Is commercial litigation going green? Environmental and greenwashing claims and how they will shape the law.

Combar lecture

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1. At 12:50pm on 19 July 2022 a thermometer at Heathrow[1] registered, for the first time in recorded history, a temperature of over 40C in the UK. This broke, by 1.1C, the previous record, set in Charlwood in Surrey, earlier the same day. The record temperature before that day of 38.7C had only stood since 2019. Of the 5 hottest days in recorded history only one took place prior to 2019. For 80 years the hottest day in UK history was quite nippy by comparison, 36.7C recorded in Northamptonshire in 1910. That record was only broken in 1990 and is now only the eighth hottest day in UK history. Every other day in the top 10 has been recorded since 1990.[2] The temperature at Heathrow was surpassed later that day by a recorded temperature of 40.3C in Lincolnshire to become Britain's highest ever temperature.[3]

2. Whilst one could debate whether these increases in temperature are due to a cyclical weather pattern or climate change, on any view the climate is currently impacting almost every aspect of our lives in ways seen and unseen. There was a time when hot summer days were welcome and could almost be ignored. We never thought about climate change in the great summer of drought, 1976, and most summers we have all experienced the sweltering courtroom with everyone wearing robes and hoping that the Judge will allow them to remove their wig and gown. That may be considered a small price to pay for an extended run of pleasant summer evenings. This year however the bone dry air of the heatwave, together with excess deaths[4], the risk of buckled[5] train

[1] https://www.bbc.co.uk/news/uk-44980493
[2] https://www.metoffice.gov.uk/about-us/press-office/news/weather-and-climate/2022/july-heat-review
[3] ibid
[4] https://www.gov.uk/government/news/ukhsa-and-ons-release-estimates-of-excess-deaths-during-summer-of-2022
[5] https://www.greateranglia.co.uk/travel-information/service-disruptions/extreme-weather-warning-avoid-travelling-greater-anglia

tracks, low water levels[6] and even wildfires[7] can no longer just be ignored or shrugged off. Similarly it seems to me that climate litigation is moving to a more central position. How our doctrine of precedent, essentially driven by a desire for certainty in the law, will react to the challenge of climate change is not certain but what is certain is that the commercial landscape is changing, and the law will need to develop with it. I do not know what the law will look like in thirty years time, but I will discuss some recent developments which may give us an insight into the possible paths the law may take.

3. The LSE has, for some time, been tracking climate litigation globally and it is clear that there has been an increase in such litigation. Their report Global Trends in Climate Change Litigation published in June this year reveals that the number of climate change related cases has more than doubled since 2015. They are tracking over 2000 cases globally and a quarter of the cases were filed between 2020 and 2022.[8] Many of these cases have been brought against governments but some are also brought against corporate entities. These could be cases seeking to enforce climate standards[9] or a smaller number using arguments based on so called 'greenwashing', or based on personal responsibility or 'failure to adapt'. I propose to look at some of these arguments in more detail.

4. There is no uniform definition of 'greenwashing' but a useful definition is provided by the Climate Social Science Networks[10] "the use of unsubstantiated or misleading claims about, or selective disclosure of, environmental performance or best practice for commercial or political gain". As opposed to the, arguably, more speculative claims I will talk about later, green washing litigation is likely to be based on well-established legal principles with which we are all familiar regarding misleading communications, whether deliberate or reckless, in other words misrepresentation. For instance, Shell was found, by the Advertising Standards Authority to have misled consumers in an advert which did not make clear that the carbon offsetting discussed in a radio advert

[6] https://blog.metoffice.gov.uk/2022/07/27/july-2022-a-dry-run-for-uks-future-climate/
[7] https://www.bbc.co.uk/news/uk-62542606
[8] https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2022/08/Global-trends-in-climate-change-litigation-2022-snapshot.pdf (key messages p1)
[9] ibid p 3
[10] CSSN Research Report 2022:1 Climate-Washing Litigation: Legal Liability for Misleading Climate Communications (Jan 2022)

was only available to consumers who signed up for the ShellGo Loyalty scheme. The risk of greenwashing is obviously something over which the Advertising Standards Authority is keeping a watchful eye. Only last weekend it was reported in the press that after a complaint by the Advertising Standards Authority a manufacturer of artificial grass has agreed to stop describing its produce as "eco-friendly". An example of greenwashing litigation is the substantial number of claims which have been issued in the High Court against German car manufacturers in respect of allegedly misleading information about emissions performance of their diesel engines. The claims which were originally issue in both the Chancery Division and the King's Bench Division have now all been transferred to the King's Bench Division and consideration will be given in the near future as to whether a Group Litigation Order should be made.

5. The fact that such claims deploy well-known legal principles does not mean that there has been no development in the law in relation to greenwashing claims. At COP 26 the UN Secretary General announced a new High Level Expert Group to establish clear standards to measure and analyse net-zero commitments from non-state actors. The Financial Conduct Authority has also published a consultation on sustainability disclosure requirements and investment labels to ensure asset managers do not mislead investors about the *greenness* of their investment products. Climate or green washing litigation may be used to try to enforce action to achieve net zero commitments made to the public or to prevent entities from trumpeting their greenness when they are not really green at all.

6. In Australia in August 2021 the Australasian Centre for Corporate Responsibility filed a claim in the Federal Court of Australia against Santos the Australian energy company arguing that Santos was misrepresenting the position when it claimed natural gas was a clean fuel, given the true effect of natural gas on the climate and that Santos was being deceptive in claiming that it had a clear and credible plan to achieve net-zero emissions by 2040, when this relied on technology that either did not exist or was based on undisclosed assumptions.[11] It is unlikely that a victory in that case would necessarily enforce climate action by major companies. Instead, if successful, it will force

[11] Ibid

companies to admit that they cannot commit to net-zero. However, this might help the general public to make informed decisions about what products or services they use.

7. Of course, governments have also made net-zero commitments including our own government and there is no doubt that environmental campaigners are seeking to hold the government to that commitment. A recent example is the Heathrow third runway case. That was of course a public law claim started by Friends of the Earth in the Administrative Court not the Business and Property Courts but Heathrow Airport Ltd (HAL) is a commercial entity which was a party to the litigation and, if we are looking for possible trends in business litigation in the future, it is helpful to look at public law cases, since in many ways the Administrative Court is a more natural place for environmental litigation.

8. In the Heathrow case, the Court of Appeal found that the Secretary of State for Transport breached various duties under the Planning Act 2008 such as failing to give an explanation for how the Airport National Policy Statement (ANPS) took account of government policy which committed to implementing emissions reductions targets set in the Paris Agreement and failing in promulgating the ANPS to have proper regard to (a) the desirability of mitigation of climate change in the period after 2050 and (b) the desirability of mitigation of climate change by restriction of emissions of non-Co2 impacts of aviation, particularly nitrous oxide[12]

9. In the event the Secretary of State did not appeal the Court of Appeal decision to the Supreme Court, but HAL did. In their judgment handed down in December 2020 the Supreme Court overturned the Court of Appeal's decision, finding that the Secretary of State did consider the implications of the Paris Agreement[13] and was, in any case, not obliged or bound by the agreement itself.[14] The fact that the UK government had ratified the Agreement did not make it "government policy" within the meaning of the relevant duty in the Planning Act. The Secretary of State had not failed to have regard to the desirability of mitigating and adapting to climate change pursuant to his duties under

[12] ibid para 15

the Act. This will undoubtedly have been disappointing for climate activists and comforting for HAL but the decision was based on long standing public law principles. Notwithstanding that the appeal succeeded, as a result of that case more generally, private companies in partnership with the government may move forward more cautiously when serious environmental impact may occur as a result of what is proposed.

10. However, while much climate litigation will take place in the Administrative Court, other litigants have brought and will no doubt continue to bring claims against corporations in the Business and Property Courts. There are a number of potential issues facing such litigants who seek to find corporations liable for some portion of the climate emergency, not least issues of jurisdiction. The potential devastation which climate change can cause is more marked in other parts of the world than in the United Kingdom, particularly, according to a recent report, in Small Island Developing States (SIDS). Litigants may wish to bring a claim against a local company which is a subsidiary of an English parent company which the litigants also wish to sue in order to found jurisdiction here. This issue of "parental responsibility" has become a significant one in recent litigation. Two cases which started in the TCC but ended up in the Supreme Court *Lungowe v Vedanta Resources Plc* and *Okpabi v Royal Dutch Shell* have provided guidance on the circumstances in which English courts will assume jurisdiction over both the parent company and the subsidiary.

11. My colleague Carr LJ gave a recent illuminating talk on this topic, "Parental Responsibility: no escaping environmental damage?" I do not propose to plagiarise all of her talk but will endeavour to summarise the position. *Vedanta* concerned the Nchanga Copper mine in Zambia, said to be the second largest open-cast copper mine in the world, covering 30 square kilometres with an annual capacity of 311,000 tons of copper. It was run by the Konkola Copper Mine (KCM) a company largely owned by Vedanta, an English registered company, though the Zambian government had a minority shareholding. The claimants were residents of the vicinity of the mine who alleged that toxic emissions had damaged their health.

12. Because Vedanta was domiciled in England it could be sued in England under Article 4 of the Brussels Recast Regulation. The claimants sought to serve KCM out of the

jurisdiction as a necessary or proper party to the claim against Vedanta as anchor defendant under PD6B para 3.1(3). The defendants challenged the jurisdiction on a number of grounds, including that there was no real issue to be tried between the claimants and Vedanta who had only been sued to found jurisdiction in England against KCM who were the real target of the claim. It was argued that to use Article 4 in this way was an abuse of EU law. That argument was rejected by Coulson J, the Court of Appeal and the Supreme Court. The Supreme Court also rejected the argument that determination of the issue whether Vedanta as parent company was under a liability for the activities of its subsidiary would involve a novel extension of the tort of negligence, holding that it would entail the application of ordinary principles of the law of negligence. Whether a duty of care arose in such a case depended said Lord Briggs at [49] "on the extent to which and the way in which the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations including land use of the subsidiary". The Supreme Court held that there was a triable issue against Vedanta.

13. The Supreme Court recognised that following *Owusu v Jackson* the English courts could no longer stay a claim against the anchor defendant on the grounds of forum non conveniens. The potential consequence of that for climate litigation was identified by Lord Briggs at [39]:

> "The result is, in a case (such as the present) where the English court is persuaded that, whatever happens to the claim against the foreign defendant, the claimants will in fact continue in England against the anchor defendant, the risk of irreconcilable judgments becomes a formidable, often insuperable, obstacle to the identification of any jurisdiction other than England as the forum conveniens. Thus not only is one of the court's hands tied behind its back, but the other is, in many cases, effectively paralysed. In the context of group litigation about environmental harm, the appellants say that it has the almost inevitable effect that, providing a minimum level of triable issue can be identified against an English incorporated parent, then litigation about environmental harm all around the world can be carried on in England,

wherever the immediate cause of the damage arises from the operations of one of that group's overseas subsidiaries."

14. In fact in that case, before the hearing in the TCC, Vedanta had agreed to submit to the jurisdiction of the Zambian Courts and it was argued that in those circumstances, Zambia, not England was the proper place to bring the claim against KCM. The Supreme Court would have acceded to that submission and concluded that the claimants had failed to demonstrate that England rather than Zambia was the proper place for the trial of the claims, were it not for the fact that it concluded that there was cogent evidence that there was a real risk that substantial justice could not be obtained in Zambia because of the problems for the claimants of funding their claims given the unavailability of legal aid and that there were no suitably experienced legal teams in Zambia to conduct complex environmental litigation. In those circumstances, the English litigation was allowed to proceed.

15. In *Okpabi* the claimants were residents of the Niger Delta in Nigeria where SPDC, a Nigerian registered subsidiary of Royal Dutch Shell ("Shell"), an English registered company, operated oil pipelines and ancillary infrastructure. The claimants claimed that persistent leaks had led to serious water and ground contamination. They commenced proceedings in England against Shell and SPDC for damages in negligence. The claim against Shell was on the basis that it exercised a high degree of control and oversight in relation to the operations of SPDC. As in *Vedanta* the claimants sought to serve SPDC out of the jurisdiction as a necessary or proper party to the claim against Shell as anchor defendant under PD6B para 3.1(3).

16. The defendants challenged the jurisdiction, contending that there was no arguable duty of care owed by Shell to the claimants and therefore no triable issue against the anchor defendant which could found jurisdiction under the necessary or proper party gateway. Fraser J in the TCC and a majority of the Court of Appeal accepted that contention and declined jurisdiction. That was reversed by the Supreme Court which had deferred consideration of the application for permission to appeal until after *Vedanta*.

17. In the judgment of Lord Hamblen, the Supreme Court cited the test from *Vedanta* as to when a duty of care of care was owed by a parent company in respect of the activities of its subsidiary and accepted the claimants' argument that a duty of care arose by what they described as Vedanta routes (1) to (4): (1) The parent company taking over the management or joint management of the relevant activity of the subsidiary; (2) The parent company providing defective advice and/or promulgating defective groupwide safety/environmental policies which are implemented as of course by the subsidiary; (3) The parent company promulgating groupwide safety/environmental policies and taking active steps to ensure their implementation by the subsidiary; and (4) The parent company holding out that it exercised a particular degree of supervision and control over the subsidiary. Lord Hamblen emphasised that whilst these Vedanta routes were convenient headings they should "not, however, be understood as supporting any special or separate parent/subsidiary duty of care test." Despite that clear warning I expect we will hear about *Vendanta* routes for a long time to come.

18. The Supreme Court for the umpteenth time emphasised that the court must not engage in a mini-trial on jurisdictional challenges and criticised the Court of Appeal for having done so. They made clear, to the extent that it was necessary to do so, that at this interlocutory stage the question for the court is whether there is a triable issue, that is to say a cause of action with a real prospect of success, not whether the claimant would win at trial. Therefore at this interlocutory stage, the claimants did not have to prove that there was a duty of care, merely that they had a sufficiently arguable case that there was. Moreover provided that the claimants could show they had a cause of action with a real prospect of success, they could rely on the likelihood of further documentation emerging on disclosure which would improve their case. This does not mean that if the claimants cannot show at the interlocutory stage that they have a cause of action with a real as opposed to a fanciful prospect of success, they can pray in aid that something may turn up later which gives them an arguable case which they do not currently have. That is pure Micawberism. That was a point which I emphasised in a judgment I handed down last week in *Margulies v Margulies* [2022] EWHC 2843 (Ch).

19. What these cases demonstrate is what might be described as a classic bind where the court wants to avoid huge sums being spent on jurisdictional challenges but also needs to ensure that cases which should not progress further in this jurisdiction do not do so.

Nonetheless, these recent Supreme Court decisions seem to me to demonstrate a balance in favour of the English courts assuming jurisdiction in respect of environmental claims where either an English parent company will not agree to the jurisdiction of the country where the environmental damage occurred or there is a real risk that the claimants will not obtain substantial justice in the other jurisdiction.

20. Another recent example of the balance being in favour of English courts assuming jurisdiction in respect of tort claims even where the relevant environmental damage has occurred in a foreign country, provided that there is a serious issue to be tried against the English parent company which is the anchor defendant, is the decision of the Court of Appeal in *Municipo de Mariana v BHP Group (UK) Ltd and BHP Group Ltd* [2022] EWCA Civ 951 ("*Mariana*"). That case concerned the worst environmental disaster ever to hit Brazil when the Fundão Dam collapsed, releasing around 40 million cubic metres of tailings from iron ore mining. The collapse and flood killed 19 people, destroyed entire villages, and had a widespread impact on numerous individuals and communities, not just locally but as a result of the damage to the entire course of a river system to the sea 400 miles away. The claimants are some 200,000 individuals and businesses who suffered loss and damage as a result of the disaster. The dam was owned and operated by Samarco, a Brazilian company which was jointly owned by two other Brazilian companies, one of which, BHP Brasil, is a subsidiary in the BHP Group of which the two defendants BHP England and BHP Australia are in effect the parent companies. The claimants brought claims in proceedings in the TCC alleging both strict liability of BHP England and BHP Australia as indirect polluters and fault-based liability.

21. Unlike in the Supreme Court cases it was common ground that there was a serious issue to be tried against both defendants. Nonetheless the defendants both challenged jurisdiction. They also sought to strike out the claims as an abuse of process. At first instance Turner J struck out the claims as an abuse of process because they were irremediably unmanageable citing the impact of the size and complexity of the claims on the resources of the court. He described the task of any judge trying to case manage the claims as akin to trying to build a house of cards in a wind tunnel. The Court of Appeal allowed the appeal. It held that unmanageability of a claim was not within the recognised categories of abuse of process and doubted whether any claim could ever be

said to be unmanageable, whilst not shutting the door to the possibility of such a conclusion being reached in another case if it were appropriate. The Court of Appeal was also prepared to assume jurisdiction notwithstanding the availability of Brazil as an appropriate forum, expressing concerns about access to justice, particularly where is a real risk of the claims encountering procedural and funding difficulties in the other forum.

22. All these cases demonstrate the willingness of English courts to take jurisdiction over environmental claims even where the environmental damage has occurred in a foreign state, provided that there is a serious issue to be tried as to parental responsibility of the English anchor defendant for the negligence or other tortious liability of its subsidiary for the environmental damage. Given the global nature of climate issues and the continuing popularity of English law and jurisdiction, it seems to me that we may increasingly see our courts assuming jurisdiction in such cases of parental responsibility even where the environmental damage has occurred elsewhere.

23. Those cases were focusing on jurisdiction, but just as fundamental to whether there is a sufficiently arguable case to go to trial is standing. In all those cases, the claimants were people who were obviously affected by what had occurred and therefore clearly had standing to bring the claims. However, those motivated to make climate based claims are not necessarily directly impacted by the decisions of individual companies. In such cases, the issues of standing, causation and proof of loss may prove major stumbling blocks.

24. An example of an ongoing case where those issues may well arise is the claim which the environmental law charity ClientEarth said in a press release in March this year that it was issuing against the directors of Shell. ClientEarth is a shareholder in Shell and therefore this would be a derivative claim alleging that the directors are mismanaging Shell in relation to climate change due to an inadequate energy plan, which leaves Shell's long term commercial viability vulnerable to the government's Net Zero Strategy. This follows on from a successful claim against Shell by climate campaigners in the Netherlands where in May 2021 the Hague District court ordered Shell to reduce its net carbon dioxide emissions by 45% by 2030. Shell is appealing that judgment. In the English case ClientEarth contends that the inadequate energy plan means Shell has

a vulnerability to stranded asset risk and to a massive write down of its fossil fuel based assets. This is said to be in breach of the directors' statutory duties under sections 172 and 174 of the Companies Act 2006 to promote the success of the company and to exercise reasonable care, skill and diligence. So far as my researches have uncovered the parties are engaged in pre-action procedures and no proceedings have yet been issued. If Client Earth proceeds with this case, the Court will have to decide first whether ClientEarth should be given permission to bring such a derivative claim. The statutory definition of derivative claims in the Companies Act requires that such a claim must be brought by a member of the company on whose behalf the claim is made or a person entitled to shares in that company by transfer or transmission: see *Boston Trust Co Ltd v Szerelmy Ltd* [2021] EWCA Civ 1176 at [14] in the judgment of Sir David Richards. Whatever the Court decides will undoubtedly inform future litigation by ClientEarth and similar groups of climate activists who are shareholders in carbon majors.

25. ClientEarth were successful in bringing a similar claim in Poland when they, as shareholders, challenged the decision of the energy company Enea to build a coal fired power plant.[15] In that case they argued that the new plant would quickly become a stranded asset and was, as a result, an unjustifiable risk to shareholders. While they are attempting something similar here in using strictly commercial concepts to achieve strategic aims there is a significant difference. In the Enea case the company was looking to spend a great deal of money on a new power plant, using a fuel that may have been considered outdated. However, the rise in the use of coal in 2021 and 2022, with it being expected to reach the same historic peak seen in 2013[16] may demonstrate the potential difficulties that can be faced by basing strategic goals on anticipated commercial outcomes. In any event the argument in the Shell case is rather more wide-ranging than one power plant and is instead focusing on Shell's commercial decisions in the light of the UK Net Zero Strategy.

26. In relation to ClientEarth's case against Shell it is instructive to consider the recent decision in May this year of Leech J in *McGaughey v Universities Superannuation*

[15] 20190801_Not-Available_press-release-1.pdf (climatecasechart.com)
[16] Global coal demand is set to return to its all-time high in 2022 - News - IEA

Scheme [2022] EWHC 1233 (Ch). There, two academics with some crowd funding support were attempting to bring a derivative claim against the directors of the corporate trustee of their pension fund. They contended that the directors were in breach of duty in a number of respects, but of relevance for present purposes is the fourth complaint, that the failure of the directors to create a credible plan for disinvestment from fossil fuel investments has prejudiced and will continue to prejudice the success of the company. The claimants argued that section 171 (the duty to act within powers) and section 172 (the duty to promote the success of the company), properly understood would have required a plan for divestment from fossil fuels and to have not done so is contrary to the interests of the company. The company responded that it had, in fact, considered environmental issues when forming its investment strategy. It argued that immediate divestment was not in the interest of the pension scheme and further argued that it did not accept that divestment would achieve the goal that the claimants wished to achieve. The company made the point that divestment would amount to simply selling the shares to someone else.

27. Since the claimants are the beneficiaries of a pension scheme, their claim was not a direct derivative claim as shareholders within the statutory definition, but what is termed a multiple derivative claim, a somewhat more nebulous concept to which common law rules apply as Leech J recognised. It was not a promising start that the common law rules were described by Briggs J in *Universal Project Management Ltd v Fort Gilkicker Ltd* [2013] Ch 551 as "obscure, complicated and unwieldy". Nonetheless it was common ground in *McGaughey* that, as Leech J said at [21]: "the category of multiple derivative claims is not closed and that the derivative claim is no more than a procedural device to avoid the injustice which would occur where a wrong is suffered for which no redress could be claimed by an affected party."

28. The common law test has four requirements which the derivative claimants had to satisfy: (1) They had sufficient interest or standing to pursue the claims on a derivative basis on behalf of the company or other entity; (2) They established a prima facie case that the claim fell within one of the established exceptions to the rule in *Foss v Harbottle*; (3) They established a prima facie case on the merits in respect of the claim; and (4) It was appropriate in all the circumstances to permit them to pursue the derivative claim.

29. In relation to the first condition, Leech J accepted the company's submission that the members of a pension scheme would only have standing if the loss which the subject company (or the scheme) is claimed to have suffered is reflective of their own loss. He rejected the claimants' argument that they did not need to show a reflective loss.

30. In relation to the second condition, the claimants relied on the fourth exception to the rule in *Foss v Harbottle* that a fraud has been committed and the minority (or other interested stakeholders) are prevented from remedying the fraud because the subject company is controlled by the wrongdoers. The judge held that on the authorities, a derivative claimant must establish a prima facie case that the defendants have committed a deliberate or dishonest breach of duty or that they have improperly benefitted themselves at the expense of the company (although the nature of that benefit need not be exclusively financial).

31. The judge noted that the claimants alleged that the company had suffered financial loss as a consequence of failing to divest itself of fossil fuel investments. They did not allege that the company had a duty to sell those investments for ethical reasons, no doubt because the Court had rejected such an argument in *Cowan v Scargill* [1985] Ch 270. In that case the NUM wanted the trustees of the National Coal Board pension fund to cease investments overseas and in oil, so in one sense an early example of environmental litigation. Sir Robert Megarry V-C made three points which Leech J cited in *McGaughey*. The first was that where, as was usually the case, the purpose of the trust was to provide financial benefits for the beneficiaries, their best interests were normally their best financial interests. The second point was the corollary of the first that in deciding where to make investments, the trustees had to put aside their own personal interests and views. As Sir Robert put it:

> "Trustees may have strongly held social or political views. They may be firmly opposed to any investment in South Africa or other countries, or they may object to any form of investment in companies concerned with alcohol, tobacco, armaments or many other things. In the conduct of their own affairs, of course, they are free to abstain from making any such investments. Yet

under a trust, if investments of this type would be more beneficial to the beneficiaries than other investments, the trustees must not refrain from making the investments by reason of the views that they hold."

32. His third point was by way of qualification of the first two, that he was not saying that this meant that the trustees' paramount concern inevitably and solely was the financial benefit of the beneficiaries. He illustrated that point in this way:

> "Thus if the only actual or potential beneficiaries of a trust are all adults with very strict views on moral and social matters, condemning all forms of alcohol, tobacco and popular entertainment, as well as armaments, I can well understand that it might not be for the "benefit" of such beneficiaries to know that they are obtaining rather larger financial returns under the trust by reason of investments in those activities than they would have received if the trustees had invested the trust funds in other investments. The beneficiaries might well consider that it was far better to receive less than to receive more money from what they consider to be evil and tainted sources."

33. However, he went to emphasise that there would be a particularly heavy burden on someone who was asserting that it was for the benefit of the beneficiaries as a whole to receive less by reason of the exclusion of what would have been a more profitable investment.

34. Having cited *Cowan v Scargill* Leech J noted that the claimants were not alleging that the company should have sold its fossil fuel investments overnight. Furthermore, the claimants did not allege that they had themselves suffered any financial loss as a consequence of the alleged breaches of duty, nor did they allege that their views on climate change would in themselves give them sufficient standing to bring the claim. The judge then concluded that the claimants did not satisfy the first condition for a multiple derivative claim:

> "In the light of this analysis the Claimants have not satisfied me that there is a prima facie case that the Company has suffered any immediate financial loss as a consequence of the Directors' failure to adopt an adequate plan for long-term

divestment of investment in fossil fuels. But even if they had been able to establish a prima facie case that the Company had suffered an immediate loss, they do not suggest that this is reflective of financial losses which they themselves have suffered. In particular, they do not suggest that there is a causal connection between the investment in fossil fuels and the benefit changes. In my judgment, therefore, the Claimants do not have a sufficient interest or standing to continue the claim".

35. The judge went on to conclude also that the claimants had not satisfied him that the directors had committed a fraud on their powers within the extended meaning of the fourth exception to the rule in *Foss v Harbottle*. He also considered that the claimants had not shown a prima facie case satisfying the third condition. He was unimpressed by the claimants' evidence which consisted primarily of newspaper articles, concluding it was so weak the case could have been struck out under CPR 3.4(2)(a). Finally he concluded that he would have exercised his discretion against allowing the claimants to make a derivative claim, leaving them to pursue a direct claim for breach of trust despite the difficulties such a claim would face.

36. The decision in *McGaughey* gives rise to two points of particular relevance for present purposes. The first is to consider in the context of the third point in *Cowan v Scargill* whether there will ever come a time when the evidence of climate change is so strong that it could be said to be in the interest of all the beneficiaries under a trust to avoid certain investments and thus to avoid climate change. It is to be noted that in *Harries v Church Commissioners* [1992] 1 WLR 1241 Sir Donald Nicholls V-C held that the Church Commissioners were entitled to take ethical considerations into account in forming their investment policy provided that that did not risk financial detriment to the trust. I doubt very much whether we are in the position at present where it could be said that avoiding climate change was in the interest of all the beneficiaries of a pension scheme, but who can say whether or not in future a litigant will attempt the argument or invite the Court to add a gloss to the rule exemplified by *Cowen v Scargill.* If successful such litigation would undoubtedly change the landscape for trusts and pension schemes.

37. The second point of relevance is, as I have said, that the Court considered that the claimants had not fulfilled the conditions for a multiple derivative claim because they had not specified what the impact of divesting from fossil fuel would have been. The judge found that they had not shown either that the company had suffered a loss through the failure to divest or that the claimants had themselves suffered a loss reflective of that loss. This case is indicative of what the minimum evidential requirements for such a claim in the future would be. It is to be noted though that recent economic and political events highlight the weakness of any argument that fossil fuel investments should not be made for financial reasons. If any court had in the past found that fossil fuel investments were poor investments from a financial standpoint the extraordinary profits of the oil majors in recent months would have shown that finding to be mistaken in the short term. It is also somewhat difficult to imagine that cases based on purely financial interests are likely to be successful in the near future as fossil fuels have been, historically, incredibly profitable.

38. It is to be noted that the Court of Appeal has given permission to appeal in *McGaughey* on the basis that it raises important and to an extent novel issues, which include whether the judge was right to conclude that the claimants had no standing because they failed to show reflective loss and whether the fourth exception to the rule in *Foss v Harbottle* was arguably satisfied. The appeal is unlikely to be heard until some time next year. In the meantime, the case makes clear that when considering derivative claims, whether single or multiple, the court will scrutinise carefully both the evidence of breach and the evidence of loss. The court will always allow for discretion in managing a trust or company and will, understandably, be reluctant to interfere with business decisions being taken by directors or trustees. *McGaughey* highlights that cherry picking media articles as evidence is not a viable strategy but it also shows that proving a deliberate or dishonest breach of duty, or that the directors benefited from the breach, will be difficult. Also, other than in cases like the environmental damage cases to which I have referred, climate change activists face obvious difficulties in bringing litigation in this jurisdiction in demonstrating both causation and loss.

39. The issue of loss and damage has been much debated in the context of the physical disasters attributed to climate change. In the 2015 Paris Agreement the parties agreed

to recognise the importance of "averting, minimising and addressing loss and damage." Alongside this however the larger developed countries (known as Annex 1 Countries) and, in particular the US, ensured that there was a clear understanding that such a commitment and recognition was not an admission of liability for funding or compensating the smaller developing countries most impacted by climate change. This issue has come up again in the COP 27 discussions. Loss and Damage in climate change discussion has mostly focused on money being paid by one country to another or in relation to Disaster Risk Finance which requires a detailed understanding of the costs involved in various natural disasters. The Centre for Disaster Protection, which is funded by the UK Government estimates that the funding for loss and damage looks set to run into hundreds of billions of dollars by 2030 and will only increase further.[17] It would be tempting then for smaller countries, most at risk from climate change, to seek out other entities from whom they can attempt to obtain redress.

40. As I have said, a major challenge they would face is that of causation. Whilst as a general proposition one can say that greenhouse gas (GHG) emissions have caused climate change which in turn has caused various disasters, what is much harder to say is that any single carbon emission caused any single disaster. Moreover, who is fundamentally responsible for GHG emissions? There is a tendency to point the finger at major oil companies and there have been many comparisons made with the tobacco companies who have been the subject of extensive litigation by those whose health has been damaged by smoking, particularly in the United States. It strikes me that one potential difference between the two is that in the litigation against tobacco companies, their liability has often been founded on the suppression of science and the knowledge they had that their product was causing harm, knowledge that was deliberately withheld from the public.

41. Can the same thing really be said of the effect of greenhouse gas emissions when we have known about climate change for some time? The UN Framework Convention on Climate Change was agreed in 1991 so it would be difficult for any car driver or air passenger to really claim that knowledge of climate change has been withheld from

[17] https://www.disasterprotection.org/blogs/uneasy-bedfellows-the-role-of-disaster-risk-finance-in-tackling-climate-induced-losses-and-damages

them. Another potential difference is that tobacco harmed the person who smoked (and those in the room with them). In contrast, while climate change might be said to harm everyone, the initial impact is not felt primarily by the user of the product releasing the greenhouse gas but by someone else, often very far away. The relationship between a potential corporate defendant and the immediate victim of climate change is very unclear.

42. A recent case in Germany addresses these issues. Luciano Lliuya, a Peruvian farmer, filed for declaratory judgment damages under the German law of nuisance against RWE, Germany's largest electricity producer arguing that RWE have knowingly contributed to climate change by emitting greenhouse gases, around 0.47% of global emissions, and as such bears a portion of the responsibility for the melting of a glacier near his hometown of Huaraz. Initially he was unsuccessful, the district court noting that it could not provide Lliuya with effective redress as his situation would not change if RWE ceased emitting greenhouse gas altogether and, the court continued, that "no linear causal chain could be discerned" given the complex nature of the causal relationships between particular emissions and particular climate change impacts , in other words why *these* emissions and *which* emissions caused *which* events.

43. In 2017 however an appeal to the Higher Regional Court of Hamm was successful. That court held that the claim was arguable and admissible, so it allowed the case to move into the evidentiary phase accepting that, if Lliuya could prove that his home is threatened by flooding or mudslides as a result of the increased volume of the glacial lake and, additionally, that RWE's greenhouse gas emissions contributed to this increased risk then his claim would be made out. Covid delayed the case as, somewhat ironically, the judges had to fly to the claimant's town in the Andes to evaluate the situation. They have also received expert evidence in court. Judgment is awaited but if in the claimant's favour will be of considerable significance for climate litigation. One academic Dr Petra Minnerop of Durham University says of this case: "A favourable outcome for the claimant could mean that the usual hurdles of establishing a causal link between a climate related impact and the specific emissions of an individual emitter can be overcome, in cases against carbon majors."

44. It is unlikely however that it will lead to the German courts being flooded with similar claims as Germany is resistant to attempted forum shopping. We may however see the reasoning of the case become influential for those who are contemplating claims against major corporations in this jurisdiction. There will no doubt be novel arguments advanced to our courts, perhaps by some of you here.

45. As I have said it is impossible to state with confidence what the legal world will look like even in ten years time, but we know that the common law has always been adaptable. Climate change is a potentially major crisis and we cannot expect the law to be exempt from its effects. It will be, I hope, another example of the common law rising to the challenge of providing certainty and justice in an ever-changing world.