GREEN LITIGATION; RISING LEVELS OF ESG CLAIMS IN THE CURRENT CLIMATE

Hannah Sharp, a partner at Rosling King LLP, discusses recent ESG claims, analyses the trends and examines the areas of greenwashing, parent company liability and derivative actions. This article has appeared in Lawyer Monthly magazine.

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­­As climate change causes ice sheets to shrink, fires to engulf our forests and seas to warm, so the number of environmental, social and governance (ESG) claims grows, with many cases being found to have direct judicial outcomes which were identified as favourable to climate action.

Judicial Review

One of the most powerful ways of tackling climate change through litigation must include bringing claims which are designed to result in change to government policy with a view to improving environmental outcomes. Back in June 2022, a successful judicial review challenge was brought by two environmental NGOs, which forced the UK Government to revise its ‘net zero’ carbon strategy. However, that is unlikely to be the end of the story: announcements by the UK Government in September 2023 have been widely criticised as watering down previous commitments, which were themselves already viewed by many as being insufficient to enable the UK to meet its climate targets. Claimant NGOs are said to be considering further action.

Derivative Actions

Oil giant Shell has recently found itself on the receiving end of a claim brought by ClientEarth, an international NGO based in the UK: *ClientEarth v Shell Plc and others* [2023] EWHC 1137 (Ch). ClientEarth sought, in its capacity as shareholder, to bring a derivative action against Shell’s Board of Directors under s261(1) of the Companies Act 2006, on the grounds that the Board had “*failed to promote the success of the company and to act with reasonable care, skill and diligence*” because “*the Board is breaching those requirements if it is not properly managing climate risk*.”

This is understood to be the first derivative action brought by a shareholder against the directors of a listed company for allegedly failing to manage climate risk. Among other things, ClientEarth relied on the alleged failure by Shell to comply with an earlier order of the Hague District Court in *Milieudefensive v Royal Dutch Shell plc*requiring it to cut its CO2 emissions by 45% from their 2019 levels by 2030, in the first ruling making a company legally obliged to align its policies with the Paris Agreement.

In the end, ClientEarth failed to convince the English High Court, which dismissed its claim in May 2023, finding that ClientEarth had failed to establish a *prima facie* case that the directors had breached their duties to Shell, and noting that the Court was “*not prepared to intervene in the commercial strategy and decision-making or superimpose new duties onto directors*”. The decision represents a setback for those seeking greater accountability for directors of listed companies which cause environmental damage.

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Parent Company Liability

Claims against parent companies have been utilised, seemingly with some success, for the purposes of holding companies said to be causing environmental damage to account. The UK Supreme Court unanimously held in *Okpabi and ors v Royal Dutch Shell plc and another* [2021] UKSC 3 and *Lungowe v (1) Vedanta Resources Plc and (2) Konkola Copper Mines Plc* [2019] UKSC 20 that a parent company may be held legally responsible for environmental harms brought about by its foreign subsidiaries.

The Supreme Court guidance in these cases emphasises that parent company liability arises not only in the narrow situation where there is a relationship of ‘control’ between parent and subsidiary – it can arise when a subsidiary simply adopts a group-wide policy. Time will tell, but for now it seems that bringing a claim against a parent company could prove to be an effective route to establishing liability of global companies for environmental failings outside the UK.

Greenwashing

‘Greenwashing’ is misleading or deceptive publicity used by an organisation to portray an environmentally responsible public image. Bodies such as the Competition and Markets Authority and Advertising Standards Agency are already investigating greenwashing claims and taking action against wrongdoers, with litigation expected to follow.

Importantly, there is no reason why defendants to greenwashing claims would be limited to fossil fuel companies or other entities directly causing environmental damage. There is the potential for a wider net of claims to be cast against any company that misleads others, including by using ‘net zero’ carbon statistics to cover up damage to the environment. One possible route to a successful greenwashing claim is likely to be a group action brought by consumers for misrepresentation following the sale of goods or services said to be environmentally friendly or carbon neutral.

False or misleading statements by companies in relation to environmental matters may also give rise to claims by shareholders, particularly as companies’ environmental reporting obligations are increasing year by year. Sections 90 and 90A of the Financial Services and Markets Act 2000 provide a cause of action for investors who have suffered losses through a fall in a company’s share price as a result of misleading statements or omissions made in prospectuses or listing particulars which induced the investors to buy, hold or sell their shares, and it seems likely that those provisions will be relied upon as the basis for environmental claims sooner or later.

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Conclusion

In June 2023, the Grantham Research Institute on Climate Change and the Environment published a snapshot of the global trends in climate change litigation focusing on the period May 2022 to May 2023. The report noted that 2,341 cases had been identified globally, with 190 of these being filed in the preceding 12 months. The report also identified that climate change litigation is expanding into new jurisdictions, with claims being brought in countries including Bulgaria, Thailand, Romania, Finland and Turkey. Most importantly, more than 50% of the noted cases were found to have direct judicial outcomes which were identified as favourable to climate action.

The boom in ESG-related claims shows no sign of slowing down. Although most of the claims in this area to date have been brought by NGOs, as the impact of climate change is increasingly felt, further claims will inevitably follow, including claims brought by more diverse categories of claimants against a wider range of defendants.

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