

Growing litigation issues in the energy transition



LAW

The international law firm Bracewell has wide-ranging experience handling litigation issues in the energy sector. A recent media roundtable addressed the rise of disputes during the energy transition. *New Energy World* Features Editor Brian Davis reports.

The traditional hydrocarbon-based energy sector faces a barrage of litigation disputes during the energy transition, from concerns about accelerating climate change to accusations of greenwashing. Here, Alistair Calvert, an energy disputes lawyer at Bracewell gives an insight into some of the growing trends in climate-related litigation.

‘Driven by the nature of the energy trilemma – and the need to find balance between energy reliability, affordability and sustainability as three core elements on the road to net zero – we expect to see these pressures leading to a significant number of disputes,’ remarks Calvert.

The hydrocarbon-based energy sector faces a storm of climate-related legal disputes during the energy transition

Photo: Adobe Stock.

The first two elements, security and affordability, have already made a major impact and account for the majority of current disputes. ‘Most disputes in the energy sector are commercial,’ he says. ‘But issues around climate litigation are trending up. Though they still account for only a fraction of disputes.’

Calvert anticipates more disputes around energy security as nations seek to ring-fence resources. This is particularly the case when it comes to hydrocarbons, given the current crisis in the wake of the Russia/Ukraine war and the need for oil and gas resources.

Nevertheless, he sees the renewed focus on hydrocarbons as likely to lead to more climate related litigation. ‘We’ve seen examples of that already with Greenpeace and others seeking judicial review of the UK

government’s latest North Sea licensing round,’ he says.

Traditionally, climate litigation has commenced against governments and public authorities.

Famously, there was the environmental group Urgenda case which the Dutch Court of Appeal concluded after four years of litigation that the Dutch state had a ‘duty of care’ to protect its citizens from climate change. Noting that it would breach its obligations under the European Convention of Human Rights (ECHR) in respect of family and private life ‘if it fails to achieve a 25% reduction in greenhouse gas (GHG) emissions by the end of 2020’. (See **Box 1**.)

The Urgenda case has led to a number of cases against governments and public authorities in Europe.

In 2021, Friends of the Earth

(FoE) took the UK government to court, challenging the UK Export Finance (UKEF) decision to pledge \$1.5bn towards a massive offshore gas project in Mozambique. In March 2022 a High Court judge ruled that this funding was ‘unreasonable’ and ultimately ‘unlawful’. However, a split decision in the High Court meant the case wasn’t a clear cut ‘win’ or ‘lose’. The case went to the Court of Appeal in December 2022, and the following month the Court of Appeal ruled against the FoE legal challenge.

FoE says it is now considering an appeal and argues that funding a new gas field instead of renewables ‘is a clear contradiction of the UK’s obligation to help other countries meet their own climate targets’.

Calvert notes that although the recent Court of Appeal judgement upheld UKEF’s decision, ‘it may be academic’ as, since UKEF made its decision to provide funding to Mozambique LNG the UK government has announced that it won’t invest in fossil fuel projects abroad. Meanwhile, the FoE and others continue to challenge the Secretary of State’s decisions in respect of the government’s net zero strategy.

‘We expect to see increasing challenges to be brought against the government, corporates and even individuals with respect to climate related targets,’ Calvert comments.

What other types of cases are being brought?

Direct action is underway against corporates in a bid to seek reduction of GHG emissions, for example.

Here again, the Dutch have led the way with the decision of the Hague District Court in May 2021 which ordered Shell to reduce its emissions by 45% by 2030. ‘We are now seeing those types of cases come into the UK,’ says Calvert, citing Greenpeace’s legal challenge against the approval of the Jackdaw field in the North Sea.

Urgenda Foundation versus The Netherlands

The Urgenda Foundation versus The Netherlands case was launched on 24 June 2015; followed by appeal at The District Court of The Hague and The Hague Court of Appeal on 9 October 2018; affirmed by the Supreme Court on 20 December 2019.

Urgenda and a group of 900 Dutch citizens sued the Dutch government to compel the state to reduce GHG emissions more aggressively. Subsequently, the Hague District Court determined that the Dutch government must reduce GHG emissions by at least 25% (compared to 1990) by 2020 to fulfil its duty of care to protect Dutch citizens against the danger caused by climate change.

A central issue was whether the state had a duty to impose further reductions on GHG emissions above the limits already imposed in Dutch climate policy. Urgenda pointed to three sources of law supporting this duty of care: Articles 2 and 8 of the ECHR; Article 21 of the Dutch Constitution; and the general duty of care in the Dutch civil code.

The Hague District Council declared that Urgenda could not rely on either the ECHR or the Dutch constitution. However, the Court did determine that the state breached its duty of care under the Dutch civil code, which requires parties to take precautionary measures to mitigate a hazardous situation.

The Court also considered the United Nations and European Union climate agreements, and declared that international obligations and principles have a 'reflex effect' in national law. On this basis, the District Court concluded that the government acted negligently when it set its target for CO₂ emission reductions at 17% compared to 1990 levels, instead of 25%.

At the time (July 2022), Philip Evans of Greenpeace UK said: 'The government knows that burning fossil fuels drives the climate crisis, yet they're approving a new gas field, without proper climate checks... Whenever we see the government acting unlawfully to greenlight new fossil fuels, we stand ready to fight in the courts.'

Action against greenwashing
Climate-based 'greenwashing' cases are also being brought against corporates – challenging statements which they are unable to live up to.

The Santos case is an example where it is alleged that Santos claimed in its annual report that it would achieve net zero emissions by 2040. However, the company is relying on carbon capture and storage technologies that are claimed to be untested or 'don't exist', so those statements are being challenged.

Action against greenwashing and financial disclosures relating to climate have also been ramped-up by regulators. For example, the Competition and Markets Authority has introduced a Green Claims Code, which sets out six key points to check that a corporate's claims are genuinely green (see **Box 2**). The Financial Conduct

Authority (FCA) has enhanced its regulatory framework within ESG (environmental, social and corporate governance) for companies to make 'fair, clear and non-misleading disclosures'. ESG statements can be challenged if they are considered to be misleading.

Calvert expects to see ongoing investigations in this space.

Environmental harm by foreign subsidiaries

High Court environmental actions are being brought against various multinational companies for the actions of foreign subsidiaries. These include Vedanta, Shell and BHP.

Claimants have sought to establish jurisdiction in the UK by showing that there is a 'real issue to be tried'

between the claimants and the parent company. So far, the English courts have steadfastly maintained the separate legal identity of parent and subsidiary companies. However, a real issue may arise where it can be shown that the parent company owed a direct duty of care to the claimants.

Last year a decision was made by the Court of Appeal in the BHP case, overturning a High Court action to strike out the claims as an abuse of process on the basis that the proceedings would be 'irredeemably unmanageable' due to their size and complexity. The Court of Appeal handed down judgement on 8 July 2022, in *Municipio de Mariana & ors versus BHP* and allowed the group litigation arising out of the collapse of the Fundão

dam in Brazil to proceed in this jurisdiction.

However, 'size and complexity' cannot form the basis of an abuse of process, even if the proceedings are unmanageable. So, the courts retain wide case management powers which can be deployed in such cases. A group representing 200,000 Brazilian claimants succeeded in the Court of Appeal to get permission to proceed with the \$5bn group action against BHP, arising from the dam collapse in 2015. 'Similar types of cases are gathering pace,' notes Calvert.

Climate claims against individuals

What's more, 'beyond corporate liability, we are now seeing claims against individuals', explains Calvert.

In February, having bought shares in Shell, Client Earth filed a derivative action against its directors. The basis for the claim is that Shell's board has failed to adopt and implement a climate trend strategy that aligns with the Paris Agreement goals in breach of the oil major's duties under Sections 172 and 174 of the UK Companies' Act.

However, 'derivative actions are difficult to bring and Client Earth may not receive the court's permission to proceed any further', says Calvert. 'One of the reasons to bring these types of cases may simply be to generate publicity. Groups like Client Earth have had real success doing that.'

Looking forward, Calvert sees that personal claims are 'going to be a potential area of growth – simply because it's something that directors have to take really seriously, it affects them not only on a professional basis, but their personal lives too'.

Generally, the appetite for litigation looks set to trend up during the energy transition. ■

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Competition and Markets Authority Green Claims Code

Green claims must:

- Be truthful and accurate.
- Be clear and unambiguous.
- Not omit or hide important information.
- Only make fair and meaningful comparisons.
- Consider the full lifecycle of the product.
- Be substantiated, and backed up with robust, credible and up-to-date evidence.