ALLEN & OVERY

Climate Litigation in the wake of Covid-19 continued: Picking up steam

1. Introduction

In the last quarter of 2020 we published under the auspices of A&O Belgium's Sustainability Flagship Project, an overview analysing the status of current climate change litigation in courts around the world in light of the Covid-19 pandemic. In that publication, we identified a number of emerging trends concerning litigation against states as well as against companies. Several months on and with the pandemic still in full swing, this contribution seeks to provide a concise update and examine which of these trends have gained further traction by analysing certain recent and highly topical court decisions.

2. Climate litigation against states

2.1 (De-)carbonisation of environmental law

(a) Environmental assessment: R. *v Secretary of State for Transport*

In the case between several environmental NGO's and the UK Secretary of State for Transport challenging a government policy (Airport National Policy Statement – ANPS) which allowed for the construction of a third runway at Heathrow International Airport, the previous publication left off at the permission granted by the UK Supreme Court to Heathrow Airport Ltd and Arora Holdings Ltd to appeal the decision. In February 2020, the Court of Appeal had held that the government's approval of the expansion was illegal because the Secretary of State had failed to adequately consider the UK's climate change commitments under the Paris Agreement and the Climate Change Act 2008 as required under the Planning Act, as well as under the SEA Directive. However, the Supreme Court did not follow this reasoning.[1]

In its judgment delivered on 16 December 2020, it overturned the previous decision by ruling that neither the Paris Agreement's provisions, nor its domestic implementation (which was being developed at the time) constituted "governmental policy" in the sense of the Planning Act. Moreover, it decided that the Secretary of State had given appropriate weight to the Paris Agreement's commitments and considerations of sustainable development by way of the targets and obligations encompassed in the Climate Change Act ("CCA"). Furthermore, the Supreme Court ruled the environmental statement's lack of distinct reference to the Paris Agreement did not breach Strategic Environmental Assessment requirements, as "the UK's obligations under the Paris Agreement were sufficiently taken into account in the UK's domestic obligations under the CCA". Finally, it ruled the Secretary of State's decision to exclude non-CO_2 emissions and post-2050 emissions was not irrational.[2] In summary, the Supreme Court reinstated the ANPS, allowing the project to proceed to the next stage – development consent.

1. R(on the Application of Friends of the Earth Ltd and others) (Respondents) v Heathrow Airport Ltd (Appellant) [2020] UKSC 52.
2. R(on the Application of Friends of the Earth Ltd and others) (Respondents) v Heathrow Airport Ltd (Appellant) [2020] UKSC 52 par 107, 132-133, 149, 165-166.

Overall, this decision appears to represent a marked exception to the materialising trend of extensive interpretation of existing environmental requirements to include climate criteria in environmental assessments and reports. Although the Supreme Court seems to refer more to domestic climate obligations, it emphasises the CCA's emission reduction targets provide an equivalent protection to the Paris Agreement's obligations as implementation thereof. In this sense, the protection's substantive scope appears to remain relatively similar. Nevertheless, this decision may influence the manner in which environmental requirements are interpreted for climate change considerations in the future, in particular the legal sources from which these considerations are drawn and how the Paris Agreement's provisions will be involved in subsequent environmental assessments.

(b) Carbon-heavy project approval: *ClientEarth v Secretary of State*

On January 2021, the UK Court of Appeal decided on a claim by an environmental NGO against the governmental approval for construction of a natural gas plant, which would become the largest in Europe. ClientEarth had been granted leave to appeal the decision on the issue whether the government had misinterpreted a number of national energy policies on several aspects, after the High Court ruled in favour of the defendants in May 2020.[3] Firstly, the appellant argued that the policies required a "quantitative" assessment of the particular contribution of the project towards the need for the type of infrastructure in question.[4] The Court of Appeal held that the policies did not require a quantitative assessment of need, thereby rejecting the appellant's first argument.[5]

Secondly, ClientEarth contended that the government did not accord carbon emission considerations the weight required by the energy policy, in light (*inter alia*) of the UK's 2050 Net Zero target.[6] The Court ruled that CO_2-emissions *"are not, of themselves, an automatic and insuperable obstacle to consent being given for any of the infrastructure for which EN-1 defines a need"* and that it is up to the decision-maker to decide how much weight is given to those considerations.[7] Thirdly, the plaintiff argued that the government had failed to adequately weigh the project's adverse impacts against its potential benefits.[8] The Court rejected this final argument by referring to its previous arguments and held that the government had in fact performed the balancing exercise correctly under the relevant policies.[9] In summary, the Court denied the appeal on all points, which may contradict the emerging trend of incorporating climate change considerations in regulatory approvals. Nevertheless, it remarked that in certain circumstances and for certain project proposals, it may be appropriate to undertake a quantitative assessment.[10] Furthermore, for climate change considerations, it suggested that in some cases their weight may be *"significant, or even decisive"*.[11] In this sense, it appears that a project proposal should be subject to an actual balancing exercise of its benefits and impacts, including on climate change. This could pan out into refusal of the development consent, depending on the circumstances at hand. Therefore, it seems the Court has confirmed that climate change impacts should be appropriately considered during the approval process, which may substantiate the trend of (de)-carbonisation of environmental law. In any case, it will be interesting to see how this ruling will play out in practice.

3. R (on the application of Clientearth) v Secretary of State for Business, Energy and Industrial Strategy and Drax Power Limited [2021] EWCA Civ 43 https://www.judiciary.uk/wp-content/uploads/2021/01/ClientEarth-v-Sec.-of-State-for-business-energy-and-industrial-strategy-judment.pdf par. 5; Clientearth, "Court upholds gas plant approval but sets important climate planning precedent" (Clientearth, 21 January 2021) <https://www.clientearth.org/latest/latest-updates/news/court-upholds-gas-plant-approval-but-sets-important-climate-planning-precedent/?utm_source=linkedin&utm_medium=social&utm_campaign=> accessed 25 January 2021; Sabin Center for Climate Change Law, "Clientearth v Secretary of State" <http://climatecasechart.com/non-us-case/clientearth-v-secretary-of-state/> accessed 25 January 2021.
4. R (on the application of Clientearth) v Secretary of State for Business, Energy and Industrial Strategy and Drax Power Limited [2021] EWCA Civ 43 https://www.judiciary.uk/wp-content/uploads/2021/01/ClientEarth-v-Sec.-of-State-for-business-energy-and-industrial-strategy-judment.pdf par. 48.
5. Ibid par. 55, 59, 63 and 67.
6. Climate Change Act 2008 article 1; Ibid par. 77.
7. Ibid par. 87-90.
8. Ibid par. 98.
9. Ibid par. 102-103 and 108.
10. Ibid par. 67.
11. Ibid par. 87.

(c) Licensing for deep-sea hydrocarbon extraction: *Greenpeace v Norway*

Recently, the Norwegian Supreme Court has ruled on the case between a coalition of environmental NGO's and the Norwegian Ministry of Petroleum and Energy, which challenged the granting of deep-sea hydrocarbon extraction licenses in the Barents Sea. The plaintiffs argued that the Ministry's decision violated article 112 of the Norwegian Constitution, which protects citizens from environmental and climate harms, because the granting of these licences is inconsistent with the climate mitigation efforts required to avoid global warming of 1.5°C or 2°C in line with the provisions of the Paris Agreement and - as alleged by the plaintiffs – further a phase-out of fossil fuels. Furthermore, considering the sensitive nature of the proposed development area (ie in the Arctic, abutting the ice zone), extraction activities could present elevated risks of damages and spills.[12] Notwithstanding, on 22 December 2020, the Supreme Court found in favour of the Norwegian government and upheld the licences on the basis that the emissions generated by the export of the hydrocarbons extracted under these licences were too uncertain in nature to justify their invalidation.[13]

By contrast, in 2019 an Australian Land and Environment Court upheld governmental refusal of a coal mining application because the environmental impact assessment did not account for exported emissions.[14] To remediate this, the subsequent approval by the New South Wales Independent Planning Commission of a separate coal mining proposal included a condition to only export the extracted resources to countries which are parties to the Parties Agreement or countries which have adopted similar policies. This would ensure the exported emissions are accounted for.[15] In short, these decisions suggest states' individual approach towards carbon emissions generated from exported hydrocarbons remains varied. However, in the absence of a global carbon accounting mechanism, the further development of this trend remains to be seen.

12. Norwegian Supreme Court 22 December 2020, HR-2020-2472-P, (case no. 20-051052SIV-HRET) https://www.domstol.no/Enkelt-domstol/hoyesterett/avgjorelser/2020/hoyesterett-sivil/hr-2020-2472-p/ (in Norwegian) accessed 20 January 2021; see also Sabin Center for Climate Change Law, "Greenpeace Nordic Ass'n v Ministry of Petroleum and Energy" http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy/?mc_cid=486b3021c4&mc_eid=[c70ad85e80] accessed 20 January 2021; Notice of Appeal to Supreme Court of Norway 24 February 2020 (unofficial translation), (case no. 18-060499ASD-BORG/03) http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200224_HR-2020-846-J_appeal.pdf accessed 20 January 2021 p.2.
13. Ibid.
14. Gloucester Resources Limited v Minister for Planning [2019] NSWEC 7 http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190208_2019-NSWLEC-7_decision.pdf accessed 20 January 2021.
15. New South Wales Independent Planning Commission, "Development Consent United Wambo Open Coal Cut Mine" (29 August 2019) https://www.ipcn.nsw.gov.au/resources/pac/media/files/pac/projects/2018/11/united-wambo-open-cut-coal-mine-project-ssd-7142/determination/ssd-7142-recommended-conditions-of-consent-final.pdf accessed 20 January 2021 section B32.

2.2 State aid: *Greenpeace v The Netherlands*

In the wake of the pandemic and in order to promote a green recovery, it has been suggested that Member States use economic incentives such as state aid in a way to make the granting thereof dependent on meeting certain criteria. These could include emission reduction targets, sustainable development policies or additional reporting requirements. The European Commission's Temporary Framework for State Aid in aid of recovery from the Covid-19 pandemic already specifies requirements for benefiting companies to publish information on their contribution to the green transition and climate neutrality.[16]

KLM receives state aid from the Dutch State in order to survive the Covid-19 pandemic. Greenpeace started interim procedures against the Dutch State claiming that the Dutch State should attach stricter climate conditions to the state aid package. On 9 December 2020 the District Court in Den Haag rejected this claim from Greenpeace.[17] The Court noted that the Kyoto Protocol stipulates that there will be cooperation with the United Nations Civil Aviation Organization (ICAO) to reduce greenhouse gas emissions from cross-border aviation. The Court furthermore determined that the CO_2-emission reduction to be imposed on KLM by Greenpeace involves a further reduction than agreed in the aforementioned ICAO context. Since there is no consensus on such an emission reduction in an international context, it is also not possible, to assume an obligation for the Dutch State to attach the emission reduction condition to the state aid package as required by Greenpeace. For the sake of completeness, the Court noted that even if there would be a concrete international emission reduction obligation Greenpeace's claim would not have been automatically allowable, since the Dutch State would have a (great) discretion in the choice of concrete national measures to be taken.

In the context of an interim procedure the result of this judgement was expected, since it is difficult to convince a Court in an interim procedure that (eg) the principle of the duty of care obliges the Dutch State to impose stricter emission reduction obligations.

3 Climate Litigation against companies

3.1 Stakeholder activism and fiduciary duties

Additionally, the increasing awareness of stakeholders and investors of their investments' carbon footprint as an emerging aspect of sustainable corporate governance has sparked scrutiny into the potential exposure arising out of corporations' continued investment in carbon-intensive industries and assets. For example, a number of HSBC shareholders has submitted a 'climate resolution' ahead of the firm's annual meeting in April 2021, contrasting its net-zero ambitions to its lack of concrete strategies and targets on phasing out fossil fuel funding.[18] This illustrates the mounting pressure on companies to translate their overarching corporate policies and client-facing statements into concrete strategies and commitments to achieve these bold claims. In this sense, the litigation risk from within may be increasing.

16. Communication from the European Commission, "Amendment to the Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak", C(2020) 3156, 8 May 2020, point 83.
17. District Court Den Haag, 9 December 2020, casenr. C/09/600364 / KG ZA 20-933 (Greenpeace v The Netherlands), ECLI:NL:RBDHA:2020:12440.
18. Attracta Mooney and Steven Morris, 'HSBC Targeted by Shareholders over Fossil Fuel Financing' (Financial Times, 10 January 2021) https://www.ft.com/content/9063f7c0-574c-4d82-825f-44e00add2818 accessed 11 January 2021.

3.2 Milieudefensie et al v Royal Dutch Shell plc – Deep dive

In the spirit of the successful *Urgenda* litigation, which resulted in the Dutch state being forced to realign its carbon reduction targets with its international commitments, environmental actors are also looking to hold companies accountable for their carbon-intensive activities. In *Milieudefensie* et al v Royal Dutch Shell plc, for which the court decision is expected in May 2021, several environmental NGO's are suing Royal Dutch Shell plc ("RDS") for an act of tort by an unlawful endangerment, in conjunction with the human rights obligations under articles 2 and 8 ECHR as applied in *Urgenda*.[19] The plaintiff seeks to force RDS to enhance its climate ambitions and emission reduction efforts for 2030 (45% reduction compared with the level in 2010), 2040 (72% reduction compared with 2010) and 2050 (100% reduction compared with 2010) by means of a judicial order.

(a) Appellant's reasoning

The plaintiff's main argument pertains to the legal ground of unlawful endangerment, which is a tort under Dutch law if five criteria established in case law are fulfilled:[20]

Firstly, the plaintiffs should demonstrate the nature and extent of the damage caused, in this case, by climate change. To this end, it asserts that examples of climate change-induced damage are rife and RDS contributes a substantial part to the global carbon emissions. Secondly, the plaintiffs must prove the damage was known and foreseeable. In this respect the plaintiff refers to the corporate policies adopted by RDS in the past, indicating that it was aware of fossil fuel combustion's detrimental effects on the global climate and the need to transition away from carbon-intensive energy sources. The plaintiffs state that RDS' corporate strategy at the time included the creation of a corporate branch focused on promoting renewable energy. However, this strategy was profoundly reassessed in 2007, after which RDS resumed major investments in technologies generally characterised as carbon-heavy (eg shale oil, shale gas, oil sands). The plaintiff argues this behaviour increases the risk of stranded assets, carbon lock-in and slows down the energy transition, thus constituting negligent behaviour.[21]

Thirdly, the plaintiff contends that the probability of dangerous anthropogenic climate change manifesting, resulting in a temperature increase of more than 2°C in the case of inaction is realistic.[22] Fourthly, the plaintiff should demonstrate the nature of RDS' actions or omissions are dangerous as to constitute negligence. Here, the plaintiff relies on the *Urgenda* decision to accord a high standard of care to actions or omissions contributing to dangerous anthropogenic climate change. According to *Urgenda*, because the state is in control of the collective emission levels in Dutch society, it should be held to an elevated duty of care.[23] In the case at hand, the plaintiffs have argued RDS has a comparable - if not more direct – grip over its activities (eg the amount of fossil fuels traded, present and future investment decisions).[24] However, plaintiffs also claim RDS' climate ambition is inadequate to meet the emission reduction efforts required to limit global warming to 2°C.[25]

The final criterion concerns the difficulty in taking precautionary measures. To this end, the plaintiffs argue that while RDS was readily aware of a potential future move away from fossil fuels, it did not undertake substantive efforts to refocus to more sustainable alternatives.[26] Plaintiffs argue that the opposite seems true, which has increased the risk of stranded assets and carbon lock-in, while potentially impeding the energy transition. Furthermore, in the spirit of the *Urgenda* ruling, the plaintiffs contend that, due to the ECHR's indirect horizontal effect, inadequate efforts to reduce emissions breaches RDS' active duty of care enshrined in articles 2 and 8 ECHR. RDS has committed to respecting human rights by subscribing to the UN Guiding Principles on Business and Human Rights and the UN Global Compact and the OECD Guidelines for Multinational Enterprises. Therefore, RDS's breach of the duty of care could also constitute a threat to human rights, in particular the right to life and the right to an undisturbed private life (articles 2 and 8 ECHR).[27]

19. Dutch Supreme Court 20 December 2019, 19/00135 (Urgenda v The Netherlands); District Court Den Haag, Milieudefensie v Royal Dutch Shell plc (pending) http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/ accessed 11 January 2021.
20. Dutch Supreme Court, 5 November 1965, NJ 1966, 136 ("Kerlderluik"), ECLI:NL:HR:1965:AB7079.
21. Ibid par. 520, 577,589, 635.
22. Ibid par 527.
23. Ibid par 611.
24. Ibid par 612-613, 636.
25. Ibid XI.4.2.
26. Ibid par 624, 637.
27. Ibid par 525-526, 586-587, 710-728, 788-789.
28. Milieudefensie et al v Royal Dutch Shell plc (Reply, 13 November 2019) C/09/571932 2019/379 par 402 and 414.

(b) RDS's position

RDS argues it has not committed a tort and that a potential judicial order to reduce its emissions would exceed the competences of the judiciary and entreat on the territory of the legislative and/or executive branches, as the current state of the law does not render international or domestic emission reduction targets directly applicable to private parties.[28]

Furthermore, RDS refutes the plaintiffs' assertion that the emissions caused by end users of fossil fuel products and by its other corporate entities could be attributed to RDS.[29] In this sense, it argues it has no control over the actions of end users of their products and is therefore not responsible for these emissions.[30] Moreover, RDS contends that the plaintiffs' claim pertaining to its future behaviour (in 2030, 2040 and 2050) is marred by uncertainty surrounding future technological developments, RDS' actions and the evolution of the standard of care.[31] For instance, in the face of regulatory uncertainty on future climate change commitments for corporations, it proposes that the end user may be responsible for emission reduction efforts rather than RDS.[32]

Additionally, RDS puts forwards multiple arguments against the unlawful endangerment claim made by the plaintiffs. With respect to the criteria specified in Dutch case law (also known as the "Kelderluikcriteria"), RDS argues the first criterion is not fulfilled. To this end, it claims the plaintiffs' assumption that the emissions of end users are attributable to RDS, rendering it a "large polluter" is false.[33] Against the fourth criterion (nature of the actions or omissions), it asserts all of its activities have been licensed and are therefore expressly permitted by the government. RDS also highlights its proactive approach towards the energy transition (eg Net Carbon Footprint ambition).[34]

The fifth criterion is refuted with reference to RDS' current emission reduction efforts, the risk of distortion of competition if RDS is singled out to comply with more stringent reduction targets, as well as the argument that other entities will fill the void created if RDS is forced to transition away from fossil fuels (market substitution argument).[35] RDS also argues a lack of causality exists between its own emissions (which it argues are negligible) and global emissions on the one hand, and the emissions generated by the end users of its fossil fuel products on the other hand.[36] Furthermore, it states that plaintiffs fail to prove that the emissions of RDS (with or without attributing end user emissions) would contribute to "dangerous anthropogenic climate change" in any substantial way.[37] As regards the claim under articles 2 and 8 ECHR, the defendant argues that, regardless of previous corporate human rights pledges, it cannot be bound by these articles, either through the indirect horizontal effect of certain ECHR provisions, or through the standard of care encompassed.[38]

(c) Reflection

As an example of the trends of 'greening' of human rights, as well as the 'better policies'- type lawsuits that seek to force companies to adopt more stringent climate change commitments, the outcome of this case will be highly anticipated by both environmental actors aiming to strengthen the reach of international and domestic emission reduction targets and corporations looking to (re-)assess the potential implications of their high-level policies and commitments on their corporate activities. Indeed, a decision in favour of the plaintiff may contribute to increasing the standard of care expected from companies for sustainable development. In particular, the pledges made by these entities in corporate policies and public statements may take on enhanced meaning, which they may have not anticipated. Furthermore, companies may sustain reputational damage when confronted with lagging climate ambitions through climate litigation. Nevertheless, from a macro-perspective, the trend of suing companies in order to hold them accountable for past, present and future emissions is likely to flourish in the future. In the end, however, all eyes are on the District Court of The Hague to deliver a resolution of the matter. It is likely though that – whatever the outcome of this judgment – it will be appealed by either party.

29. Ibid par 427.
30. Ibid par 430-435.
31. Ibid par 439, 445.
32. Ibid par 458-459.
33. Ibid par 512.
34. Ibid par 478.
35. Ibid par 525-534.
36. Ibid par 542.
37. Ibid par 540-544.
38. Ibid par 577, 621-622, 649.

4. Conclusion

In conclusion, while the trends on greening of human rights and holding companies accountable for their emissions appear to be perpetuating, the court's decision on their merit remains to be seen. Furthermore, the UK Supreme Court's decision on the Heathrow case seems to be a hiccup in the emerging trend of (de-) carbonisation of environmental law. This is also the case for the Norwegian Supreme Court decision on deep-sea hydrocarbon extraction and the Court of Appeal's recent ruling on the power plant approval, which may have muddied the waters further. That is not to say this trend will fade away; the implications of these decisions for future case law are uncertain at this time. Finally, the trends of stakeholder activism and attaching requirements to state aid illustrate, albeit not always successfully in court, the increasing weight being attached to corporate climate ambitions and potential consequences arising out of a (perceived) lack of efforts. Whether these types of claims will become more prevalent is likely; their outcome, however, remains a question for future contemplation.

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