SQUIRE PATTON BOGGS

UK ESH Webinar Series: Recent Trends in Climate Litigation

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Introduction

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Overview

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- Global trends
- Recent UK climate cases
- Recent European climate cases

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Global trends in climate litigation

Global trends in climate litigation

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- Paper by the Grantham Research Institute on Climate Change – examined cases between May 2018 and May 2019
- Two broad categories
  - Strategic cases – visionary approach and new types of legal action – aim to influence
  - Routine cases – using more stablished mechanisms such as planning and emissions reduction schemes
- 1,328 cases were identified in 28 countries, including the US and EU, plus cases before international institutions - 75% of cases were in the US
- Most claims in high-income countries, but continued geographic expansion and a growing trend in low and middle income countries
- Most defendants are governments, but also some major companies
- NGO's make up the vast majority of claimants, but citizens are making more climate adaptation claims, and investors, activist shareholders and cities/states are bringing claims

Global trends in climate litigation (continued)

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- Human rights and science play an increasing role
- Climate litigation is increasingly viewed as a tool to influence policy outcomes and corporate behaviour
- Litigation could encourage private companies and investors to give greater consideration to climate risk
- As yet there is insufficient evidence of the impacts of climate change litigation
- GRI also hosts a useful web-page which summarises the current status of various climate litigation cases: https://climate-laws.org/cclow/litigation_cases
- See also http://climatecasechart.com/ which estimate worldwide number of climate change cases filed to date has reached approximately 1,800 (of which approx. 26% non-US cases) - across around 40 jurisdictions

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Recent UK climate cases

Plan B - The Heathrow case

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- ***R (Plan B Earth and others) v Secretary of State for Transport and others***
- Appeal against the rejection of Judicial Review concerning the government's Airports National Policy Statement (NPS)
- May 2019 - High Court rejected the Judicial Review challenges
- July 2019 - Claimants given leave to appeal
- The appeal was allowed and the NPS was found to be unlawful as it did not accord with the governments commitment to the provisions of the UN Framework Convention on Climate Change and Paris Convention
- The court declared the NPS unlawful and ordered that it cannot take legal effect until it has been reviewed by the Secretary of State

Plan B - The Heathrow case (continued)

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- The government quickly stated that it would not be appealing
- May 2020 - Heathrow Airport, together with developer Arora Holdings have applied, and gained leave, to appeal the decision to the Supreme Court
- Friends of the Earth has announced that it will resist the appeal
- Supreme Court hearing is expected to take place on 7 and 8 October 2020

ClientEarth - Drax Challenge

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- ***R (ClientEarth) v. Secretary of State for Business, Energy and Industrial Strategy***
- Judicial Review of the approval of new gas turbines
- January 2020 – ClientEarth announce launch of Judicial Review proceedings
- Challenging the decision by the government to approve Drax's installation of four new gas turbines at its plant in Selby
- Grounds – that the installation undermines the UK's commitments to achieving net-zero and its own Clean Growth Strategy
- The Planning Inspectorate had also recommended the application be rejected on climate grounds – the first refusal of its kind citing climate change as the motivating factor
- 22 May 2020 – High Court dismissed the judicial review challenge
- Drax's response indicated that the technology they intended to use would assist with the company's ambitions of becoming carbon negative by 2030
- ClientEarth is considering an appeal

Chris Packham - HS2

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- ***Packham v Secretary of State for Transport and others***
- TV Presenter Chris Packham challenged HS2 on environmental grounds.
- Packham launched a £100,000 crowdfunded legal challenge of HS2, stating that the Oakervee review, on whose recommendation the Prime Minister approved the scheme, was “compromised, incomplete and flawed”
- Packham’s solicitors sent a letter to the PM pointing out that the report was published in 2013, before the government signed up to achieving ‘net-zero’ and as such the scheme may contravene the UK’s climate change commitments
- It was also claimed that the scheme will destroy up to 700 sites of ancient woodland
- The High Court **refused permission** to proceed with an application for judicial review and found all four grounds of the claim to be unarguable so the claim did not have a realistic prospect of success.
- It is understood that Packham is going to apply for permission to appeal

Bristol Airport expansion planning refusal

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- Application refused by North Somerset Council's planning committee on the grounds of noise and climate impacts, against the advice of planning officers (Feb 2020 – ratified March 2020)
- The Council stated that the environmental and societal impacts of approving the scheme would outweigh the economic benefits
- It is likely that the decision will be appealed

Coal mining in Cumbria

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- Cumbria County Council's decision to resolve to grant planning permission for a major new underground metallurgical coal mine (March 2019 – ratified Oct 2019)
- Campaign group - Keep Cumbrian Coal in the Hole - for a new deep coal mine in Cumbria
- Feb 2020 - Granted permission to judicially review the planning approval on climate grounds
- The claimants assert that the council failed to consider the greenhouse gas emissions associated with the mining operations and the government's net zero target
- The review is due to be held in Manchester but is not yet listed

Other National Policy Statements to be scrutinised

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- Claim served on multiple secretaries of state for various departments requesting the Energy Infrastructure National Policy Statements EN-1 to 6 be reviewed
- Challenge being mounted by founder of Ecotricity and others
- Following the Heathrow challenge, there has been a call for review of the Policy Statements that relate to major energy infrastructure
- The Policy Statements were designated in 2011 and the argument is that they require review, especially given the UK's commitment to net zero by 2050 and its ratification of the Paris Agreement
- The claim:
  - challenges the assumption of authority by civil servants, rather than the Secretary of State, to decide that the NPSs will not be reviewed now; and
  - challenges the failure to review the Energy NPSs in light of material changes that would have substantially affected their content. This includes the government's commitment to net zero carbon by 2050

Challenge to Second Roads Investment Strategy

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- 1 June 2020 - Transport Action Network - Statement of Facts and Grounds deposited at the High Court
- Challenging the Secretary of State for Transport on the legality of the 'Second Roads Investment Strategy' (**RIS2**)
- RIS2 determines which road projects will be taken forward by Highways England within the five-year period it covers (2020 to 2025)
- The challenge has four grounds:
  - Failing to take account of the impact of RIS2 on climate change objectives (carbon budgets, the net zero target and the Paris Agreement)
  - Breach of TAN's legitimate expectation that the strategy would include the establishment of a metric for measuring the emissions of greenhouse gases from road users
  - Failing to take account of duties under the Air Quality Standards Regulations 2010d
  - Failing to carry out a Strategic Environmental Assessment
- Next stage will be grant/refusal of permission to judicially review – no date set yet

Themes and trends….

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- Planning regime focussed - targeting grounds for planning decisions
- Mixed results
- Growing in number significantly since Government commitment to net zero by 2050
- We expect to see expansion of grounds and types of action, as seen elsewhere, such as human rights

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Recent European climate cases

Netherlands v Urgenda (1)

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- Urgenda, a climate change NGO on its own behalf and on behalf of almost 900 Dutch citizens, brought proceedings against the Dutch state in respect of the Netherlands' climate change policy and GHG reduction targets.
- Urgenda argued that the Dutch state has a duty of care to ensure that the Netherlands achieves a reduction of 25% to 40% GHG emissions by 2020, or a 40% reduction by 2030, compared to 1990 levels.
- The Dutch state's current climate change policy is expected to achieve a 17% reduction in GHG emissions by 2020.
- June 2015 – District Court in the Hague decided that:
  - The Dutch state has an obligation to mitigate climate change as quickly and as much as possible, as part of its duty of care under Dutch law to protect and improve the living environment.
  - A reduction of less than 25% to 40% would be a breach of the Dutch state's duty of care.
  - However, it did not think there were sufficient grounds for it to require the Dutch state to adopt a target of more than a 25% reduction.

Netherlands v Urgenda (2)

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- This was the first time a court has ordered a government to strengthen its climate change policy and set higher climate change targets.
- Decision upheld by Hague Court of Appeal in 2018 which also ruled Dutch government contravening its duty of care under Articles 2 and 8 of the European Convention on Human Rights by failing to pursue a more ambitious GHG reduction target for the end of 2020.
- Decision also upheld by Dutch Supreme Court in 2019, which also ruled that Dutch government should consider the latest climate science when drawing up policies to achieve that GHG reduction.
- Milieudefensie v Shell – group of NGOs and 17,000 Dutch citizens bringing claim demanding Shell reduce its GHG emissions by 45% compared to 2010 levels by 2030, and to zero by 2050 in line with the Paris Climate Agreement.

Carvalho v European Parliament

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- Claimants (10 families from 8 countries) alleged that the EU's existing target to reduce domestic GHG emissions by 40% by 2030, as compared to 1990 levels, is insufficient to avoid dangerous climate change and threatens claimants' fundamental rights of life, health, occupation, and property.
- Claimants asserted this would require a 50%-60% reduction in GHG emissions below 1990 levels by 2030.
- May 2019 – General Court of the European Union:
  - Did not rule on the merits.
  - Dismissed the case on procedural grounds – claimants could not bring the case since they are not "sufficiently and directly affected" by these policies.
  - Climate change affects everyone, but case law requires that claimants are affected by the contested act in a manner that is "peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually."
- Claimants appealing to CJEU.

ClientEarth v ENEA

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- ClientEarth was a shareholder in ENEA, a Polish utility company.
- ClientEarth brought claim under Polish Commercial Companies Code seeking the annulment of a resolution consenting to construction of the €1.2 billion Ostrołęka C coal-fired power plant.
- July 2019 – Regional Court in Poznań found the company resolution authorising construction of the power plant to be legally invalid. No requirement to consider the environmental merits of the case.
- However, ClientEarth has put the directors on notice in relation to an alleged breach of directors' duties for failure to consider the material economic transition risks with the project.

Friends of the Irish Environment v Ireland

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- FIE claimed that Irish government's National Mitigation Plan in 2017 (which seeks to transition to a low-carbon economy by 2050) violated Ireland's Climate Action and Low Carbon Development Act 2015, Ireland's Constitution and obligations under the European Convention on Human Rights.
- FIE alleged that the Plan is inconsistent because it is not designed to achieve substantial short-term emissions reductions to transition to a low carbon economy by 2050.
- Irish High Court ruled for the government - the law does not require particular intermediate targets and the Government appropriately exercised the policy-making discretion afforded to it. The current plan is only an initial step in achieving targets for transitioning to a low-carbon, climate resilient, and environmentally sustainable economy by 2050, and will be subject to review and revision.

L'affaire du Siècle (1)

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- December 2018 – 4 French NGOs issued a formal notice initiating the first stage in legal proceedings against the French government for inadequate action on climate change.
- Claimants argue French government has general duty to act.
  - French Charter for the Environment - citizens' constitutional rights to live in a healthy and ecologically balanced environment
  - European Convention for the Protection of Human Rights and Fundamental Freedoms (ECPHR) - Articles 2 & 8 of the ECPHR, respectively "the right to life" and the "right to respect for private and family life."
  - General principle of law providing the right of every person to live in a preserved climate system – stemming from national law (e.g. the preamble of the Charter for the Environment and article L. 110-1 of the French Environment Code, etc.) and international law (the Rio Declaration, the United Nations Framework Convention on Climate Change, the Kyoto protocol, the Paris Agreement,).

L'affaire du Siècle (2)

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- Claimants additionally argue the State has further “specific” obligations EU and national law to:
  - mitigate greenhouse gas emissions; and
  - take action to prepare for the impacts of climate change on France.
- Claimants seeking an order requiring the French government to take:
  - Proper measures to reduce GHG emissions to meet the objective of limiting the rise of the average global temperature below the threshold of 1.5 °C compared to pre-industrial levels;
  - Necessary measures to achieve France's targets for reducing greenhouse gas emissions, developing renewable energies and increasing energy efficiency;
  - Necessary measures to adapt the national territory to the effects of climate change; and
  - Necessary measures to protect citizens’ lives and health from the risks of climate change.
- A petition supporting the action received 2 million signatures in its first month.

More themes and trends from Europe ….

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- Mixed results
- Use of human rights – particularly Arts 2 and 8 European Convention on Human Rights
- Shareholder activism
- Personal liability?

Questions?

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