Environmental litigation heats up

Governments and corporates are facing an onslaught of litigation over climate change, environmental damage and allegations of 'greenwashing'

By Rob Harkavy

Images: Fraser Allan

The rise of environmental lawsuits launched by individuals, NGOs, companies and trade associations is staggering: in the 28 years between 1986 and 2014, approximately 800 cases were filed globally. In the subsequent eight years, until mid-2022, the total was 1,200. Furthermore, the geographical scope of filings is also widening, with 47 climate cases in Latin America and the Caribbean, 28 in the Asia-Pacific region and 13 cases in Africa – a total of 88 – in the year from May 2021 alone, up from 58 in the previous 12 months.

Environmental litigation has many targets: governments, businesses, the increasingly critical issue of 'greenwashing' and companies seeking redress from governments over losses sustained from 'green' legislation.

Challenging governments

An example of top-level litigation against a government was initiated in December 2018 by a group of French NGOs – *Notre Affaire à Tous*, *Fondation pour la Nature et l'Homme*, Greenpeace France and Oxfam France – alleging that the French government's failure to implement effective measures against climate change violated a statutory duty to act. Once the French government rejected their claim, the organisations launched a suit in Paris, asking the court to order that the government pay compensation for the damage wrought by climate change.

On 3 February 2021 the Paris Administrative Court made its ruling; it recognised that government policy had caused environmental damage and ordered that measures be taken to tackle climate change, but it did not make a compensation order as the claimants had not shown that any harm could not be repaired. However, a symbolic order of EUR 1 was made for "moral damage".

Michelle Jonker-Argueta, senior counsel for strategic litigation at Greenpeace, anticipates an increase in the number of environmental claims brought by NGOs. She tells *CDR*: "The science is getting stronger and the law too is getting stronger, especially human rights legislation which enshrines the right to a healthy environment."

Lois Horne, litigation partner at **Macfarlanes**, expands on Jonker-Argueta's theme, highlighting a case in the United Kingdom, *R(On the Application of Mathew Richards) v The Environment Agency and Walleys Quarry Limited [2021]*, brought on behalf of a five-and-a-half-year-old boy. It argued that the Environment Agency had failed to protect his right to life and family life under Articles 2 and 8 of the European Convention on Human Rights (ECHR), due to health problems caused by hydrogen sulphide emissions from a landfill site. "While he could not rely on a right to a healthy environment and had to satisfy the requirements to show his rights under the ECHR were violated, the case indirectly related to a right to a healthy environment," says Horne, continuing: "Globally there have been cases which have similarly tried to claim indirectly the right to a healthy environment through claiming that government bodies and officials had a statutory duty to care for individuals under certain domestic legislation," highlighting the Australian case of *Sharma v Minister of the Environment* (2021), which established the government's duty of care to children relating to carbon emissions.

The other type of claim, Horne says, is against governments based on inaction resulting in environmental degradation, such as in *Future Generations v Ministry of the Environment and Others* [2018]. "A group of Colombian children successfully claimed that the federal government, state and local authorities had all failed to protect the Colombian Amazon, resulting in increased greenhouse gas emissions and the negative associated health impacts, much like what was argued in *Urgenda Foundation v Kingdom of the Netherlands*," a case brought on behalf of 886 individuals.

In July 2022, environmental charity ClientEarth successfully challenged the UK government's net-zero strategy in the High Court, on the grounds that the measures did not go far enough. Not all cases have been successful though. In *Greenpeace Mexico v Ministry of Energy and Others* (2020) the District Court in Mexico City found no right to health or a healthy environment, instead holding that health is contingent on the quality of the environment and is not a right in and of itself. It did nonetheless grant a temporary injunction against proposals underway under the policies.

Similarly, in *La Rose et al v Her Majesty the Queen* (2020), a group of young Canadian claimants failed to hold the federal government to account on the basis of a public trust duty and fiduciary obligation with regards to the climate and their constitutional rights relevant to a healthy environment.

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> **Greenpeace**

Challenging corporates

Companies, like governments, are finding themselves in the firing line. In a 2021 decision based on a duty of care enshrined in Dutch tort law, a Netherlands court held that **Royal Dutch Shell** had an "obligation of result" to reduce its greenhouse gas emissions.

Cross-border actions are also on the rise. In *Okapi and others v Royal Dutch Shell*, 40,000 citizens in Nigeria sued the oil giant for environmental damage and its consequences, including oil spills and pollution. In 2021 the UK Supreme Court determined that there is a case to be answered and that the parent company (UK-headquartered Royal Dutch Shell rather than its Nigerian subsidiary) owed a duty of care.

This may have huge consequences for the liability of parent companies for the actions of their subsidiaries, as explained by **Justin Williams**, head of international arbitration at **Akin Gump Strauss Hauer & Feld** in London: "A series of recent UK Supreme Court decisions has highlighted the increased exposure of UK parent companies to tort claims by parties affected by the activities of their subsidiaries. This is not 'piercing the corporate veil' but arises from a direct duty of care owed by parent entities to third parties."

Williams continues, "In practice, many UK-based companies across many sectors will owe such duties, even if they are not aware they do. This raises important issues of risk management and environmental, social and governance (ESG) policy. Parent companies should revisit their policies and practices to ensure compliance."

Earlier this year the Court of Appeal in *Município de Mariana v BHP Group UK* found that the English courts had jurisdiction to hear a claim against UK and Australian parent companies regarding the activities of their Brazilian subsidiary in relation to the 2015 collapse of the Fundao dam.

While Royal Dutch Shell does operate in Nigeria, and BHP in Brazil (at least, via subsidiaries) a German court has held that a company does not need to have a footprint in a particular country to answer a case in that territory. In a case initially filed in 2015 but which had been put on hold because of the pandemic, a farmer in Peru is taking action against the energy generator **RWE**. The court has ruled the case admissible, saying that polluters can be held accountable for their contribution to global climate change.

Horne does not see any let up in the onslaught of environmental claims against corporates: "The litigation landscape is becoming more challenging for corporates due to the number of creative avenues through which claimants are bringing environmental causes of action. As a result, they are allocating time, cost and resource to defending claims all under the spectre that even if they are successful in the courts they may still have a battle in the court of public opinion."

Greenwashing

Companies should steel themselves against an onslaught of 'greenwashing' claims. German NGO *Deutsche Umwelthilfe* (DUH) has recently launched legal action against **Beiersdorf** (the maker of Nivea), **BP** and French oil giant **TotalEnergies** over 'misleading' statements regarding the green credentials of the companies' products.

In Italy, a Venice court has granted a temporary injunction to **Alcantara**, a manufacturer of a microfibre product used in the automotive sector, against **Miko**, one of its main Italian competitors, over a raft of eco-friendly claims which a court found to be "vague, generic, false, and non-verifiable".

That may have significant ramifications as the court's decision was based on **European Commission** guidelines over the application of the Unfair Commercial Practices directive.

Michael Fenn, partner at **Pinsent Masons** in London, has a warning for businesses: "The recent extreme weather conditions in Europe have brought climate change to the forefront of people's minds. Products and investments that have green credentials command a 'greenium' which may encourage companies to exaggerate the green credentials of products and investments."

Sections 90 and 90A of the Financial Services and Markets Act 2000 allow investors to claim compensation from listed companies for losses resulting from: "Untrue or misleading statements within, or omissions from, prospectuses or listing particulars," or "untrue or misleading statements within, or omissions from, other information published by the company, or as a result of a dishonest delay by the company in publishing information".

Fenn reports that third-party litigation funders and major forensic accountancy firms "are investigating and considering the possibility of bringing such claims. As such, it appears that shareholder claims over greenwashing are very likely to grow in the UK as companies face increasing pressure from regulators and investors to publish environmental, social and governance disclosures in their market facing information".

He advises companies to "ensure that claims made about the green credentials of a product or investment are true and accurate, clear and unambiguous, do not omit or hide important relevant information, [are] fair and meaningful and capable of substantiation".

Companies seeking redress

Environmental litigation is not all one-way traffic. An increasing number of fossil-fuel companies

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are using the 1990 Energy Charter Treaty (ECT) to recoup losses incurred by being impelled to comply with green legislation. The ECT liberalised trade and investment in energy but did not differentiate between fossil fuels and renewables with the latter, at the time, in their infancy.

Most notably, the Supreme Court of the Netherlands upheld a decision to reduce the country's greenhouse gas emissions by 25% compared with 1990s levels. And since signing the ECT, EU member states have increased the required level of reduction to 40%. The Dutch government has also announced plans to phase out all coal-fired energy generation by 2030.

As a consequence, in February 2021, RWE filed a still-pending EUR 1.4 billion arbitration claim against the Dutch government (*RWE v Kingdom of the Netherlands*) alleging that it failed to allow adequate time or provide compensation for the transition away from coal. Similarly, in August 2022, the British oil company **Rockhopper Exploration** succeeded in its EUR 190 million arbitration claim against Italy over a ban on new oil operations in its territorial waters, while the British company **Ascent Resources** is suing Slovenia for EUR 120 million over changes to the country's fracking rules.

What's next?

There is unlikely to be any let up in governments and corporations being taken to task over alleged environmental damage. While not all claimants will be successful, it seems likely that governments and corporations will need to consider international treaty, international and European legislation and human rights law as they move forward.

Secondly, the issue of biodiversity is likely to move further up the litigation agenda, with the internationally endorsed Taskforce on Nature-Related Financial Disclosures due to be finalised by 2023.

In France, a claim has been launched against French supermarket chain **Groupe Casino** by a coalition of NGOs and indigenous communities from Brazil and Colombia over its sale of beef products which have been linked to deforestation in the Amazon.

Also in France, *Notre Affaires à Tous* and *Pollins* launched a claim against the French state for its failure to protect biodiversity, the first ever legal action against a state for this type of cause of action.

These (and other) cases demonstrate that while biodiversity-related litigation is not yet gathering the same attention as climate litigation, it is an area which is being litigated and, much like with environmental litigation, biodiversity claimants are likely to become more creative in their causes of action, better funded and better resourced to bring claims in the future. CDR