STEPHENSON HARWOOD'S COP26 INSIGHTS SERIES

Are we reaching a 'tipping point' in ESG litigation?

In advance of the 2021 COP26 summit, Sir David Attenborough warned G7 leaders that "*we are now on the verge of passing tipping points, boundaries that, once passed, will unleash irreversible and self-amplifying change*".

Tipping points occur when small-scale climate changes push parts of the Earth's system into abrupt or irreversible change, triggering global consequences. Climate change measures, such as the Paris Agreement (United Nations 2015), are designed to avoid such tipping points, and avoid subsequent dramatic shifts to the Earth's system as a whole.

Across Europe and England and Wales, ESG litigation appears to be experiencing its own tipping point – at least in relation to environmental and climate change claims. In July 2021, the London School of Economics reported that the cumulative number of climate change-related cases (proceedings filed before international, national, or regional courts and tribunals) globally has more than doubled since 2015, with over 1,000 in the past six years. States and private companies are increasingly being subjected to judicial scrutiny, with Courts mandating parties do their share to prevent climate change.

Netherlands ESG litigation

The case of *Urgenda*[1] in the Netherlands paved the way for other climate-related suits, as the first ever judgment ordering a government to set more ambitious emissions targets.

In 2015, the Urgenda Foundation, an environmental group, brought a class action lawsuit seeking a court order requiring the Netherlands to reduce its greenhouse gas emissions by 40% (or at least 25%) by 2020, or alternatively by 40% by 2030 (compared to 1990 levels). Urgenda argued that the government's existing pledge would be insufficient to meet the Netherland's contribution toward the UN goal of keeping global temperature increases within 2 degrees Celsius.

Urgenda argued that failure by the Netherlands to take such action would violate human rights under the European Convention on Human Rights ("**ECHR**"), as well as the government's duties of care under Article 21 of the Dutch Constitution and the Dutch Civil Code. The civil code imposes a duty not to act in conflict with "*what according to unwritten law has to be regarded as proper social conduct*" (a standard which the Dutch courts can interpret in accordance with evolving social norms and conventions).

The Hague District Court ruled in favour of the Claimants, holding that the Netherlands had breached its duty of care under the Dutch Civil Code in failing to take measures to protect its citizens against the real threat of climate change. The Hague Court of Appeal later ruled that Article 2 and Article 8 ECHR placed a positive obligation on the Dutch government to protect its citizens against circumstances that would adversely affect those human rights. The Hague Court of Appeal confirmed that the government must reduce emissions by at least 25% by 2020 to fulfil its duty of care.

This obligation was subsequently upheld by the Dutch Supreme Court in September 2019. The Dutch Supreme Court agreed that the Dutch government

[1] Urgenda v The State of the Netherlands, ECL1:NL:2019:2007

had a "*positive obligation*" to "*take appropriate measures to prevent dangerous climate change*" which would include, "*as an absolute minimum*" compliance with the emissions target. The Dutch Supreme Court noted that climate change is a global issue but held that the government was individually responsible for failing to do its own part to protect its residents, in contravention of their rights under Article 2 and Article 8 ECHR.

In 2021, the Hague District Court delivered a further ground-breaking judgment[2]. This followed the principles first outlined in *Urgenda* and applied these to a private company rather than to a nation State. The Hague District Court ordered Royal Dutch Shell PLC ("**Shell**") to set and meet emissions targets, to reduce its worldwide CO2 emissions by 45% by 2030 (compared to 2019 levels). Should Shell fail to comply with this reduction obligation, fines, penalties or civil damages could follow.

This decision is the first time any Court in the world has imposed such a duty on a company. The case was filed against Shell in 2019 by Milieudefensie (Friends of the Earth Netherlands) and six other Dutch NGOs, alongside 17,000 individuals (the "**Claimants**"). The Claimants argued that Shell failed to take sufficient measures to reduce emissions generated by its group, in breach of its duty of care to prevent dangerous climate change through its policies. As with *Urgenda*, the Claimants argued that this duty arose from the Dutch Civil Code, as supplemented by the right to life and the right to respect for private and family life under Articles 2 and 8 of the ECHR (respectively).

Shell argued that: (i) their actions merely contributed to global warming, and they were not solely causative of climate change, (ii) that other offenders existed, and Shell's reductions would be offset by their emissions, (iii) the EU Emissions Trading System pre-empts further emissions cuts and (iv) that any reduction obligation would affect Shell's profits and growth. The Hague District Court dismissed all arguments, holding that an individual entity can be required to take preventative action on climate change, and that the existence of other offenders did not absolve Shell of its individual responsibility.

The Court further held that Shell's policies amounted to "*intangible, undefined and non-binding plans for the long-term*". The Court also noted that "*all enterprises regardless of their size, sector, operational context, ownership and structure*" have a responsibility to respect human rights, implying that all companies must do their part to help prevent climate change.

We understand that Shell intends to appeal the decision, arguing that it has been unfairly singled out and that tackling climate change requires coordination. However, whilst the matter progresses through the appeals process, Shell must start complying with the judgment. It is likely that this decision will result in 'copycat' suits. Indeed, Roger Cox, lawyer for Milieudefensie urged all organisations to "*pick up the gauntlet*". In France's Nanterre District Court, claimants are already seeking an order against Total, demanding they make more explicit efforts to prevent climate change.

ESG litigation in England and Wales

Following *Urgenda* various other climate justice suits were commenced across the EU, including in Belgium, Germany, France, Ireland and Italy. In these cases, at a high level, interested parties and lobby groups commenced litigation against the State, arguing that the State had failed to take appropriate legal action to reduce emissions in line with the requirements of the Paris Agreement. Broadly speaking, the Courts have found in favour of the Claimants: Germany's Constitutional Court found the German government to be violating citizens' fundamental rights in offloading climate change issues on to post-2030 generations. Similarly, France's *Conseil d'Etat* (the highest Administrative Court) mandated the French government to take steps to reduce C02 emissions by 40% by 2030.

[2] Milieudefensie et al v Royal Dutch Shell PLC

The Courts in England and Wales have been slower to respond to this trend. This may be a consequence of the English and Welsh legal system being based on common law and precedent, rather than on a civil code against which duty and breach arguments against States can perhaps more easily be pleaded. Instead, cases are usually commenced on judicial review grounds, with parties challenging a government policy or decision, arguing that climate change commitments have not been considered when such policies or decisions were made. However, judicial commentary suggests that the Courts are mindful of the Executive's "*wide discretion*"[3] when it comes to assessing the advantages and disadvantages of any course of action, and that "*political debate*" and the "*substance of policy*" are "*none of the Court's business*"[4].

However, the English courts have been quick to act in other areas. Several recent cases appear to indicate that the Supreme Court is prepared to entertain the concept of parent company culpability for the actions of foreign subsidiaries where such actions have resulted in environmental disaster. In such cases, the UK courts appear to have widened the circumstances in which claims can be brought in the courts of England and Wales:

(1) In Vedanta Resources PLC and another v Lungowe and others (2019)[5], the Supreme Court held that the claimants, 1800 Zambian citizens whose health had been impacted by a Zambian mine could bring proceedings in England. Vedanta, a UK company, was a majority stakeholder in Konkola Copper Mines PLC (a Zambian company who owed the mine). The Supreme Court concluded that there was a suitably arguable case that Vedanta exercised a sufficiently high level of supervision and control at the mine, with sufficient knowledge of the ESG risks involved, so as to owe a duty of care to the Claimants. Vedanta have since settled all claims.

(2) In Okpabi v Royal Dutch Shell (2021)[6] the Supreme Court held that two communities in Nigeria could bring proceedings in the English courts against Shell and a Nigerian operating subsidiary for negligence, following widespread environmental damage and contaminated water sources from a Nigerian oil spill. The Supreme Court emphasised that the number of circumstances in which a parent company may owe a duty of care towards the victims of a tort perpetrated by overseas subsidiaries are various and should not be limited.

(3) In Município de Mariana and others v BHP Group PLC (2021)[7], relating to the Fundão Dam environmental disaster, the Court of Appeal reopened an earlier refusal to grant permission to appeal against a decision to shut out a claim brought in England by the victims of the disaster on jurisdictional grounds, and granted permission to appeal. The Court held that a combination of circumstances was "*truly exceptional*" and that the case, brought by over 200,000 Brazilian claimants impacted by the release of more than 40 million cubic metres of mining waste, was of "*exceptional importance*".

The clear indication from judicial decisions to date is that such claims are, in theory, viable. It remains to be seen whether the English courts will ultimately entertain the more holistic climate change challenges, as successfully brought against various EU States following *Urgenda*.

Conclusion

The momentum and appetite for ESG-related litigation is building globally with both States and companies facing judicial scrutiny. The tipping point has arguably already been reached with claims based on environmental and climate change, at least, becoming increasingly common over the next few years. It remains to be seen whether claims based on wider ESG issues will similarly increase – although it is our expectation that they will.

[3] R (on the application of ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy and ors [2021] EWCA Civ 43
[4] R (Friends of the Earth Ltd and Ors) v Heathrow Aiport Ltd [2020] EWCA Civ 214
[5] Vedanta Resources PLC and another v Lungowe and others [2019] UKSC 20
[6] Okpabi and others v Royal Dutch Shell PLC and another [2021] UKSC 3
[7] Município de Mariana and others v BHP Group PLC [2021] EWCA Civ 1156

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