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TAKING THE TEMPERATURE
CLIMATE CHANGE LITIGATION IN E&W

The climate crisis has dominated news headlines around the world over recent years as the true scale of the challenge to address our climate breakdown becomes increasingly clear. A key part of action to address the crisis must be the introduction and enforcement of a legal framework which facilitates significant change.

Here, we consider the existing legal framework in England and Wales, particularly focusing on directors' duties, and the role of recent and potential future developments in climate change litigation for the wider debate.

The legal and regulatory framework

As regards directors' duties relating to climate change, several provisions under the Companies Act 2006 offer ways for investors to monitor and take necessary action. Under s.393, directors must not approve accounts unless they are satisfied that they have "*given a fair view of the assets, liabilities, financial position and profit or loss*". S.414C attempts to ensure that directors are properly assessed in line with their s.172 duties by requiring that the company's strategic report provides "*fair review*" of the business covering the principal risks and uncertainties being faced, and specifically refers to environmental and employee matters (s.414C(4)).

Both sections give scope for liability if a company's report fails to adequately address environmental factors. However, these sections are broadly drafted to allow environmental matters to be addressed in language within the requirements, but without giving them proper consideration. LJ Sales recently noted that "*[t]here is a clear case for these company laws to be modified…to provide a greater impetus to boards and individual directors to accord greater attention and weight to climate issues than has now been considered appropriate*" (Anglo-Australasian Law Society Speech (27 August 2019)). Although the guidance and legislation available is useful in giving investors avenues for scrutiny, they offer insufficient certainty given their broad language and general terms. Meanwhile, stakeholders must be aware of the requirements of the current legislative framework and act accordingly which we cover below in the examination of *McVeigh.*

Looking ahead, there are moves afoot to ensure reporting standards for premium listed companies specifically include climate-related disclosures. The FCA's recent consultation paper proposes the introduction of new rules requiring companies to state whether (and if not, why not) they comply with disclosure standards recommended by the Taskforce on Climate-related Financial Disclosures (TCFD). Additionally, the FCA is proposing to issue a Technical Note setting out existing environmental, social and governing (ESG) disclosure required by EU legislation and the FCA Handbook, which applies to *all* issuers. On the current timetable, from January 2021 the TCFD recommendations will have greater bearing on the FCA's regulatory framework and investors will have greater clarity on the ESG factors considered by companies. As recently as September 2020, the Department for Work and Pensions launched an additional consultation seeking views on their plans to require trustees of large pension schemes to have effective governance schemes in place to scrutinise risks and opportunities arising out of climate change. Prior to that, and notwithstanding Brexit, the European Commission also recently announced that it will introduce rules requiring businesses to undertake due diligence to mitigate environmental and human rights abuses in their supply chains.

Litigation: holding Governments to account

Public bodies' climate change compliance is also subject to increasing scrutiny. In a recent judgment regarding a number of jointly-managed judicial review proceedings against the Secretary of State (SoS) for Transport relating to Heathrow Airport's extension plans, the Court of Appeal (CoA) unanimously found the adoption of the Government's Airports National Policy statement to be unlawful (*R (on the application of Plan B Earth) v SoS for Transport (and related proceedings)* ([2020] EWCA Civ 214)). The issue was whether the Government's commitment to the 2015 Paris Agreement constituted Government policy on climate change and should therefore be considered by the SoS in formulating the Government's Airports National Policy. The CoA held in the affirmative on both counts and sent the Policy back to the Government for re-assessment. Until then, the Heathrow expansion plans have been put on ice.

It remains to be seen whether the UK Supreme Court (UKSC) will follow the CoA's reasoning with permission to appeal having been granted earlier this year. Meanwhile, this judgment demonstrates that the judiciary is increasingly willing to hold the Government accountable to its stated climate change policy, consistent with the UK's commitments to the Paris Agreement. To avoid being absorbed in lengthy and costly litigation, private businesses that depend upon Government contracts, plans and permissions must ensure that the Government carries out a specific analysis of climate change ramifications prior to approval.

Litigation risks for businesses

It is not only Governments who have been on the receiving end of climate change litigation; businesses have also been targeted with actions regarding their legislative obligations or the environmental impact of their operations. Here, we consider recent developments in three types of actions companies may face: shareholder activism, tort-based compensatory claims and collective proceedings.

Shareholder Activism: Disclosure and Climate Change Policies

As noted above, shareholders/investors are increasingly expecting full climate change disclosure and for a business's activities to meet a sustainability threshold. The key Australian case of *McVeigh v Retail Employees Superannuation Pty Ltd* (REST) (NSD 1333/2018), where trial is (at the time of writing) listed for November 2020, provides insight into the type of litigation which UK businesses may see in the future.

Mr McVeigh, one of REST's fund members, alleges that: (i) s.1017(c) Australian Corporations Act 2001 requires REST to provide its fund members with information allowing them to make an informed judgment about the management and financial condition of their REST product and REST's investment performance from a climate change perspective; and (ii) REST breached its fiduciary duties as a trustee by not having a more developed climate change policy. The case has been supplemented by the recent filing of Ms O'Donnell (*Kathleen O'Donnell v Commonwealth of Australia & Others* (VID482/2020), which builds upon Mr McVeigh's claim with a view to securing far-reaching climate change related disclosure requirements.

Both Mr McVeigh's and Ms O'Donnell's cases will be ones to watch. Given the similarity of the English and Australian legal systems, it is to be expected that UK investors and fund members may soon test compliance with existing and developing reporting duties of businesses in this jurisdiction, and scrutinise private businesses' climate change policies for adequacy.

Tort-Based Compensatory Claims: Carbon Majors 'Watch Out'

A large body of international and national cases signal a future in which three of the main hurdles facing such an action may be overcome.

First, climate change science is improving at such a rate that traditional hurdles to claimants (such as attribution and causation) no longer appear as insurmountable as they once did. Science is increasingly able to establish a causal relationship between anthropogenic climate change and certain weather events and is therefore capable of attributing a companies' greenhouse gas emissions to climate change.

In addition, recent legal developments will make it easier for claimants to hold corporations to account for their subsidiaries' environmental and climate change failures. The UKSC's landmark judgment in *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe and Others* ([2019] UKSC 20) establishes that in circumstances where a parent company exercises sufficient control over a subsidiary, the parent owes a duty of care to individuals affected by that subsidiary's practices. A claim against the English parent and its subsidiaries may therefore be pursued.

By contrast, the CoA in *HRH Emere Godwin Bebe Okpabi and others v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd* ([2018] EWCA Civ 191) - decided before *Vedanta* - held that a duty of care did not extend from Shell's UK parent to the Nigerian claimants. A decisive factor which distinguished the claim from *Vedanta* was that Shell only had a minority shareholding in the Nigerian subsidiary, whereas Vedanta was the majority shareholder in its subsidiary, Konkola Copper Mines. *Okpabi*'s appeal to the UKSC was stayed to await the outcome of *Vedanta* and was heard in June 2020, with the judgment anticipated in late 2020 or early 2021.

UK-based multinationals may therefore find themselves increasingly exposed to environmental and climate-related claims from non-UK-based claimants for the shortcomings of their international subsidiaries.

Consumer Rights and Fraud: Collective Proceedings

This type of action concerns companies which seek to circumvent ever stricter regulatory efforts to combat climate change via fraudulent means. The claimants in the well-known group actions of purchasers of

Volkswagen, Audi, Skoda and SEAT cars recently achieved an interim success in the High Court. Mr. Justice Waksman found that Volkswagen's use of software to reduce emissions in test conditions amounted to installing a 'defeat device' within the meaning of Art.3(10) Regulation 715/2007/EC (*Crossley and others v Volkswagen AG and others* ([2020] EWHC 783 (QB))). In addition, he held that it was an abuse of process by Volkswagen to dispute whether the vehicles contained a defeat device, given that the High Court is bound by the previous finding of the German authority which found that the vehicles contained a defeat device. This litigation indicates that the landscape of collective redress proceedings is changing, with recent judgments clarifying its availability and scope.

The CoA in *Lloyd v Google LLC* ([2019] EWCA Civ 1599) permitted the use of CPR r.19.6(1) to bring an opt-out collective action and clarified the 'same interest' requirement in the context of data breach cases. This requirement is met where an identifiable class of people have the same cause of action and suffered the same loss as a result. Whilst the pending UKSC appeal will likely determine the availability of CPR r.19.6(1) for collective proceedings and clarify the same interest requirement for the foreseeable future, it is possible to envisage this collective mechanism being used in the context of climate litigation.

The above demonstrates some of the successes to date in using existing legislation and procedures to tackle climate-related violations. Whilst the involvement of investors and stakeholders is clearly necessary to ensure that influential private actors in the economy have climate change front and centre in their minds, litigation is also capable of being brought by interested parties.

A continued focus on improving reporting standards will assist with this, whilst it is prudent to expect a good deal of further litigation in this exciting and developing sphere.

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The team [...] undertakes environmental, climate change, and commercial litigation matters against corporations for a client roster which includes activist Greta Thunberg. […] The group also has a thriving pro-bono practice.
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