of State to agree to the OGA's grant of consent, and (b) the decision of the OGA's to grant consent. In Petition P560/22, (the "Greenpeace Jackdaw Petition") Greenpeace challenges the decisions in relation to the Jackdaw project. In Petition P967/23, (the "Greenpeace Rosebank Petition"), Greenpeace challenges the decisions in relation to the Rosebank project. In Petition P1158/23, (the "Uplift Rosebank Petition"), Uplift challenges the decisions in relation to the Rosebank project.

[3] All parties are agreed that the decisions were unlawful as the Environmental Impact Assessments ("EIA") on which they were based did not assess the effect of downstream emissions (sometimes also referred to as Scope 3 emissions), ie the effect on climate of the combustion of the oil and gas to be produced.

[4] The issue in this case is what remedy the court should grant in respect of these admittedly unlawful decisions. Should the decisions be reduced (quashed) and made again on a proper and lawful basis taking into account downstream emissions? Or should the

court grant declarator rather than reduction, so that the decisions stand and the projects proceed despite the decisions being unlawful.

The Jackdaw project

Introduction

[5] The developer of the Jackdaw project, and the First Interested Party in the Greenpeace Jackdaw Petition, is BG International Limited. BG International Ltd is part of the Shell group of companies. As various other companies in that group are involved in the Jackdaw project, it is convenient to refer collectively to Shell rather than referring individually to BG International Limited and other particular companies within the Shell group.

[6] Both Greenpeace and Shell have lodged affidavits relating to the Jackdaw project. Greenpeace have lodged an affidavit from Dr Doug Parr, the chief scientist and policy director for Greenpeace. Shell have provided an affidavit from Mr Simon Roddy who has been the leader for the Shell UK Upstream business since May 2021 and is the Decision Executive for the Jackdaw project. Mr Roddy is responsible for making the key decisions in relation to the project. The content of these affidavits is disputed. This judicial review is proceeding in the normal way on the basis of documents and legal submissions and not hearing witness evidence, and it is not for me to resolve the differences between the affidavits or make findings of fact on matters in dispute. Nevertheless, the affidavits are useful by way of background and to inform the court of the positions of Greenpeace and Shell.

The Jackdaw project

[7] The Jackdaw field is an ultra-high pressure/high temperature ("uHPHT") gas condensate field located in the Central North Sea. The Jackdaw development will comprise a "not permanently attended installation" consisting of a wellhead platform with four wells, connected via a 30 km subsea pipe to the existing operational Shearwater hub which is operated by Shell. All operational support for Jackdaw will be provided by the existing Shearwater facility. All processing of the gas and fluid extracted from the Jackdaw Field will be carried out at Shearwater. Gas and condensate will then be exported to the mainland separately via Shearwater's export pipelines.

[8] Works at the Jackdaw field are expected to be completed in the first half of 2026, with production commencing later in 2026.

[9] Jackdaw is expected to produce for around 8 years. According to Mr Roddy, the Jackdaw field is expected, at its peak, to produce around 6.5% of the UK's gas production.

The work involved in the Jackdaw project

[10] Mr Roddy explains that there are four key elements of the project. The drilling of the four wells was commenced in August 2023 and as at the end of August 2024 was 52% complete at a cost of £220m. The sub-sea pipeline was installed in July 2024 and as at the end of August 2024 the pipeline system was 57% complete at a cost of £170m. The construction of the wellhead platform was commenced in the third quarter of 2022, approximately a month after the OGA consent on 1 June 2022, and as at the end of August 2024 was 90% complete at a cost of £275m. The modifications to the Shearwater platform were commenced in April 2024 and as at the end of August 2024 were 77% complete at a cost of £48m.

Making the Jackdaw project safe

[11] Mr Roddy explains that if Shell were required to suspend the works at the Jackdaw field, it could do so in a safe manner. However, this would be a complex exercise. It is technically feasible to suspend work on the wells only when an uHPHT section of the well has been made safe. Drilling of the first well is complete and has been made safe by the installation of a "Christmas tree". It is anticipated that all four wells will be completed by around June 2025. Suspension of the works would have an impact on Shell's ability to secure the specialist service companies and specialist equipment available at present and required when the works restarted. Essential works to be completed to make the pipeline safe for other seafarers would extend until spring 2025. A guard vessel or temporary navigation aid would be required to protect the jacket from vessel collision. The estimated cost of a 12 month suspension would be at least £200million plus a significant delay to project start up.

Effect of delay on the Jackdaw project

[12] In addition to the costs of making the works safe, Mr Roddy has identified other consequences of delay. Shell has entered into various contracts with other commercial parties in relation to the export of gas and liquids from the field in the expectation of production commencing at the latest in the third quarter of 2026. If production is delayed Shell may be required to pay compensation under the contracts, or the contracts may be terminated. The jobs of the 1000 workers involved in the construction of the project would be at risk and they might take other work or move abroad and be difficult to replace once the project re-commenced. A delay in the start of production would reduce the overall amount of gas that could be produced from the field by 2 to 5 million barrels as there will be

less available time to recover the gas reserves from the Jackdaw field prior to cessation of production at Shearwater.

Effect of cancellation of the Jackdaw project

[13] If the Jackdaw project were required to stop permanently, decommissioning of the already installed infrastructure would be required at a cost estimated by Mr Roddy to exceed £350million.

The Rosebank project

Introduction

[14] The developer of the Rosebank project, and the First Interested Party in the Greenpeace Rosebank and Uplift Rosebank Petitions is Equinor UK Limited. The Third Interested party in the Greenpeace Rosebank and Uplift Rosebank Petitions is Ithaca SP E&P Ltd. Ithaca obtained an interest in Rosebank by its acquisition of Siccar Point Energy in July 2022. Equinor holds an 80% interest in Rosebank with Ithaca holding 20%. Equinor acts as an "operator", undertaking the day-to-day management of Rosebank and employing or engaging the majority of staff. Ithaca acts as a "non-operator", maintaining an active oversight role. As Ithaca was not listed as an interested party in either the Greenpeace Rosebank Petition nor the Uplift Rosebank Petition, these petitions were originally served on Equinor and not Ithaca. On 20 August 2024, Ithaca was given leave to enter each process in each of the Rosebank Petitions as an interested party.

[15] Greenpeace, Uplift, Equinor and Ithaca have lodged affidavits relating to the Rosebank project. Greenpeace has lodged an affidavit by Dr Parr. Uplift have lodged affidavits by Dr Daniel Jones (Head of Research at Uplift) and Tessa Khan (Executive

Director of Uplift). Equinor has lodged affidavits by Aud Lisbeth Hove, (Vice President Project Management and Control and Rosebank Project Director) and Valerie Appleyard (Environmental advisor for the Rosebank project). Ithaca has lodged an affidavit by Iain Lewis (Chief Financial Officer of Ithaca). As with the affidavits in the Greenpeace Jackdaw Petition, these affidavits are useful by way of background and to inform the court of the positions of Greenpeace, Uplift, Equinor and Ithaca, but I make no findings of fact in relation to them. Equinor also produced an affidavit from Mark Wilson, a director of the trade body Offshore Energies UK, setting out the views of that trade body and its members on various general issues, which I found to be of little assistance in the resolution of the particular issues arising in these petitions.

The Rosebank project

[16] The Rosebank project comprises a Floating Production, Storage and Offloading ("FPSO") vessel and three subsea production templates with up to seven production wells, five water injection wells and an export pipeline.

[17] Mr Lewis explains that Rosebank is estimated to be the largest undeveloped oil and gas field in the UK continental shelf. The first production of oil is expected to be in 2026-2027. Rosebank is estimated to have recoverable resources of over 300 million barrels of oil equivalent and a production life of around 25 years. In the period to 2030 it is estimated that the field will produce 7% of the UK's oil crude output. The field will produce in excess of 21 million standard cubic foot of natural gas per day, equivalent to the daily usage of Aberdeen. Ms Hove states that Rosebank is expected to produce around 4.5% of the UK's gas production for the period 2032-2035.

[18] Ms Appleyard notes that guidance is required as to how to calculate the downstream emissions as there are several different ways to do the calculation. She states that the Rosebank average annual production equates to approximately 2.5% of UK oil and gas energy demand and to between 0.017% and 0.036% of global oil and gas energy demand.

[19] Dr Parr has made a rough calculation of the downstream emissions. He concludes that the combined emissions from both Rosebank and Jackdaw will likely be responsible for 0.00006345 degrees Celsius of global warming. He also calculates that as a result of Jackdaw and Rosebank there will be approximately 32,000 additional heat related deaths until 2100, with that figure being purely from heat-related deaths and not from other climate impacts.

Activity prior to the grant of consent/commencement of judicial review proceedings

[20] Ms Hove explains that the Rosebank project is a complex and long-term endeavour with work streams that take many years of planning and preparation. By the time the judicial review proceedings were commenced by the petitioners in late 2023, Equinor had placed more than 260 different contracts, committed funding of £1.87 billion and spent £466 million. Ms Hove does not provide a break down as to which of these contracts were entered into, and what funds were committed or expended, in the period prior to the grant of consent on 27 September 2023 and the period between then and the commencement of the first judicial review proceedings in November 2023. However, it is clear that significant commitments were made before the granting of the consent. For example, a bareboat charter for the FPSO vessel was entered into in January 2023 and Subsea production system, Umbilicals, Risers and Flowlines ("SURF") contracts were placed in March 2023. She explains that in entering into investment decisions and contracts prior to the granting of consent, Equinor acted on the basis that following *Greenpeace* v *Advocate General* and an

email from OPRED dated 1 June 2022, that there was no need to include downstream emissions in the Environmental Statement and also acted on the basis that the OGA and the UK government were supportive of the development.

[21] Mr Lewis explains that the deliberations concerning the final decision on whether to invest are often called the "Final Investment Decision". Although often spoken about as a single decision, it is a series of decisions over a period where the company moves closer to publicising its commitment to the project. Internal deliberations and deliberations with Ithaca's partners were underway during much of 2023. Ithaca announced the Final Investment Decision on 27 September 2023, in the context of the OGA grant of consent on the same day. The FID was taken against a supportive UK policy landscape, which included the principal objective under section 9A of the Petroleum Act 1998 of "maximising the economic recovery of UK petroleum", and fifteen meetings between Ithaca and government ministers from 7 April 2022 in which the government actively encouraged Ithaca's investment in Rosebank. In considering whether to make the FID, Ithaca was aware that a judicial review challenge was a possibility.

The work involved in the Rosebank project

[22] Work is ongoing to upgrade the FPSO vessel. Engineering and procurement of the SURF equipment commenced in 2023. Installation of the SURF equipment can only be done during suitable weather windows and three windows have been identified for this: 2024, spring/summer 2025 and spring/summer 2026. Drilling is scheduled to commence in the first/second quarters of 2025.

Effect of delay of the Rosebank project

[23] Ms Hove considers that there is a real risk that if there is a delay to allow re-consideration of the consent, the work due to be done in 2025 could not be rescheduled to 2026. This is for various reasons, including the limited availability of specialist vessels which must be contracted and scheduled several years in advance. A one year delay in relation to the consents would actually delay the project by two years or more. An even longer delay would likely arise if it was necessary to cancel the existing contracts and re-tender, rather than just negotiate extensions to the existing awarded contracts. There would also be additional costs for a 1 year delay in the region of £300 million in respect of SURF works and £95 million in respect of the drilling and wells works, and for a two year delay £500 to £600 million in respect of the SURF works and £210 million for the drilling and wells works. If vessels are redeployed on other projects Equinor may not be able to secure them for use at the next available weather window and Equinor will be in a weaker negotiating position which may lead to increased costs. Equinor estimates that a one year delay in the taking of new decisions on the grant of consent would result in at least a two to three year delay in first oil and commencement of production and Equinor may be required to pay compensation under various contracts, or the contracts may be terminated.

[24] Ms Hove further explains that the Rosebank project is expected to create 2,000 UK-based jobs during the height of the development phase and will continue to support and average of approximately 525 UK-based jobs during the lifetime of the field. The precise impact on jobs of suspending the works at Rosebank is difficult to predict, but several hundred workers could be exposed to the risk of redundancy.

Effect of cancellation of the Rosebank project

[25] Ms Hove states that if the Rosebank project does not go ahead, there will be no opportunity for the UK government to receive the significant tax receipts that will be generated by the project. She also states that the project will support local and UK employment during construction, operation and decommissioning stages over a 30 year life-span: it is estimated that it will support the equivalent of 13,293 man-years of full time employment, of which around 72% will be in the UK.

Grounds of review

[26] Although various grounds of review were pled, only three were insisted upon. The first, which was relied on by each petitioner in each of the three petitions, was that that the decisions were unlawful as they did not take account of downstream emissions. The other two grounds were relied on only by Uplift and arose only in the Uplift Rosebank Petition. These were ground 4 in that petition (failure to take the Scottish National Marine Plan into consideration) and ground 6 in that petition (failure of the OGA to give reasons).

Ground of review in all three petitions: Finch

[27] In each of the Greenpeace Jackdaw, Greenpeace Rosebank and Uplift Rosebank, the petitioners challenged the decisions of the Secretary of State and the OGA on the basis that they are unlawful as they did not take account of downstream emissions as required by *R (Finch)* v *Surrey County Council* [2024] PTSR 988 ("the *Finch* ground").

[28] Article 2(1) of the Parliament and Council Directive 2011/92/EU, as amended by Directive 2014/52/EU (the "Directive"), requires member states to adopt all measures necessary to ensure that, before development consent is given, projects likely to have

significant effects on the environment are made subject to a requirement for development consent and an assessment with regard to their effects on the environment. Article 3(1) requires that "the environmental impact assessment shall identify, describe and assess in an appropriate manner … the direct and indirect effects of a project" on various factors, one of which is climate. The Directive has been transposed into UK law through a series of statutory instruments applicable to different types of project for which, under the Directive, development consent and an economic impact assessment are required. In respect of offshore oil and gas, the Directive has been transposed into UK law previously by the Offshore Petroleum Production and Pipe-lines (Assessment of Environmental Effects) Regulations 1999 (the "1999 Regulations"), and currently by the 2020 Regulations. In respect of onshore oil and gas in England, the Directive has been transposed into English town and country planning law by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (the "2017 Regulations").

[29] In *Finch*, a developer applied to the local planning authority for planning permission for a project to extract oil at an onshore site in Surrey. The planning authority accepted as sufficient an Environmental Statement which assessed only direct releases of greenhouse gases at the project site over the lifetime of the project, and contained no assessment of the impact on climate of the combustion of the oil. The Supreme Court held by a majority of three to two that the council's decision to grant planning permission was unlawful because the EIA for the project failed to assess the effect on climate of the combustion of the oil to be produced (paragraph 174).

[30] That finding of the Supreme Court as to the proper interpretation of Directive as it is transposed to English law under the 2017 Regulations, is equally applicable to the proper interpretation of the Directive as it is transposed to UK law under the 2020 Regulations. The

decision of the Supreme Court is binding on this court, and accordingly the petitioners must succeed on this ground. In respect of both the Jackdaw project and the Rosebank project, both the Secretary of State's agreement to the OGA's grant of consent, and the grant of the consent of by the OGA, were unlawful because the environmental assessments for each project failed to assess the effect on climate of the combustion of the oil or gas to be produced.

Chronology of Finch

[31] Before leaving *Finch*, it is useful at this stage to set out the chronology of the *Finch* case and how that inter-relates with the chronology of the granting of consents for the Jackdaw and Rosebank fields.

[32] On 21 December 2020, the first instance decision in *Finch* was issued. Holgate J found that downstream emissions were not an effect of the project ([2020] EWHC 3566 (Admin); [2021] P.T.S.R. 1160 at para [101]).

[33] On 7 October 2021 the decision of the Inner House in *Greenpeace* v *Advocate General* was issued. That was a challenge to decisions of the Secretary of State and the OGA granting consent in relation to the Vorlich oil field in the North Sea. The decisions were made under the 1999 Regulations, which provided for a statutory appeal rather than judicial review, and have now been replaced by the 2020 Regulations. The Inner House held that downstream emissions were not direct or indirect effects of a project and did not require to be assessed in terms of the Regulations (para [64]). In so doing they expressly agreed (para [65]) with the reasoning of Holgate J at first instance in *Finch*. The Inner House refused the appeal and the challenge failed.

[34] On 14 January 2022, the Inner House refused leave to appeal to the Supreme Court in *Greenpeace* v *Advocate General*.

[35] On 17 February 2022, the decision of the Court of Appeal in *Finch* was delivered ([2022] EWCA Civ 187). The appeal was refused by a majority of two to one. The majority (Lewison LJ, Lindblom SPT) concluded that the downstream emissions were not relevant effects of the project and therefore did not have to be addressed in the environmental impact assessment. In his dissenting judgment Moylan LJ took the view that that conclusion was legally flawed (paragraph 95).

[36] On 27 May and 1 June 2022 respectively, in respect of the Jackdaw field, the Secretary of State agreed to the OGAs consent and the OGA granted consent, and the decisions were published on 1 June 2022.

[37] First orders in the Greenpeace Jackdaw Petition were granted on 15 July 2022. Shortly thereafter, on 27 July 2022, the petition was sisted (stayed) on the unopposed motion of Greenpeace pending the decision of the Supreme Court in *Finch*.

[38] On 3 August 2022, Equinor submitted the Rosebank Environmental Statement.

[39] On 9 August 2022, the Supreme Court granted leave to appeal in *Finch*.

[40] On 21 and 22 June 2023 the Supreme Court heard *Finch*.

[41] On 16 June and 27 September 2023 respectively, in respect of the Rosebank field, the Secretary of State agreed to the OGAs consent and the OGA granted consent, and the decisions were published on 28 September 2023.

[42] First orders in the Greenpeace Rosebank Petition were granted on 2 November 2023. Shortly thereafter, on 15 November 2023, the petition was sisted on the unopposed motion of Greenpeace pending the decision of the Supreme Court in *Finch.*

[43] First orders in the Uplift Rosebank Petition were granted on 18 December 2023, and shortly thereafter, on 8 January 2024, the petition was sisted on the unopposed motion of Uplift pending the decision of the Supreme Court in *Finch*.

[44] On 20 June 2024 the Supreme Court delivered its decision in *Finch.*

[45] On 1 July 2024 the sists in all three petitions were recalled to fix a by order hearing on 30 August 2024 to consider further procedure, and thereafter the petitions proceeded to a substantive hearing on 12 to 15 November 2024.

[46] Two points in particular can be taken from this chronology.

[47] The first is that the law on whether downstream emissions should be included in the environmental assessment was uncertain prior to the granting of the consents for each field: the split decision of the Court of Appeal predates the granting of the consents. The Jackdaw consent was granted after the split decision of the Court of Appeal in *Finch*. In respect of Rosebank, the Secretary of State's agreement to that the OGA consent was granted 5 days before the Supreme Court heard argument in *Finch*, and the OGA consent was granted after the Supreme Court had heard that argument.

[48] The second is that in commencing the projects after the granting of consents rather than waiting until the law was settled by the Supreme Court, the developers took the risk that the consents would be unlawful if the Supreme Court decided that downstream emissions must be included in environmental assessments.

Ground four of the Uplift Rosebank Petition: failure to take the Scottish National Marine Plan ("NMP") into consideration

[49] Uplift seeks reduction on the ground that the OGA and the Secretary of State were obliged to take the NMP into consideration in making their decisions regarding the proposed development at Rosebank, and failed to do so.

[50] This ground is unfounded.

[51] Uplift are correct to say that the Secretary of State was obliged to take the NMP into consideration. Section 58(1) of the Marine and Coastal Access Act 2009 provides that a public authority must take any authorisation decision in accordance with the appropriate marine policy documents, unless relevant considerations indicate otherwise. Section 58(2) provides that if such an authority takes such a decision other than in accordance with such documents, the public authority must state its reasons. The Secretary of State is such a public authority, and the appropriate marine policy documents are the NMP.

[52] However Uplift are wrong to say that the Secretary has failed to take the NMP into consideration. The NMP was considered in detail in the Rosebank Environmental Statement. Indeed, Appendix A to the Environmental Statement is headed "Alignment Between the Development and the Scottish National Marine Plan". The Environmental Statement was expressly taken into account by the Secretary of State and he took his decision in accordance with the NMP. Accordingly, the Secretary of State has complied with his duties under section 58.

[53] In respect of the OGA, the situation is reversed: Uplift are correct to say that the OGA did not consider the NMP but incorrect to say that the OGA was under a duty to do so.

[54] The 2020 Regulations set out an overall decision-making process with separate roles for the Secretary of State and the OGA. Within that overall process, responsibility for consideration of the NMP lies with the Secretary of State and not the OGA.

[55] The first stage of the decision-making process lies with the Secretary of State. When taking a decision as to whether to agree to the grant of consent, the Secretary of State must reach a conclusion on the significant effects of the project on the environment (Regulation 14(1)) and that conclusion must take into account the Environmental Statement (Regulation 14(2)). The NMP is considered as part of the Environmental Statement. So, for example, in this case the NMP was considered as it was part of the Rosebank Environmental Statement, in particular Appendix A.

[56] The second stage of the decision-making process lies with the OGA. Once the Secretary of State has made his decision as to whether to agree to the consent, the OGA must then decide whether to grant consent (Regulation 15(1)(a)). In so doing the OGA considers various matters (see para [60] below). There is no requirement in the 2020 Regulations for the OGA to duplicate the work already done by the Secretary of State. Where the OGA grants consent, it does not re-consider the matters already considered by the Secretary of State and come to its own separate independent decision on them: the OGA merely attaches the Secretary of State's decision to its own decision (Regulation 15(2)). The NMP having already been considered in detail by the Secretary of State as part of the first stage of the overall decision making process, the OGA was under no duty to repeat that work in the second stage of the overall process.

Ground six of the Uplift Rosebank Petition: failure of the OGA to give reasons

[57] Uplift also seeks reduction of the OGA decision on the ground that the OGA failed to give reasons for its decision to grant consent.

[58] Counsel for Uplift accepted that there was no statutory requirement to give reasons, but submitted that a separate duty to provide reasons had arisen at common law as an aspect of the general duties of procedural fairness and natural justice (*R* v *Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, at 560, R *(on the application of Help Refugees Ltd)* v *Secretary of State for the Home Department* [2018] 4 WLR 168, at paragraph 122.) In deciding whether to grant consent, the OGA must have regard to the matters set out in section 8(1) of the Energy Act 2016 and how it is acting in accordance with its strategy under section 9A of the Petroleum Act 1998 of maximising the economic recovery of UK Petroleum. Counsel for the OGA submitted that the 2020 Regulations set out the circumstances in which reasons require to be given, and the OGA was not under a wider obligation to provide reasons (*R (CPRE Kent)* v *Dover DC* [2018] 1 WLR 108, *Purdon* v *City of Glasgow District Licensing Board* 1989 SLT 201; *Stefan* v *General Medical Council* 1999 1 WLR 1293 at p1300).

[59] The 2020 Regulations set out in detail how the Secretary of State, in the exercise of his discretion, has decided to implement the Directive. In particular, they set out how the Secretary of State has implemented the requirement under Article 2(1) of the Directive to adopt measures necessary to ensure that before development consent is given, projects likely to have significant effects on the environment are made subject to a requirement for development consent and an assessment with regard to their effects on the environment. The 2020 Regulations set out a clear statutory scheme in respect of the giving of reasons. If the Secretary of State agrees to the grant of consent he must set out his conclusion on any

significant effects of the project on the environment (Regulation 14(3)). If the Secretary of State refuses to agree to the grant of consent he must set out the main reasons for that refusal (Regulation 14(4)). The Secretary of State's decision is then published, together with details of how any representations arising from the consultation process were taken into account (Regulation 16). If the Secretary of State has agreed to the grant of consent, but the OGA does not grant consent, the OGA must notify the developer of the reasons for its decision (Regulation 15(4)). Where, as happened in respect of Rosebank, the OGA grants consent, the OGA attaches to the OGA's notification the Secretary of State's decision (15(2)), and there is no obligation under the 2020 Regulations for the OGA to give reasons.

[60] In considering whether to grant consent, the OGA considers various factors set out in its published Financial Guidance and its published UK Continental Shelf Development and Production Consent Guidance. The OGA requires the developer to provide it with detailed information about these factors. One factor is the financial capacity of the developer (Financial Guidance). Another factor is that the OGA assesses whether the proposed project accords with the obligations set out in the OGA Strategy, including the Central Obligation under the Strategy to (a) secure that the maximum value of economically recoverable petroleum is recovered from UK water, and in so doing (b) take appropriate steps to assist the Secretary of State in meeting the net zero target, including reducing greenhouse gas emissions from sources such as flaring and venting and power generation (Consent Guidance paragraph 3-4). Other factors relate to technical matters regarding the proposed project (eg Consent Guidance paragraph 7, 12, 40, 58, 121). The OGA also considers commercial factors such as the developer's supply chain (Consent Guidance paragraph 70 ff). In order to satisfy the OGA on the various factors, the developer requires to provide the OGA with highly sensitive confidential business, operational and financial information. The

sensitivity of such information is reflected in the statutory scheme set out in the 2020 Regulations, which provides:

> "20. Confidentiality
>
> Nothing in these Regulations requires the disclosure of information which is subject to an obligation of confidentiality by virtue of any law of any part of the United Kingdom."

[61] In *R (CPRE Kent)* v *Dover DC* Lord Carnwath emphasised that "the court should respect the exercise of ministerial discretion in designating certain categories of decision for a formal set of reasons." (paragraph 58)

[62] In my opinion the court is not justified in interfering with the ministerial discretion exercised in designating, in the 2020 Regulations, what categories of decision require reasons and what categories of decision do not. Ministerial discretion has been exercised in designating the environmental impact assessment as a category for which formal reasons must be given (and indeed published), and in designating the other matters considered by the OGA as a category for which reasons need not be given.

[63] That is a rational distinction.

[64] There is a strong public interest in requiring the provision of reasons in respect of environmental matters. As Lord Leggatt says in *Finch* (emphasis added):

> "20 Obligations arising under the Aarhus Convention have been built into articles 6, 8 and 9 of the... Directive. ….. article 9(1) provides that the public must be promptly informed of the decision taken and of 'the main reasons and considerations on which the decision is based, including information about the public participation process'.
>
> 2 The rationale underpinning these public participation requirements is expressed in recital (16) to the … Directive:
>
> > 'Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and

> contributing to public awareness of environmental issues and support for the decisions taken.'
>
> Two important ideas are included within this rationale. First, public participation is necessary to increase the democratic legitimacy of decisions which affect the environment. Second, the public participation requirements serve an important educational function, contributing to public awareness of environmental issues. Guaranteeing rights of public participation in decision-making and promoting education of the public in environmental matters does not guarantee that greater priority will be given to protecting the environment. But the assumption is that it is likely to have that result, or at least that it is a pre-requisite. You can only care about what you know about." (Paragraph 21)

[65] There is no such strong public interest in requiring the provision of reasons for the matters considered by the OGA. These are confidential matters. They arise between the developer and the OGA, not between the OGA and the public or the OGA and the petitioner. Neither of the developers involved in the Uplift Rosebank Petitions seeks reasons from the OGA: the position of each of Equinor and Ithaca is that the OGA was under no obligation to give reasons.

[66] Accordingly, I find that the OGA was under no common law duty to give reasons for granting consent, and that ground of appeal 6 fails.

Parties' submissions on remedy

Submissions for Greenpeace

[67] Counsel submitted that the decisions should be reduced and remade in a lawful manner with all of the relevant material available in order that the respondents observe and fulfil their national and international obligations. The normal remedy was reduction and refusal of that remedy should be used sparingly (*R (Corus UK Limited)* v *Newport City Council* [2010] EWCA Civ 1626 at 15, *R (Sitki)* v *Inner London Crown Court* [1994] COD 342, *NLEI Limited* v *Scottish Ministers* 2023 SLT 149 at 59, *Douglas* v *Perth and Kinross Council* 2017

SC 523 at 46, *Amid* v *Kirklees Metropolitan Council* [2001] EWCA Civ 582 at 20). The government was subject to both domestic and international obligations in relation to the reduction of greenhouse gas emission (Climate Change Act 2008, section 1, *R (Fighting Dirty Limited)* v *Environmental Agency* [2024] EWHC 2029 (Admin) at 342(2)), *Verein KlimaSeniorinnen Schweiz* v *Switzerland* at number 3600/20 (2024) 79 EHRR 1 at paras [103]-[120], [420], [502], [521] and [523]-[526], Stern Report, *The Economics of Climate Change* 30 October 2006; *Berkeley* v *Environment Secretary* [2001] 2 AC 603 at p 608; *R (Edwards)* v *Environment Agency (No 2)* [2008] Env LR 34 at paragraph 63.). The failure to assess the downstream emissions could not be remedied other than by reduction (eg *Finch, Friends of the Earth Limited* v *Secretary State for Levelling Up, Housing and Communities* [2024] EWHC 2349 (Admin)). The excluded emissions were significant and would make a difference to the decision (*Berkeley*; *Finch* at p 152). Arguments that the development would be a net zero development, and that other oil and gas would be used instead should be rejected (*Friends of the Earth* paragraph 121-124). The emissions that have been excluded will be significant. The principle of finality does not override unlawfulness. Energy security was a matter for the Secretary of State and not the court. Considerations such as revenue from taxation must be balanced against, for example, the increased costs associated with tackling the effect of climate change. It was not relevant that the developers had been given incorrect advice by OPRED. The developers knew that the Supreme Court decision in *Finch* was awaited. Their decision to carry on with the development notwithstanding that uncertainty was a commercial decision for them at their own risk.

Submissions for Uplift

[68] Counsel accepted that reduction was a discretionary remedy which the court was at liberty to refuse (*Walton* v *Scottish Ministers*; *R (on the application of Champion)* v *North Norfolk District Council* [2015] 1 WLR 3710 and paragraph 54 – 58). The purpose of judicial review was the preservation of the rule of law and ensuring that public bodies comply with the duties that have been placed on them by Parliament and by the general principles of administrative law (*AXA General Insurance Co Limited* v *Lord Advocate* 2012 SC (UKSC) 122 at 162 and 169). Reduction will normally be the appropriate remedy (*R (on the application of Edwards)* v *Environmental Agency* [2008] Env LR 34 at paragraph 36, *Walton* v *Scottish Ministers* at paragraph 112). It could not be said that the decision if taken again would inevitably be the same. The public had been deprived of the ability to fully participate in the decision making process on downstream emissions, as required by the EIA Directive. Counsel further submitted that little prejudice had been suffered by the interested parties. The petition had been raised promptly and any development carried out by the developers in reliance on the OGA's grant of consent was carried out by them knowingly at their own risk. The arguments made by the respondent regarding potential benefits to the UK economy were irrelevant: these were a matter not for the Court of Session but for the OGA and the Secretary of State. Reduction did not invalidate all actions performed in reliance on it (*Boddington* v *British Transport Police* [1999] 2 AC 143 at 164; R *(on the application of Majera)* v *Secretary of State for the Home Department* [2022] AC 461).

[69] In response to the secondary position of Equinor that any reduction should be suspended pending re-determination, counsel for Uplift submitted that the clear intention was to permit them to continue the development in the *interim*. If the Secretary of State decides not to grant such agreement, the developers will have been permitted to continue

developing the project for a significant additional period of time on the basis of an unlawful consent. It would be incompetent for the Secretary of State to reconsider the agreement while the original agreement remained unreduced.

Submissions for the Advocate General

[70] Counsel accepted that the decisions were unlawful on the *Finch* ground and invited the court not to grant any remedy that would bring work on Jackdaw or Rosebank to a stop in a way that risked the safety or environment of the site. An unlawful administrative decision has legal effect until the court orders otherwise (*Majera)* and the court has discretion whether to deprive an unlawful position of legal effect (*Majera, Eba* v *Advocate General* 2012 SC (UKSC) 1, *Walton* v *Scottish Ministers* 2013 SC (UKSC) 67 at paragraphs 130 - 140 and 155 - 156. It was doubtful whether the Secretary of State had the power to re-consider his decision while the original decision remained in force. The order sought by Equinor for the Secretary of State to confirm the timescale for a re-consideration and the information required was opposed.

Submissions for the OGA

[71] The OGA accepted that the decision of the OGA to grant consent for the Jackdaw and Rosebank projects was unlawful on the *Finch* ground. The remedy to be granted was a discretionary matter for the court on which the OGA made no submissions.

Submissions for Shell

[72] Counsel invited the court to refuse reduction, failing which suspend any reduction to allow the decisions to be re-made or to allow safety works and the removal of equipment.

[73] Counsel submitted that in judicial review petitions the element of discretion was central and the court had power to withhold a remedy (*Hooley Limited* v *Ganges Jute Private Limited* 2019 SC 632 at para [15], *AXA General Insurance Co Limited* v *Lord Advocate* 2012 SC (UKSC) 122 at paragraph [161], *Grahame* v *Magistrates of Kirkcaldy* [1882] 9 R (HL) 91 at 91-2, 97, Rules of the Court of Session Rule 58(13)). The court was not bound to reduce an unlawful decision (*King* v *East Ayrshire Council* 1998 SC 182 at 194, *RBS Plc* v *Donnelly and McIntyre* [2020] CSOH 106 at [94] - [97], *William Grant and Sons Limited* v *Glen Catrine Bonded Warehouse Limited* 2001 SC 901 at 930). Judicial review was a flexible procedure and the court must not lose sight of the wider interests and good administration (*King,* at 196).

[74] Counsel submitted that there was a significant public interest in ensuring that those engaged in the development of projects can arrange their business activities with a high level of certainty. In the whole period in which Jackdaw had been under development UK government policy (and legislative activity) had been supportive of the project. Shell was entitled to act in reliance of that policy and legislative position and in compliance of the law as it then was. Shell was not at fault in omitting an assessment of downstream emissions: it was expressly told by the OPRED that downstream emissions did not form part of the consent process and would not be taken into account. Neither the Secretary of State nor the OGA had suggested to Shell that it ought not to take action to implement the consent, rather they had behaved in a business as usual fashion by granting additional consents and permits. Counsel also referred to the length of time which had elapsed since the consent was given and the length of time which would elapse before there could be re-consideration: there should be no return to regulatory limbo. In the exercise of its discretion the court was bound to consider the range of public and private interests in play (*Walton* at 103, 95). The

Jackdaw development was integral to the future viability and sustainability of other facilities in the North Sea, in particular the Shearwater hub.

[75] Counsel submitted that Shell's conduct should not be held against it in relation to remedy: Shell had acted in accordance with an *ex facie* valid consent granted in its favour in circumstances where it could not have any certainty as to the outcome or timing of *Finch.*

[76] Counsel emphasised that Shell did not contend that the works at Jackdaw could not be safely suspended on or reversed but rather sought to make plain the significant operational, safety and financial challenges of doing so. Reduction of the consent could lead to a requirement of decommissioning of the work at a cost to the public purse by virtue of tax allowances. A fresh application for consent was not an answer given the timescale, the practicable and financial consequences of any suspension, and the risk to viability of the project in its entirety and the broader infrastructure in the UK North Sea.

Submissions for Equinor

[77] Equinor's primary position was that the court should refuse reduction and instead pronounce a declarator that the Environmental Statement prepared by Equinor in respect of the Rosebank project was incomplete and not fully in compliance with the guidance subsequently provided by the UK Supreme Court in *Finch*. It would be inequitable and unjust to reduce the decisions given the stage the project had reached and the prejudice to the public interest that would be occasioned by reduction. The key questions for the court were whether Equinor should be made to bear the consequences of the failure by the respondents in their understanding of the legal requirements of an EIA and whether the Rosebank project should be placed in limbo for a significant period of time as a result.

[78] Counsel submitted that it was uncontroversial that the court had a discretionary equitable jurisdiction in relation to remedy(*Grahame* v *Magistrates of Kirkcaldy*, *London and Clydeside Estates Ltd* v *Aberdeen District Council* at p31, *King* v *East Ayrshire Council*, *Walton* v *Scottish Ministers* 2013 SC (UKSC) 67 at paragraphs 103 to 140, 155-156; *Caz Rae, Petitioner* 2024 SLT 974, *Kendall* v *Rochford District Council* [2014] EWHC 3866 (Admin), [2015] Env LR 21, paragraph 114, *O'Reilly* v *Mackman* [1983] 2 AC 237 at pp.280-28, *Bahamas Hotel* 2011 UKPC 4 at paragraph 40).

[79] Counsel submitted that it would be unjust to reduce consents determined many months before *Finch* was decided by the Supreme Court. That would be contrary to the public interest in good administration. It would also be unjust as Equinor had no option but to undertake significant works in reliance on the consent or it would have risked breaching its license. By email dated 1 June 2022 OPRED had advised Equinor that the Environmental Statement should not take account of downstream emissions. The issues which arise in this case did not arise from any failure by Equinor: it would be unreasonable to require Equinor to bear the consequences of the regulator's failure. Equinor had incurred significant expense in commencing a complicated sequence of highly technical works and it was reasonable for it to have done so pending the Supreme Court decision. It was not clear what the status of the works undertaken since the grant of consent would be if reduction was pronounced (*Boddington*; *Archid* v *Dundee* CC 2014 SLT 81). New decisions could not reasonably be expected to take place until at least late 2025 or 2026. The practical consequences of reduction would include reduced security in the midst of a European energy crisis, delayed tax income, disruption to the supply chain and direct investment, and increased project costs and complexity.

[80] Equinor's fall-back position was that the court should suspend the effect of any reduction until new decisions were taken and order the respondents to confirm what information was required by each respondent to make a new decision and the time scale for the decision to be taken. Courts can suspend the effects of any orders they make (*HM Treasury* v *Ahmed* 2010 2 AC 534 paragraphs 4-5, *Greenpeace Limited* v *Advocate General for Scotland)*. The petitioners had not sought *interim* orders. Equinor required to progress with the projects to avoid being in breach of licences and had spent very significant sums. Reduction would cause uncertainty to the status of works undertaken. There was no cogent material that there was likely to be any different decisions. The power to allow a new decision to be taken prior to decree of reduction arose from the equitable jurisdiction of the court to fashion practical remedies in public law cases and all the concerns of the Advocate General could be addressed by way of a suitably clear declarator. The competence of new decisions being taken prior to reduction of the original decision was not in doubt (*R (Rockware Glass) Limited* v *Chester CC* 2006 EWCA Civ 992 at paragraphs 71, 74-75, *R (on the application of Chichvarkin)* v *Secretary of State for the Home Department* [2010] EWHC 1858 at paragraph 46ff). Counsel invited the court to ordain the Secretary of State and the OGA to confirm: (i) what information is required by each respondent to make a new decision, and (ii) the timescale for new decisions to be taken.

Submissions for Ithaca

[81] Counsel submitted that reduction should be refused. The authorities on the court's approach to remedies were not controversial. It was common ground that there was a general principle that the rule of law requires that public decision making is made lawfully, and that judicial review remedies are discretionary. Counsel acknowledged that the

Environmental Statement was incomplete and not fully in compliance with the guidance subsequently provided by the Supreme Court in *Finch*, but submitted that a declarator was sufficient. At the time of the Environmental Statement, the law was as set out by the Inner House in *Greenpeace* v *Advocate General*. Equinor and Ithaca were obliged in terms of their licence to incur preparatory work and expenditure after the grant of consent. Equinor had sought guidance form OPRED and Ithaca and Equinor had regulated their businesses on the assumption that the consent was lawful. If reduction were granted contracts and expenditure incurred would be uncertain (*Boddington*). Competing policy considerations are recognised in primary legislation (Petroleum Act 1998 section 9A). The grant of reduction would have disproportionately wide implications for UK energy security policy, the UK economy (including direct investment, employment and supply chains), the UK's offshore energy infrastructure and security, wider commercial uncertainty and satisfying UK demand for oil and gas. Ithaca had made a significant investment, and the consequences of delay would be significant. Reduction would reduce the supply of oil and gas, not the existing UK and European demand. Reduction would affect the international perception of the UK, including its reputation for inward investment.

[82] Counsel further submitted that if reduction were to be refused, its effect should be suspended to allow the Secretary of State and the OGA to reconsider matters in the light of a revised Environmental Statement.

Remedies in Scottish judicial reviews

[83] In *EBA* v *Advocate General for Scotland* Lord Hope contrasted Scots and English law and said:

> ".. the grounds of judicial control of administrative action in Scotland are based on legal principle. Judicial review by the Court of Session is not an exercise of judicial discretion, in contrast to what was said as to the position in English law in R *(Sivasubramaniam) v Wandsworth County Council* [2003] 1 WLR 475, para 47….. …[A]lthough the Court has a discretion to refuse a remedy in judicial review on what may be described as equitable grounds, it has no discretion to refuse to entertain a competent application: *Tehrani v Secretary of State for the Home Department* 2007 SC (HL) 1, para 53." (paragraph 27)

[84] In a further contrast to the position in England, the English concepts of mandamus, prohibition and certiori (now known as mandatory, prohibiting and quashing orders: Senior Courts Act 1981 section 29(1A) 1981) do not apply in Scotland. Nor does the statutory test under section 31(6) of the Senior Courts Act that where the court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant relief if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. Nor do the statutory provisions set out in section 29A of the Senior Courts Act 1981, which provide that a quashing order may include provision for the quashing not to take effect until a date specified in the order, or for limiting or removing any retrospective effect of the quashing, and set out matters to which the court must have regard in deciding to make such provision.

[85] The powers of the Court of Session in judicial review procedure are set out in Rule 58.13 of the Rules of the Court of Session. The Rule implements the recommendation of the Dunpark report that:

> "If the procedure is to be effective, we consider that the judge must have the power to grant any decree or make any order which he considers necessary or reasonable in the interests of justice".
> (*Report to the Rt Hon Lord Emslie, Lord President of the Court of Session, by the Working Party on Procedure for Judicial Review of Administrative Action* (1984), (para 5))

[86] Rule 58.13 provides:

"(2) In exercising the supervisory jurisdiction on a petition for judicial review, the Lord Ordinary may—
(a) grant or refuse any part of the petition, with or without conditions;
(b) make any order that could be made if sought in any action or petition including, in particular, an interim order or any order listed in paragraph (3) (whether or not such an order was sought in the petition).
(3) Those orders are—
(a) reduction;
(b) declarator;
(c) suspension;
(d) interdict;
(e) implement;
(f) restitution; and
(g) payment (whether of damages or otherwise)"

[87] Reduction is the Scottish equivalent of quashing. It is a remedy which is available in various circumstances, for example to reduce a deed or other document such as a contract or will, to reduce a court decree, or, as here, to reduce a decision challenged in a judicial review.

[88] In deciding how to exercise these powers, the court has a wide discretion, which can even extend to refusing a remedy (*EBA* v *Advocate General* paragraph 27 quoted above). As the Lord Chancellor (Selbourne) said in *Grahame* v *Magistrates of Kirkcaldy* 1882 9 R (HL) 91 at p 96-7:

> "It is inseparable from the principles of equitable jurisdiction that its exercise may be withheld where on the balance of conflicting considerations the reasons against the interference of a Court of equity are found to preponderate... [i]n Scotland the legal and equitable jurisdictions have always been united, and the natural result of that union is that strict legal rights ought not… to be enforced without regard to the discretion which from the nature of the subject-matter, and of the interests of all those concerned in it, ought to be exercised by a Court of equity"

[89] The appropriate remedy in any particular judicial review is fact specific, and in exercising its discretion the court requires to consider all the circumstances in order to arrive at a result which is equitable in the particular circumstances of the particular case. The

particular factors to be taken into account will vary case by case, but may include the following, which does not constitute an exhaustive list.

(a) Public authorities must act in accordance with the law

[90] It is a fundamental principle of the rule of law that public authorities must act in accordance with the law. Accordingly, when a public authority makes an unlawful decision, the normal remedy in a judicial review is that the decision is reduced, so long as the unlawfulness is material to the decision. As the Lord President (Carloway) said in delivering the Opinion of the Court in *NLEI Ltd* v *Scottish Ministers* 2023 SLT 149 at para [59]:

> "… where there has been an identifiable error on the part of a decision -maker, the court should be slow before deciding not to quash that decision. However, in order to merit reduction of the resultant decision, the error must be a material one, in the sense that, had it not been made, the decision might have been different (*Carroll v Scottish Borders Council*, at para [66] citing *Bova* v *Highland Council* 2013 SC 510, Lord Menzies, delivering the opinion of the court, at para [57])."

Further, Lord Hoffman said in *R (Edwards)* v *Environment Agency (No 2)* [2008] Env LR 34 at paragraph 63:

> "It is well settled that 'the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary' (Lord Roskill in *Inland Revenue Commissioners* v *National Federation of Self-Employed and Small Businesses Ltd* [1982] A.C. 617, 656.) But the discretion must be exercised judicially and in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it."

[91] The exceptional nature of refusal of reduction was emphasised in *Grahame* v *Mags of Kirkcaldy*. The magistrates had decided to build stables on ground held by them for the inhabitants of a burgh to use as a bleaching green. The issue for the House of Lords was whether the magistrates should be ordered to remove the stables. Lord Watson stated:

> "It appears to me that a superior Court, having equitable jurisdiction, must also have a discretion, in certain exceptional cases, to withhold from parties applying for it that remedy to which, in ordinary circumstances, they would be entitled as a matter of

> course. In order to justify the exercise of such a discretionary power there must be some very cogent reason for depriving litigants of the ordinary means of enforcing their legal rights. There are, so far as I know, only three decided cases, in which the Court of Session, there being no facts sufficient to raise a plea in bar of the action, have nevertheless denied to the pursuer the remedy to which, in strict law, he was entitled. These authorities seem to establish, if that were necessary, the proposition that the Court has the power of declining, upon equitable grounds, to enforce an admittedly legal right; but they also shew that the power has been very rarely exercised." (p 92)

The House of Lords did withhold the remedy in that case, but it is significant that in doing so the court did not allow matters to continue as if no unlawfulness had taken place: instead of removal of the stables, a different piece of the magistrates' land was substituted for use as a bleaching green.

(b) The practical effect of reduction

[92] In *King* v *East Ayrshire Council*, the Lord President (Rodger), delivering the opinion of the court, stated:

> "Even where a court is satisfied that an administrative body has erred in law in reaching their decision, the court is not bound to reduce that decision. As Lord Hailsham LC pointed out in *London & Clydeside Estates Ltd* v *Aberdeen District Council* at p 31 the jurisdiction to grant decree of reduction of administrative decisions is 'inherently discretionary'. In particular it is relevant for the court to consider what practical effect the person seeking reduction will achieve if the decision is reduced." (p 194C).

(c) The public interest in good administration

[93] There is a public interest in certainty and finality of decisions.

[94] In *King* v *East Ayrshire Council* a decision of a local authority to close a school was challenged on a ground which was not advanced until over a year after the school was closed. The court stated:

> "It is recognised that the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of

> a decision for any longer than is absolutely necessary in fairness to the person affected by it (*O'Reilly* v *Mackman* at pp 280H-281A per Lord Diplock). … Judicial review is a flexible procedure and the court can, of course, take account of new matters and grant different remedies from those which are originally sought. In an appropriate case that could be done even at a late stage, but in deciding whether to grant a remedy on a different basis the court must not lose sight of the wider interest in good administration which Lord Diplock describes."

[95] *King* was decided prior to the introduction of a 3 month time limit for the bringing an application to the supervisory jurisdiction of the court (section 27A Court of Session Act 1988). As I said in respect of that time-limit in *Odubajo* v *SSHD* [2020] CSOH 2:

> "It is an important principle in respect of good public administration that there should be certainty about the validity of administrative decisions. A time limit contributes to such certainty. Public authorities may, after the expiry of the time limit without a judicial review application having been made, proceed on the basis that the decision is a valid one. A third party who has an interest in the subject matter of the decision may also proceed on that basis." (para [16])

(d) The potential prejudice to public and private interests

[96] *Walton* v *Scottish Ministers* was a challenge to a roads decision on the ground of failure to comply with consultation requirements under the Environmental Assessment Directive (Directive 85/337/EEC). Lord Goff took into account that "the potential prejudice to public and private interests from quashing the order is very great" (para [131]). Lord Hope stated:

> "[155] The better way to meet the concerns that the Extra Division expressed about this case … would have been to weigh in the balance against any breach of the Directive that the applicant was able to establish the potential prejudice to public and private interests that would result if the schemes and orders were to be quashed. …the fact that an individual may bring an objection on environmental grounds derived from European directives does not mean that the court is deprived of the discretion which it would have at common law, having considered the merits and assessed where the balance is to be struck, to refuse to give effect to the objection.
>
> [156] ….Where there are good grounds for thinking that the countervailing prejudice to public or private interests would be very great, as there are in this case, it will be open to the court in the exercise of its discretion to reject a challenge that is

> based solely on the ground that a procedural requirement of European law has been breached if it is satisfied that this is where the balance should be struck."

[97] Although *Walton* was a statutory appeal, in my opinion the potential prejudice to public and private interests should also be considered when the court is exercising its discretion as to the appropriate remedy in a judicial review.

[98] In the current case there are, broadly speaking, three main interests that require to be balanced. The first is public interest in the Rule of Law and in public authorities acting lawfully. The second is the private interest of members of the public in respect of climate change issues arising out of the Jackdaw and Rosebank projects. The third is the private interest of Shell, Equinor and Ithaca as developers of the Jackdaw and Rosebank projects.

Is the appropriate remedy reduction or declarator?

The difference in the practical effect of reduction and the practical effect of declarator

[99] The decisions challenged in these petitions were unlawful. What remedy should the court grant in respect of that unlawfulness? The petitioners seek reduction. Shell, Equinor and Ithaca seek declarator.

[100] There is a stark difference in the practical effect of these different remedies.

[101] If the decisions are reduced, then the Secretary of State and the OGA will take them again, but this time on a lawful basis, taking into account the downstream emissions. It may be that they will grant the consents. It may be that they will refuse consents. That will be a matter for them.

[102] If declarator is granted and the decisions are not reduced, the decisions will not be retaken. The unlawful decisions will stand. Shell, Equinor and Ithaca will progress the projects and extract oil and gas, despite the consents being unlawful.

[103] So the issue for the court comes down to whether the Secretary of State and the OGA should be given an opportunity to reconsider their decisions (in which case the remedy will be reduction), or whether their existing decisions should be given effect to (in which case the remedy will be declarator).

The public interest in authorities acting lawfully

[104] In this case, the consents have been granted unlawfully.

[105] The error is a material one, in the sense that, had it not been made, the decision might have been different. The addition of downstream emissions will add to the assessment process a new and significant factor which was not included on the previous assessment and may change the result of the assessment.

[106] In any event, in the case of a decision under the 2020 Regulations, it is not a pre-requisite of reduction that the decision might have been different. As Lord Leggatt states about an argument made in *Finch*:

> "The argument made is a version of the claim that, if information about environmental impacts would make no difference to the decision whether to grant development consent (or on what conditions), it is not legally necessary to obtain and assess such information in the EIA process. Such a contention was resoundingly rejected by the House of Lords in *Berkeley*. It misunderstands the procedural nature of the EIA. The fact (if it be the fact) that information will have no influence on whether the project is permitted to proceed does not make it pointless to obtain and assess the information. It remains essential to ensure that a project which is likely to have significant adverse effects on the environment is authorised with full knowledge of these consequences."

[107] In these circumstances, the public interest in the rule of law and in authorities acting lawfully is a strong factor in favour of reduction.

The private interest of members of the public in respect of climate change

[108] The effect of the burning of fossil fuels on climate change and the lives of individual persons is now well recognised in law.

[109] In giving the majority judgment of the of the Supreme Court *Finch*, Lord Leggatt said:

> "Anyone interested in the future of our planet is aware by now of the impact on its climate of burning fossil fuels—chiefly oil, coal and gas. When fossil fuels are burnt, they release carbon dioxide and other 'greenhouse gases'—so called because they act like a greenhouse in the earth's atmosphere, trapping the sun's heat and causing global surface temperatures to rise." (paragraph 1)

[110] In *Verein KlimaSeniorinnen Schweiz* v *Switzerland* (App No 3600/20) (2024) 79 EHRR 1, the European Court of Human Rights said:

> "At the outset, the Court notes that climate change is one of the most pressing issues of our times. While the primary cause of climate change arises from the accumulation of [greenhouse gas] in the Earth's atmosphere, the resulting consequences for the environment, and its adverse effects on the living conditions of various human communities and individuals, are complex and multiple. The Court is also aware that the damaging effects of climate change raise an issue of intergenerational burden-sharing…and impact most heavily on various vulnerable groups in society, who need special care and protection from the authorities." (paragraph 410)

[111] In considering the question of whether the remedy should be reduction or declarator, the private interests of members of the public are engaged in two ways.

[112] Firstly, just as the developers have an interest on the impact of the remedy on their business, members of the public have an interest in the impact of the remedy on their lives.

[113] Secondly, individual members of the public have an interest in being able to contribute to the decision by expressing concerns which the decision maker can take into account *(Finch* paragraph 21, see para [64] above).

[114] In my view these private interests of members of the public weigh strongly in favour of the decisions being reduced and remade on a lawful basis. That would mean that the

effect of downstream emissions on climate change would be taken into account, and members of the public and the petitioners would be able to express their views on that in the consultation stage of the decision-making process.

[115] I am fortified in this view by the reasoning of the Lord President (Carloway) in *Greenpeace* v *Advocate General*:

> "[69] Had there been defects in the notification and consultation procedures, and the appellants had been substantially prejudiced by them, it would have been difficult for the court to resist affording the appellants the remedy which they seek; i.e. a quashing (reduction) of the consent. Regulation 16 makes it clear that the power to afford the appellants that remedy is a permissive rather than a mandatory one. In that context, no doubt all the circumstances have to be taken into account (*King v East Ayrshire Council*, LP (Rodger) at p.194 (p.1294)). Nevertheless, if a consent has been obtained, in a situation in which the appellants had been deprived of their right to make representations and to be consulted, the effect is that the consent has been obtained unlawfully. It can hardly be argued that, as a significant campaigner on fossil fuel issues, the appellants did not have a substantial interest, in a practical sense, in the outcome (ibid)."

Although that reasoning was set out in an appeal under the 1999 Regulations, it is equally applicable in principle to a judicial review under the 2020 Regulations.

The private interests of the developers in respect of the projects

[116] Shell, Equinor and Ithaca, as the applicants for the consents and developers of the projects, have an obvious private interest in their respective project going ahead.

Decision in Finch post-dates the consents

[117] In this case the consents are challenged on the basis of a decision of the Supreme Court which post-dates the consents. The decisions on the Jackdaw consent were made in May/June 2022 and Rosebank in June/September 2023. The judgment of the Supreme Court

in *Finch* was delivered in June 2024. Counsel for Equinor submitted that it would be unjust to reduce consents determined many months before the Supreme Court judgment.

[118] The Supreme Court judgment states the correct interpretation of the 2020 Regulations. The law as stated by the Supreme Court in *Finch* also applies to decisions which were dated prior to the *Finch* judgment. An example this can be found in the English High Court case of *Friends of the Earth* v *Secretary of State for Levelling Up Housing and Communities*. That was a challenge to a planning decision on the ground of failure to assess downstream emissions. The decision was dated 7 December 2022, which was after the Supreme Court granted leave to appeal in *Finch* but before it had heard argument in *Finch*. The case was stayed pending the judgment of the Supreme Court in *Finch* and heard after that judgment was issued. The court applied the law as set out in *Finch* and quashed the decision.

[119] Accordingly, the mere fact that the Supreme Court judgment post-dates the decisions for Jackdaw and Rosebank does not of itself justify refusal of reduction. However, in considering all the circumstances of the case, consideration has to be given as to what the parties did in the period between the decision and the judgment, and thereafter, and it is to that which we now turn.

Conduct of the parties

[120] The conduct of parties during the period between the time of a decision and the time of a resolution of a judicial review of that decision may have a bearing on the exercise of the equitable discretion to refuse reduction. If a petitioner delays in bringing a judicial review, or delays in progressing it, or does not seek *interim* remedies, and so allows the decision maker and third parties to proceed for a significant period of time on the basis that the

decision is lawful, then there may be situations in which it is equitable for the decision to stand and reduction be refused. If on the other hand it is the respondent or a third party who has caused a situation whereby a significant period of time has passed before the final resolution of the judicial review by the court, then it may be equitable to reduce the decision notwithstanding that it has been relied on in the meantime. If the delay is caused by none of the petitioner, respondent nor third party, then reliance on the decision in the meantime may be neutral in respect of remedies. All of this very much depends on the particular facts and circumstances of the case.

[121] Each of Greenpeace, Uplift, Shell, Equinor and Ithaca knew or ought to have known at the time that the consents were granted that the law was uncertain. While it was true that by then the decision of the Inner House in *Greenpeace* v *Advocate General* had become final as leave to appeal to the Supreme Court had been refused, that had not given certainty to the law at the time at which the consents were granted. The Court of Appeal had given its split decision on 17 February 2022, which was prior to the grant of the Jackdaw consent on 1 June 2022. The Supreme Court had heard argument in *Finch* on 21 and 22 June 2023, which was prior to the grant of the Rosebank consent on 27 September 2023. What Lord Devlin said extra-judicially about uncertainty is even more apposite where the rumblings take the form of a split decision in the Court of Appeal, or take the form of arguments which have already been made in the Supreme Court and upon which the judgment of the Supreme Court is awaited:

> "A judge-made change in the law rarely comes out of a blue sky. Rumblings from Olympus in the form of *obiter dicta* will give warning of unsettled weather. Unsettled weather is itself of course bound to cause uncertainty, but inevitably it precedes the solution of every difficult question of law"
> (*Judges and Lawmakers* (1976) 39 Modern Law Review 1, 10.)

Conduct of the petitioners

[122] Greenpeace and Uplift each brought their judicial reviews within the 3 month time limit. At their instance, the judicial reviews were then sisted to await the Supreme Court judgment in *Finch*. The petitioners cannot be criticised for the sist. In view of the uncertainty as to the law at that time it would not have been appropriate for this court to have heard and disposed of the judicial reviews prior to the Supreme Court judgment. Nor can they be criticised for not seeking *interim* remedies at the outset. The law was uncertain until it was clarified by the Supreme Court. Until then, *interim* remedies were very unlikely to be granted as the court was bound by the Inner House decision in *Greenpeace* v *Advocate General*. Further, *interim* interdict is granted *periculo petentis*: a party who obtains *interim* interdict but ultimately loses the case is liable in damages for loss suffered by the interdicted party (*Fife* v *Orr* (1895) 23 R 8). Had the petitioners obtained *interim* interdict, and the Supreme Court had come to the same decision as the Inner House and the majority in the Court of Appeal, then the damages due by the petitioners in respect of the loss suffered by the Shell, Equinor and Ithaca for not being able to proceed with the Jackdaw and Rosebank projects in in the meantime would have been very substantial. Upon the Supreme Court decision being issued, Greenpeace sought *interim* suspension and interdict in both of their petitions. The motions for *interim* orders called at the By Order case management hearing on 30 August 2024 at which the court indicated that the *interim* orders sought raised complex engineering and health and safety issues and a hearing on *interim* orders may be a distraction from preparation for the November substantive hearing and may necessitate a delay in that hearing. The motions were continued to a hearing on 25 September but were not proceeded with as parties instead focussed on the November substantive hearing. There is nothing in the conduct of the petitioners which would justify refusal of reduction.

Conduct of Shell, Equinor and Ithaca in commencing and proceeding with the projects

[123] Regulation 4 of the 2020 Regulations provides:

> **"4.− Requirement for Consent**
> (1) A developer must not commence a project without the Secretary of State's agreement to the OGA's grant of consent and the consent of the OGA."

[124] Accordingly Shell was prohibited from commencing the Jackdaw project until 1 June 2022 and Equinor and Ithaca were prohibited from commencing the Rosebank project until 27 September 2023. Any work that they did before then, and any contracts they entered into before then, were done or entered into at the risk that consent would be refused. While in taking that risk they may have gained comfort from their understanding of government policy or legislation, or from any meetings they had with government ministers, or from any feedback given on draft applications, they were not entitled to assume that consents would be granted. None of these matters fettered the discretion of the Secretary of State and the OGA in considering the merits of the final application and coming to a decision on it.

[125] All works done and contracts entered into by Shell, Equinor and Ithaca after the grant of their respective consents were done or entered into at the risk that the Supreme Court might find that downstream emissions required to be taken into account. In proceeding with the projects from the date of the OGA consent, Shell, Equinor and Ithaca took the risk that there might be a successful judicial review and the consents might be reduced.

[126] A third party such as Shell, Equinor or Ithaca cannot proceed with certainty that a decision is lawful and will not be reduced unless and until the 3 month time limit for bringing judicial review proceedings has expired without proceedings having been brought (*Odubajo* v *SSHD* para [95] above). Here judicial reviews were commenced within that

time-limit. Once the respective judicial reviews were underway, Shell, Equinor and Ithaca could not proceed with any certainty that the decision was lawful or would not be reduced: the questions of lawfulness and the remedy would be determined by this court.

[127] After the proceedings were commenced, none of Shell, Equinor or Ithaca sought to progress the judicial reviews urgently. Shell and Equinor did not oppose the sists, and Ithaca did not enter the process to oppose the sists. The developers cannot be criticised for that: as indicated above (para [122]) it would not have been appropriate for the sist to be recalled until the Supreme Court decision was available.

Emails from OPRED to the developers

[128] The Offshore Petroleum Regulator for Environment and Decommissioning ("OPRED") is part of the Department of Energy Security and Net Zero and for present purposes is the Secretary of State. In an email of 1 June 2022 to Equinor, OPRED stated that downstream emissions need not be considered, and referred to the Court of Appeal decision in *Finch* without acknowledging that the court was split.

[129] Counsel for Equinor did not go so far as advancing an argument that the email constituted a representation which gave Equinor a legitimate expectation that downstream emissions would not be taken into account. He submitted that as Equinor was specifically told not to include downstream emissions in the Environmental Statement, Equinor could not be criticised for not addressing this issue and it would be contrary to the interests of justice for Equinor to be required to address this matter years after the submission of the Environmental Statement.

[130] In my view, the email and Equinor's conduct in the light of it, is not, in all the circumstances of this case, a bar to reduction of the consents. Equinor knew or ought to

have known that the law was uncertain. Accordingly, in deciding to proceed with the project without waiting for the law to be clarified by the Supreme Court, Equinor was not entitled to rely on the email as being an accurate statement of the law.

[131] A similar situation arises in relation to the Jackdaw project. In an email of 12 October 2021 to Shell, OPRED stated that downstream emissions are not taken into account when making an assessment of the significant effects on the environment of the project. Counsel for Shell submitted on the basis of that email that Shell was not at fault in omitting an assessment of downstream emissions from its Environmental Statement.

[132] Although the email was an accurate statement of the law as it was understood at the time it was written, by the time Shell's Environmental Statement was put out for public consultation on 18 March 2022 the situation had changed: the Court of Appeal's split decision in *Finch* had been issued and Shell knew or ought to have known that the law was uncertain. In deciding to proceed with the project after consent was granted on 1 June 2022 without waiting for the law to be clarified by the Supreme Court, Shell was not entitled to rely on the email as being an accurate statement of the law.

[133] In all the circumstances of the case, the emails of 1 June 2022 and 12 October 2021 do not justify withholding the normal remedy of reduction.

Conduct of Equinor and Ithaca in relation to their obligations under the Rosebank Field Development Plan

[134] An explanation was advanced on behalf of Equinor and Ithaca as to why they had proceeded with the works despite the petitions for judicial review. Counsel submitted that, as licensees of the Rosebank field, they were obliged to carry out the development in

accordance with the Rosebank Field Development Plan and had no alternative but to proceed.

[135] If a licensee fails to comply with a term of the licence, the OGA may take enforcement action against them, which may include a financial penalty (Energy Act 2016 section 42). The licence for the Rosebank field included the model clauses set out in Schedule 10 of the Petroleum (Current Model Clauses) Order 1999. In terms of the model clauses, the licensee must prepare and submit a programme of works to the Minister (in this context the OGA) for approval (Clause 17(2)) and must carry out the programme except in so far as authorised by the Minister (ie OGA) to do otherwise (Clause 17(8)).

[136] I do not accept that Equinor and Ithaca had no alternative but to proceed with the works in accordance with its original Field Development Plan. Equinor could have gone to the OGA and asked for the plan to be varied in the light of the bringing of the judicial review proceedings and the uncertainty (pending the Supreme Court decision in *Finch*) as to whether the consents were lawful. Counsel for the OGA confirmed that if there is a reasonable explanation for any delay the OGA can amend the dates in the plan. As Equinor and Ithaca could have sought to have the dates in the original Field Development Plan varied to postpone the obligations to carry out the works until after resolution of these judicial reviews, but chose not to do so, it is not equitable to allow them to found on their obligations in the unvaried plan in order to prevent reduction of the consents.

Conclusion on conduct

[137] In summary then, the period of delay between the granting of the consents and the issuing of the Supreme Court judgment was not the fault of the petitioners nor the developers. However, in proceeding with the projects during that period, rather than

waiting until the law was made certain, the developers took the risk that they were proceeding on the basis of an unlawful consent. The commercial decision to take that risk, rather than take the alternative option of not proceeding with the project in the meantime, was one for the developers to make, but it does not justify departing from the normal remedy of reduction.

Timing of re-consideration

[138] Where a decision of a public authority is reduced in a judicial review, normally the authority is able to proceed immediately to make the decision afresh on a lawful basis. However, in the current case the re-consideration cannot take place for some time.

[139] The 2020 Regulations provide for a procedure whereby the Secretary of State may, before coming to a decision, require a developer to provide further information and for the public to be consulted on the information provided (Regulation 12). If the court orders reduction in this case, the Secretary of State proposes to follow that procedure in respect of downstream emissions, and to require the developers to provide further information about downstream emissions and then consult with the public on that information.

[140] However, at this stage the Secretary of State is not in a position to specify what further information about downstream emissions the developers should provide.

[141] The UK government is consulting on draft supplementary Environmental Impact Assessment guidance in the light of *Finch*:

> "to provide clarity on Environmental Impact Assessment expectations when assessing the effects of scope 3 emissions on climate from proposed offshore oil and gas projects seeking development and production consent" (*Environmental Impact Assessment (EIA) – Assessing effects of scope 3 emissions on climate Consultation on draft supplementary guidance for assessing the effects of scope 3 emissions on climate from offshore oil and gas projects* October 2024 p3)

[142] The consultation was issued on 30 October 2024 with a response date of 8 January 2025. Until the supplementary EIA guidance has been issued, EIA decisions will be deferred (*Consultation* p3). In a statement dated 29 August 2024 OPRED said:

> "It would not be appropriate to continue to assess environmental statements affected by the [*Finch*] judgment while new EIA guidance is being prepared. Doing so could lead to operators wasting time and money submitting environmental statements that do not contain the required elements. We are therefore deferring the assessment of any environmental statements we receive relating to oil and gas extraction and storage activities until the new guidance is in place."

The Government's intention is to publish finalised supplementary Environmental Impact Assessment guidance in spring 2025 alongside the government response to the consultation:

> "Publication of the supplementary EIA guidance will mark an end of the deferral of EIA decisions and allow the EIA process to function as normal for offshore oil and gas development and production projects" (*Consultation* p4)

[143] It is clear from the affidavits of Dr Parr and Ms Appleyard that there is no consensus on how downstream emissions should be calculated. It is in the interests of good administration that the government gives proper consideration to what will be required in assessing downstream emissions, and in so doing has the benefit of the results of public consultation.

[144] As there is good reason for the delay in re-consideration, and taking into account all the circumstances of the case, the delay in re-consideration does not justify refusal of the normal remedy of reduction.

Consequences for public and private interests if the Jackdaw and Rosebank projects do not go ahead

[145] Counsel for Shell submitted that if consent were to be reduced, the viability of the Jackdaw project as a whole would be threatened, which in turn would impact the UKs

security of supply and the energy transition, jobs, the local and national economy and the commercial interests of Shell and the other companies with which it was working. There was a public interest in completion of the projects. Similar arguments were made by counsel for Equinor, who focussed on reduced energy in the midst of a European energy crisis, loss of tax income and job losses. Counsel for Ithaca made a similar argument and also referred to the substitutability of oil and gas from abroad to meet continuing UK demand, and the principal objective under section 9A of the Petroleum Act 1988 of maximising the economic recovery of UK petroleum.

[146] These arguments as to the public and private interests in completion of the projects go to the substance of whether or not the development of, and extraction of oil and gas from, the Jackdaw and Rosebank fields should go ahead.

[147] However, the question for me is not whether the projects should go ahead, but whether the unlawful decisions should be retaken in a lawful manner. If the consents are granted on re-consideration, the concerns underlying these arguments will fall away. If the consents are not granted on re-consideration, then that will be because the new decisions have been taken lawfully having taken into account all relevant factors and concerns, including the effect of downstream omissions. The potential consequences of a possible refusal of consent at the re-consideration stage do not justify the court preventing the re-consideration from taking place.

Public interest in inward investment to the UK

[148] Counsel for Ithaca also raised the issue of inward investment to the UK. He submitted that investors in the UK look for stability, predictability and certainty, and that to reduce the consents would be the antithesis of that. However, inward investors are not

entitled to certainty that an unlawful decision will be given effect to. All that they are entitled to certainty about is that decisions will be taken in accordance with the law, and that the legal system will act impartially in ensuring that the law is upheld.

Power of the Secretary of State to re-consider

[149] The Secretary of State has raised concerns as to whether the Secretary of State has the power to agree to the grant of consent for a project while the original decision on whether to agree to the grant for consent remains in force due to suspension of the reduction. Counsel for the Advocate General submits that the Secretary of State does not have that power: having made his decision to agree he is *functus*. He submits that there is no statutory power to revoke his decision, and that there was no implied power

(a) under Regulation 14 (Interpretation Act 1978 section 12(1), (*R (Piffs Elm Ltd)* v *Commission for Local Authority Administration in England* [2024] KB 107 at 97 - 101)

(b) under the purpose of the legislation (*R (Ball)* v *Hinckley & Bosworth Borough Council* [2024] PTSR 1344 at 57 - 60 and 62)

or

(c) as an ancillary power (*R (Gleeson Developments Ltd)* v *Secretary of State for Communities and Local Government* [2014] PTSR 1226 at 20 and 24 - 25.)

[150] In my opinion the answer to the Secretary of State's concerns lies in the wide equitable powers of this court to provide an appropriate remedy in a judicial review, including the power under Rule 58.13(2) to impose conditions. The source of the Secretary of State's power to re-consider his decision would be the order made by this court and the 2020 Regulations.

Conclusion on whether the appropriate remedy is reduction or declarator

[151] Having considered all the circumstances of the case and the various public and private interests, I have reached the conclusion that the balance lies in favour of granting reduction. The public interest in authorities acting lawfully and the private interest of members of the public in climate change outweigh the private interest of the developers. The factors advanced by Shell, Equinor and Ithaca in respect of their private interest do not justify the departure on equitable grounds from the normal remedy of reduction of an unlawful decision.

[152] The decisions will be reduced, and can be taken again, this time taking into account downstream emissions.

Suspension of reduction

[153] In *Greenpeace* v *Advocate General* the question of remedy for failure to consider downstream emissions did not arise because the Inner House, giving its judgment prior to the Supreme Court judgment in *Finch,* found that downstream emissions need not have been taken into account. Nevertheless the court did consider what remedy it would have granted had it decided otherwise, and, having indicated that the court would have found it difficult to refuse reduction (see para [115] above), the Lord President went on to consider suspension of reduction:

> "[70] However, in a situation in which the appellants did not take steps to obtain an interim order and delayed bringing proceedings, despite their knowledge of the project going ahead, the court may have required to consider whether to suspend the operation of any decision to quash the consent until such time as the Secretary of State had been afforded an opportunity to reconsider his agreement to the consent in the light of any representations made. Since the matter does not arise for decision, the court will reserve its view on the precise terms, or competence, of any such order (cf. *Walton*, Lord Carnwath at p 102 (p.1231) paras 142–145)."

[154] The concerns of the Lord President as to the competency of suspension in relation to a statutory appeal under the 1999 Regulations do not arise in the current petitions. The wide powers of the court to provide an appropriate remedy in a judicial review extend to suspension of any reduction.

[155] An example of a judicial review in which reduction was suspended (by means of a stay) in order to allow reconsideration to take place is the English Court of Appeal decision in *R (Rockware Glass)* v *Chester CC* in which Buxton LJ said:

> "I am satisfied that in general terms it would be wrong and disproportionate for the quashing order to take effect so as to require the closure of the plant during the short period before Chester determine the fresh application for a permit. The law is sufficiently upheld by the judgment of this court, the declarations made by the judge which we are upholding, and the fact that the existing permit will be quashed as soon as a decision is taken by Chester on whether and on what terms to grant the new permit." (paragraph 71)

[156] In my opinion a similar course should be taken here.

[157] It would be wrong and disproportionate for the reduction to take effect immediately so as to require work on the projects to cease during the period before the re-consideration. These are complex engineering projects which depend on the co-ordination of many factors, including availability of vessels, the manufacturing capacity of contractors, the availability of staff, a complex contractual structure with suppliers and, not least, the limited times of the year when weather conditions allow works to progress in a hostile off-shore environment. If the reduction were to take effect immediately but then, on re-consideration, the consents were granted, then there would have been significant disruption to the projects, at considerable cost both in monetary terms and jobs, and reinstating the necessary co-ordination may be difficult as vessels may have been redeployed or suppliers or employees may have taken other work.

[158] The effect of suspension is that Shell, Equinor and Ithaca are given options as to how to proceed pending the re-consideration. They may, if they wish, continue with the projects. They may, if they wish, make the projects safe but take no further action until they have the result of the re-consideration: that would mean that, if on re-consideration the consents are refused, they would not have expended resources and efforts on progressing the projects between now and the date of refusal.

[159] The decision as to which option to take will be a commercial decision for Shell, Equinor and Ithaca to take, taking into account the commercial risks involved, including the risk as to whether or not the consents will be granted on re-consideration.

[160] However, while it is equitable to suspend the reduction in order to provide practical options as to how to deal with the practical issues of construction and engineering prior to re-consideration, it is not equitable to allow the production of oil and gas prior to then. The re-consideration will take into account what the emissions will be if oil and gas is extracted. A fundamental purpose of the Directive and 2020 Regulations is that activities giving rise to emissions must not begin until the emissions are assessed (see para [28] above). To allow extraction to take place prior to re-consideration would frustrate that purpose. Concerns about the effect of emissions from the oil and gas extracted do not extend to the preparatory engineering and construction works, and so it is appropriate to allow such works to proceed in the period before re-consideration. It will be a condition of the suspension of the reductions that no oil or gas may be extracted from the Jackdaw or Rosebank field until the OGA has granted a consent for that field.

[161] In reaching this decision to suspend the reduction, I am conscious that the period which will elapse between the reduction and re-consideration will be considerably longer than the short period in *Rockware Glass*. However, there are good reasons for the length of

time required. The proper assessment of the effect of downstream emissions is crucial to the lawfulness of the re-consideration. The Secretary of State is currently engaged in an exercise of determining how that assessment should properly be made and by a consultation has sought the input of the public, including the petitioners and Shell, Equinor and Ithaca (see paras [141-142] above). It would be against the interests of good administration if, rather than this exercise running its course and a proper assessment being made on re-consideration, the exercise was cut short and the downstream emissions were assessed on a basis which turned out to be unsatisfactory. The court will not interfere with the consultation process already underway by which the government will come to a view on the requirements for assessing downstream emissions, and Equinor's motion to ordain the respondents to confirm: (i) what information is required by each respondent to make a new decision, and (ii) the timescale for new decisions to be taken, is refused.

[162] Nevertheless, the court expects the Secretary of State and the OGA to proceed towards re-consideration as soon as possible after the consultation period has elapsed so that consent is granted or refused as soon as possible. Indeed, under Regulation 14 of the 2020 Regulations the Secretary of State is under an obligation to make his decision as to whether or not to agree to the grant of consent within a reasonable period from the date he is provided with the relevant information, taking into account the nature and complexity of the project. Similarly, the OGA is required to make its decision whether to grant consent within a reasonable time from the Secretary of State's decision (Regulation 15(2)). The Secretary of State has stated that the deferral of EIAs will come to an end in spring 2025 with the publication of the new guidance and the EIA process will then function as normal (see para [142] above). The court expects the re-consideration to take place as soon as possible in accordance with that timetable.

Legality of works done on the projects prior to reduction

[163] Counsel for Equinor raised the question of the legal status of works done prior to reduction.

[164] The effect of reduction on matters done prior to reduction is a matter of great difficulty on which the courts in both Scotland and England have declined to express a general view (*Archid* v *Dundee* CC at para [55]; *Boddington* at p 164, *Majera* at paragraph 42).

[165] In the current petitions, the answer to any concerns as to the validity of acts done prior to reduction of the consents can be found in the wide equitable powers of this court to provide an appropriate remedy in exercising its supervisory jurisdiction. The Court of Session is accustomed in public law cases to the concept of making orders with only prospective effect. Where the court decides that an Act of the Scottish Parliament is not within legislative competence, or a member of the Scottish Government does not have the power to make subordinate legislation, or the purported exercise of a function by a member of the Scottish Government was outside devolved competence, the court may make an order removing or limiting any retrospective effect of the decision (Scotland Act 1998 section 102(2)). In my view, the power of the court to provide an appropriate remedy in exercising its supervisory jurisdiction extends to limiting or removing any retrospective effect of reduction.

[166] In this case, due to the timing of the Supreme Court decision in *Finch*, and the timing of the re-consideration, a considerable amount of time will have elapsed between the consents and the reduction. In the meantime Shell, Equinor and Ithaca have commenced the projects in terms of the consents and complex engineering works are part completed. In

order to avoid any doubt about the legality of works done between the granting of consents and reduction, the retrospective effect of the reduction will be removed. The reduction will have prospective effect from the date when it ceases to be suspended. The reduction will not apply to works done during the period of suspension.

Conclusion

[167] In the Greenpeace Jackdaw and Rosebank Petitions I shall sustain the petitioner's first and second pleas-in-law. In the Uplift Rosebank Petition, I shall sustain the petitioner's first and eighth pleas in law.

[168] In each of the three petitions I shall order as follows.

(1) Reduction of the Secretary of State's decision to agree to the granting of consent by the OGA.

(2) Reduction of the grant of consent by the OGA.

(3) Both of these reductions will be subject to the following conditions:

(a) the effect of the reductions is suspended until the date on which the OGA makes a new decision under the 2020 Regulations as to whether or not to grant consent for the project;

(b) during the period of suspension

i. the Secretary of State shall have the power to make a decision, under the 2020 Regulations, as to whether or not to agree to the grant of consent by the OGA for the project;

ii. the OGA shall have the power to make a decision, under the 2020 Regulations, as to whether or not to grant consent for the project;

iii. the Secretary of State and the OGA may take steps under the 2020 Regulations in order to make such decisions.

(c) during the period of suspension no oil or gas may be extracted from the relevant field;

(d) the reductions will be prospective from the date at which the period of suspension ends.

(4) I reserve all questions of expenses in each of the three petitions in the meantime.