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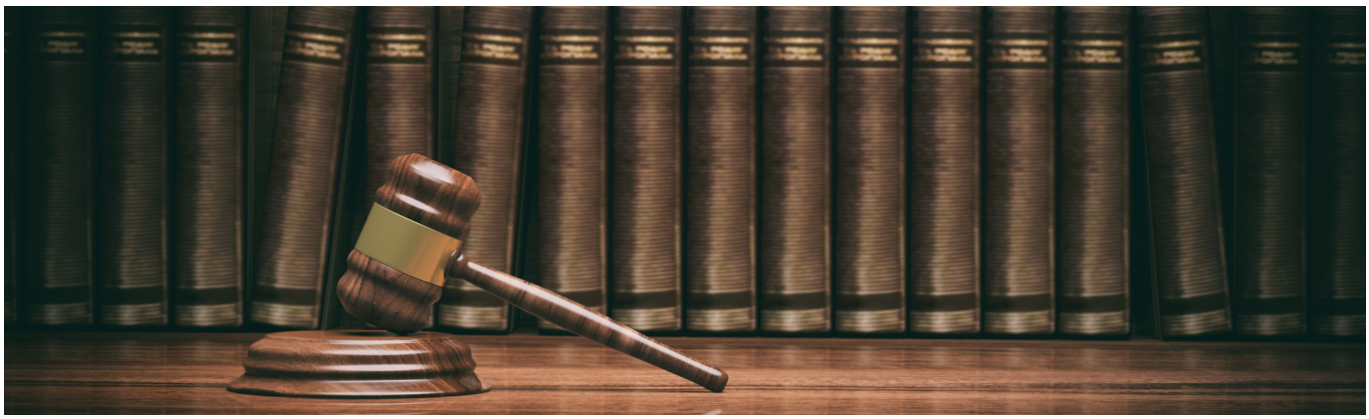

CLIMATE CHANGE LAW. CURRENT PERSPECTIVES.

Climate change-related tort claims by foreign claimants

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The present post addresses the potential scope for climate change-related tort claims in English courts by foreign claimants against corporate entities present within the jurisdiction, including potential responses by a defendant faced with such a claim post-Brexit. In particular, it considers what lessons may be drawn from claims before English courts based on environmental harm (beyond climate change) suffered elsewhere in the world.

In recent years, there have been a number of high-profile claims in English courts in respect of environmental damage and associated losses suffered in foreign jurisdictions and brought against companies present in the United Kingdom. Among the highest profile claims has been the *Vedanta Resources* litigation, a group tort claim brought by approximately 1,826 Zambian citizens concerning alleged toxic emissions from a copper mine in Zambia, brought against the Zambian company which operated the mine and its UK-incorporated parent company. Claimants in other cases have been located in, for example, Nigeria and Brazil. *Vedanta* accords with the typical profile of such cases in that it is a claim against a corporate entity present in England and Wales coupled with claims against foreign entities (again, typically, with those foreign entities operating in the claimants' home State).

Alongside that trend in English courts, there has been a proliferation in courts around the world of litigation related to climate change. However, according to a 2021 report (see pp. 6, 23), there have been relatively few climate change-related cases explicitly invoking tort law as their primary cause of action. Yet a tort claim against a western-domiciled company by a foreign claimant for damage suffered in their own jurisdiction is not without precedent: for example, a Peruvian farmer has commenced a claim in German courts against Germany's largest electricity producer for its contributions to climate change. There may well be a particular appetite for claims in places where the immediate consequences of climate change are already being felt by large swathes of the population — as well as by corporations and even by States themselves — where, at least in some cases, the local courts do not offer the same possibilities for pursuing effective and direct relief as English courts.

Rationale for targeting companies with a presence in the UK

In the context of environmental damage generally foreign claimants frequently bring claims against the English parent company of a local subsidiary which has directly caused environmental damage alongside claims against the local subsidiary. A common pattern (exemplified in the *Vedanta* litigation) is that the parent

company itself has not been directly involved in causing the environmental damage. Instead, for the purposes of establishing liability, it is necessary for the claimants to establish that the English parent company exercised a level of managerial control sufficient to give rise to direct liability in tort for the conduct of its foreign subsidiary. In the context of climate change-related claims, a claimant may be assisted by new mandatory reporting requirements for UK companies for their entire corporate groups. These requirements may show that the parent company has knowledge of and has assumed responsibility for emissions of its subsidiaries around the world, and also provide evidence of failings on the part of the parent company.

Despite the challenges of establishing the liability of an English parent company, there may be various rationales for targeting a claim against such a company. Three reasons spring to mind.

First, the parent company may have deeper pockets than the local subsidiary whose operations directly caused the damage in question. Especially in the context of mass claims for serious environmental damage where the sums claimed can be very substantial, including potentially claims arising from climate change, the ability of a defendant to satisfy a judgment debt is of critical importance.

Second, the purpose of including the parent company as a defendant may be to provide a jurisdictional 'anchor' for a claim in which other entities — such as the local subsidiary whose operations directly caused the environmental harm — may be included as defendants. The claimant may perceive an advantage in having the claim litigated before English courts, rather than the local courts in the foreign jurisdiction, especially if there may be delays, no rigorous regime for disclosure, issues with impartiality, or other practical issues concerning access to justice in those local courts. The purpose of a related claim against the English parent may be to provide a means by which to found jurisdiction over the claim against the local subsidiary.

That said, this second consideration — the interest in 'anchoring' a claim against a foreign subsidiary — may be of lesser importance in climate change-related claims than in environmental claims generally. In the context of climate change, the conduct founding a tort claim may be caused by a polluter anywhere in the world. This is in contradistinction to, for example, harm caused by a mine where the tortious conduct and the harm suffered are likely to be geographically proximate. Thus, it is quite conceivable that a company operating in England could be the defendant to a tort claim based on its own directly harmful conduct, rather than its management of a subsidiary which itself caused the harm in a foreign jurisdiction, though this may raise causation challenges (as to which see below). On this basis it may be unnecessary to bring the foreign subsidiary into the litigation.

Third, if one of the strategic aims of the litigation is to precipitate a change in systemic practices, it may be considered more effective to litigate the issue at the parent company level in its home jurisdiction, where internal corporate reforms are more likely to be implemented across the entire corporate group. It may also be thought that a judgment of the English courts may be of greater global prominence than a judgment rendered by the local courts.

Applicable law — an opportunity?

Certain barriers may arise for a tort claim arising from climate change if the applicable law is English tort law. For example, under English tort law it may be difficult to establish the existence of a duty of care, given the potential lack of proximity between the alleged tortfeasor (an emitter or its parent company) and any given claimant. The new mandatory reporting requirements for UK companies for their entire corporate groups may go some way to obviating this difficulty. Breach of any such duty may well be difficult to prove, and the same may be true when it comes to establishing causation, given the difficulties in holding any single emitter (or even group of emitters) responsible for losses caused to any specific claimant.

Some, or all, of these difficulties may not arise in a claim with an applicable law other than that of England. An *"unwritten duty of care"* to prevent climate change has already been found to exist in the Dutch Civil Code. Other claims currently being advanced around the world rely on, for example, the German law of nuisance, Hawaiian law on nuisance, negligence and trespass, and a duty of

care under Australian law owed by ministers to young people (although the existence of this duty of care has most recently been rejected on appeal to the Full Court of the Federal Court of Australia — a decision which may be appealed to the High Court of Australia). It may be that the laws of at least some foreign jurisdictions provide greater scope for a successful tort claim for damage arising from climate change than English tort law does.

Thus, the selection of applicable law will be of prime importance in a climate change-related tort claim before English courts. Post-Brexit, the relevant rules for civil and commercial matters remain (for the most part) those set out in the Rome II Regulation. Rome II makes specific provision for environmental damage, defined by Recital (24) as follows:

"'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms."

Article 7 provides for a default position that a tortious claim arising out of environmental damage or other damages sustained as a result of environmental damage will be governed by the law of the jurisdiction in which the damage occurs. Damage is this context means *direct* damage, not indirect or consequential damage.

In the context of climate change litigation, it is likely that such direct damage will have been suffered in a foreign jurisdiction, meaning that the default position is that foreign law will apply. Who benefits from that starting point depends, of course, on the content of that foreign law.

Unusually, however, Article 7 offers an opportunity for a claimant to opt for another choice of applicable law. Instead of the law of the country in which direct damage is suffered, a claimant may choose to base their claim on the law of the country in which the event giving rise to the damage occurred. That offers claimants the opportunity to take advantage of more favourable legal norms providing they can link sufficiently events in those countries with the environmental damage. This may well prove a means by which to subject English defendants to a pro-claimant law.

Establishing jurisdiction

As a threshold for being able to pursue a tort claim, the claimant would need to establish that the English court has jurisdiction over the claim. Post-Brexit, it is the common law rules which apply to the establishment and exercise of jurisdiction.

Insofar as the claim is against a company present in or based in England and Wales, service can be effected on such a defendant as of right, although proceedings may be stayed on *forum non conveniens* grounds. A corporate defendant's ability to argue for a stay has been materially strengthened post-Brexit given that *Owusu v Jackson* (Case C-281/02) no longer requires a claim against an English-domiciled company to be tried in England and Wales. If — as has usually been the case for environmental claims to date — a claim is also brought against a defendant which is not present within the UK, the claimant will almost invariably require permission under rule 6.36 of the Civil Procedure Rules ("**CPR**") to serve the claim form on the defendant outside of the jurisdiction. The claimant will, therefore, need to show that:

(1) There is a serious issue to be tried on the merits;
(2) There is a good arguable case (i.e. a much better argument than the contrary) that the claim in question falls within one or more of the jurisdictional gateways set out in paragraph 3.1 of Practice Direction 6B; and
(3) In all the circumstances, England and Wales is clearly or distinctly the appropriate forum for the trial of the dispute and that the Court ought to exercise its discretion to permit service out.

Serious Issue to be Tried

There is a serious issue to be tried where there is a real — as opposed to fanciful — prospect of success on the merits. This test is familiar to English lawyers, being the test on applications for summary judgment. However, in cases where that issue turns on a question of law or construction, then a different approach is taken. If an application is made to set aside service out, then the Court must decide that question of law or construction. It cannot merely determine whether the claimant has a real prospect of succeeding. This may be of particular significance in climate change litigation as novel issues of law or construction are litigated, albeit *Vedanta*

illustrates the limits of this principle (as there the questions of whether there was a duty of care were wrapped up in the factual detail such that an abstract determination was not possible).

Jurisdictional gateways

There are two gateways of potential significance in the context of climate change tort litigation.

First, paragraph 3.1(9) of Practice Direction 6B (concerning claims in tort) provides a gateway where: (a) (recoverable and significant) damage was — or will be — sustained within England and Wales; or (b) the damage which has been or will be sustained results from an act committed — or likely to be committed — within the jurisdiction (such being substantial and efficacious). A claim against a UK company, either on the basis of its own emissions based on its operations in England or its management of a foreign subsidiary which has substantial emissions, may well fall within this gateway.

Second, paragraph 3.1(3) provides a gateway where: (a) a claim form has or will be served on another defendant (the "anchor defendant") outside of this gateway (for present purposes, most likely an English parent company); (b) there is a real issue which it is reasonable for the court to try between the claimant and the anchor defendant; and (c) the claimant wishes to serve the claim form on another person who is a *"necessary or proper party to that claim"*. This provides a basis for extended jurisdiction in multi-party cases where the tort gateways — for whatever reason — may not apply. Its most obvious application in the context of climate change litigation is to extend litigation against an English parent company to bring in decision-makers and operators who are not present in the jurisdiction (such as operating companies and other related companies).

Establishing that England is the proper forum

In the context of service out, a claimant must show that England is clearly and distinctly the appropriate forum. Equally, even where a company with an English presence is served as of right, it may argue that the English proceedings should be stayed on *forum non conveniens* grounds if another jurisdiction is the proper forum. In the context of claims by foreign claimants for damage arising from climate change, there may be obvious connections with another jurisdiction, such as the applicable law (a strategic factor to be weighed against the possibility of that applicable law being potentially more favourable to claimants than English law), and documents and witnesses being located in the foreign jurisdiction, potentially in a language other than English.

Against these factors, it may be open to a claimant to argue that there is a real risk of substantial injustice in the foreign jurisdiction, which may justify the case being tried in England even if it is not the natural forum for the claim: *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460. In this context, the authorities suggest that it is only in an exceptional case that such matters justify the English court assuming jurisdiction. However, in mass tort claims, difficulties in advancing civil claims in foreign jurisdiction has proven a powerful factor in favour of claims being heard in England.

An early example of this was *Lubbe v Cape plc* [2000] 1 WLR 1545, a personal injury claim by 3,000 claimants against an English-incorporated parent company of a South African subsidiary involved in the manufacture of asbestos products. The court had ordered that the litigation proceed as a group claim. It was found that the natural forum was South Africa, but the House of Lords accepted that there was a real risk of injustice there, including because the lack of established group claim procedures may have impaired the claimants in securing funding for their claim.

More recently, in *Vedanta*, a similar approach was taken in the context of mass environmental tort claims. At first instance, Mr Justice Coulson found that the claimants lacked sufficient resources to fund the action themselves, would not receive legal aid and could not fund the action through a conditional fee agreement because such agreements are unlawful in Zambia. Mr Justice Coulson also considered that the Zambian legal profession lacked the resources and experience to conduct such litigation. On that basis, the defendants' jurisdiction challenge failed — the claims were to proceed in England and Wales. The Court of Appeal and the Supreme Court dismissed the defendants' appeals against that conclusion.

The considerations identified in *Lubbe* and *Vedanta* of expertise, procedure and effective access to justice are

likely to be relevant in many potential climate change actions given the consequences of climate change will be felt in many jurisdictions that may not have the experience or procedures necessary to facilitate effective mass tort litigation, especially where complex scientific evidence may be involved and/or procedures required to deal with very many claims being brought by individuals of limited means against a well-resourced defendant.

Conclusion

A tort claim before an English court for damage arising from climate change elsewhere in the world will obviously encounter procedural and substantive hurdles. However, there is clearly scope for such claims given English companies' new reporting obligations regarding climate change, given the possibility of selecting a favourable applicable law, and given possible arguments regarding the propriety of England as a forum for such claims. The quality, efficiency and prominence of the English judicial system can only provide a further incentive for such claims.

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