

Climate change litigation risk growing in the UK

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The growth of climate change-related litigation is becoming a risk which UK businesses of all types cannot afford to ignore.

The total number of climate change actions issued globally almost doubled between 2017 and 2020, according to data from the London School of Economics. Whereas by 2017, 884 climate change cases had been brought in 24 countries, 1,587 had been brought by May 2020 - in approximately 37 countries including the US, which accounted for over 75% of cases, a total of 1,213. Outside the US, the majority of cases have been brought in Australia, the UK and bodies and courts of the EU.

Although the UK has not yet seen the number of cases related to climate change witnessed in some other jurisdictions, climate change is becoming an ever more pressing item on governmental and corporate agendas and it is increasingly important that all businesses understand and take steps to mitigate the risks of litigation.

Climate change litigation covers a broad range of actions that result from climate-related issues, mitigation and risks. Claimants, including a growing number of activist non-profit organisations, are seeing the potential for litigation to drive an increase in climate change mitigation activity, across a range of claim types. The risks are no longer limited to governments and fossil fuel companies: all businesses must be aware of the risks.

In addition to the usual litigation and attendant reputational risks, navigating disputes in this area may also give rise to the range of complexities involved in defending class or mass actions, due to the potential for large numbers of claimants to pursue climate change-related claims against an organisation.

Climate change litigation in the energy sector

Historically, climate change litigation has been dominated by claims against companies involved in the extraction, refinement and sale of fossil fuels. Common causes of action have included claims of nuisance, negligence, fraud and non-disclosure, and have tended to be based on arguments that the activities of these companies directly relate to emissions associated with climate change. These companies remain the targets of litigation: there are currently at least 40 ongoing climate cases worldwide against the biggest fossil fuel companies - the so-called 'Carbon Majors' - including one complaint in the UK.

In recent years, there have been an increasing number of claims based on inconsistencies between discourse and action on climate change, known as 'greenwashing'. These cases arise when corporate marketing campaigns are said to overstate advertised environmental performance or benefit and to be misleading. In principle, greenwashing allegations may be levelled against businesses operating in a range of sectors. However, these claims have particularly been seen against energy companies, relating to, for example, how advertising campaigns have portrayed the scale of businesses' carbon activities or, conversely, of their renewable and low-carbon activities.

Climate change litigation involving governments

Public law actions are also a longstanding and increasingly prevalent strand of climate change litigation - covering human rights; and constitutional and administrative law issues, including judicial review of planning and other government decisions. Outside the US, approximately 80% of climate change cases have been brought against governments.



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Michael Fenn, Partner

Although such claims are often brought by corporations or individuals, activists and other groups are increasingly recognising the extent to which public law avenues offer a means of holding governments to account and produce outcomes that go beyond the individual litigant bringing the claim. Successful cases have the power to influence governmental policy and action.

A defining case was brought by the Urgenda Foundation against the Dutch government, in which judgment was given in December 2019. Here, the claimant successfully sought an injunction to compel the government to reduce its emissions. The decision led to a commitment by the Dutch government to reduce the capacity of its remaining coal-fired power stations by 75%, and to implement a €3 billion package of emissions-reduction measures by 2020. Michelle Bachelete, UN High Commissioner for Human Rights, said that the case "provide[d] a clear path forward for concerned individuals in Europe - and around the world - to undertake climate litigation in order to protect human rights".

Following that path, in February 2021, four environmental groups succeeded against France in what some commentators described as the "case of the century". The claimants accused the French government of failing to fulfil its obligations to decrease greenhouse gas emissions in line with the Paris Climate Agreement and related French laws. The lawsuit followed a petition signed by 2.3 million people expressing their dissatisfaction with how the French government was attempting to mitigate global warming. The French government was given further time to provide information to the court on the steps it is taking, and must pay symbolic compensation of €1.

Similarly, the French municipality of Grande-Synthe, a low-lying coastal town, is pursuing its own proceedings against the French government regarding the adequacy of its action on climate change, in particular the impact of climate change on the town as a result of exposure to sea level rise and flooding. The court previously ordered the government to justify that it is taking adequate action towards meeting its 2030 climate goals, and the matter is due to come back to court in March 2021.

These cases, and similar actions in countries including Ireland and Australia, demonstrate the growing willingness of courts to find states legally blameworthy for climate change inaction. Future cases are also in the pipeline - for example, a case against the Belgian government by non-profit Climate Case is due to be heard in March 2021.

Climate change litigation in other sectors

The threat of climate change litigation is also beginning to bite beyond the public and energy sectors.

As climate change continues to increasingly threaten society - and the financial success of corporations within it - various stakeholder groups are showing an increasing willingness to use litigation to effect change from businesses outside the energy sector. As well as the potential for greenwashing action where advertising claims do not align with climate change mitigation activities, claims have particularly been seen in relation to financial disclosures and investment decisions.

Financial disclosure

Shareholder claims against banks, pension funds and investment funds for failing to factor climate risk into their decision-making and to disclose climate risk to their beneficiaries have become more prevalent, as the financial implications of climate risk become more apparent and urgent.

Several claims have been brought in common law jurisdictions. In 2018 an Australian man, Mark McVeigh, sued his pension fund for their failure to disclose and subsequently address the climate change risks affecting his investments. The pension fund agreed to settle, acknowledging in a subsequent press release that climate change "is a material, direct and current financial risk to the superannuation fund" and "it is important to actively identify and manage these issues". This illustrates how shareholder litigation can alter current and future corporate behaviour.

More recently, in July 2020, another Australian, Kathleen O'Donnell, filed a court case against the Australian government. In this ongoing case, O'Donnell proposes that climate change poses a material risk to investors in Australian government bonds, and alleges that the government breached its duty of disclosure and misled and deceived investors in failing to disclose such risks. The case offers an interesting example of the growing relationship between government accountability, investor action and climate change risk.



As the government pursues and brings into effect a number of measures to improve corporate reporting in relation to climate change risks, it is likely to be only a matter of time before the UK sees financial disclosure climate change litigation

In the UK, a report by environmental charity and legal activists ClientEarth, published in February 2021, asserts that a majority of top-listed companies are failing to adequately disclose the effects of climate change on their businesses. The report goes on to assert that such failures are potentially unlawful in accordance with existing UK laws that require companies to disclose material information about their climate change-related risks and impacts.

As such, and as the government pursues and brings into effect a number of measures to improve corporate reporting in relation to climate change risks, it is likely to be only a matter of time before the UK joins Australia in seeing financial disclosure climate change litigation.

Directors' duties

Shareholders have also increased their demands in relation to climate change compliance on the basis that climate change creates additional risks for companies and their financial performance. Climate change considerations are particularly relevant to the execution by directors of their legal duties.

For example, in 2018, a Polish power company was sued by one of its shareholders, which suggested that the company's construction of a coal-fired power plant would harm the company's economic interests due to climate change-related financial risks arising from the rising price of carbon as against the falling cost of renewables. The shareholder argued that it was an "indefensible" risk to investors to pursue the project and that to do so would constitute a breach of the members' fiduciary duties of due diligence and to act in the best interests of the company and its shareholders. The ultimate success of this action resulted in the construction project ending, setting a powerful precedent that corporations and directors are legally obliged to consider climate change as part of their company law obligations.

The case also highlights the fact that even shareholders with a nominal shareholding have the standing to initiate proceedings of this type, which can in turn have a deep impact on corporate and company policy at even the largest companies. Here, the minority shareholder in question was ClientEarth, whose shareholding when commencing proceedings was only worth €30, while the decision it was challenging had been approved by a majority of shareholders. As public companies are unable to control who purchases their shares, the risk of litigation to companies of this type is particularly acute. However, even in the context of private limited companies, company law procedures and remedies offer a powerful tool for shareholder activism.

In late August 2019 Lord Sales, a UK Supreme Court judge, identified the scope of directors' legal obligations to consider environmental concerns in operating companies. These obligations include, and potentially exceed, the need for directors to comply with a range of regulatory and disclosure requirements and avoid attracting civil or criminal liability for polluting activities. Lord Sales envisaged circumstances in which company directors might have to take action to reduce their contribution to climate changing activity for reputational or other financial reasons when discharging their statutory duties - including, in the UK, the duty under section 172 of the 2006 Companies Act to promote the success of the company for the benefit of its members.

Specific cases are yet to materialise in a UK context. Despite this, there is a high likelihood that we will see climate change litigation against directors in the coming years, as climate considerations begin to form a recognised part of their existing legal obligations and duties.



Michael Fenn

Partner
Risk Advisory Services
+44 20 7054 2760
+44 7932 401 402
michael.fenn@pinsentmasons.com
