

LEGAL

In July 2021, the London School of Economics (LSE) published the third report in its *Global Trends in Climate Litigation* series, presenting the trends originating from climate cases filed or concluded between May 2020 and May 2021. The report identified the most common types of climate litigation, which included compliance with climate commitments; constitutional and human rights cases; corporate and financial markets cases; and climate adaptation-focused cases.

As well as exploring the growth of strategic climate litigation brought by activists to increase ambition on climate issues, the report also highlights cases that result in challenges to climate change policies, either intentional or otherwise.

Key cases

A recent, high-profile victory for climate activists came courtesy of the *Milieudefensie vs Shell* case, where the District Court of the Hague held that Shell owed a 'duty of care' to the claimants to reduce emissions resulting from its operations by 45% by 2030, relative to 2019 emission levels. This marked the first time that a company had been held legally responsible for its individual contribution to global emissions.

This is one of the forward-looking cases emphasised by the report that centres on the current and future activities of major emitters. Such cases aim to obtain a court declaration that the climate targets of major emitters comply with the Paris Agreement.

Another of the cases touched on in the report is the Australian case of *McVeigh vs Rest*. This claim was brought by a 23-year-old member of an Australian pension fund, who claimed that the fund's trustees were not doing enough to disclose and manage climate change risks. In November 2020, the fund settled the claim, acknowledging that 'climate change is a material, direct and current financial risk to the superannuation fund across many risk categories, including investment, market, reputational, strategic, governance and third-party risks'.

The broader impacts of the settlement (which are expected to be felt beyond the Australian jurisdiction) are likely to include increased pressure on funds globally to manage climate change risks actively and set out initiatives to that effect; with increased

Climate litigation and energy

John McElroy, Committee Member of the London Solicitors Litigation Association (LSLA) and a Partner at Hausfeld, highlights some of the key cases and future trends in climate litigation.

pressure on businesses to manage and report to their investors on any financial risk posed by climate change; and members demanding more from their funds and carefully scrutinising the management of climate-related financial risk.

Future trends

The report identified supply chains as a possible target of future climate litigation. In such cases, claimants could hold companies liable for climate-related acts or omissions of their supply chains.

In *Milieudefensie*, the court differentiated emissions from the Shell group and those resulting from wider entities within Shell's business network. The court held that Shell had an obligation to reduce emissions (including from its value/supply chain) but acknowledged that Shell had a higher level of responsibility for its own operations and emissions. The court afforded Shell a lower standard of obligation, ie 'significant best efforts' for supply chain emissions. But the report concluded that emphasis on such emissions could be taken as a 'growing consensus' around the need to limit cumulative emissions, with a focus on upstream as well as supply-side emissions.

However, whilst the *Milieudefensie* judgment is an example of courts stepping in to develop the law in concert with the climate crisis, the case is being appealed and may ultimately be overturned. Observers from outside the Netherlands might well question whether such a judgment could be given in less climate-progressive jurisdictions.

Analysis in the report also noted that lack of attention to supply chain resilience (in relation to extreme weather events caused by climate change) may lead to shareholder and other stakeholder claims against directors. In the UK,

with rapidly evolving regulatory and common law obligations concerned with reporting climate risk, it is also possible that there will be an increase in scrutiny around reporting by security issuers on the effect of climate change on their business and related risk mitigation.

Future claims may also relate to government subsidies and tax breaks for sectors with high emissions, of which there have been relatively few to date. The report draws attention to a UK case filed against the state-owned Oil and Gas Authority's (OGA) strategy to support new exploration and production initiatives in the North Sea, which could signal an expansion in focus for strategic climate litigation.

More to come

The cumulative number of climate change-related cases has more than doubled globally since 2015. Indeed, the overall impression of the report is that climate change litigation is expected to continue to grow.

Furthermore, the increasing impact of climate change on commercial issues indicates that the range of claims and defendants is expected to broaden. We at the LSLA and Hausfeld agree with the conclusions in the report relating to increased litigation in the financial markets and in connection with listed security issuers. The courts are expected to play an important role in developing the law to ensure that all stakeholders, across society, are incentivised to put the risks (financial or otherwise) posed by the climate crisis at the heart of their decision-making processes. ●



An increasing number of strategic climate litigation cases have been brought by activists to increase global ambition on climate issues

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