Debevoise London Climate Change and ESG Litigation Series

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As we look ahead at UK litigation trends for 2023/2024, we expect to see a continued increase in the pace of climate and ESG related litigation. To date, there have been few direct climate change related actions brought before the English courts against private companies. However, in recent years we have seen Claimant law firms find innovative and novel ways to attempt to make UK companies liable for the acts of overseas subsidiaries and third parties for environmental harms. This is a development that could well lead to future climate change related cases in the United Kingdom.

The Debevoise London Commercial Litigation team has a real depth of experience in defending claims in this area. We have had considerable success in defending claims brought by overseas claimants against UK domiciled parent companies. We are currently involved in the leading cases in this space which concern parent company liability for both private law tort and rights-based remedies.

In a new series for 2023, we are sharing our thoughts on how climate change and ESG litigation is emerging in the UK courts. We will consider whether the UK courts are likely to respond to the threats imposed by climate change to fundamental rights, property rights, rights to culture and human rights by imposing private law remedies against private companies. While climate action has traditionally been confined to the spheres of government at both a national and international level, international trends suggest that climate activists are looking beyond the instruments of government to the acts of individual companies in contributing to the intrusions of climate change. The use of private law remedies to combat the threat of climate change faces many obstacles and it remains to be seen how the law will develop in the face of the profound systemic risk threatened by climate change.

If you have any questions or would like to discuss the matters raised in this series further please do not hesitate to contact the Debevoise London Commercial Litigation team.

ESG Litigation: The Rise of Cases Against UK Domiciled Parent Companies

Climate change litigation broadly encompasses legal proceedings brought before administrative, judicial and other investigatory bodies in domestic and international courts and organisations that raise issues of law or fact regarding the science of climate change and climate change mitigation efforts.

The pace of climate change litigation is rapidly increasing. Since 2015, over 1,000 climate change-related cases have been commenced globally, compared with a total of 834 cases filed between 1986-2014.

The nature of claims varies, but they have typically focused on:

- Claims against governments seeking to enforce climate commitments. This includes actions seeking to challenge governmental decision-making, e.g., in granting new licences for the exploration of fossil-fuel sources;

- Claims against private companies, such as

    - Shareholder actions: For example, ClientEarth's recent claim against Shell's Board of Directors, brought in ClientEarth's capacity as a Shell shareholder, alleging that the directors are mismanaging the risks of climate change through an inadequate energy plan.

    - Claims seeking to establish liability for so-called "greenwashing" against companies making allegedly unsubstantiated or misleading claims regarding their environmental/climate change-related performance.

There is, however, a new type of claim that we consider will form the basis of a wave of climate litigation in the coming years, namely, claims which will seek to establish direct corporate legal liability for adverse climate change impacts, either to obtain damages or other remedies (such as injunctions). Such claims will principally be based on historic and continued contributions to global emissions and pleaded in tort (or tort-like causes of actions).

A claim of this type has yet to be brought in the United Kingdom, and as such, the legal viability has not been properly tested (and in reality, it is likely to be a very difficult claim).

However, law firms specialising in high-profile group actions against multinational companies have publicly announced their intention to begin pursuing this type of case

in the English courts. As such, it may not be long before the English Courts are asked to grapple with the complexities raised by such a claim.

Why England?

A key reason why bringing climate change litigation in the English courts may appear attractive to claimants is due to recent decisions of the UK Supreme Court on the liability of parent companies for the acts or omissions of foreign-based subsidiaries.

The recent mandatory reporting requirements for UK companies may also lead to litigation where it can be shown that a parent company has knowledge of, and assumed responsibility for, emissions of its subsidiaries in other jurisdictions.

The two principal cases under English law are *Vedanta Resources plc and another v Lungowe and others* [2019] UKSC 20 and *Okpabi and others v Royal Dutch Shell plc and another* [2021] UKSC 3. These cases establish the following broad principles:

- Parent-company liability is not a distinct category of tortious liability. The normal principles of negligence apply in determining questions of parent liability for the acts or omissions of a subsidiary.

- Whether or not a parent company is liable is a question of fact regarding the extent to which a parent company intervened in the relevant activities of the subsidiary. While there are some factors that may indicate a sufficient level of intervention, these are not exhaustive. The factors can include:

    - the management or joint management of the subsidiary's relevant operations by the parent company;

    - the issuance of group-wide polices and guidelines by the parent company and their implementation by the subsidiary;

    - whether the parent company takes active steps to secure implementation of policies by the subsidiary; and

    - whether the parent company publicly holds itself out as exercising a degree of control and supervision over its subsidiary.

- The courts must accept assertions supporting the claim as arguable unless "demonstrably untrue or unsupportable".

- In the climate-claim context, that means (in theory) a case can be brought in England against a parent company domiciled or incorporated in this jurisdiction alleging that the parent is responsible in tort for the actions or omissions of foreign subsidiaries. Claimant firms will likely rely on the recent case law to argue that such claims cannot be summarily dismissed and should therefore proceed to a full trial.

It is also possible for claims to be brought with an applicable law other than that of England and Wales. The selection of applicable law is of particular importance in climate change litigation, and we can expect claimants to be creative in identifying laws that may give rise to an obligation by a UK-domiciled parent company for the activities of its subsidiary operating in another jurisdiction. Claimant firms can expect to face challenges to jurisdiction in such cases. The English Courts have a broader right post-Brexit to grant a stay of proceedings if the English Court is satisfied that there is another available forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice. Relevant factors will include where damage was sustained, and the location and availability of witnesses.

Other than the ongoing changes in parent-company liability, additional factors include:

- Upcoming cases in the UK Supreme Court that may entail significant changes to the law of nuisance, as well as the availability of:
- group-litigation mechanisms;
- litigation funding;
- disclosure; and
- the negative reputational issues associated with a climate change case.

What Will a Climate Change Litigation Claim in England Look Like?

Looking into the "crystal ball", we map out the dynamics and likely touch-points of such a case:

- **Likely claimants**: We anticipate that the first wave of claimants will be a group of people who: (i) have already suffered tangible loss and damage due to adverse climate change impacts; and (ii) are located in jurisdictions with challenging local access to justice. That **jurisdiction** is likely to apply the common law which is similar to the laws of England and Wales.

- **Likely defendants**: We believe that the first wave of targets will be UK-domiciled entities, which are alleged to be significant greenhouse gas emitters. It will be important for those entities to be a significant, or even the ultimate, decision-maker within its corporate group.

- **Likely causes of action against UK-domiciled entities**: In England and Wales, there is no current statutory regime for compensation for harm caused by adverse climate change impacts. Claimants will therefore need to utilise existing causes of action, such as private-law causes of action in:

  - negligence; and/or

  - nuisance.

- **Likely causes of action against non-UK entities**: It is a common tactic for environmental claims against a UK-domiciled parent company to be accompanied with other claims against a non-UK subsidiary. Those claims will likely be governed by foreign law. In other jurisdictions, claims are being advanced on a wide range of different issues, including an "unwritten duty of care" to prevent climate change (Netherlands) and constitutional-law rights to health and a healthy environment (Colombia, Mexico), among others. These claims may get greater scrutiny and attention in England and Wales than claims brought in the jurisdiction where the subsidiary is domiciled. For a claim to proceed in the English courts against a non-UK entity, there must also be an alleged claim (such as a tort-based claim) against the UK-domiciled entity (such that the foreign company is joined as a necessary and proper party to that claim).

For a negligence claim to succeed, claimants must show that there was a duty of care owed to them by the defendant which was breached, leading to foreseeable harm. The fundamental issue for claimants, then, will be to demonstrate that there is either an existing duty of care or that there is a basis for a novel duty of care to be established.

Given that liability has never been imposed in this jurisdiction for climate change-related harm, it is likely that the claimants would need to establish a novel duty of care, including by showing that harm was sufficiently foreseeable and proximate and that it is otherwise fair, just and reasonable for the courts to establish a new duty of care (i.e., satisfying the test in *Caparo Industries plc v Dickman* [1990] 2 AC 605).

In attempting to establish a new duty of care, the claimants are likely to consider and potentially adopt equivalent approaches deployed in other jurisdictions or to rely on findings made by courts or other bodies in foreign jurisdictions. For example:

- As to foreseeable harm, the New Zealand Court of Appeal in the case *of Smith v Fonterra* noted that there would be an arguable (and triable) basis to allege that the defendants in those proceedings ought reasonably to have been aware of adverse climate effects on coastal areas caused by greenhouse gas emissions.

- Proximity of harm is likely to be one of the most complex issues the parties and the courts will have to grapple with. The key obstacle in a climate change claim is that everyone emits greenhouse gases, so it is very difficult to attribute responsibility for climate change harm to an individual or company. One potential model of attribution that has been proposed is to claim in relation to a company's alleged percentage contribution to global emissions. The success of such a model obviously depends on the reliability and credibility of the underlying scientific evidence.

- The question of fair, just and reasonable is likewise a difficult obstacle for claimants. Policy considerations will fall under this limb, such as whether the courts are appropriately equipped to deal with such claims. Initial cases are likely to face applications for summary disposal on the basis that no such duty of care exists.

As regards a claim in nuisance, there are two forms:

- An action can be brought in private nuisance, which protects occupiers of land (i.e., those with an interest in land) in respect of unreasonable interference with their enjoyment of that land.

- An action can also be brought in public nuisance by a class of claimants who have suffered "*special damage*" which impacts on their comfort and convenience.

The principal issue for an action in nuisance will be for claimants to identify the specific nuisance. As with negligence, there is no existing case law recognising that, for example, greenhouse gas emissions constitute a nuisance that must be abated.

Key Takeaways

Although there are major obstacles to successfully pursuing tort-based climate change claims in the English courts, there is likely to be a growing appetite for these types of claims. That is all the more so in view of recent Supreme Court decisions on the liability of UK-based parent companies.

Given that climate change is one of the major geopolitical issues facing this generation and the overwhelming perception that successive UK governments have failed

adequately to tackle the issue, the interest in pursuing climate change claims against large multinational companies is unlikely to wane in the coming months and years.

The issues raised in this note are complex and involve novel issues of law. We have been and are at the forefront of thinking in this area, having acted in a number of the key cases, including the *Okpabi* case that was heard in the Supreme Court. We would be very happy to discuss the issues raised in greater detail with you.

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Please do not hesitate to contact us with any questions.

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